

**IN THE SUPREME COURT OF THE STATE OF ALASKA**

|                                      |   |                                |
|--------------------------------------|---|--------------------------------|
| MICHAEL GRUNERT,                     | ) |                                |
|                                      | ) |                                |
| Appellant,                           | ) | Supreme Court Case No. S-10841 |
|                                      | ) |                                |
| v.                                   | ) |                                |
|                                      | ) |                                |
| STATE OF ALASKA and                  | ) |                                |
| CHIGNIK SEINERS ASSOCIATION,         | ) |                                |
| INC.,                                | ) |                                |
|                                      | ) |                                |
| Appellees.                           | ) |                                |
| _____ )                              |   |                                |
| Trial Court Case No. 1JU-02-00349 CI |   |                                |

**APPEAL FROM THE SUPERIOR COURT  
FIRST JUDICIAL DISTRICT AT JUNEAU  
THE HONORABLE PATRICIA A. COLLINS PRESIDING**

**BRIEF OF APPELLEE**

GREGG D. RENKES  
ATTORNEY GENERAL

Lance B. Nelson  
Assistant Attorney General  
Alaska Bar #8310139  
State of Alaska – Dept. of Law  
1031 W. 4<sup>th</sup> Avenue, Suite 200  
Anchorage, Alaska 99501  
(907) 269-5100

Filed at Anchorage, Alaska, this  
\_\_\_\_\_ day of \_\_\_\_\_ 2003, in the  
Supreme Court of the State of Alaska  
Marilyn May, Clerk

By: \_\_\_\_\_  
Deputy Clerk

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES.....iii

AUTHORITIES PRINCIPALLY RELIED UPON ..... vii

STATEMENT OF ISSUES PRESENTED FOR REVIEW ..... 1

STATEMENT OF THE CASE ..... 1

    I. STATEMENT OF FACTS ..... 1

        A. The Board of Fisheries Received a Proposal to Address Serious  
            Problems in the Chignik Commercial Salmon Fishery. .... 1

        B. The Board Adopted the Co-op Regulation After Rigorous Review and  
            Consideration of the Issues..... 5

        C. The Co-op Regulation Authorizes Cooperative Harvesting, But Does  
            Not regulate the Marketing of Salmon. .... 6

    II. STATEMENT OF THE COURSE OF PROCEEDINGS ..... 9

STANDARD OF REVIEW..... 10

ARGUMENT..... 11

    I. SUMMARY OF ARGUMENT ..... 11

    II. THE CO-OP REGULATION IS CONSISTENT WITH ALL  
        APPLICABLE STATUTORY AUTHORITY ..... 12

        A. Standard of Review..... 12

        B. The Board Has Very Broad Statutory Authority to Adopt Regulations..... 13

        C. The Co-op Regulation Serves a Proper “Development” Purpose ..... 14

        D. The Statutory Definition of “Fishery” Does Not Invalidate the Co-op  
            Regulation..... 18

        E. The Co-op Regulation’s Use of the Term “Fishery” Is Consistent With  
            The Statutory Definition ..... 19

        F. Allocation Within a Fishery Is Consistent With the Board’s Statutory  
            Authority ..... 21

        G. Appellant’s Arguments Based on the Statutory Definition of Fishery are  
            Moot Because the Co-op Regulation Has Been Amended by the Board  
            to Authorize Different Types of Gear in the Cooperative Fishery ..... 25

|  |    |
|--|----|
| H. The Co-op Regulation Is Not Inconsistent With, or Preempted By, the<br>Alaska Cooperative Corporations Act .....  | 26 |
| I. The Co-op Regulation is Consistent With CFEC Statutes .....   | 29 |
| III. THE CO-OP REGULATION IS CONSTITUTIONAL.....   | 33 |
| A. Standard of Review.....   | 33 |
| B. The Co-op Regulations Does Not Implicate the Equal Access Clauses<br>of the Alaska Constitution Because It Does Not Limit Admission to a<br>User Group..... | 33 |
| C. The Co-op Regulation Does Not Treat Similarly Situated Fishermen<br>Differently.....  | 35 |
| D. Even if the Co-op Regulation Implicates the Equal Access Clauses, It Is<br>Still Constitutional Because It is Consistent with Equal Access Values.....      | 39 |
| IV. JUDICIAL REVIEW SHOULD BE LIMITED TO THE RECORD<br>BEFORE THE BOARD.....   | 42 |
| V. CONCLUSION.....   | 45 |

## TABLE OF AUTHORITIES

### Cases

|  |                            |
|--|----------------------------|
| Baxley v. State, 958 P.2d 422 (Alaska 1998).....   | 33, 41                     |
| Causey v. Guilford County, 192 N.C. 298, 135 S.E. 40 (North Carolina 1926).....              | 13                         |
| Ellis v. State, 944 P.2d 491(Alaska 1997).....   | 44                         |
| Gilbert v. State, Dept. of Fish and Game, 803 P.2d 391 (Alaska 1990) .....                   | 11, 16, 40                 |
| Interior Alaska Airboat Ass’n v. State, Bd. of Game, 18 P.3d 686, 689 (Alaska 2001).....     | 10, 12, 16, 33, 43         |
| Kelso v. Rybacheck, 912 P.2d 536 (Alaska 1996).....  | 44                         |
| Kenai Peninsula Fisherman’s Co-op. Ass’n v. State, 628 P.2d 897 (Alaska 1981).....           | 13, 14, 15, 16, 23         |
| Native Village of Elim v. State, 990 P.2d 1 (Alaska 1999) .....                              | 10, 43                     |
| O’Callaghan v. Rue, 996 P.2d 88, 95 (Alaska 2000) .....                                      | 10                         |
| Peninsula Marketing Ass’n v. State, Bd. of Fisheries, 817 P.2d 917 (Alaska 1991).....        | 12, 23                     |
| Rutter v. State, 963 P.2d 1007, (Alaska 1998) .....  | 22                         |
| Southwest Center for Biological Diversity v. Babbitt, 131 F.Supp.2d 1, 6 (D.D.C. 2001) ..... | 44                         |
| State v. Hebert, 803 P.2d 863 (Alaska 1990) .....  | 16, 17, 34, 35, 36, 37, 40 |
| State v. Kenaitze Indian Tribe, 894 P.2d 632 (Alaska 1995).....                              | 34                         |
| State v. Otness, 986 P.2d 890 (Alaska App. 1999) .....                                       | 23                         |
| State, Dept. of Highways v. Green, 586 P.2d 595, (Alaska 1978).....                          | 33                         |
| State, Dept. of Revenue, Perm. Fund Dividend Div. v. Cosio, 858 P.2d 621 (Alaska 1993) ..... | 10                         |
| State, Dept. of Revenue, v. Andrade, 23 P.2d 58 (Alaska 2001) .....                          | 33                         |
| Stepovak-Shumagin Set Net Ass’n v. State, Bd. of Fisheries, 886 P.2d 633 (1994).....         | 43                         |
| Tongass Sport Fishing Ass’n v. State, 866 P.2d 1314 (Alaska 1994).....                       | 34, 43                     |
| Warner v. State, 819 P.2d 28 (Alaska 1991) .....   | 13                         |

**Constitutional Provisions**

Alaska Const. art VIII, § 2..... 14  
Alaska Const. art. VIII, § 3..... 1, 33, 37  
Alaska Const. art. VIII, § 15..... 1, 37, 40  
Alaska Const. art. VIII, § 17..... 1, 33, 37

**Statutes**

Alaska Administrative Procedures Act ..... 10  
Alaska Cooperative Corporations Act..... 26, 27  
AS 10.15 ..... 26, 28  
AS 16.05 ..... 18, 19  
AS 16.05.221(a)..... 14, 17  
AS 16.05.221(b) ..... 16  
AS 16.05.251(a)..... 25  
AS 16.05.251(a)(12)..... 14, 21  
AS 16.05.251(a)(3)..... 23  
AS 16.05.251(e)..... 21, 22, 23, 38, 39  
AS 16.05.255(a)(10)..... 16  
AS 16.05.940(14) ..... 26  
AS 16.05.940(14)(B)(ii) ..... 20, 21  
AS 16.43 ..... 31  
AS 16.43.100 ..... 29  
AS 16.43.140 ..... 30  
AS 16.43.140(a)..... 30  
AS 16.43.170(b) ..... 30  
AS 16.43.210(a)..... 30  
AS 16.43.300 ..... 33  
AS 16.43.950 ..... 31

|                       |    |
|-----------------------|----|
| AS 16.43.990(3) ..... | 19 |
| AS 44.62.020 .....    | 10 |
| AS 44.62.030 .....    | 10 |
| AS 44.62.100 .....    | 10 |
| AS 44.62.210 .....    | 44 |

### **Regulations**

|   |                                     |
|---|-------------------------------------|
| 5 AAC 01.480(b) .....   | 24                                  |
| 5 AAC 06.355 (a) .....  | 6                                   |
| 5 AAC 15.332 .....  | 25                                  |
| 5 AAC 15.359 .....  | 31                                  |
| 5 AAC 15.359 .....  | 1, 5, 9, 21, 29, 31, 32, 38, 40, 45 |
| 5 AAC 15.359 (Register 165) .....                             | 10                                  |
| 5 AAC 15.359(b) .....   | 28                                  |
| 5 AAC 15.359(b)(1) .....                                      | 6, 26, 27, 28                       |
| 5 AAC 15.359(b)(2) .....                                      | 7, 27                               |
| 5 AAC 15.359(b)(3) .....                                      | 7, 34, 40                           |
| 5 AAC 15.359(b)(4) .....                                      | 7, 34, 40                           |
| 5 AAC 15.359(b)(4)(A) .....                                   | 34                                  |
| 5 AAC 15.359(b)(5) .....                                      | 7, 34, 37                           |
| 5 AAC 15.359(b)(6) .....                                      | 7                                   |
| 5 AAC 15.359(b)(7) .....                                      | 31, 32                              |
| 5 AAC 15.359(c) .....   | 7                                   |
| 5 AAC 15.359(c) (Register 165, effective March 6, 2003) ..... | 25                                  |
| 5 AAC 15.359(d) .....   | 7, 28, 37                           |
| 5 AAC 15.359(e) .....   | 8                                   |
| 5 AAC 15.359(f) .....   | 9                                   |
| 5 AAC 15.359(g)(1) .....                                      | 8, 15                               |

|                          |        |
|--------------------------|--------|
| 5 AAC 15.359(g)(2) ..... | 8      |
| 5 AAC 27.894.....        | 41     |
| 5 AAC 28.120(f).....     | 25     |
| 5 AAC 28.160.....        | 6      |
| 5 AAC 28.170(f).....     | 24, 41 |
| 5 AAC 34.816.....        | 6      |
| 5 AAC 39.222(f)(1) ..... | 23     |
| 5 AAC 39.999.....        | 9      |
| 5 AAC 47.022(57) .....   | 23     |
| 5 AAC 61.024(a)(3).....  | 24     |
| 5 AAC 77.172(a) .....    | 24     |
| 5 ACC 27.894(e).....     | 41     |

**Other Authorities**

|   |    |
|---|----|
| 3 Norman J. Singer, Sutherland Statutory Construction § 58:3 (6th ed. 2001) ..... | 13 |
|---|----|

## AUTHORITIES PRINCIPALLY RELIED UPON

### STATUTES

#### **A.S. 16.05.221. Boards of fisheries and game.**

(a) For purposes of the conservation and development of the fishery resources of the state, there is created the Board of Fisheries composed of seven members appointed by the governor, subject to confirmation by a majority of the members of the legislature in joint session. The governor shall appoint each member on the basis of interest in public affairs, good judgment, knowledge, and ability in the field of action of the board, and with a view to providing diversity of interest and points of view in the membership. The appointed members shall be residents of the state and shall be appointed without regard to political affiliation or geographical location of residence. The commissioner is not a member of the Board of Fisheries, but shall be ex officio secretary.

