

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FIRST JUDICIAL DISTRICT AT JUNEAU

DEAN ANDERSON, MICHAEL)
GRUNERT and all persons similarly)
situated,)
)
Plaintiffs,)
)
vs.)
)
STATE OF ALASKA, BOARD OF)
FISHERIES,)
)
Defendant, and)
)
CHIGNIK SEINERS ASSOCIATION,)
INC.,)
Defendant-Intervenor.)
_____)

Case No. 1JU-02-349 CI.

MEMORANDUM IN SUPPORT OF
DEFENDANT’S CROSS-MOTION FOR SUMMARY JUDGMENT AND IN
OPPOSITION TO PLAINTIFFS’ MOTION FOR SUMMARY JUDGMENT ON
PLAINTIFFS’ DECLARATORY JUDGMENT ACTION

I. INTRODUCTION.

Defendant, State of Alaska, Board of Fisheries (Board) has cross-moved for summary judgment pursuant to Rule 56 of the Alaska Rules of Civil Procedure. The Board is entitled to summary judgment against plaintiffs upholding the validity of 5 AAC 15.359, Chignik Area Cooperative Purse Seine Salmon Fishery Management Plan (the co-op regulation)¹ in this matter. There are no genuine issues of

¹ A copy of the regulation is attached as Exhibit A.

material fact. The validity of the co-op regulation must be judged by the record of the Board of Fisheries, the content of which is not disputed.² Defendant is also entitled to judgment as a matter of law. The co-op regulation is within the Board's statutory authority and is not inconsistent with the Alaska constitution. Accordingly, defendant's motion for summary judgment should be granted and plaintiffs' motion.

II. PROCEDURAL AND FACTUAL BACKGROUND

At its meeting in January 2002, the Alaska Board of Fisheries (Board) adopted 5 AAC 15.359, Chignik Area Cooperative Purse Seine Salmon Fishery Management Plan (co-op regulation). Exhibit A. The co-op regulation was based on a proposal from the public. In response to its call for regulatory proposals to be considered during its 2001-02 meeting cycle, the Board of Fisheries had received a proposal requesting adoption of a regulation that would authorize fishing by joint ventures in the Chignik Area commercial salmon fishery. Proposal 105 was made by three Chignik commercial fishermen: Aaron Anderson, George Anderson, and Axel Kopun. In the problem statement accompanying the proposal, they stated:

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 produce quality or flexibility in competing with farmed salmon

² Defendant has filed a motion to strike extra-record affidavits and evidence filed by plaintiffs with their motion for summary judgment.

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.

Exhibit B, excerpt from Record Copy (RC) 1, Proposal 105, Board of Fisheries Proceedings, January 2002.

The board considered Proposal 105 and many other proposals dealing with the Kodiak and Chignik area fisheries at it January 7-14, 2002 meeting in Anchorage. Many Chignik commercial salmon fishermen attended the meeting. 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.

Exhibit C, Record Copies from Board of Fisheries Proceedings related to Proposal 105, RC 13 at 68-69.

Other public testimony and written comments were directed at 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 two possible responses to the changing world salmon market conditions, increasing efficiency and improving product quality, through a cooperative fishery approach:

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.

Exhibit C, RC 21 at 4, 26-27.

The record contains much more information consisting of oral public testimony documenting the dire conditions and challenges facing the commercial salmon fishing industry in Alaska that has not been transcribed. *See, e.g.*, testimony of economist Gunnar Knapp, Tape 3B, Counter # 590 – Tape 4A, Counter # 180; testimony of Glen Haight, Fisheries Development Specialist, Department of Community and Economic Development, Tape 3A, Counter ## 450-545. Exhibit D.

Because the proposal contained innovative and new aspects, the Board created a special committee to address only Proposal 105. Exhibit C, RC 105. One of the plaintiffs, Dean Anderson, served as a public panel member of that committee. *Id.* at 1. The report provides extensive details of the issues discussed in committee and indicates a very comprehensive review and discussion. *See* Table attached to RC 105 documenting issues and positions of committee participants. No consensus was

reached by the public panel, and the committee made no specific recommendation, but rather laid out options for discussion by the full board. *Id.* at 7, 8-10.

