TABLE OF CONTENTS

Page

PREFACE..... i

LIST OF FIGURES..... ii

LIST OF TABLES..... iii

LIST OF APPENDICES..... iv

LIST OF APPENDIX TABLES v

INTRODUCTION..... 1

Salmon..... 1
Herring..... 4
Razor Clams..... 5

1978 SALMON FISHERY..... 7

1978 SUBSISTENCE FISHERY..... 13

1978 HERRING FISHERY..... 14

1978 RAZOR CLAM FISHERY..... 16

MISCELLANEOUS..... 17

1978 Law Suit..... 17

PERSONNEL..... 18

LITERATURE CITED..... 20

Background Publications..... 20

PREFACE

The goals of this report are to document the events of the 1978 commercial and subsistence salmon fisheries and the commercial herring and razor clam fisheries in Upper Cook Inlet. The objective in producing this publication is to document the background of and rationale for the management of the various fisheries within Upper Cook Inlet. The field operations and research aspects of the management area are not presented in this report since they are adequately discussed in the technical reports produced by the research staff.

All fishery data contained in this report supercede the data presented in previous reports. Unless otherwise noted, all commercial catch data are final. Data tabulation is presented in TABLES and APPENDIX TABLES. The TABLES contain data for the 1978 season only. The APPENDIX TABLES contain historical data.

All corrections and comments on the contents of this report should be directed to the area office, Box 3150, Soldotna, Alaska 99669.

LIST OF FIGURES

Figure		Page
1.	Upper Cook Inlet District - subdistrict map.....	21
2.	Major salmon run timing schematic.....	22
3.	Cook Inlet herring districts.....	23

LIST OF TABLES

Table		Page
1.	1978 Upper Cook Inlet commercial salmon catch by period, date and species	24
2a.	Daily and cumulative sonar salmon count by salmon species, Susitna River, 1978	25
2b.	Daily and cumulative late run sockeye salmon sonar counts, Kasilof River, 1978	27
2c.	Daily and cumulative late run sockeye salmon sonar counts, Kenai River, 1978	28
3.	Aerial survey counts of set gillnets by date and subdistrict, Upper Cook Inlet 1978	29
4.	1978 Emergency Order summary Upper Cook Inlet salmon	30
5.	1978 Emergency Order summary Cook Inlet herring	33

LIST OF APPENDICES

APPENDIX	Page
A. 1978 Alaska Supreme Court opinion on Kenai Peninsula Fishermen's Cooperative Association, Inc. (Appellant) vs. State of Alaska; Board of Fisheries et al.....	34

LIST OF APPENDIX TABLES

Appendix Table		Page
1.	Commercial harvest of Upper Cook Inlet king salmon in percent by gillnet gear type, 1966-1978	35
2.	Commercial harvest of Upper Cook Inlet sockeye salmon in percent by gillnet gear type, 1966-1978	35
3.	Commercial harvest of Upper Cook Inlet coho salmon in percent by gillnet gear type, 1966-1978	36
4.	Commercial harvest of Upper Cook Inlet pink salmon in percent by gillnet gear type, 1966-1978	36
5.	Commercial harvest of Upper Cook Inlet chum salmon in percent by gillnet gear type, 1966-1978	37
6.	Commercial harvest of Upper Cook Inlet salmon in percent by gillnet gear type, 1966-1978	37
7.	Commercial catch of Upper Cook Inlet salmon in numbers of fish by species, 1954-1978	38
8.	Cook Inlet herring catches in tons by District, 1961-1978	39
9.	Commercial harvest of razor clams in Cook Inlet, 1919-1978	40
10.	Exvessel value of Upper Cook Inlet commercial salmon harvest in thousands of dollars by species, 1960-1978	41
11.	Numbers of Interim-use and permanent permits issued and fished in Cook Inlet, 1971-1978	42
12.	Upper Cook Inlet Subsistency fishery by district and species, 1971-1978	43

ANNUAL MANAGEMENT REPORT
UPPER COOK INLET AREA
1978

INTRODUCTION

The Cook Inlet area includes all waters of Alaska enclosed by a line extending from Cape Douglas (58 52' N. Lat.) and a line extending south from Cape Fairfield (148 40' W. Long.). This area was split into two management areas, Upper and Lower Cook Inlet, prior to the 1974 commercial fishing season.