#### **A.S. 16.05.251. Regulations of the Board of Fisheries.**

(a) The Board of Fisheries may adopt regulations it considers advisable in accordance with AS 44.62 (Administrative Procedure Act) for

(1) setting apart fish reserve areas, refuges, and sanctuaries in the waters of the state over which it has jurisdiction, subject to the approval of the legislature;

(2) establishing open and closed seasons and areas for the taking of fish; if consistent with resource conservation and development goals, the board may adopt regulations establishing restricted seasons and areas necessary for persons 60 years of age and older to participate in sport, personal use, or subsistence fishing;

(3) setting quotas, bag limits, harvest levels, and sex and size limitations on the taking of fish;

(4) establishing the means and methods employed in the pursuit, capture, and transport of fish;

(5) establishing marking and identification requirements for means used in pursuit, capture, and transport of fish;

(6) classifying as commercial fish, sport fish, guided sport fish, personal use fish, subsistence fish, or predators or other categories essential for regulatory purposes;

(7) watershed and habitat improvement, and management, conservation, protection, use, disposal, propagation, and stocking of fish;

(8) investigating and determining the extent and effect of disease, predation, and competition among fish in the state, exercising control measures considered necessary to the resources of the state;

(9) prohibiting and regulating the live capture, possession, transport, or release of native or exotic fish or their eggs;

(10) establishing seasons, areas, quotas, and methods of harvest for aquatic plants;

(11) establishing the times and dates during which the issuance of fishing licenses, permits, and registrations and the transfer of permits and registrations between

registration areas is allowed; however, this paragraph does not apply to permits issued or transferred under AS 16.43;

(12) regulating commercial, sport, guided sport, subsistence, and personal use fishing as needed for the conservation, development, and utilization of fisheries;

(13) requiring, in a fishery, observers on board fishing vessels, as defined in AS 16.05.475(d), that are registered under the laws of the state, as defined in AS 16.05.475(c), after making a written determination that an on-board observer program

(A) is the only practical data-gathering or enforcement mechanism for that fishery;

(B) will not unduly disrupt the fishery;

(C) can be conducted at a reasonable cost; and

(D) can be coordinated with observer programs of other agencies, including the National Marine Fisheries Service, North Pacific Fishery Management Council, and the International Pacific Halibut Commission;

(14) establishing nonexclusive, exclusive, and superexclusive registration and use areas for regulating commercial fishing;

(15) regulating resident or nonresident sport fishermen as needed for the conservation, development, and utilization of fishery resources;

(16) requiring unlicensed fishing vessels present in or transiting the waters of the state to report to the department the quantity, species, and origin of fish on board; in this paragraph, "unlicensed fishing vessel" means a fishing vessel that is not licensed under AS 16.05.490 - 16.05.530.

(b) [Repealed, Sec. 12 ch 52 SLA 1986].

(c) If the Board of Fisheries denies a petition or proposal to amend, adopt, or repeal a regulation, the board, upon receiving a written request from the sponsor of the petition or proposal, shall in addition to the requirements of AS 44.62.230 provide a written explanation for the denial to the sponsor not later than 30 days after the board has officially met and denied the sponsor's petition or proposal, or 30 days after receiving the request for an explanation, whichever is later.

(d) Regulations adopted under (a) of this section must, consistent with sustained yield and the provisions of AS 16.05.258, provide a fair and reasonable opportunity for the taking of fishery resources by personal use, sport, and commercial fishermen.

(e) The Board of Fisheries may allocate fishery resources among personal use, sport, guided sport, and commercial fisheries. The board shall adopt criteria for the allocation of fishery resources and shall use the criteria as appropriate to particular allocation decisions. The criteria may include factors such as

(1) the history of each personal use, sport, guided sport, and commercial fishery;

(2) the number of residents and nonresidents who have participated in each fishery in the past and the number of residents and nonresidents who can reasonably be expected to participate in the future;

(3) the importance of each fishery for providing residents the opportunity to obtain fish for personal and family consumption;

(4) the availability of alternative fisheries resources;

(5) the importance of each fishery to the economy of the state;

(6) the importance of each fishery to the economy of the region and local area in which the fishery is located;

(7) the importance of each fishery in providing recreational opportunities for residents and nonresidents.

(f) Except as expressly provided in AS 16.40.120(e) and 16.40.130, the Board of Fisheries may not adopt regulations or take action regarding the issuance, denial, or conditioning of a permit under AS 16.40.100 or 16.40.120, the construction or operation of a farm or hatchery required to have a permit under AS 16.40.100, or a harvest with a permit issued under AS 16.40.120.

(g) The Board of Fisheries shall consider a request of the commissioner for approval of a petition to the Alaska Commercial Fisheries Entry Commission to establish a moratorium on new entrants into a commercial fishery under AS 16.43.225 at the board's next regular or special meeting that follows the receipt by the board of the request for approval of the petition and that allows time for the notice required under this subsection. The board may consider the request of the commissioner for approval of the petition only after 15 days' public notice of the board's intention to consider approval of the petition. The board shall consider whether the commissioner, in support of the request for approval of the petition, has adequately shown that the fishery meets requirements for a moratorium on new entrants under AS 16.05.050. The board by a majority vote of its members at the meeting when the petition must be considered shall approve or disapprove the petition.

(h) The Board of Fisheries shall adopt by regulation a policy for the management of mixed stock fisheries. The policy shall provide for the management of mixed stock fisheries in a manner that is consistent with sustained yield of wild fish stocks.

#### **A.S. 16.05.940(14). Definitions.**

(14) "fishery" means a specific administrative area in which a specific fishery resource is taken with a specific type of gear; however, the Board of Fisheries may designate a fishery to include more than one specific administrative area, type of gear, or fishery resource; in this paragraph

(A) "gear" means the specific apparatus used in the harvest of a fishery resource; and

(B) "type of gear" means an identifiable classification of gear and may include

(i) classifications for which separate regulations are adopted by the Board of Fisheries or for which separate gear licenses were required by former AS 16.05.550 - 16.05.630; and

(ii) distinct subclassifications of gear such as "power" troll gear and "hand" troll gear or sport gear and guided sport gear;

#### **A.S. 16.43.100 Duties and general powers.**

(a) To accomplish the purposes set out in AS 16.43.010, the commission shall

(1) regulate entry into the commercial fisheries for all fishery resources in the state;

(2) establish priorities for the application of the provisions of this chapter to the various commercial fisheries of the state;

(3) establish administrative areas suitable for regulating and controlling entry into the commercial fisheries;

(4) establish, for all types of gear, the maximum number of entry permits for each administrative area;

(5) designate, when necessary to accomplish the purposes of this chapter, particular species for which separate interim-use permits or entry permits will be issued;

(6) establish qualifications for the issuance of entry permits;

(7) issue entry permits to qualified applicants;

(8) issue interim-use permits as provided in AS 16.43.210, 16.43.220, and 16.43.225;

(9) establish, for all types of gear, the optimum number of entry permits for each administrative area;

(10) administer the buy-back program provided for in AS 16.43.310 and 16.43.320 to reduce the number of outstanding entry permits to the optimum number of entry permits;

(11) provide for the transfer and reissuance of entry permits to qualified transferees;

(12) provide for the transfer and reissuance of entry permits for alternative types of legal gear, in a manner consistent with the purposes of this chapter;

(13) establish and administer the collection of the annual fees provided for in AS 16.43.160;

(14) administer the issuance of commercial fishing vessel licenses under AS 16.05.490;

(15) issue educational entry permits to applicants who qualify under the provisions of AS 16.43.340 - 16.43.390;

(16) establish reasonable user fees for services;

(17) issue landing permits under AS 16.05.675 and regulations adopted under that section;

(18) establish and collect annual fees for the issuance of landing permits that reasonably reflect the costs incurred in the administration and enforcement of provisions of law related to landing permits;

(19) establish a moratorium on entry into commercial fisheries as provided in AS 16.43.225; and

(20) administer, when necessary to accomplish the purposes of this chapter, a vessel permit system under AS 16.43.450 - 16.43.520.

(b) The commission may do all things necessary to the exercise of its powers under this chapter, whether or not specifically designated in this chapter.

#### **A.S. 16.43.140 Permit required.**

(a) After January 1, 1974, a person may not operate gear in the commercial taking of fishery resources without a valid entry permit or a valid interim-use permit issued by the commission.

(b) A permit is not required of a crewmember or other person assisting in the operation of a unit of gear engaged in the commercial taking of fishery resources as long as the holder of the entry permit or the interim-use permit for that particular unit of gear is at all times present and actively engaged in the operation of the gear.

(c) A person may hold more than one interim-use or entry permit issued or transferred under this chapter only for the following purposes:

(1) fishing more than one type of gear;

(2) fishing in more than one administrative area;

(3) harvesting particular species for which separate interim-use or entry permits are issued;

(4) if authorized by regulations of the commission, fishing an entire unit of gear in a fishery in which the commission has issued entry permits for less than a unit of gear under AS 16.43.270(d); under this paragraph, a person may not hold more than two entry permits for a fishery; however, the person may not

(A) fish more than one unit of gear in the fishery; or

(B) acquire a second entry permit for the fishery after the person has acquired an entry permit that authorizes the use of an entire unit of gear in the fishery;

(5) consolidation of the fishing fleet for a salmon fishery; however, a person may hold not more than two entry permits for a salmon fishery under this paragraph, but the person who holds two entry permits for a salmon fishery may not engage in fishing under the second entry permit.

**A.S. 16.43.170(b) Transfer of entry permits.**

(b) Except as provided in (e) of this section, the holder of an entry permit may transfer the permit to another person or to the commission upon 60 days notice of intent to transfer under regulations adopted by the commission. No sooner than 60 days nor later than 12 months from the date of notice to the commission, the holder of an entry permit may transfer the permit. If the proposed transferee, other than the commission, can demonstrate the present ability to participate actively in the fishery and the transfer does not violate any provision of this chapter or regulations adopted under this chapter, and if a certificate for the permit under AS 16.10.333(b)(1) - (2), 16.10.338, or AS 44.81.231(a) is not in effect, the commission shall approve the transfer and reissue the entry permit to the transferee provided that neither party is prohibited by law from participating in the transfer.

**A.S. 16.43.210(a) Interim-use permit; qualifications.**

(a) Pending the establishment of the maximum number of entry permits under AS 16.43.240 and the issuance of entry permits under AS 16.43.270, the commission shall issue interim-use permits under regulations adopted by the commission for each fishery, not subject to a moratorium under AS 16.43.225, to all applicants who can establish their present ability to participate actively in the fishery for which they are making application.

**A.S. 44.62.020 Authority to adopt, administer, or enforce regulations.**

Except for the authority conferred upon the lieutenant governor in AS 44.62.130 - 44.62.170, AS 44.62.010 - 44.62.320 do not confer authority upon or augment the authority of a state agency to adopt, administer, or enforce a regulation. To be effective,

each regulation adopted must be within the scope of authority conferred and in accordance with standards prescribed by other provisions of law.

**A.S. 44.62.030 Consistency between regulation and statute.**

If, by express or implied terms of a statute, a state agency has authority to adopt regulations to implement, interpret, make specific or otherwise carry out the provisions of the statute, a regulation adopted is not valid or effective unless consistent with the statute and reasonably necessary to carry out the purpose of the statute.