In response to the proposal, information board members received at the meeting, and the committee report, the Board adopted a regulation now codified at 5 AAC 15.359. But the Board did not simply adopt Proposal 105; it made many changes to address legal and policy concerns raised at the meeting.³

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. Exhibit C, RC 9 at 1. 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.⁴ *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

³ The full transcript of the Board's deliberations on Proposal 105 and its amendments is attached as Exhibit E.

⁴ 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 AAC 27.894(e). In other words, the herring are available and can be

individual fishermen or group of fishermen. 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 determinations from 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).

The regulation does not require the applying group to form corporation or other particular business entity.

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 would operate. 5 AAC 15.359(b)(2). The reason for that requirement is that the regulation also guarantees 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 that 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 his right to make a voluntary decision to join the co-op or not, that choice applies to the entire fishing season; he may not switch

counted before fishing occurs, which is not the case with salmon returning over a period of weeks or months.

back and forth. 5 AAC 15.359(b)(5). Also, any permit holder that participates in the Chignik cooperative may not go and fish for salmon in another area of the state. 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% for each participant when co-op membership is from 51 to less than 85% of registered permit holders; 1% when participant when membership is 85% of registered permit holders. 5 AAC 25.359(d). The commissioner is given the authority to open separate fishing periods for the cooperative and the rest of the fishery as necessary to achieve the allocation, with the clear understanding 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 it 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 and harvest at a rate that results in higher quality fish.

Finally, since a cooperative fishery is rather unique in commercial salmon fishing in Alaska, the Board provided for annual reconsideration and remodeling of the co-op regulation by exempting relevant regulatory proposals from the limitations of its normal three-year topic cycle and the agenda change request standards found in 5 AAC 39.999, agreeing to consider co-op related proposals on an annual basis. 5 AAC 15.359(f).

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.

Exhibit E at 48.

III. SUMMARY JUDGMENT STANDARDS.

Summary judgment is appropriate when “there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law.” Civil Rule 56(c). In this case, plaintiffs have challenged the validity of a regulation adopted by the Board of Fisheries. The only evidence relevant to the court’s determination of the validity of the regulation is the record of the Board’s proceedings. There is no indication from the briefing of any genuine issues of material facts, i.e., the record. Defendant is entitled to judgment as a matter of law because the challenged regulation is consistent with all applicable statutory and constitutional provisions.

IV. ARGUMENT.

A. Summary of Argument.

The Chignik Area Cooperative Purse Seine Salmon Fishery Management Plan, 5 AAC 15.359 (the co-op regulation), is a valid regulation. The provisions of the co-op regulation are consistent with the Board of Fisheries’ statutory authority and the Alaska Constitution.

The Alaska Constitution grants the legislature plenary authority over the natural resources of the state:

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 the same kind of extremely 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.

The co-op regulations does not interfere in any way with the Alaska Co-operative Corporations Act.

Finally, because it does not bar admission to a user group, the co-op regulation does not even implicate the provisions of the equal access clauses of the Alaska Constitution.

B. Standards of judicial review of regulations.

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), AS 44.62.100, including the APA requirements that the regulations be consistent with statutory authority and “standards prescribed by other provisions of law.” AS 44.62.020; AS 44.62.030. A challenger has the burden to demonstrate that the regulation is invalid. *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, Dep’t of Revenue, Perm. Fund Dividend Div. v. Cosio*, 858 P.2d 621, 624 (Alaska 1993). The

judicial standards for review of an administrative regulation were recently summarized by the Supreme Court of Alaska:

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 engage in reasoned decision making.

Interior Alaska Airboat Ass’n v. State, 18 P.3d 686, 689-70 (Alaska 2001) (footnotes omitted). 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.” *Native Village of Elim v. State*, 990 P.2d 1, 5 (Alaska 1999). The wisdom of a regulation is not a subject of judicial review. *Gilbert v. State, Dept. of Fish and Game*, 803 P.2d 391, 397 (Alaska 1990).

In this case, plaintiffs’ have not claimed that the Chignik co-op regulation is unreasonable and arbitrary; their challenge is based on claims of the inconsistency of the regulation with statutory and constitutional provisions.

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).

The Supreme Court of Alaska 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, 903 (Alaska 1981).