Upper Cook Inlet consists of that portion of Cook Inlet north of the latitude of Anchor Point and is divided into two districts, the Central and Northern (Figure 1). The Central District is approximately 75 miles long and averages 32 miles in width, and consists of six subdistricts. The Northern District is 50 miles long and averages 20 miles in width, and contains two subdistricts.

Salmon

Fish traps, set gill nets, drift gill nets and purse seines have all been utilized to harvest salmon in areas of Upper Cook Inlet, with varying degrees of success, since the inception of the commercial fishery in 1882. Fish traps accounted for the vast majority of the commercial catch until the mid-1940's when set gill nets began to dominate the fishery. By 1958, the last year that traps were fished in Upper Cook Inlet, they harvested less than 16% of the commercial catch. Purse seines have only been used in the Chinitna Bay subdistrict.

The efficiency of the gill nets increased significantly as a result of advancements made in technology during World War II. They were the development of more durable synthetic materials used in the construction of gill nets and more reliable outboard motors enabling the fishermen to tend their nets more efficiently and to fish further from shore. These advancements, combined with a change in the commercial fishing regulations in 1947, created a viable drift gill net fishery.

The commercial fishing regulations governing the maximum length of set and drift gill nets allowed in Upper Cook Inlet were changed in 1947. The maximum length for set gill nets prior to 1947 was 100 fathoms in the aggregate and most set net fishermen used four 25 fathom nets. In 1947, this regulation was changed to allow a maximum of 105 fathoms of set gill nets in the aggregate with no single net to exceed 35 fathoms in length. This regulation has remained unaltered to date.

Drift gill nets were also restricted to a maximum length of 100 fathoms prior to 1947. This amount of drift gill net gear was apparently insufficient to make commercial fishing economically feasible, as periodic attempts were made to fish with drift gill nets prior to 1947 but none of the ventures were completely successful. A major change occurred in 1947 when the legal complement of drift gill net was increased to 200 fathoms. It appears that changing this gear restrictions and the introduction of larger, faster and more seaworthy boats was all that was necessary to make drift gill net a viable commercial fishing gear type in Upper Cook Inlet. The gear limit for drift gill nets was reduced in 1949 to a maximum length of 150 fathoms and that limit remains in effect today.

Drift gill nets could be fished in both the Central and Northern Districts of Cook Inlet prior to 1954. After that time, drift gill nets were restricted to the Central District. The success of fishing with drift gill nets was phenomenal. By 1950, three years after its inception, drift gill net gear accounted for slightly over 50% of the commercial salmon harvest (Daisy, 1977). The drift gill nets have continued to catch the majority of the salmon in Upper Cook Inlet ever since.

Gill nets are currently the only legal gear used in Upper Cook Inlet with the exception of the Chinitna Bay Subdistrict where hand purse seines and beach seines are also legal. Set gill nets are the only legal gear in the Northern District, while both set and drift gill nets are permitted in the Central District.

All five species of salmon are harvested in Upper Cook Inlet as they migrate to their stream of origin. The four major spawning systems are the Kenai, Susitna, Kasilof, and Crescent River drainages. Most of the salmon move through the Inlet at approximately the same time creating a mixed species and mixed stock fishery (Figure 2). There are four noteable exceptions to this generalization; the Susitna River king salmon run, the early Kenai River sockeye salmon run, early Kenai River king salmon run and the late Kenai River coho salmon run.

The early run of king salmon to the Susitna River comprises the largest component of the total Cook Inlet king salmon run. Cook Inlet king salmon stocks have a history of commercial exploitation dating back to 1882. These stocks produced an average annual commercial harvest through 1940 of about 60,000 fish, which appears to approximate the maximum sustainable yield for this stock.