**A.S. 44.62.100 Presumptions from filing.**

(a) The filing of a certified copy of a regulation or an order of repeal by the lieutenant governor raises the rebuttable presumptions that

(1) it was duly adopted;

(2) it was duly filed and made available for public inspection at the day and hour endorsed on it;

(3) all requirements of this chapter and the regulations relative to the regulation have been complied with;

(4) the text of the certified copy of a regulation or order of repeal is the text of the regulation or order of repeal as adopted.

(b) The courts shall take judicial notice of the contents of the certified copy of each regulation and of each order of repeal duly filed.

## **REGULATIONS**

**5 AAC 15.359 Chignik Area cooperative purse seine salmon fishery management plan**

(a) The purpose of the management plan under this section is to establish the criteria and management measures for a salmon purse seine cooperative fishery in the Chignik Area.

(b) Chignik Area CFEC salmon purse seine permit holders may receive a permit issued by the commissioner, or the commissioner's designee, to form an annual cooperative fishery only under the following conditions:

(1) at least 51 CFEC salmon purse seine permit holders must, together, apply to the commissioner for a permit to fish as a cooperative fishery each year;

(2) an application for an annual cooperative fishery permit must be submitted to the commissioner by April 1 in 2002, or March 1 in any year after 2002; the application must contain the name and CFEC permit number of each applicant; a copy of a cooperative fishery agreement containing the contractual terms upon which the cooperative will be operated must be submitted with the application, including articles of incorporation, corporate by-laws, partnership agreements, or other similar documents that contain the contractual terms of the cooperative;

- (3) a CFEC salmon purse seine permit holder who did not apply by the deadline specified in (2) of this subsection, may elect to participate in the cooperative fishery by registering with the department by April 15 in 2002, or March 15 in any year after 2002; a CFEC salmon purse seine permit holder who does not register by the applicable date specified in this paragraph may not participate in the cooperative fishery;
- (4) the contractual terms of the annual cooperative fishery agreement must
- (A) provide for participation in the cooperative fishery by registering permit holders who registered after the original deadline, as provided in (3) of this subsection, on the same terms as applicants who did apply by the original deadline;
- (B) be consistent with state laws that apply to the salmon fishery resources of the state;
- (5) if an annual cooperative fishery permit is approved and issued by the commissioner, or the commissioner's designee, for that year, all permit holders that applied by the original deadline or registered after the original deadline to participate in the cooperative fishery may only participate in that cooperative fishery;
- (6) a CFEC permit holder who participates in the annual cooperative fishery
- (A) in the Chignik Area may not participate in any other commercial salmon net registration area as either a permit holder or crew member from June 1 through August 31 of that year; and
- (B) who holds salmon net gear permits for more than one commercial salmon net registration area listed in 5 AAC 39.120(d), must designate the Chignik Area as the single area for salmon net fishing for that year as specified in 5 AAC 39.115 and 20 AAC 05.1940;
- (7) at least one CFEC purse seine permit holder who is a participant in the cooperative must be on board a purse seine vessel engaged in the taking and delivery of salmon for the cooperative.
- (c) If an annual cooperative fishery permit application meets the qualifications and requirements of this section, the commissioner, or the commissioner's designee, will issue a permit, which may contain registration requirements, reporting requirements, gear specifications, other than those specified in 5 AAC 15.332, and other requirements or conditions that the commissioner determines necessary for conservation and management purposes.
- (d) For each year that an annual cooperative fishery permit is issued under this section, the Chignik Area cooperative fishery shall be allocated a percentage of the annual Chignik Area commercial sockeye salmon harvestable surplus based on the number of permit holders participating in the cooperative as follows:
- (1) if participation in the cooperative is less than 85 percent of the registered Chignik Area CFEC purse seine permit holders, the allocation to the annual cooperative fishery will be nine-tenths of one percent of the harvestable surplus for each participant in the cooperative; and
- (2) if participation in the cooperative is 85 percent or more of the registered Chignik Area CFEC purse seine permit holders, the allocation will be one prorated share of the harvestable surplus for each participant in the cooperative.

(e) The commissioner may, by emergency order, open and close separate fishing periods and areas for the cooperative fishery and the open fishery as necessary to achieve the allocation established in (c) of this section. The allocation established under (c) of this section is secondary to escapement and harvest objectives, and the commissioner may, by emergency order, reduce or expand fishing opportunity to ensure escapement and harvest objectives.

(f) Notwithstanding the provisions of 5 AAC 39.999, at its first meeting in the fall of each year, the board may consider written requests for regulation changes to the provisions of this section that are sent to the executive director of the board at least 45 days before the meeting. If the board accepts a request, it will schedule the proposed regulation change as necessary to consider the merits of the request.

(g) In a year when a cooperative fishery permit is issued under this section, the provisions of 5 AAC 15.357(b)(1) do not apply.

(h) In this section,

(1) "cooperative fishery" means a commercial purse seine salmon fishery in which, by agreement of the participants, the number of fishing vessels may be reduced with the intent of decreasing overhead expenses associated with commercial fishing and controlling the rate of harvest to achieve a higher quality product;

(2) "open fishery" means a commercial purse seine fishery conducted by CFEC permit holders who do not participate in the cooperative fishery.

#### **5 ACC 39.222(f)(1) Policy for the management of sustainable salmon fisheries**

(f) In this section, and in implementing this policy,

(1) "allocation" means the granting of specific harvest privileges, usually by regulation, among or between various user groups; "allocation" includes quotas, time periods, area restrictions, percentage sharing of stocks, and other management measures providing or limiting harvest opportunity;

## STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Was the Board of Fisheries' adoption of 5 AAC 15.359 consistent with all applicable statutory authority?
2. Is 5 AAC 15.359 consistent with the equal access clauses of sections 3, 15, and 17 of article VIII of the Alaska Constitution?

## STATEMENT OF THE CASE

### I. STATEMENT OF FACTS

#### A. The Board of Fisheries Received a Proposal to Address Serious Problems in the Chignik Commercial Salmon Fishery.

In response to its call for regulatory proposals for its 2001-02 meeting cycle, the Board of Fisheries received a proposal from three Chignik Area commercial salmon fishermen for a regulation authorizing fishing by joint ventures in the Chignik Area commercial salmon fishery. [Exc. 173-74.] In the problem statement accompanying Proposal 105, the fishermen asserted:

**PROBLEM:** The substantial downturn in the salmon market over the past decade has reduced fishing income drastically while operating expenses have continued to increase every year. Fuel, grocery, and insurance expenses have increased at or above inflation rates over the past ten years while salmon prices have declined to less than 50% of what they were just over a decade ago. The current fishing fleet is overcapitalized and the competitive harvest system does not allow for real improvements in produc[t] quality or flexibility in competing with farmed salmon in foreign or domestic markets. The lower salmon prices drop, the more pronounced these problems become.

#### **WHAT WILL HAPPEN IF NOTHING IS DONE?**

1. Chignik Bay, Chignik Lagoon, Chignik Lake, Perryville, Ivanoff Bay residents, and all Chignik fishermen will continue to endure severe economic hardships as income from salmon fishing continues to decline due to poor prices and ever-increasing operating expenses.
2. Limited entry permits will continue their exodus from rural to urban interests.
3. Permit values will continue to plummet.

4. Safety will be compromised as fishermen are forced to take greater risks to try to make a living and to hire inexperienced crew members because no crew members are available.

[Id.]

The Board considered Proposal 105 at it January 7-14, 2002, meeting in Anchorage. [Exc. 181-230.] The Alaska Department of Fish and Game (ADF&G), in its Staff Comments for Kodiak and Chignik Proposals, offered the following information on Proposal 105 for the Board's consideration:

WHAT WOULD THE PROPOSAL DO? This proposal would allow the CFEC permit holders to form a joint venture and combine their fishing efforts under specific conditions. This proposal would also allocate a percentage of the Chignik sockeye salmon harvest to the voluntary joint venture members and the remainder of the harvest to the permit holders not associated with the joint venture.

...

BACKGROUND: As with many Alaska salmon fisheries, the price of commercially caught salmon has significantly decreased over the past decade while the costs associated with operating a fishing vessel have continued to rise. A segment of the Chignik salmon fleet wants to implement an alternative method to harvest salmon that would significantly reduce their operating costs. The department would continue to manage the commercial salmon fisheries to allow traditional fisheries to be conducted on Chignik Area salmon stocks and to achieve the department's escapement goal for both Black Lake (early run) and Chignik Lake (late run) sockeye salmon and local stocks of pink, chum, coho, and chinook salmon.

DEPARTMENT COMMENTS: The department is neutral to the allocative aspects of this proposal. Department staff believe we can manage the fishery with whatever allocative language the BOF provides, if the language and intent are clear. If the Board adopts this proposal, the department requests the flexibility to be above or below the allocation percentages at any time during the season and that the harvest allocation be stated as a range. The department would also require the joint venture fleet to develop an accurate and dependable method to report all harvest activities on a daily basis. The joint venture fleet will be expected to abide by all regulations, reporting

requirements, and other requirements to the same degree as the independent fleet.

A joint venture comprised of Chignik CFEC permit holders could enhance the department's ability to manage the salmon fisheries by reducing the number of vessels in the fleet. This proposal would reduce the number of fishing vessels, crewmembers, and CFEC permit holders required to harvest the salmon surplus to escapement needs.

In general, a joint venture fleet may respond to inseason management concerns faster than a larger fleet of individual competitive fishermen.

COST ANALYSIS: The department believes that approval of this proposal may result in a reduction in the direct cost for some private persons to participate in this fishery. The approval of this proposal is expected to increase the costs of managing the fisheries by adding additional responsibilities to department fisheries management staff.

[Exc. 242-44; Exhibit C, Record Copies from Board of Fisheries Proceedings related to Proposal 105, RC 13 at 68-69.]

Other public testimony and written comments addressed the same concerns raised in the proposal and the ADF&G report. In an economic assessment of a potential joint venture fishery, McDowell Group of Juneau discussed increased efficiency and improved product quality, as two ways a cooperative fishery would respond positively to the changing world salmon market.

The geography and structure of the Chignik seine fishery make it a prime candidate for experimenting with a full-fledged JV fishery. According to local fishermen, the process of harvesting the entire catch using just 20 percent of the vessels is entirely feasible, greatly reducing operating costs for the fleet. The Chignik lagoon fishing area, where most of the harvest occurs, allows fishermen to purse seine salmon in large quantities as they school prior to ascending the Chignik River.

Salmon market price elasticity based on the Alaska sockeye salmon harvest may be a thing of the past. Salmon prices are now dictated by the global supply of farmed salmon, which comprise over sixty percent of the world market. Therefore, lower returns to Alaska will not mean higher prices for salmon. Cost of operation, however, will continue to increase with inflation. With these two factors a surety for the near future at least, the potential economic benefits of a JV fishery are compelling.

The proposed JV fishery would be much more efficient than the current competitive harvesting process. The operational cost efficiencies and crew reductions gained through a JV fishery, as proposed by the Chignik Seafood Producers Alliance (CSPA), could increase permit holder income and the overall net income from the fishery. Average crew income could increase slightly under a JV fishery, but total crew employment and payroll would decline significantly overall.

...

Alaska's traditional, competitive salmon fisheries present a number of logistical obstacles to producing salmon fillets. These obstacles often result in temperature abuse and improper handling of fish, both major impediments to producing fillets of sufficient quality to compete with farmed salmon. A harvesting system that removes these logistical factors can facilitate production of high-quality fillets, enabling access to the lucrative – and growing – U.S. market.