“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.⁵

C. The co-op regulation is consistent with the statutory definition of “fishery.”

Contrary to plaintiffs' arguments, the statutory definition of the term “fishery” in AS 16.05.940(14) does not somehow prohibit the adoption of 5 AAC 15.359. The statutory definition, standing alone, does not place any restriction on the board's ability to adopt regulations. The definition simply defines a fishery; it does not

⁵ 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 95, 607 n.24 (Alaska 1978).

address the board's ability to create a cooperative fishery. Furthermore, the definition of "fishery" can reasonably be read to include subclassifications such as cooperative fishing or non-cooperative fishing. AS 16.05.940(14) defines "fishery" as follows:

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

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

As recently pointed out by counsel for defendant-intervenor in another case, the portion of the definition addressing "distinct subclassifications of gear" must be read to allow the Board the discretion to create subclassifications among users who employ identical means of harvest, such as fishing as part of a co-op or not. AS16.05.940(14)(B)(ii) clearly allows the Board to create subclassifications among fishermen who use the same method of harvest, e.g., salmon purse seiners.

Under AS 16.05.940(14)(B)(ii), the permissible subclassifications include, but are not limited to,⁶ “sport gear and guided sport gear....” These two representative subclassifications use identical methods and means of harvest (rod, reel, hook and line) and fish in the same areas, yet the Board is explicitly allowed to identify each as a distinct fishery. If the Board has the statutory authority to make such a distinction for guided sport and sport fishermen using the same type of gear, by analogy it can also distinguish, as separate fisheries, fishing by Chignik Area seiners who fish in a co-op and those who do not, even though they all use the same type of gear. This interpretation is further supported by the fact that the statutory amendments to the definition of fishery in 1992 were designed and intended to clarify and ensure the board’s authority to allocate among users of the same type of gear, and not to limit the Board’s allocation authority at all. *See* discussion below at 22-25.

In any event, the implementation of the substantive provisions of 5 AAC 15.359 does not depend on the use of the term “fishery.” While 5 AAC 15.359 does contain references 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

⁶ According to AS 01.10.040(b), “When the words ‘includes’ or ‘including’ are used in a law, they shall be construed as though followed by the phrase ‘but not limited to.’” So in AS 16.05.940(14)(B), “type of gear” may include, but is not limited to, distinct subclassifications such as sport gear and guided sport gear.

in the cooperative from non-participants. The fact that the Board may have created a fishing opportunity different from the one described in the statutory definition of the term “fishery” does not make the regulation inconsistent with statutory authority because the statutory definition does not purport to restrict the Board’s authority to create a different fishing opportunity.

D. 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. The Board interpreted AS 16.05.251(e) and AS 16.05.940(14) to not 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. The Supreme Court of Alaska 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.”⁷ 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 Peninsula*, 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.*

The Board has allocated fishery resources “within a fishery” in many of its regulations for many years. In the sport fisheries, the Board adopts bag limits limiting the number of fish any one fisherman can harvest in one day. See, e.g., 5 AAC 47.022(57) (bag limit of two king 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 Board also has 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 be invalid regulations under plaintiffs’ interpretation of the law.

Under plaintiffs’ interpretation of statutory authority, since the Board has no authority to allocate within a fishery, it would be limited to designating an amount or

⁷ As explained in the previous section above, the Board does not concede that the cooperative fishery and the open fishery are the “same” fishery. Memo. Supporting Cross-Mtn. for Summ. Jdgmt, Opp. to Summ. J. Page 19 of 34 Anderson, et al. v. State, Bd. of Fisheries Case No. 1JU-02-349 CI

percentage of fish for each personal use, sport, guided sport, and commercial fishery in an area, and then opening the season for each fishery until those amounts or percentages were harvested, giving the hardest working and most skilful sport fisherman, for example, the opportunity to as much fish as possible during that time, rather than being limited to daily, seasonal, or annual limits. That interpretation would turn fisheries management in Alaska on its head. It would also require a very narrow interpretation of the Board's authority statutes, contrary to the supreme court's mandate for liberal construction. *Kenai Peninsula*, 628 P.2d at 903.

Plaintiffs may argue that the allocations cited above are different because they are specifically provided for in AS 16.05.251(a)(3): the Board may adopt regulations for "setting quotas, bag limits, harvest levels, and sex and size limitations on the taking of fish." But that statutory provision is not limited to the personal use, sport, or guided sport fisheries; it also applies to commercial fisheries. 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 fishermen.