The years 1941 through 1951 were an era of over-exploitation, with a peak catch of 187,513 king salmon occurring in 1951. Thereafter, the annual harvest declined steadily from 1952 until the early 1960's, despite the fact that there was an increase in fishing effort. By 1963, it was clearly recognized the Cook Inlet king salmon runs had been reduced to a relict condition.

Increased protection was extended to the remaining stocks in the early 1960's. Early fishing for king salmon in the Northern District of Cook Inlet was curtailed after the 1963 season and remained closed through 1970. Two 12-hour periods were held in early June of 1971 and again in 1972. Escapement surveys of the Susitna River drainage for those two years indicated poor escapements. This fishery was closed in 1973 and has remained closed to date.

Due to the concern for Susitna River king salmon, commercial fishing was also restricted on the eastside of the Central District during the 1960's. In addition, the 1963 Board of Fish and Game adopted a regulation stating any king salmon accidentally caught while fishing for other species could only be utilized for subsistence or welfare purposes. This action provoked the commercial fishermen to file a law suit against the State fo Alaska to allow them to sell any incidentally caught king salmon. the suit was won by the fishermen and the regulation was repealed during the 1964 Board meeting.

The closure to protect the early king salmon run prompted the set net fishermen on the eastside of the Central District to protest to the Board of Fish and Game that their early harvest consisted primarily of early Kenai River sockeye salmon. A 1971 Board policy stated the Commercial Fisheries Division would manage the early Kenai River sockeye salmon for a minimum of 20,000 salmon past the sonar counters located near Soldotna. In addition, the Sport Fish Division would manage the Russian River sockeye salmon sport fishery on a sliding scale basis depending upon the run strength of the early Russian River sockeye salmon return.

The early Kenai River king salmon run was never specifically mentioned since the sport fishery for king salmon on the Kenai River was still in it's infancy and there were no apparent stock allocation or biological problems.

The late run of Kenai River coho salmon does not have a history of over-exploitation. But it does have a recent history as being a focal point in the controversy concerning resource allocation by user groups.

The commercial harvest of the other salmon stocks in Upper Cook Inlet are not evenly distributed between gear types or between the different areas of Upper Cook Inlet. The sockeye salmon harvest is the most evenly distributed between the drift and set gill nets. Set nets averaged 41.6% and the drift nets averaged 58.4% of the sockeye salmon harvest for the years 1966-1978. Two extreme cases are the king salmon catch (93.3% by set nets) and the chum salmon catch (88% by drift nets). These data are presented in Appendix Tables 1-6.

All of the major rivers and the vast majority of the smaller streams flowing into Upper Cook Inlet are glacial in origin making the waters of Upper Cook Inlet extremely turbid, and well suited for gill net fisheries. This area is also characterized by strong currents and the second largest tidal range in North America of up to 40 feet in the Northern District.

The turbidy of the major salmon producing rivers in Upper Cook Inlet makes escapement enumeration very difficult. However, through recent advancements in electronic technology, salmon can be accurately counted in these glacial rivers by use of sonar.

The Alaska Department of Fish and Game began experimenting with this technique for counting salmon in 1966 through research and development contracts with Mr. Al Menin of the Bendix Corporation. By 1968, a functional upward looking multiple transducer sonar counter had been developed and was used to enumerate sockeye salmon escapements into the Kenai and Kasilof Rivers. Continuing technological advances and research on sonar counters have resulted in the single transducer side-scanning sonar counters currently being used in the Kenai and Kasilof Rivers.

These sonar counters were used in the Kenai, Kasilof and Susitna Rivers during the 1978 season and provided in-season escapement data on the sockeye salmon runs. Escapement data on the remaining sockeye salmon runs in Upper Cook Inlet and the runs of king, pink, chum, and coho salmon to all systems in the area were unobtainable during the fishing season. Therefore, management relied heavily on commercial catch data for gauging run strength.