A logical incarnation of cooperative harvest scenario is for seiners in the JV fleet to make a set, purse up, and then call a tender to pump the live fish out of the net. Fish would be landed to a processing table aboard the tender, individually bled, then held in slush ice or refrigerated seawater until delivery at the plant. This harvesting process would enable producers to focus on quality, absent the time pressures inherent in competitive harvest. It addresses the three most important quality factors in producing high quality salmon suitable for fillets: temperature, bleeding, and handling.

[Exc. 252, 273-74].

**B. The Board Adopted the Co-op Regulation After Rigorous Review and Consideration of the Issues.**

The Board considered much more information, including written and oral public comments and testimony documenting the dire conditions and challenges facing the commercial salmon fishing industry in Alaska. *See, e.g.*, written comments and testimony of economist Gunnar Knapp and testimony of Glen Haight, Fisheries Development Specialist, Department of Community and Economic Development [Exc. 291-3; 328-29].

Because the proposal presented innovative aspects and unique issues, the Board created a special committee to address only Proposal 105. [Exc. 297-308]. A significant number of Chignik fishermen, including Dean Anderson, one of the plaintiffs below, served as public panel members of that committee. [Exc. 297]. The committee's report provided extensive details of the issues discussed in committee and positions of committee participants and indicated a very comprehensive review and discussion. [Exc. 297-308]. No consensus was reached by the public panel, and the committee made no specific recommendation, but rather laid out options for consideration by the full board. [Exc.303, 306-08].

The Board, in response to the proposal, the information board members received at the meeting, and the committee report, adopted a regulation now codified as the Chignik Area Cooperative Purse Seine Salmon Fishery Management Plan, 5 AAC 15.359 (the co-op regulation). But the Board did not simply adopt Proposal 105 as originally written; it made many changes to address legal and policy concerns raised at

the meeting. [Exc. 182-230]. Because Proposal 105 presented novel legal questions, the Department of Law prepared an extensive analysis of potential legal issues and commented on potential legal issues throughout the Board's deliberations. [Exc. 231-41; Exc. 189-92, 206-07, 215, 222-24]. Board members were aware of the legal issues and addressed them. [Exc. 226-28].

**C. The Co-op Regulation Authorizes Cooperative Harvesting, But Does Not Regulate the Marketing of Salmon.**

The co-op regulation authorizes Chignik Area CFEC salmon purse seine permit holders to apply to the commissioner to fish as a cooperative. A minimum of 51 permit holders must apply. 5 AAC 15.359(b)(1). The reason for the minimum number requirement is that the department reported to the Board that it could manage for only a limited number of cooperatives, preferably one. [Exc. 231]. Salmon fisheries are different from many other fisheries in that there is no preseason guideline harvest level or annual harvest objective such as in crab or groundfish fisheries. *See, e.g.*, 5 AAC 34.816; 5 AAC 28.160. Since no one can know in advance exactly how many salmon will be returning to a particular spawning area, it is not possible to manage a commercial salmon fishery by allocating a set number of fish or pounds of fish to individual fishers or groups of fishers. As a consequence, when allocating salmon between competing user groups, the Board deals in terms of percentages of the returning run based on in-season indices. *See, e.g.*, 5 AAC 06.355 (a) (purpose of management plan is to distribute, to the extent practicable, the harvestable surplus of salmon to set and drift gillnet fisheries for the allocation percentages specified in regulation).

Along with the co-op application, the applicants must file a copy of their cooperative agreement containing the contractual terms upon which the co-op will operate. 5 AAC 15.359(b)(2). This requirement is designed to avoid potential problems under the equal access clauses of the Alaska Constitution by guaranteeing that any Chignik permit holder who is not an original applicant may register to join the co-op within 14 days of the co-op application deadline, 5 AAC 15.359(b)(3), and ensuring latecomers will be treated on the same terms as original applicants, 5 AAC 15.359(b)(4). The department is, therefore, required to review the contractual terms to insure that the cooperative agreement is consistent with these requirements. 5 AAC 15.359(c).

Once a permit holder exercises the voluntary right to join the co-op or not, that choice applies to the entire fishing season; the permit holder may not switch back and forth between the co-op and open fisheries. 5 AAC 15.359(b)(5). Also, any permit holder who participates in the Chignik cooperative may not fish for salmon in another area of the state during the Chignik salmon season. 5 AAC 15.359(b)(6).

If the application meets all conditions for a permit, the department will issue a cooperative permit that may contain registration, reporting, and other requirements the commissioner deems necessary. 5 AAC 15.359(c). If a cooperative permit is issued, then the percentage of the harvestable surplus of the Chignik sockeye salmon run will be allocated to the cooperative based on the following formula: .9 percent for each participant when co-op membership is from 51 to less than 85 percent of registered permit holders, and 1 percent per participant when membership is 85 percent or more of registered permit holders. 5 AAC 15.359(d). The co-op regulation gives the

commissioner the authority to open separate fishing periods for the cooperative and the rest of the fishery as necessary to achieve the allocation, with the express direction that the allocation objective is secondary to meeting escapement goals and harvest objectives. 5 AAC 15.359(e).

The regulation also defines the terms “cooperative fishery” and “open fishery” to distinguish between fishing by cooperative members and fishing by nonmembers. 5 AAC 15.359(g)(1)-(2). The definition of “cooperative fishery” also helps explain the purpose of the regulation:

“cooperative fishery” means a commercial purse seine salmon fishery in which, by agreement of the participants, the number of fishing vessels *may be reduced* with the intent of decreasing overhead expenses associated with commercial fishing and controlling the rate of harvest to achieve a higher quality product....

5 AAC 15.359(g)(1) (emphasis added). As noted in the definition, the activities of the cooperative are permissive. The regulation does not dictate how many vessels the cooperative will use for fishing or even whether the number of vessels will be reduced. It does not dictate the rate of harvest by the co-op or how fish will be handled, processed or marketed. It simply gives the opportunity for flexibility to potentially reduce overhead by harvesting fish with less than all the participating permit holders’ vessels and to harvest at a pace that potentially results in higher quality fish.

The co-op regulation addresses only the harvest of fish by the co-op and its members. It does not require the applying permit holders to form a corporation, partnership, or any other particular kind of business entity. It does not prohibit a cooperative from being composed of many different entities such as corporations or

partnerships. It does not require that the fish harvested by the cooperative be marketed or sold cooperatively. It does not address the marketing or sale of salmon at all.

Finally, since the cooperative fishery was largely untested and somewhat experimental in nature, the Board provided for annual reconsideration and remodeling of the co-op regulations AAC 15.359(f). Annual review of the co-op proposals is an exemption from the limitations of the Board's normal three-year topic cycle and the agenda change request standards found in 5 AAC 39.999..

Before the final vote on adoption of the co-op regulation, Board member Russell Nelson summarized the Board's motivation:

I think that our fishery is indeed in trouble and it's going to take some innovative ideas like this, and maybe this isn't it, but I'm hoping it is, and if it's not, then I'd like to see more proposals that come from the different areas. This may not be the panacea for all fisheries in Alaska, there may have to be other ideas for other areas, but it's things like this that need to come before the board so that we can start to straighten out and save our fishing industry.

[Exc. 229].

## **II. STATEMENT OF THE COURSE OF PROCEEDINGS**

The two plaintiffs below filed their complaint on April 5, 2002 challenging the validity of 5 AAC 15.359. [Exc. 38-52.] Chignik Seiners Association (CSA), an association of Chignik Area commercial fishermen, intervened on the side of the State.

[Exc. 89-91.] The plaintiffs also moved for a preliminary injunction, which was opposed by the State and CSA and ultimately denied by the superior court on June 28, 2002.

[Exc. 133-41.] The trial court granted the state and CSA's motions for summary

judgment, finding the co-op regulation statutorily and constitutionally valid. [Exc. 142-71.] Only one of the plaintiffs, Mr. Grunert, appealed.

In December 2002, the board of Fisheries considered regulatory proposals to change the co-op regulation, and several changes were adopted and became effective on March 6, 2003. 5 AAC 15.359 (Register 165).

### STANDARD OF REVIEW

This court will review grants of summary judgment de novo.<sup>1</sup> Once filed by the Lieutenant Governor, regulations are rebuttably presumed to be valid and consistent with the provisions of the Alaska Administrative Procedures Act (APA), including the APA requirements in AS 44.62.020 and AS 44.62.030 that the regulations be consistent with statutory authority and “standards prescribed by other provisions of law.”<sup>2</sup> A challenger has the burden to demonstrate that the regulation is invalid.<sup>3</sup>

A court may “not substitute its judgment for the Board’s or alter the Board’s policy choice when the Board’s decision is based on its expertise.”<sup>4</sup> The wisdom

---

<sup>1</sup> *Interior Alaska Airboat Ass’n v. State, Bd. of Game*, 18 P.3d 686, 689 (Alaska 2001).

<sup>2</sup> AS 44.62.100; *See also Interior Alaska Airboat*, 18 P.3d at 689.

<sup>3</sup> *O’Callaghan v. Rue*, 996 P.2d 88, 95 (Alaska 2000); *Native Village of Elim v. State*, 990 P.2d 1, 14 (Alaska 1999); *State, Dept. of Revenue, Perm. Fund Dividend Div. v. Cosio*, 858 P.2d 621, 624 (Alaska 1993).

<sup>4</sup> *Native Village of Elim*, 990 P.2d at 8.

of a regulation is not a subject of judicial review.<sup>5</sup>

## ARGUMENT

### I. SUMMARY OF ARGUMENT

By adopting the Chignik co-op regulation, the Board took an innovative and experimental approach to the increasing economic and social challenges facing the commercial salmon fishery in Alaska. While the initial proposal presented many legal issues, the Board worked hard to address those issues in the final version of the regulation. The real question for this Court in this appeal is whether it will continue to interpret the Board's authority broadly to allow it the flexibility to continue to "balance economic, ecological, cultural, international, and other policy concerns ... in the face of scientific uncertainty." If so, the Court will find the co-op regulation valid.

The provisions of the co-op regulation are consistent with the Board of Fisheries' statutory authority and the Alaska Constitution. The co-op regulation does not conflict with either the Alaska Cooperative Corporation Act or the Limited Entry statutes. The regulation does not even implicate the provisions of the equal access clauses of the Alaska Constitution because it is carefully crafted to provide equal access to all permit holders. The trial court's judgment should be affirmed.

---

<sup>5</sup> *Gilbert v. State, Dept. of Fish and Game*, 803 P.2d 391, 397 (Alaska 1990).

## II. THE CO-OP REGULATION IS CONSISTENT WITH ALL APPLICABLE STATUTORY AUTHORITY

### A. Standard of Review

The judicial standards for review of an administrative regulation's consistency with statutory authority were recently summarized by this Court:

Regulations are presumptively valid and will be upheld as long as they are "consistent with and reasonably necessary to implement the statutes authorizing their adoption." But reasonable necessity is not a requirement separate from consistency. If it were, courts would be required to judge whether a particular administrative regulation is desirable as a matter of policy. Thus where a regulation is adopted in accordance with the Administrative Procedures Act, and the legislature intended to give the agency discretion, we review the regulation first by ascertaining whether the regulation is consistent with the statutory provisions which authorize it and second by determining whether the regulation is reasonable and not arbitrary.

In determining whether a regulation is reasonable and not arbitrary courts are not to substitute their judgment for the judgment of the agency. Therefore review consists primarily of ensuring that the agency has taken a hard look at the salient problems and has genuinely engaged in reasoned decision making.

*Interior Alaska Airboat*, 18 P.3d at 689-70 (footnotes omitted). While the Court exercises independent judgment on issues of statutory construction, the Board of Fisheries' interpretation is entitled to some weight. *Peninsula Marketing Ass'n v. State, Bd. of Fisheries*, 817 P.2d 917, 922 (Alaska 1991).