AS 16.05.251(e) should not be interpreted to preclude the Board's adoption of the co-op regulation. The current language of AS 16.05.251(e) was intended to affirmatively clarify that the Board did have authority to allocate among the different classes of fisheries, including guided sport; it does not address, and was not

intended to limit, the Board’s ability to allocate within a fishery. A review of the chronological and legislative history of AS 16.05.251(e) may be helpful in interpreting its scope and intent.

Before AS 16.05.251(e) was even adopted, the Supreme Court of Alaska had already ruled that the Board’s “duty to conserve and develop fishery resources implied a concomitant power to allocate fishery resources among competing users” despite any express statutory language to that effect. *Meier v. State, Board of Fisheries*, 739 P.2d 172, 174 (Alaska 1987) *citing*, *Kenai Peninsula Fisherman’s Co-op. Ass’n v. State*, 628 P.2d 897, 903 (Alaska 1981). The *Kenai Peninsula* court had relied only on the language of the former AS 16.05.221(a)⁸ and the former AS 16.05.251(a),⁹ which did not directly address allocation of fishery resources at all, finding that the power to establish priorities among competing users is necessarily inherent in its powers to regulate for the conservation and development of the fishery resources of the state. *Id.*

⁸ In 1981, AS 16.05.221(a) read as follows:

For the 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.

See, Kenai Peninsula, 628 P.2d at 897 n.7.

⁹ In 1981, AS 16.05.251(a) was structured much like the current version, listing “certain enumerated areas of fisheries management” for which the Board could adopt regulatory measures. *Kenai Peninsula*, 628 P.2d at 902 n.9.

at 901-04. There was no subsection (e) or any version of today's AS 16.05.251(e) that expressly addressed allocation.

Subsection (e) was not added until 1986, when the legislature amended AS 16.05.251(e) to add the following:

The Board of Fisheries shall establish criteria for the allocation of fishery resources among personal use, sport and commercial fishing. The criteria may, as appropriate to particular allocation decisions, include facts such as

- (1) the history of each personal use, 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.

Sec. 3, ch. 52 SLA 1986. This language did not even purport to authorize Board allocations of fishery resources; rather it assumed such authority, as already established in law by the court, and went on to require the Board to establish criteria to use when exercising its allocation authority.

The statute was again amended in 1992 to provide the language still in effect today. Sec. 2, ch. 90 SLA 1992. The 1992 amendment was made in conjunction with several amendments to AS 16.05.251(a) and the statutory definition of "fishery" addressing concerns with Board authority over guided sport fishing and non-resident

fishing. Sections 1-3, ch. 90 SLA 1992. In its original form, House Bill 505 (HB 505), the legislation enacted in ch. 90 SLA 1992, would have only amended AS 16.05.251(e) by adding references to guided sport fishing as an additional category of fishing to read:

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

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

House Bill No. 505 (17th Alaska Legislature, February 18, 1992). The bill's sponsor, Representative Mackie, later offered a committee substitute to amend AS 16.05.251(a)(12) and add a new paragraph (a)(15) as follows:

(a) The Board of Fisheries may adopt regulations it considers advisable ... for

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

...

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

Section 1, CSHB 505 (17th Alaska Legislature, March 20, 1992). The committee substitute also added the language contained in the present form of AS 16.05.251(e), and amended the statutory definition of "fishery" into its present form found now at AS 16.05.940(14). The reason for the changes, according to the minutes of the House

Finance Committee meeting on March 20, 1992, was explained by Rep. Mackie as follows:

Representative Mackie stated that CSHB 505 (RES) would make clear that the Board of Fisheries may regulate guided sport fishing harvest activities as a separate and distinct subgroup of resource users. Differing legal opinions have raised questions about the extent to which the Board may identify and treat separately subgroups of general classifications. He stated that CSHB 505 (RES) was introduced to ensure that the Board of Fisheries has the regulatory ability to respond to the growing charter fishing industry. Charter fishing operations would be distinguished as a subgroup of sports fishing. He noted that in Southeast Alaska a strict catch quota for King Salmon has been set by international convention. He asserted that the charter industry is pitted against traditional sports and commercial harvest for the limited allocation. He emphasized that CSHB 505 is intended to provide a level playing field. The Board of Fisheries would be allowed to regulate the harvest of resources by sport, personal use, charter and commercial gear users when conflicts develop.