The salmon fishery is the most economically important fishery in Upper Cook Inlet. Historical catch records indicate that this fishery began in 1882 and it has continued every year since then. Records for the commercial catch in Upper Cook Inlet have only been kept since 1954 and are presented in Appendix Table 7. The commercial catches have remained relatively stable over the years, particularly when compared to the commercial fisheries in many other areas of the state. The commercial catch in Upper Cook Inlet has averaged about 2,900,000 salmon since 1954. Pink salmon runs, as well as coho and chum salmon runs to a much lesser degree are larger on even years than on odd years. Thus, the even year catch has averaged about 3,900,000 salmon while the odd year catch averages only 1,800,000 salmon.

Herring

The herring fisheries in Cook Inlet collectively represent the second most economically important fishery managed from the Soldotna office of the Alaska Department of Fish and Game. This fishery can be divided into three components. In descending order of economic importance, they are the Kamishak Bay purse seine fishery, the Upper Cook Inlet gill net fishery, and the Kachemak Bay/Resurrection Bay purse seine fishery. This relative ranking based on economic importance describes the 1978 fishing season. Historically, each of these herring fisheries have held various positions of prominence. Figure 3 shows the Herring Management districts for Cook Inlet.

Commercial herring fishing began in Cook Inlet in 1914 as a gill net fishery in the Halibut Cove area of Kachemak Bay. The industry expanded rapidly and by 1925 there were a total of eight salteries in Cook Inlet six of these in Halibut Cove, one in Seldovia and one in Port Graham. Gill netting remained the primary method of catching herring until 1923 when purse seining was introduced. In 1927, the herring stocks were apparently depleted and it became uneconomical to fish the area. During the three highest years of production in Kachemak Bay, 1924-1926, the total annual harvest averaged approximately 8,000 tons. The average annual catch for the 15 years (1914-1928) the fishery in Kachemak Bay was active was 2,850 tons.

The next major herring fishery to develop in Cook Inlet was a purse seine operation for reduction purposes in the Day Harbor-Resurrection Bay area. The fishery started there in 1939 and lasted through 1959. The annual catch during the three highest years, 1944-1946, averaged about 16,500 tons. The average for all years of operation was 3,500 tons.

The present fishery in Lower Cook Inlet began as a purse seine operation in 1969 with a catch of 1,347 tons and was initiated primarily to supply roe for the Japanese market. Herring are fished at a time when their roe is at it's highest development immediately prior to spawning from late April through early June. Appendix Table 8 shows the Cook Inlet herring harvest from 1961-1978.

The catch from this fishery peaked in 1970 when 4,800 tons were taken; 2,700 from the Southern District and 2,100 from the Eastern District. The catch dropped in 1971 to 986 tons, taken mostly in the Eastern District, and to only 96 tons in 1972, with most of the catch still coming from the Eastern District. The large reduction in the catches during 1971 and 1972 appeared to be due to a combination of late, cold spring weather plus the possibility that the Eastern and Southern Districts were overfished in 1970. Marketing

problems also played a role in keeping the 1972 catch low.

In 1973, fair weather and a four-fold increase in price combined to produce a catch of 1,592 tons. These factors allowed fishermen to search for herring in areas that had rarely, if ever, been fished before. Fair concentrations of herring were located in several bays in the Outer District and in the Northern end of the Kamishak Bay District. A new fishery also developed in the Central District where set gill nets were utilized.

A 4,000 ton quota was set for the entire Cook Inlet area prior to the 1974 season. Good prices and fair weather continued in 1974 and a catch of 2,691 tons was achieved. Effort was again spread out and catches were made in all districts. Nearly 80% of the total catch was taken from the Kamishak Bay District.

Analysis of the data collected during the 1974 season showed that the Kamishak Bay Distict had the best quality herring and the healthiest population. There appeared to be good numbers of herring in the area, spawn was heavy and the harvest was well distributed through several age classes. Herring in the Eastern and Outer Districts were lacking in quality, as well as quanity, with the harvest depending heavily on the age four fish. Southern District herring were of good quality but hard to find while herring in the Central District were plentiful but of poor quality and only suitable for bait.

Almost all the harvest of 4,149 tons in 1975 and 4,848 tons in 1976 came from the Kamishak Bay District. The only exception to this was the small bait harvest from the Central District. In 1976, about 3,500 tons of herring were spotted in the Southern District but a sample indicated that they were too young for good roe quality and no fishery was held.