This Court has ruled that the statutes authorizing the Board of Fisheries must be construed liberally to achieve their intended purposes. *Kenai Peninsula*

*Fisherman's Co-op. Ass'n v. State*, 628 P.2d 897 (Alaska 1981).<sup>6</sup> Liberal construction requires a court to interpret statutory language more expansively than it might otherwise.

As noted by the leading commentator on statutory construction:

“Liberal” is often used to signify an interpretation which produces broader coverage or more inclusive application of statutory concepts. What is called a liberal construction is ordinarily one which makes a statute apply to more things or in more situations than would otherwise be the case under a strict construction.... A strict construction is one which limits the application of the statute by the words used.

3 Norman J. Singer, *Sutherland Statutory Construction* § 58:3 at 88-89 (6<sup>th</sup> ed. 2001)(footnotes omitted). The treatise goes on to quote a North Carolina case:

With respect to statutes, construction is strict or liberal. Strict construction refuses to extend the import of words used in a statute so as to embrace cases or acts which the words do not clearly describe; liberal construction is that by which the letter of the statute is enlarged or restricted so as more effectually to accomplish the purpose intended.

*Id.*, § 58:5 at 105, *quoting*, *Causey v. Guilford County*, 192 N.C. 298, 135 S.E. 40, 46 (North Carolina 1926).

## **B. The Board Has Very Broad Statutory Authority to Adopt Regulations**

The Legislature has granted the Board of Fisheries extremely broad authority to regulate the state's fisheries. The Alaska Constitution grants the legislature plenary authority over the natural resources of the state:

---

<sup>6</sup> Appellant erroneously cites *Warner v. State*, 819 P.2d 28 (Alaska 1991) for the proposition that the courts will narrowly interpret statutory authority for regulations. The narrow rule of construction in *Warner* applies only to the authority of a rule-making agency to resolve the availability of damages as an administrative remedy; it does not apply to the general scope of rule-making or to any issue in this case. *Id.* at 32.

The legislature shall provide for the *utilization, development, and conservation* of all natural resources belonging to the State, including land and waters, for the maximum benefit of its people.

Section 2, article VIII, Alaska Constitution (emphasis added). In turn, the legislature has granted to the Board of Fisheries a similarly broad delegation of authority to manage the state's fishery resources. The Board is specifically authorized to "adopt regulations it considers advisable ... regulating commercial, sport, guided sport, subsistence, and personal use fishing as needed for the *conservation, development, and utilization* of fisheries." AS 16.05.251(a)(12) (emphasis added). The broad statutory charge to the Board is essentially identical to the broad constitutional charge to the legislature. The co-op regulation easily fits within the broad purview of the Board's statutory authority.

**C. The Co-op Regulation Serves a Proper "Development" Purpose**

Regulations of the Board "must be premised on the need to effectuate conservation and development purposes." *Kenai Pen. Fish. Co-op.*, 628 P.2d at 903 AS 16.05.221(a). Appellant argued below that the purposes of the co-op regulation do not serve a legitimate fishery conservation or development purpose:

the sole purpose of the regulation is to save purse seiners operating expenses so that [they] can compete with foreign fish farmers. BOF member Coffey's comment that the whole idea of the regulation is to save fishermen money [sic]. Saving fishermen money is not a conservation or development of [a] fishery resource purpose for which the Board was created to adopt regulations.

[R. 557.] Appellant argues on appeal that the operation of commercial fishermen association businesses organized collectively to take and process fish is of "no concern to the jurisdiction of the board." Appellant's Brief at 17. The State strongly disagrees. The

Board clearly has a right to regulate resource harvesting and utilization activities as a development concern. The Board also has the responsibility to see that harvesting opportunities are provided in a constitutional way, and thus has the authority to require equal treatment of co-op members.

The purpose of the regulation is spelled out in the regulation itself in the definition of “cooperative fishery,” which reads:

“cooperative fishery” means a commercial purse seine salmon fishery in which, by agreement of the participants, the number of fishing vessels may be reduced with the intent of decreasing overhead expenses associated with commercial fishing and controlling the rate of harvest to achieve a higher quality product....

5 AAC 15.359(g)(1). The purpose of the co-op regulation is to create a fishing opportunity that increases the economic efficiency of commercial fishing by allowing a lower-cost option for harvesting fish, and that increases the quality of the fish product by providing for a more controlled rate of harvest. Certainly, these are legitimate fishery development goals.

This Court has ruled that the Board of Fisheries’ statutory authorities must be construed liberally to achieve their intended purpose. *Kenai Pen. Fish. Co-op.*, 628 P.2d at 903. In the same case, the Court stated:

The legislature established the Board for the purposes of conserving and developing fishery resources. The terms “conserving” and “developing” both embody concepts of utilization of resources. “Conserving” implies controlled utilization of a resource to prevent its exploitation, destruction or neglect. “Developing” connotes management of a resource to make it available for use.

*Id.* If the Board has the power to manage a fisheries resource to make it available for use, the Board necessarily has the power to regulate the manner in which it makes the resource available for use. In another case, this Court has explained that as long as a regulation makes “resources available for use in a certain way,” it serves a “development purpose.” *Interior Alaska Airboat*, 18 P.3d at 691.<sup>7</sup> That is all the Board has done here.

Increased economic efficiency of fishing in a particular area in a particular way serves a “development” purpose. The co-op regulation was designed to provide the opportunity for more net income for fishers in a time of increased economic stress on the fishing industry. The Board must be able to consider such basic factors as cost efficiency when addressing development concerns. Reducing overhead expenses makes the fishery more economically viable and increases net profits for fishers. If the costs of participating in a fishery are so high that participation is not economically viable, the fishery resource will not be developed at all, the resource will not be used at all. This Court has cited preventing economic distress to fishermen as a legitimate purpose for creating non-uniform classifications among commercial fishermen. *Gilbert*, 803 P.2d at 399 n.10.<sup>8</sup> If preventing economic distress is a legitimate purpose for discrimination in a fisheries regulation, it also constitutes a legitimate development concern.

---

<sup>7</sup> The Court was reviewing a regulation of the Board of Game, which has an identical charge to that of the Board of Fisheries for “the conservation and development of the game resources of the state.” AS 16.05.221(b).; *See also* AS 16.05.255(a)(10) (Board of Game may regulate hunting “as needed for the conservation, development, and utilization of game”).

Controlling the rate of harvest to improve product quality likewise tends to achieved the goal of alleviating economic distress in the fishing industry and is, therefore, within the proper purview of the Board’s “development and utilization” responsibility. The co-op regulation does not regulate how fish, once caught, must be handled, processed, marketed, or sold. All it does is regulate the harvest of fish to provide the opportunity for a harvest that might result in a higher quality product, which might result in a higher price, which all results in a more economically viable commercial fishery, which, in some cases, may determine whether a commercial fishery occurs at all.

What if the Board opened a fishery and nobody came because nobody could afford to participate? The Board would not be acting responsibly or consistent with its statutory charge to conserve and develop the fishery resources of the state if it refused to consider possible measures to make a fishery economically viable.

AS 16.05.221(a); AS 16.05.251(a)(12). The record before the Board showed that the economic viability of many salmon fisheries is presently in doubt, and with the co-op regulation, the Board sought to develop an innovative way to make a salmon fishery more viable.

---

<sup>8</sup> The court has also ruled that “alleviating local poverty” is a legitimate purpose for a Board of Fisheries regulation. *State v. Hebert*, 803 P.2d 863, 870 (Alaska 1990).

**D. The Statutory Definition of “Fishery” Does Not Invalidate the Co-op Regulation**

Appellant argues that the Chignik cooperative fishery does not fit the exact definition of “fishery” as in AS 16.05.940(14). Appellant’s Brief at 22-32. But he points to no provision of AS 16.05 that applies the definition in a way that prohibits adoption of the co-op regulation. The statutory definition does not, of itself, purport to restrict the Board’s authority to create a different kind of fishing opportunity. The definition simply explains what is meant by the term “fishery” as used elsewhere in AS 16.05. It does not restrict or even address the board’s ability to create a cooperative fishery. It does not require that fishing opportunities only be provided in a “fishery.” Therefore, the fact that the Board may have created a fishing opportunity that is not a “fishery” does not make the regulation inconsistent with statutory authority.

The implementation of the substantive provisions of the co-op regulation does not depend on the use of the term “fishery.” While the co-op regulation does refer to the term “fishery,” the Board could have done everything it does in the regulation without any such reference. It could have simply used the term “cooperative,” “group,” or “sub-fishery” or anything else to distinguish the participants in the cooperative from non-participants. The appellant failed to provide any legal support for its argument that the co-op regulation is somehow invalid because it allegedly creates a fishing opportunity

different than the statutory definition of “fishery.”<sup>9</sup>

**E. The Co-op Regulation’s Use of the Term “Fishery” Is Consistent With The Statutory Definition**

Even if some part of AS 16.05 required the co-op harvest opportunity to meet the statutory definition of “fishery,” that requirement would be satisfied here because the statutory definition can, in fact, be reasonably read to include subclassifications such as cooperative fishing or non-cooperative fishing, especially under the mandate for liberal construction.

The statutory definition of “fishery” is somewhat complicated, but quite broad. In arguing that the statutory definition does not encompass a co-op fishery, appellant ignores not only the mandate for liberal construction, but the express language in AS 16.05.940(14):

In AS 16.05 – AS 16.40

...

(14) “fishery” means a specific administrative area in which a specific fishery resource is taken with a specific type of gear; however, the Board of Fisheries may designate a fishery to include more than one specific administrative area, type of gear, or fishery resource; in this paragraph

(A) “gear” means the specific apparatus used in the harvest of a fishery resource; and

(B) “type of gear” means an identifiable classification of gear and may include

(i) classifications for which separate regulations are adopted by the Board of Fisheries or for which separate gear licenses were required by former AS 16.05.550 – 16.05.630; and

---

<sup>9</sup> Appellant also argues that the definition of “fishery” in AS 16.43.990(3) precludes adoption of the co-op regulation. Appellant’s Brief at 23-25. But that definition is applicable only to AS 16.43 and not to AS 16.05, the chapter containing the Board’s authority.

(ii) distinct subclassifications of gear such as “power” troll gear and “hand” troll gear or sport gear and guided sport gear....

AS 16.05.940(14) (B)(ii) defines “type of gear” broadly to mean an identifiable class of gear that may include “distinct subclassifications of gear such as ... sport gear and guided sport gear,” which are subclassifications of identical gear used by different methodologies. The statutory language “such as” in the definition reflects a broad and inclusive legislative intent, rather than a strict or narrow one.

Appellant’s attempts to distinguish the subclassifications of “sport gear and guided sport gear” from the subclassifications of cooperative and non-cooperative fishing ring hollow. Appellant’s Brief at 32. Harvesting fish in a co-op differs from non-co-op fishing as much or more than the method for guided sport fishing differs from non-guided sport fishing. In each case, the same gear is used, but the human interactions are changed so that the gear is used in a different way.

In an open, competitive fishery, each fisher competes with others to find the optimal fishing spot and time, with the goal of catching the most possible fish for himself, to the detriment of others. Each fisher generally has only himself to rely on to look for and harvest the most fish.