The reason for the changes to the current language of AS 16.05.251(e) were based on a perceived need for clarification of the Board's authority to allocate between guided sport fishermen and non-guided sport fishermen, rather than on any perceived need to *grant* allocation authority to the board in general or to restrict the allocation authority of the Board to only those types of allocations listed in AS 16.05.251(e). If the legislature had wanted to do that, it could easily have inserted the word "only" as follows: The Board of Fisheries may allocate fishery resources only among ... fisheries. There is nothing in the legislative history indicating an intent to place new limits on the Board's broad authority to allocate fishery resources.

Moreover, AS 16.05.251(e) cannot be read in a vacuum. AS 16.05.251(a)(3) (authorizing quotas and harvest levels) and (a)(12) (authorizing the regulating of commercial fishing as needed for the conservation, development, and utilization of the fisheries) authorizes the kind of allocation made by the Board in the Chignik co-op regulation. These provisions constitute an extremely broad grant of discretionary authority to the Board of Fisheries to allow it the flexibility required to manage the state's fisheries. Clearly, that broad grant would include the authority to adopt regulations like the co-op regulation in this case. The permissive language in AS 16.05.251(e) and the legislative intent behind it should not be construed to somehow impose a limitation on the otherwise broad grant of authority contained in AS 16.05.251(a)(3) and (12). When the legislature provides a broad statutory grant of regulation-making authority to an agency, there is inconsistency only if the regulation bears no reasonable relation to statutory objectives. *Rollins v. State, Dept. of Revenue*, 991 P.2d 202, 207 (Alaska 1999).

E. The co-op regulation serves a proper “development” purpose.

Plaintiffs have argued that the purposes of the co-op regulation do not serve a legitimate fishery conservation or development purpose.¹⁰ Plaintiffs claim

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

¹⁰ Regulations of the Board “must be premised on the need to effectuate conservation and development purposes.” *Kenai River Fisherman's Co-op*, 628 P.2d at 903. Memo. Supporting Cross-Mtn. for Summ. Jdgmt, Opp. to Summ. J. Page 25 of 34 Anderson, et al. v. State, Bd. of Fisheries Case No. 1JU-02-349 CI

conservation or development of [a] fishery resource purpose for which the Board was created to adopt regulations.

Plaintiffs' Supporting Memorandum at 13. Defendant strongly disagrees.

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 was to create a fishing opportunity that would increase the economic efficiency of commercial fishing by cutting the costs involved in harvesting the fish and would provide a more controlled rate of harvest to maintain a higher quality fish product. Certainly, these are legitimate fishery development goals.

Our Supreme Court has ruled that the Board of Fisheries' statutory authority must be construed liberally to achieve their intended purpose. *Kenai Peninsula*, 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 resource to make it available for use, certainly it must have the power to regulate the manner in which it makes it available

for use. That is all the Board has done here. In another case, the supreme 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 Ass’n*, 18 P.3d at 691.¹¹

Under plaintiff’s interpretation, if commercial fishermen in an area came to the Board and asked it to change the regulations to allow for a different, cheaper type of gear, the use of which would present no conservation concerns, the Board would not be able to even consider such a request because cheaper fishing gear (saving fishermen money) is not a legitimate “development” concern.

Certainly, the economic efficiency of fishing in a particular area in a particular way has a “development” purpose. If the costs of participating in a fishery are so high that it is not economically viable to fish, how will a fishery resource be developed at all. If a fishery resource is made available for use in a way that economically viable use is impossible, the resource will not be made available for use at all. How can the Board not consider such a basic factor as cost efficiency when addressing development concerns? The Alaska Supreme Court has cited preventing economic distress to fishermen as a legitimate purpose for creating non-uniform classifications among commercial fishermen. *Gilbert v. State, Dep’t of Fish and Game*,

¹¹ 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).
Memo. Supporting Cross-Mtn. for Summ. Jdgmt, Opp. to Summ. J. Page 27 of 34
Anderson, et al. v. State, Bd. of Fisheries
Case No. 1JU-02-349 CI

803 P.2d 391, 399 n.10 (Alaska 1990). If it's a legitimate purpose for discrimination in fisheries regulation, it should certainly be viewed as a legitimate development concern. 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).

The impact of a harvest method on the quality of a fishery product is likewise within the proper purview of the Board's "development" responsibility. The co-op regulation does not regulate how fish, once caught, must be handled. It does not regulate how fish are processed or marketed after harvest. All it does is 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 certainly 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 the fishery economically viable. AS 16.05.221(a); AS 16.05.251(a)(12).