A deficiency in the age composition of the Kamishak Bay herring became apparent during the 1976 season. The 1971 and 1972 age classes were very weak. Since these age classes would normally be expected to produce a significant portion of the 1977 and 1978 harvest and would be contributing in lesser degrees to the harvest through 1981, it was necessary to reduce the quota in the Kamishik Bay District for the next few years to compensate for the expected deficiency.

Prior to the 1977 season, the 4,000 ton quota was changed to a guideline harvest level to allow management more flexability if large numbers of herring materialized. The harvest level for the Kamishak Bay District was set between 2,700 and 3,000 tons of herring for the 1977 season in order to compensate for the weak 1971 and 1972 age classes. The harvest from other districts was dependent on the number of herring showing in those areas.

Razor Clams

Cook Inlet's commercial razor clam fishery began in 1919. The harvest records indicate that as much as 510,000 pounds of razor clams were harvested annually in Cook Inlet during the early 1920's. Records are very poor for the years 1925-1944 but periodic commercial harvest did occur primarily from the Polly Creek and Ninilchik areas (Appendix Tables 9).

The harvest of razor clams averaged less than 10,000 pounds/year for the years 1945-1949. The razor clam harvest increased to over 300,000 pounds in 1950

and 112,000 pounds in 1951. No commercial razor clam catches were reported from 1952-1960. The beach along the Central District eastside, was closed to commercial razor clam digging in 1959.

Commercial razor clam digging operations were renewed in 1960 with a harvest of approximately 373,000 pounds. This fishery continued at Polly Creek through 1962. The harvests were 278,000 pounds and 196,000 pounds in 1961 and 1962, respectively. No commercial harvest ocurred during the years 1963-1970. Digging for razor clams resumed in 1971 and continued through 1973 with harvests of 15,000 pounds, 32,000 pounds,and 57,000 pounds, respectively. There has been little commercial razor clam harvest since 1973.

The sporadic nature of the razor clam fishery appears to be closely related to the market for razor clams. The primary problems associated with developing this fishery have been transporting clam diggers to the remote beaches and transporting the razor clams to the processors.

The State of Alaska was expelled from the National Shellfish Council in 1954 (this council is the national regulatory body for shellfish). Consequently, Alaska's razor clams could not be shipped outside of the State if they were to be sold for human consumption. This resulted in a sporadic market for razor clams to be sold for bait and a limited in-state human consumption market. The State of Alaska was readmitted to the National Shellfish Council in 1973; however, more restrictive harvesting regulations and the economics associated with the transportation problem have prevented any successful commercial harvesting operations in Cook Inlet to date.

Most of the razor clams harvested in Cook Inlet prior to 1972 were hand dug. Since 1972, there have been numerous attempts to develop both mechanical and hydraulic dredges. Thus far, all of these ventures have been unsuccessful.

The Department of Natural Resources, Division of Agriculture, has approved a portion of the beach at Polly Creek for commercially harvesting razor clams for human consumption. This "certified" beach is approximately three miles long and extends from Redoubt Point to a marker located three miles south of Redoubt Point. Additionally, the Alaska Department of Fish and Game has established the southernmost one half mile of the Polly Creek certified beach as an experimental area for testing mechanical and hydraulic dredges.

Razor clams which are intended to be sold for bait may be taken from any area on the westside of Cook Inlet. Razor clams which are to be sold for human consumption must come from the certified beach. Also, any razor clams harvested from the certified beach which have broken shells cannot be legally sold for human consumtion under a federal regulation. Furthermore, all bait clams must be dyed with the appropriate dye specified by the Division of Agriculture before the razor clams leave the beach where they are harvested.

1978 SALMON FISHERY

The 1978 season resulted in the largest total salmon harvest in Upper Cook Inlet since 1964. This was due primarily to the record sockeye salmon catch selling at $1.37/pound, and the large harvest of the other species, all selling at high prices, combining to make the 1978 salmon catch worth over 25.6 million dollars to the commercial fishermen (Appendix Table 10). Table 1 shows the 1978 season catch by species and by fishing period for Upper Cook Inlet. The success of this season was further enhanced with good escapements of all species in most systems (Table 2).