In a co-op fishery, the approach and methodology is different. There is no competition or jockeying for position. It is in the interests of all participating to maximize the total harvest rather than the harvest of a particular boat. It would be expected that co-op vessels would share information with each other on finding fish and the timing of setting and retrieving gear to optimize the total catch. It would be

reasonable to expect that a limited number of the most experienced fishers be appointed to supervise and coordinate fishing activities of the co-op participants, thereby directing the activities of participants much as a sport fishing guide would direct a clients' activities. A cooperative fishery also contemplates different methods for holding and delivering fish to processors because of the expected slower or more controlled pace of the fishery and product quality measures. [Exc. 274.]

AS 16.05.940(14)(B)(ii) clearly contemplates distinctions between fisheries such as cooperative and competitive fisheries, as well as sport and guided sport fisheries. Accordingly, even a strict reading of the language of AS 16.05.940(14) does not support appellant's narrow interpretation.

Contrary to appellant's arguments, the co-op fishery in 5 AAC 15.359 is not defined in terms of the kind of business entity formed by its participants, or how fish are sold or marketed. It only regulates how fish are harvested to promote development and utilization of the fishery and ensures equal opportunity for participation in that operation. AS 16.05.251(a)(12).

**F. Allocation Within a Fishery Is Consistent With the Board's Statutory Authority**

Even assuming that the co-op regulation only addresses fishing within one "fishery," as defined in AS 16.05.940(14), the regulation is not inconsistent with statutory authority because the Board has the power to allocate within a single fishery. The Board interpreted AS 16.05.251(e) and AS 16.05.940(14) not to preclude allocation to a

cooperative fishery within the Chignik Area seine fishery, and that interpretation is reasonable.

AS 16.05.251(e) provides, in pertinent part:

(e) The Board of Fisheries may allocate fishery resources among personal use, sport, guided sport, and commercial fisheries. The board shall adopt criteria for the allocation of fishery resources and shall use the criteria as appropriate to particular allocation decisions. The criteria may include factors such as

(1) the history of each personal use, sport, guided sport, and commercial fishery;

(2) the number of residents and nonresidents who have participated in each fishery in the past and the number of residents and nonresidents who can reasonably be expected to participate in the future;

(3) the importance of each fishery for providing residents the opportunity to obtain fish for personal and family consumption;

(4) the availability of alternative fisheries resources;

(5) the importance of each fishery to the economy of the state;

(6) the importance of each fishery to the economy of the region and local area in which the fishery is located;

(7) the importance of each fishery in providing recreational opportunities for residents and nonresidents.

This statutory language is permissive, not restrictive. The first sentence reads: “The Board of Fisheries *may* allocate fishery resources among personal use, sport, guided sport, and commercial fisheries.” (Emphasis added). It does not state that the Board may allocate resources *only* among the specified fisheries, and may not allocate to sub-fisheries or other classifications of users. This Court has noted the permissive and discretionary nature of the language of AS 16.05.251(e). *Rutter v. State*, 963 P.2d 1007, 1008 (Alaska 1998).

Notably, the Board has not interpreted AS 16.05.251(e) to limit its ability to allocate only within a “fishery.”<sup>10</sup> For salmon management purposes, the Board has defined the term “allocation” to mean

the granting of specific harvest privileges, usually by regulation, *among or between various user groups*; “allocation” includes quotas, time periods, area restrictions, percentage sharing of stocks, and other management measures providing or limiting harvest opportunity.

5 AAC 39.222(f)(1) (emphasis added). The Board uses “various user groups,” as opposed to “fisheries,” in describing its own allocations. This interpretation is entitled to some deference, *Peninsula Marketing Ass’n*, 817 P.2d at 922, especially in light of the mandate for liberal construction of fishery statutes. *Kenai Pen. Fish Co-op.*, 628 P.2d at 903. An agency’s construction of a statute must not be overturned “except for weighty reasons.” *State v. Otness*, 986 P.2d 890, 892 (Alaska App. 1999). In adopting regulations, an agency is not required to employ strict construction, but to adopt regulations consistent with the purposes of the statute. *Id.*

Under AS 16.05.251(a)(3), the Board has consistently allocated fishery resources “within a fishery” in many of its regulations for many years. AS 16.05.251(a)(3) provides that the Board may adopt regulations “setting quotas, bag limits, harvest levels, and sex and size limitations on the taking of fish.” In the sport fisheries, the Board adopts bag limits on the number of fish any one fisher within the fishery can harvest in one day. See, e.g., 5 AAC 47.022(57) (bag limit of two king

---

<sup>10</sup> As explained in the previous section above, the Board does not concede that the cooperative fishery and the open fishery are the “same” fishery.

salmon per day in Juneau area salt-water sport fishery). The Board also adopts seasonal and annual limits in the sport, personal use, and subsistence fisheries. *See, e.g.*, 5 AAC 61.024(a)(3) (five king salmon seasonal limit in Susitna-West Cook Inlet Area); 5 AAC 77.172(a) (10 king, 75 chum salmon annual limit for personal use fishing in specified area of Yukon River drainage ); 5 AAC 01.480(b) (annual subsistence limit of 250 salmon in Chignik Area).

The language in AS 16.05.251(a)(3) authorizing quotas and bag limits is not limited to the personal use, sport, or guided sport fisheries; it also applies to commercial fisheries. The Board also has, in fact, adopted individual quotas in commercial fisheries. *See* 5 AAC 28.170(f) (individual annual equal-share amount limit for commercial fishermen in sablefish fishery in sub-districts of Eastern Gulf of Alaska). All these limits and quotas are allocations “within a fishery” and would apparently be invalid regulations under appellant’s assumed interpretation of the law.

The co-op regulation, basically, sets quotas or harvest levels for fishermen participating in the Chignik commercial salmon fishery. It allocates aggregated quotas to groups of fishermen based on the size of group membership. There is nothing in the statutes that limits the Board from setting quotas or harvest levels for groups of fishers.

The notion that apparently underlies appellant’s position is that the hardest working and most skillful fisher must be given the opportunity to harvest as much fish as possible. No legal authority supports that notion. The Chignik seine fishery is already restricted to CFEC permit holders. In other commercial fisheries, participants have been limited to quotas representing an equal share of the harvestable surplus. *See* 5 AAC

28.120(f) In sport fisheries, guided sport fisheries, personal use, and subsistence fisheries, participants are limited to equal bag limits regardless of skill or effort expended. The law simply does not require that fisheries be regulated to allow maximum harvest by the best fishers. Under AS 16.05.251(a), the board clearly has the authority to allocate within a “fishery” no matter how that term is defined.

**G. Appellant’s Arguments Based on the Statutory Definition of Fishery are Moot Because the Co-op Regulation Has Been Amended by the Board to Authorize Different Types of Gear in the Cooperative Fishery**

In a meeting in December 2002, the Board of Fisheries adopted an amendment to the co-op regulation that authorizes different types of gear to be used in the cooperative fishery, but not in the open fishery. 5 AAC 15.359(c) (Register 165, effective March 6, 2003) The new version of the relevant regulatory language now reads as follows, with the added language underscored:

If an annual cooperative fishery permit application meets the qualifications and requirements of this section, the commissioner, or the commissioner’s designee, will issue a permit, which may contain registration requirements, reporting requirements, gear specifications, other than those specified in 5 AAC 15.332, and other requirements or conditions that the commissioner determines necessary for conservation and management purposes.

Appellant’s arguments on the statutory definition of the term “fishery” are premised on the point that both the cooperative fishery and open fishery in Chignik use identical gear to harvest fish, and, therefore, there is only one “fishery.” Appellant’s Brief at 25-32.

That premise is no longer valid. Under the new regulation, the commissioner may authorize different gear to be used in the cooperative fishery, but the open fishery is still subject to the gear restrictions in 5 AAC 15.332. Thus, the cooperative fishery is clearly

a different fishery under AS 16.05.940(14) because it does not use the same “specific type of gear.”

Appellant’s arguments on this subject are moot and should not be considered.

**H. The Co-op Regulation Is Not Inconsistent With, or Preempted By, the Alaska Cooperative Corporations Act**

Appellant claims that the co-op regulation is invalid because it ventures into areas delegated to the Department of Community and Economic Development (DCED) in the Alaska Cooperative Corporations Act (ACCA), AS 10.15. Appellant’s Brief at 14-22. That claim is patently incorrect. The co-op regulation, to promote the development and utilization of the Chignik commercial salmon fishery resource, authorizes fishers to operate jointly under certain criteria. The co-op regulation does not interfere with ACCA. It does not even require that the applying group of permit holders be a cooperative corporation, much less dictate how any such corporation is formed, the number of incorporators, or its duration.

The regulation states only that “at least 51 CFEC salmon purse seine permit holders must, together, apply to the commissioner for a permit to fish as a cooperative fishery each year.” 5 AAC 15.359(b)(1). Under the regulation, the applicants could form a partnership, limited partnership, a large group of sole proprietors, or any other kind of organization or association. The cooperative could be made up of a number of cooperative corporations with an agreement of some kind to act together in harvesting fish. All the regulation requires is that the applicants furnish a copy of whatever agreement the applicants make among themselves so that the state is assured

that participation is open to every Chignik Area permit holder and that any later registering co-op participants are allowed participation on the same terms as original applicants. 5 AAC 15.359(b)(2).

The co-op regulation does not address the marketing of fish. It does not require that cooperative members market their fish together. Under the co-op regulation, any fish caught could be divided up equally and sold at the direction of individual cooperative members. On the other hand, two or three groups of co-op members could form separate cooperative corporations or other business entities. These groups could jointly obtain a cooperative permit, but separately market their shares of fish.

The co-op regulation does not limit the duration of any co-operative organization that applies for a permit. An applicant group's existence need not be limited to one year under the co-op regulation. It is correct that the co-operative permit is issued by the commissioner on an annual basis, and is only good for one year, but that does not limit the life expectancy of the applying entity. 5 AAC 15.359(b)(1). It just means that its members will have to apply again the next year and show that they still meet the qualifications for a permit under the regulation. If they don't qualify, each member would have to fish individually, but they could still market and sell their fish cooperatively. If the applying entity is a cooperative corporation, it need not be dissolved and reincorporated every year. The co-op regulation does not to interfere in anyway with the incorporation requirements or other rules that govern the function of cooperative corporations found in the Alaska Cooperative Corporations Act.

The Board does not allocate to a corporation or any other business entity; it allocates to the cooperative fishery or group of permit-holders participating in the cooperative fishery. 5 AAC 15.359(d). The business entity, whatever form it takes, does not apply for or receive a permit on its own standing; the permit holders who are members collectively receive the permit. 5 AAC 15.359(b)(1) (“at least 51 CFEC salmon purse seine permit holders must, together, apply ... for a permit to fish as a cooperative fishery each year”). While the permit holders may apply and receive the permit as a group under the auspices of their organization, in truth the individuals collectively apply for and receive the permit. 5 AAC 15.359(b).

The co-op regulation does not conflict with any provision of AS 10.15. Even if the co-op regulation could be seen as regulating cooperative corporations, appellant cites no statutory language, principle of law, or case authority that would prevent the Board of Fisheries from exercising some limited authority over the activities of cooperative corporations, to the extent they are engaged in the harvesting and sale of fish, by restricting allocations to members of cooperatives that meet certain criteria designed to help develop and utilize the fishery.

Appellant appears to claim that any regulation of the activities or operations of a cooperative fishermen association by any governmental agency other than the commissioner of DCED is invalid. Appellant’s Brief at 16-17. But the DCED statutes cited by appellant do not back up the argument. The authority they delegate does not purport to be exclusive of all other government regulation of the business activities of

cooperative corporations. Appellant could hardly claim that any fish harvesting activities of a cooperative corporation are not subject to Board of Fisheries regulations.