F. The co-op regulation is not inconsistent with the Alaska Cooperative Corporations Act.

Plaintiffs claim that the co-op regulation is invalid because it ventures into areas delegated to the Department of Community and Economic Development in

the Alaska Cooperative Corporations Act, AS 10.15. Plaintiffs' Memorandum at 17-18. That claim is patently incorrect and is a frivolous argument. The co-op regulation does not even require that the applying cooperative be a cooperative corporation, much less dictate how any 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). For all the regulation cares, the applicants could form a partnership, limited partnership, a large group of sole proprietors, or any other kind of organization or association. For all the regulation cares, 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 can determine that participation be 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 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 state on an annual basis, and is only good for one year, but that does not limit the life expectancy of the applying entity. It just means that it will have to apply again the next year and show that it still meets the qualifications for a permit under the

Memo. Supporting Cross-Mtn. for Summ. Jdgmt, Opp. to Summ. J. Page 29 of 34
Anderson, et al. v. State, Bd. of Fisheries
Case No. 1JU-02-349 CI

regulation. 5 AAC 15.359(b)(1). If the applying entity is a cooperative corporation, it need not be dissolved and reincorporated every year. The co-op regulation does not even purport 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.

G. The co-op regulation does not implicate the equal access clauses of the Alaska Constitution because it does not bar admission to a user group.

The co-op regulation does not implicate the equal access clauses of the Alaska Constitution. Plaintiffs have 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. Plaintiffs' Memorandum at 14-16. However, it is well settled that these provisions are not implemented unless limits are placed on the admission to resource user groups. *Interior Alaska Airboat Ass'n v. State*, 18 P.3d 686, 695 (Alaska 2001); *State v. Kenaitze Indian Tribe*, 894 P.2d 632, 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.

The Board was careful to make sure the co-op regulation guaranteed an actual, voluntary choice for every Chignik Area CFEC permit holder. 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). Neither plaintiffs, nor any other permit holder, can complain

that their admission to the co-op fishery was limited by the regulation; in fact, their option to join is guaranteed. 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. 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 the Supreme Court of Alaska 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.

There is no discrimination under the Chignik co-op regulation. Similarly situated fishermen 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 and is guaranteed an actual, voluntary choice. Every one is required to make that choice, just as the herring fishermen in *Hebert* were required to elect to participate in superexclusive fisheries or not.

Plaintiffs have no constitutional right to harvest a certain amount of salmon each year or a certain percentage of the harvest. They have no constitutional right to even 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).

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 plaintiffs.

Even assuming *arguendo* that the equal access clauses are somehow implicated by the co-op regulation, the co-op regulation would be constitutional because it has a legitimate purpose and is carefully drawn for the least possible infringement on open access values. *McDowell v. State*, 785 P.2d 1, 10 (Alaska 1989). Plaintiffs argue that the co-op regulation's purposes of providing opportunities for fishing with decreased overhead and higher product quality is not a legitimate purpose. Plaintiffs' Supporting Memorandum at 37-40. But our supreme court has already found that preventing economic distress to fishermen is a legitimate purpose for creating non-uniform classifications among commercial fishermen. *Gilbert v. State, Dep't of Fish and Game*, 803 P.2d 391, 399 n.10 (Alaska 1990). 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). The purposes of the co-op regulation are virtually identical to the purposes upheld as legitimate in *Gilbert* and *Hebert*.

The co-op regulation is also carefully drawn to have the least possible infringement on open access values. The regulation was carefully designed to guarantee the choice for all permit holders to participated in the cooperative fishery or

not. 5 AAC 15.359(b)(3)-(4). The regulation does not prevent the formation of a voluntary co-operative by those who choose not to participate in the cooperative that receives a permit under 5 AAC 15.359.

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

V. CONCLUSION.

Defendant is entitled to summary judgment as a matter of law on all of plaintiffs' claims. The Chignik co-op regulation is consistent with the Alaska Statutes and the Alaska Constitution. Defendant State of Alaska, Board of Fisheries respectfully requests that summary judgment be granted in its favor and plaintiffs' motion be denied.

DATED this ___th day of June 2002 at Anchorage, Alaska.

BRUCE M. BOTELHO
ATTORNEY GENERAL

By:

Lance B. Nelson
Assistant Attorney General
ABA No. 8310139