More commercial fishermen participated in the fishery in 1978 than in 1977. In 1978, there were 549 permanent and 42 interim-use drift gill net permits validated to fish in Cook Inlet. Of these, 537 actually fished. Similarly, there were 742 permanent and 5 interim-use set gill net permits renewed (Appendix Table 11). The precentage of set net permit holders who were residents of Alaska was significantly higher than the percentage of drift net permit holders, 94% and 68% respectively.

At their December meeting in 1977, the Alaska Board of Fisheries adopted policy #77-27-FB, known as the "Comprehensive Management Policy for the Upper Cook Inlet" (Appendix A). This policy states that stocks wich normally move in Cook Inlet to spawning areas prior to June 30 shall be managed primarily as a non-commercial resource, stocks which normally move in Cook Inlet after June 30 shall be managed primarily as a non-recreational resource until August 15, and stocks moving to spawning areas on the Kenai Peninsula after August 15 shall be managed primarily as a non-commercial resource. This policy was generated in an effort to provide the public with a generalized statement regarding how the Upper Cook Inlet salmon resources would be allocated for the different user groups (further discussion of this policy is covered in the "Coho Salmon" section of the "1978 Commercial Fishery" portion of this report). The Board of Fisheries also adopted two proposed changes in the commercial fishing season in Upper Cook Inlet; one change affecting the Northern District and the other affecting the Central District.

The Northern District was scheduled to have two 12-hour commercial fishing periods in early June (June 5 and June 12) as a result of the Board's action. These two fishing periods, were targeting on Susitna River king salmon and restricted in that; 1) commercial fishing was allowed only in the Northern District, 2) only set gill net could be used, 3) each fisherman was limited to fishing one 35-fathom net, and 4) the maximum mesh size was 6 1/2 inches.

The 1978 commercial fishing regulation books were printed with this information in them. However, at their 1978 spring meeting, the Board of Fisheries reversed their prior action concerning these two fishing periods and cancelled them. Consequently, Friday July 3 was the first day open to commercial fishing in the Northern District.

The second regulation change opened the Western Subdistrict of the Central District on June 19 to commercial fishing with set gill nets only. This provided the commercial fishermen in the Western Subdistrict with two fishing periods, June 19 and June 23, before the entire Central District opened to commercial fishing on June 26. These two early openings were allowed in an

effort to increase the harvest of the Crescent River sockeye salmon run.

In summary, the 1978 commercial salmon season for Upper Cook Inlet opened in the Central District on June 26, except that the Western Subdistrict was open on June 19 and June 23 to commercial fishing with set gill nets only. The Northern District's commercial fishing season began on July 3. According to the 1978 commercial fishing regulations, the commercial fishing season continued until closed by emergency order; however, the only area to have its season closed by emergency order was the Upper Subdistrict of the Central District (explained later in this report). Consequently, the remainder of Upper Cook Inlet remained to commercial fishing until midnight on December 31, 1978. Due to bad weather, lack of fish and processors, all commercial fishing ceased by the end of September.

Aerial surveys of the Western Subdistrict were conducted during the two commercial fishing periods in early June in order to obtain an actual count of the number of set gill nets being fished on June 19 and June 23, respectively (Table 3). The decrease in effort on June 23 was primarily due to bad weather. These two early commercial fishing periods resulted in a harvest of 3,400 sockeye salmon on June 19 and 3,400 sockeye salmon on June 23. Therefore, the catch per unit of effort (CPUE) was 35 and 66 sockeye salmon per set net for these two periods, respectively. These data suggests that the Crescent River sockeye salmon run was still increasing in strength.

The stock composition estimate for the Central District westside set net catch during the time period June 19 - June 26 indicated that approximately 77% of their sockeye salmon harvest were of Crescent River origin (Bethe and Krasnowski, 1980). Additional stock composition data suggested that the majority of the westside set nets continued to catch primarily Crescent River sockeye salmon through July 15. Subsequent scale samples indicated a significant decrease in the proportion of Crescent River sockeye salmon in the westside set net harvest.