There is no conflict between 5 AAC 15.539 and ACCA and, therefore, the co-op regulation does not encroach on the authority of the commissioner of DCED. Appellant does not cite a single instance of an actual conflict between the requirements of the co-op regulation and ACCA. It is absolutely possible for a cooperative corporation to comply with all of the requirements of ACCA and all of the requirements of the co-op regulation. A cooperative is not forced to choose to comply with one or the other. The co-op regulation does not overrule any requirement of ACCA. ACCA does not address how cooperative fishing associations harvest fish. The co-op regulation offers a voluntary choice to cooperatives. Members of a cooperative corporation could harvest fish in the Chignik commercial fisheries without a permit issued to them under the co-op regulation, but if they want an allocation under the regulation, it must meet the regulation's requirements. In doing that, it is not forced to act in violation of any provision of ACCA.

#### **I. The Co-op Regulation is Consistent With CFEC Statutes**

The Board of Fisheries and the Commercial Fisheries Entry Commission (CFEC) have partnership roles in regard to commercial fishing in Alaska. The Board decides whether and how fish will be harvested, processed, and utilized. AS 16.05.251. The CFEC decides whether entry into a particular fishery should be limited, the optimal number of limited entry permit holders for a fishery, and who those permit holders will be. AS 16.43.100. The co-op regulation creates no conflict between these roles.

The co-op regulation does not limit entry into a commercial fishery. All permit holders may freely choose participate in either the cooperative fishery or the open fishery, or not fish at all.

Appellant argues that the CFEC statutes somehow bar the Board's adoption of the Chignik co-op regulation because the CFEC statutes require "present active participation" in the fishery by permit holders. Appellant's Brief at 32. CFEC statutes contain no such requirement. They only require that those who receive permits be able to demonstrate *the present ability to actively participate*; there is nothing that prevents an able person from choosing not to participate in the fishery.

The statutes that authorize and apply to the Commercial Fisheries Entry Commission (CFEC) do not impose an active participation requirement on CFEC permit holders unless they and their vessels are actually involved in the operation of fishing gear. AS 16.43.140(a) provides that "a person may not operate gear ... without a valid entry permit." It does not require a permit holder to operate gear every year or any year. AS 16.43.140(b) exempts crewmembers from the permit requirement "as long as the holder of the entry permit ... for that particular unit of gear is at all times present and actively engaged in the operation of the gear." But it does not require a permit holder to operate gear every year or any year. Under AS 16.43.170(b), the CFEC shall approve transfer of an entry permit to another person if, among other things, the "transferee ... can demonstrate the present ability to participate actively in the fishery." But there is no requirement that the transferee actually participate in the fishery. AS 16.43.210(a) provides that the CFEC shall issue interim-use permits "to all applicants who can

establish their present ability to participate actively in the fishery for which they are making application.” But it does not require interim-use permit holders to actually participate in the fishery. Nothing in the CFEC statutes requires active participation in the fishery by Chignik co-op members.

The cooperative fishery created by 5 AAC 15.359 does not require or authorize issuance of a CFEC permit to a business entity. Under the provisions of the co-op regulation, every vessel that is used in the co-op fishery must have at least one CFEC permit holder on board. 5 AAC 15.359(b)(7). The actual fishing is done by individual permit holders who are members of the cooperative fishery.

The Chignik co-op regulation does not require an individual co-op member to refrain from participating actively in the co-op fishery. Nothing in 5 AAC 15.359 limits the right of a co-op member to participate in the cooperative fishery. If a fishing period is opened for the cooperative fishery, and every individual member of the cooperative decides to fish, there is nothing in 5 AAC 15.359 to prevent or limit that level of fishing; that would only be limited by the voluntary contractual agreement of co-op members.

In short, there is nothing in the provisions of the Chignik co-op regulation that is inconsistent, in any way, with any provision of a CFEC statute in AS 16.43. Furthermore, those statutes give direction to the Commercial Fisheries Entry Commission; they do not limit or circumscribe the power of the Board to regulate the harvest of fish, as opposed to issuing CFEC permits. *See*, AS 16.43.950 (“Nothing in this chapter [AS 16.43] limits the powers of the Board of Fisheries.... Holders of ... permits

issued under this chapter are subject to all regulations adopted by the Board of Fisheries.”).

Appellant also argues that the CFEC statutes constitute a “fundamental requirement of active participation of gear operators in the fishery in order to benefit and receive remuneration from the salmon fisheries.” Appellant’s Brief at 35. Appellant cannot, however, point to any particular provision that imposes such a requirement or restriction. All of the fishing activities and resulting financial benefits in a cooperative fishery under 5 AAC 15.359 must be performed by qualified CFEC permit holders. 5 AAC 15.359(b)(7). Even assuming some broad public policy in favor of appellant’s interpretation, that policy has not been translated into any kind of statutory restriction. There is nothing in the CFEC statutes that limits the ability of those permit holders to share that benefit with others, including other permit holders.

The co-op regulation does not conflict with the CFEC statutes. The co-op regulation does not decide who gets a limited entry permit for Chignik. It presumes all participants in either type of fishery already have permits. Nor does the co-op regulation regulate the number of permit holders who will actually fish; it leaves that to the permit holders themselves. From the record before it, the Board was convinced that the fishery needed another option to maintain economic viability. The Board did not change the number of permits for the Chignik fishery, something that would be in CFEC’s province, rather it changed the harvest rules to allow the existing number of permit holders to be more viable. The CFEC could still act to reduce the number of permits

under its statutory authority. AS 16.43.300. The co-op regulation would not be an obstacle to such a change.

### **III. THE CO-OP REGULATION IS CONSTITUTIONAL.**

#### **A. Standard of Review**

“A party raising a constitutional challenge to a statute bears the burden of demonstrating the constitutional violation. A presumption of constitutionality applies, and doubts are resolved in favor of constitutionality.” *Baxley v. State*, 958 P.2d 422, 428 (Alaska 1998). The party attacking the constitutionality of a statute has the burden to “negative every conceivable basis which might support it.” *State, Dept. of Revenue, v. Andrade*, 23 P.2d 58, 71 (Alaska 2001). The constitutionality of a regulation carries the same presumption as a statute.<sup>11</sup>

#### **B. The Co-op Regulation Does Not Implicate the Equal Access Clauses of the Alaska Constitution Because It Does Not Limit Admission to a User Group**

The co-op regulation does not implicate the equal access clauses of the Alaska Constitution. Appellant has argued that the co-op regulation is inconsistent with the equal access clauses found in sections 3 and 17 of article VIII of the Alaska Constitution. Appellant’ Brief 38-50. However, it is well settled that these provisions are not implicated unless limits are placed on the admission to resource user groups. *Interior Alaska Airboat*, 18 P.3d at 695; *State v. Kenaitze Indian Tribe*, 894 P.2d 632,

---

<sup>11</sup> Administrative regulations that are legislative in character are interpreted using the same principles applicable to statutes. *State, Dept. of Highways v. Green*, 586 P.2d 595, 607 n.24 (Alaska 1978).

640 (Alaska 1995); *Tongass Sport Fishing Ass'n v. State*, 866 P.2d 1314, 1318 (Alaska 1994). The co-op regulation does not restrict admission to a user group.

Everything about the co-op regulation is voluntary. The co-op formation is voluntary. No Chignik permit holder is barred from participating in the cooperative fishery; in fact, the Board was careful to make sure that the regulation guarantees admission to any permit holder who desires to participate. 5 AAC 15.359(b)(4). If a co-op application is submitted by the required number of permit holders, then the co-op regulation guarantees that every non-applying permit holder has the right to join the co-op. 5 AAC 15.359(b)(3). For permit holders who join after a co-op application is filed, the co-op regulation guarantees their participation will be on equal terms with those who originally applied. 5 AAC 15.359(b)(4)(A).

Admission is restricted only in the sense that each permit holder is limited to one of two voluntary choices: to participate in the co-op or not. 5 AAC 15.359(b)(3) and (5). This is not unequal treatment; every fisherman is required to make the same choice. This is very similar to the issue addressed by this Court in *State v. Hebert*, 803 P.2d 863 (Alaska 1990). In *Hebert*, herring fishermen challenged Board of Fisheries regulations that created “superexclusive” fisheries and prohibited fishermen who operated in one of the “superexclusive” fisheries from participating in any other similar herring fishery, and fishermen who fished in another fishery from participating in a “superexclusive” fishery. *Id.* at 864. The Court noted that all fishermen were “free to choose to fish in a superexclusive use district.” The Court found that even though the Board’s goal was to alleviate local economic distress, there was no discrimination

between local residents and others: “Superexclusive use has the same effect on local fishermen who wish to fish outside one of the superexclusive use districts as it does on outsiders with a similar desire.” *Id.* at 865. The Court stated:

In our view the regulation does not violate any of the article VIII clauses. The regulation does not limit one’s ability to fish in a superexclusive district except in the sense that one may not fish in more than one district in any one year. Regulations of this sort were common in Alaska prior to statehood. When the framers of our constitution met in 1956, exclusive registration was used throughout the commercial salmon fishery.... There is no suggestion in the debates of the delegates to Alaska’s Constitutional Convention that this regulatory device was meant to be prohibited by the article VIII equal access clauses. In view of the importance of the salmon fishing industry in Alaska, especially in the 1950’s, it is not possible to conclude that the constitutional framers intended to prohibit this method of regulation.

*Id.* at 866-67. Likewise, the Chignik co-op regulation does not limit the ability of a Chignik permit holder to fish in co-op fishery openings, except in the sense that he or she may not participate both in the co-op and in the open competitive fishery.

**C. The Co-op Regulation Does Not Treat Similarly Situated Fishermen Differently**

There is no discrimination under the Chignik co-op regulation. Similarly situated fishers are not being treated differently. Those who choose not to participate in the co-op are not being singled out. Every permit holder is being treated alike in that they are guaranteed an actual, voluntary choice. Each one is required to make that choice, just as the herring fishers in *Hebert* were required to elect to participate in superexclusive fisheries or not.

The State does not disagree that all Chignik permit holders are similarly

situated with respect to the Chignik sockeye salmon resource before a cooperative permit is issued. They are. But once they freely choose to participate in the co-op fishery or not, they are no longer similarly situated because the methodology and approaches they use to harvest and deliver fish and the allocations to their chosen fisheries will be different.<sup>12</sup>

What appellant is really complaining about is having to make a choice between the cooperative and open fisheries in the Chignik Area. He seems to claim some constitutional or statutory right to continue fishing according to historical patterns. But there is simply no basis for a “right” to status quo commercial fishing. There is no constitutional or statutory provision that even implies such a right.

In the *Hebert* opinion cited above, this Court has already ruled that the Board may constitutionally require fishers who are currently similarly situated with each other to make tough choices about whether to participate in a particular fishery. 803 P.2d at 866. Before the adoption of the superexclusive fisheries regulations, the defendants and all other herring fishers had been able to legally participate in both the two fisheries in question and any other commercial herring fishery. With the adoption of the regulations, herring fishers were required to make a choice with restrictive consequences. *Id.* They could no longer fish in all fisheries as was their historic practice; they now were limited to participation in one superexclusive fishery and no other fishery

---

<sup>12</sup> If co-op membership is 85 percent or less, the allocation to the co-op fishery will be .9 % per participant, and the allocation to the open fishery will be at least 1.1 % per participant. 5 AAC 15.359(d).

or participation in any nonexclusive fisheries, but not in a superexclusive one. *Id.* They claimed that this violated sections 3, 15, and 17 of the Alaska Constitution. *Id.* The Court rejected those claims. *Id.*

The co-op regulation presents exactly the same kind of constitutional context in the Chignik sockeye salmon fishery. Before adoption of the Chignik co-op regulation, all Chignik permit holders could participate in any commercial salmon opening in Chignik. After adoption of the regulation, if application for a cooperative permit is made, fishers are required to make a choice and will no longer be able to fish during all openings, but only the openings for the fishery they chose. 5 AAC 15.359(b)(5). Chignik fishers who still want to fish in every opening have no more constitutional claim that their admission to a user group is barred than the herring fishermen in the *Hebert* case, who still wanted to fish in every herring fishery.

The co-op regulation was designed to provide an opportunity to co-op participants to reduce overhead expenses in the cooperative fishery, not the status quo-type open fishery. Appellant had this opportunity as did every other Chignik permit holder. The only reason appellant missed an opportunity to reduce overhead expenses is because he deliberately rejected the opportunity by choosing to not participate in the cooperative fishery. When a clear choice to obtain a benefit is provided and he rejects it, appellant cannot legitimately complain that he did not have the same choice as every other permit holder.

Appellant also argues that the State has somehow conceded that the

cooperative fishery cannot be deemed to be a separate fishery and all Chignik permit holders are similarly situated because of a discussion between counsel for defendant and a member of the Board about application of the allocation criteria found in AS 16.051.251(e). Appellant's Brief at 46. That argument takes the quote out of context and is much too simplistic. There were not two different salmon fisheries in the Chignik area until a cooperative fishery permit was issued under 5 AAC 15.359, some months after the Board meeting. The co-op fishery and the open fishery were only hypothetical up to that point. Until then, the Board would not have been able to identify the membership of the cooperative fishery.

Since the Chignik co-op fishery was a new, and at that point, theoretical fishery, if the Board had tried to apply the allocation criteria to any significant degree, it would have been doing so in a vacuum, and the allocation criteria themselves would not have been particularly relevant. A quick scan of the criteria shows the challenge of applying most of the criteria to the Chignik co-op situation:

- (1) the history of each personal use, sport, guided sport, and commercial fishery;
- (2) the number of residents and nonresidents who have participated in each fishery in the past and the number of residents and nonresidents who can reasonably be expected to participate in the future;
- (3) the importance of each fishery for providing residents the opportunity to obtain fish for personal and family consumption;
- (4) the availability of alternative fisheries resources;
- (5) the importance of each fishery to the economy of the state;
- (6) the importance of each fishery to the economy of the region and local area in which the fishery is located;
- (7) the importance of each fishery in providing recreational opportunities for residents and nonresidents.

AS 16.05.251(e). As can be seen, the factors would most likely have been exactly the same for both “fisheries” at the time of the Board’s consideration. The cooperative fishery had no “history” at the time of the Board’s deliberations. Its economic importance would be impossible to judge with any degree of certainty until after the fishery had been existence for a while. Since the membership was unknown at the time, it would have been impossible to determine how many residents and nonresidents would participate. As pointed out by counsel for the state at the Board’s meeting:

most of the criteria you look at, it would be exactly the same for both groups, subgroups I guess, so I think you should review the allocation criteria to the extent anything might apply, that would be good because it would eliminate one issue but, I think it’s going to be difficult.

[Exc. 224.] The point was that the criteria would not be very helpful in this particular situation because the co-op fishery was only a potentiality and had no history because it was only theoretical rather than an established.<sup>13</sup>

All of this does not stand for the proposition urged by appellant: that because permit holders are similarly situated before they make a choice to join the co-op or not, they remain similarly situated after the choice is made. They do not.

**D. Even if the Co-op Regulation Implicates the Equal Access Clauses, It Is Still Constitutional Because It is Consistent with Equal Access Values**

Even assuming, *arguendo*, that the co-op regulation somehow implicates

---

<sup>13</sup> In point of fact, however, Board chair Ed Dersham did go on to state that he believed that the cooperative fishery, as compared to the status quo, would benefit both the economy of the area and the state as a whole, and member Dr. John White concurred in that finding. [Exc. 225.]

the equal access clauses, the co-op regulation is constitutional because it has a legitimate purpose that addresses an important state interest and is drawn carefully for the least possible infringement on open access values. *Gilbert*, 803 P.2d at 398-99. Appellant argues that the co-op regulation has no legitimate purpose. Appellant’s Brief at 49-50. But this Court has already found that preventing economic distress to fishermen is a legitimate purpose for creating non-uniform classifications among commercial fishermen. *Gilbert*, 803 P.2d at 399 n.10. The Court has also ruled that “alleviating local poverty” is a legitimate purpose for a Board of Fisheries regulation. *Hebert*, 803 P.2d at 870. The purposes of the co-op regulation are virtually identical to the purposes upheld as legitimate in *Gilbert* and *Hebert*.

The co-op regulation also is crafted to have the least possible infringement on open access values. The regulation is carefully designed to provide equal access by guaranteeing a voluntary choice for all permit holders to participate in the cooperative fishery. 5 AAC 15.359(b)(3)-(4). The regulation does not prevent the formation of one or more voluntary co-operatives by those who choose not to participate in the cooperative that receives a permit under 5 AAC 15.359. There is no grant of special privilege in 5 AAC 15.359 that might violate the provisions of section 15, article VIII of the Alaska Constitution, because whatever opportunities it creates are guaranteed open to every permit holder. 5 AAC 15.359(b)(3). The appellant has not shown how the legitimate purposes of the co-op regulation could be achieved with less impact on those who chose to fish in the open fishery rather than join the co-op. He has, therefore not shown that the regulation fails the “least possible infringement” test.

Appellant has no constitutional right to harvest a certain amount of salmon each year or a certain percentage of the harvest. Appellant has no constitutional right to an opportunity to harvest a certain amount or percentage. The Board has the discretionary authority to impose an equal share quota in commercial fisheries just as it does with bag limits or annual quotas for the sport fisheries in the state. *See, e.g.,* 5 AAC 28.170(f) (equal share quotas for each fishermen participating in the harvest of sablefish).

When it is possible, the Board has authorized the creation of co-ops of just two or more permit holders. For example, in 5 AAC 27.894, the Board allowed herring gillnet fishermen to form co-ops without a membership minimum. But in the case of herring, the harvestable surplus is set with a preseason exploitation rate based on total biomass estimates. 5 ACC 27.894(e). In other words, the herring are available and can be counted before fishing occurs, which is not the case with salmon returning over a period of weeks or months. In the case of commercial salmon, it would be impossible to manage for individual quotas based on a pro rata percentage share of the run. But it is possible to aggregate pro rata shares into large groups and manage for a percentage allocation to the groups. That is what the Board did in this case. The co-op regulation does not infringe on any constitutional right possessed by appellant.

Appellant has not met his burden to demonstrate that the co-op regulation is unconstitutional. If the Court has any doubts at all about the constitutionality of the regulation, those doubts must be resolved in favor of the regulation. *Baxley v. State*, 958 P.2d 422, 428 (Alaska 1998).

#### **IV. JUDICIAL REVIEW SHOULD BE LIMITED TO THE RECORD BEFORE THE BOARD.**

This Court should not consider evidence that was not part of the record before the Board of Fisheries in determining the validity of the challenged regulation. In his brief, appellant includes numerous citations to information that was not available to the Board of Fisheries when it adopted the co-op regulation. See, e.g., Appellant’s Brief at 11-12 (“Events After the Adoption of the Regulation”). Appellant’s excerpt of record includes many pages of documents that are, on their face, not part of the record. [Exc. 30-37, 54-88, 92-104, 117-32.] This evidence should not be considered by the Court on appeal.

In response to the State’s motion below to strike extra-record exhibits, the Superior Court denied the motion, but ruled that “[t]o the extent the exhibits are not relevant to the issues before the court, they will not be considered.” [R. 1653.] While there is no exact Alaska court precedent for limiting review to the record in a legal challenge to an APA rule-making decision, the State requests that the Court take the

opportunity in this case to clarify the rule for trial courts.<sup>14</sup>

Evidence that is not relevant is inadmissible. Evidence Rule 402. Evidence is relevant only if it tends to make a fact that is of consequence to the determination of the action more or less likely. Evidence Rule 401. In this case, as in any challenge to the regulatory action of an administrative agency, facts are relevant only if they tend to prove or disprove that the agency has taken a hard look at the salient problems and genuinely engaged in reasoned decision making. *See Interior Alaska Airboat*, 18 P.3d at 690. A court makes that determination by looking only to the administrative record in existence

---

<sup>14</sup> The Court has implicitly indicated that its review of evidence will be limited to the record before the Board. *See, e.g., Native Village of Elim*, 990 P.2d at 5, 7-8 (In actions challenging a regulation's application of a constitutional principle to a particular set of facts, the court will look to the record to see whether it supports the reasonableness of the agency's action; "record suggests" requirement of predetermined sustained yield formula would be disproportionate to potential benefits, and "record supports the Board's contention that the exercise would be counter productive;" "record supports the Board's contention that the nature of the fishery resource" precludes mathematically precise calculation; "record also shows" salmon operate on fluctuating cycle making estimating returns difficult; "review of record does not persuade us that the Board has abused its considerable discretion in developing a sustained yield policy"); *Interior Alaska Airboat* 18 P.3d at 693-94 ("record demonstrates that the Board did give consideration to how the challenged regulation would affect aircraft users;" "record shows that the Board gave careful consideration to conflicting points of view"); *Tongass Sport Fishing Ass'n*, 866 P.2d at 1319 (court's review of record showed Board took a hard look at salient problems affecting fishery; record reflected reasoned decision-making, written decisional document not required); *Stepovak-Shumagin Set Net Ass'n v. State, Bd. of Fisheries*, 886 P.2d 633, 647 (1994) (Board's action should be judged on the record as a whole, not just written findings; court inquires into entire record of deliberations).

at the time of the agency's decision. *Ellis v. State*, 944 P.2d 491, 494 (Alaska 1997).<sup>15</sup>

There may be limited circumstances in which evidence that is not part of the rulemaking record may be admitted to support an argument that the agency failed to consider all the relevant factors. If such an exception were to be recognized by this Court, however, it should be done narrowly to prevent the exception from swallowing the rule. "The last thing a reviewing court should do is encourage parties not to submit a pertinent information to an agency and then seek the judicial overturning of agency action based on the failure to consider what the petitioning party supposedly knew but did not tell the agency." *Southwest Center for Biological Diversity v. Babbitt*, 131 F.Supp.2d 1, 6 (D.D.C. 2001). Consideration of extra-record evidence should be allowed, if at all, only to show whether the agency considered the relevant factors. *See Id. at 7*. In no circumstance should extra-record evidence be admitted for the purpose of substituting the court's judgment for that of the agency on the merits of the rulemaking decision. *Id.*

The Board of Fisheries' duty in considering Proposal 105 was to consider all relevant matter presented to it before deciding whether to adopt the regulation. *See AS 44.62.210; see also Kelso v. Rybacheck*, 912 P.2d 536, 540 (Alaska 1996). The

---

<sup>15</sup> In *Ellis*, this court reviewed a semi-rulemaking action by the Department of Natural Resources that closed some land to mineral entry. The court expressly limited its review to "the administrative record which was before the Board when it made its decision." *Id.* at 494.

Board's regulations should not be attacked on the basis of information the Board never saw.

**V. CONCLUSION**

Because 5 AAC 15.359 is consistent with all applicable statutory and constitutional authority, defendant State of Alaska, Board of Fisheries, respectfully requests that the judgment of the superior court finding the regulation valid be affirmed.

DATED this 3rd day of June 2003 at Anchorage, Alaska.

GREGG D. RENKES  
ATTORNEY GENERAL

By:

Lance B. Nelson  
Assistant Attorney General  
ABA No. 8310139