The first commercial fishing period for the entire Central District occurred on June 26. This resulted in a total catch of 36,000 salmon, primarily sockeye and chum, respectively. These catches were significantly above average for the season's first fishing period. (It should be noted that Upper Cook Inlet is managed primarily for one species at any given point in time and the area's single species management is aimed at sockeye salmon from the opening of the commercial fishing season until approximately the last week in July).

The second commercial fishing period, June 30, produced a harvest of 75,000 sockeye salmon. This catch was considerably above the previous year's catch for this time period. The catch of chum salmon during this period (6,800) was also unusually large, suggesting that the chum salmon run was either stronger than average or early, or both.

The commercial fishing period on July 3 produced an extraordinary Central District catch of 180,000 sockeye salmon. The drift fleet harvested most of these fish, primarily from the vicinity of the Kalgin Island buoy south. This indicated there was a large number of sockeye salmon holding low in the Central District where they were accessible to the drift fleet but not to set nets. The Northern District commercial catch of 131 sockeye salmon on July 3,

the first fishing period of the 1978 season, was very low for that date.

Emergency Order #2S-08-78 was issued on July 4 opening the Cental District to commercial fishing with set and drift gill nets from 6:00 AM unitl 6:00 PM on Wednesday, July 5. (A brief justification is given for each emergency order in Table 4). This fishing period resulted in a harvest of 267,000 sockeye salmon, with 96% caught by the drift fleet in the same location below Kalgin Island buoy. It appeared that an atypical situation of the wind blowing continuously from the north was contributing to the unusual behavior of the sockeye salmon.

The regularly scheduled fishing period on July 7 was restricted to commercial fishing with set gill nets only. The lack of escapement into the Kenai River (Table 2) was the primary justification for this action, particularly when considering the holding behavior of the sockeye salmon low in the Central District making them extremely vulnerable to overexploitation by the drift fleet. Approximately 11,400 sockeye were caught during this fishing period, 11,300 in the Central District and only 100 in the Northern District.

All areas were open to commercial fishing with all gear types during the regularly scheduled fishing period on July 10. A total of 386,000 sockeye salmon were caught. Again, approximately 96% of these fish were harvested by the drift fleet and the wind continued to blow from the north.

Emergency Order #2S-10-78 was issued on July 13. This closed the Central and Northern Districts to commercial fishing on July 14, a regularly scheduled fishing period. An aerial survey over the Central District during the morning of July 13 indicated the schools of sockeye salmon were still below the southern end of Kalgin Island. Additionally, the Kenai River sockeye salmon escapement continued to lag farther and farther behind the desired level for that point in time.

An aerial survey on July 14 showed a very large school of sockeye salmon had rapidly moved north and east of Kalgin Island and appeared to be heading toward the Kenai River. As a result of this aerial survey, an Emergency Order, #2S-11-78, was issued which opened the Central and Northern Districts to commercial fishing with set gill nets from 6:00 AM until 6:00 PM and the Central District to commercial fishing with drift gill nets from 12:00 noon until 6:00 PM on Saturday, July 15. This fishing period produced a catch of 744,000 sockeye salmon, a new record catch of sockeye salmon in one fishing period. Just over 520,000 of these sockeye salmon were caught by the drift fleet and the majority of these were caught within five miles of the mouth of the Kenai River. The regularly scheduled 12-hour fishing period on July 17 produced a catch of 347,000 sockeye salmon. The catch of 143,000 sockeye salmon by the drift fleet, combined with the 169,000 sockeye salmon harvested by the Central District's eastside set nets, indicated the large schools of sockeye had moved inshore and were heading for the Kenai River. Additionally, an aerial survey showed the vast majority of the drift fleet was fishing along the east shore within approximately five miles of the mouth of the Kenai River. The fishing period resulted in a dramatic increase in the Northern District salmon harvest.

An Emergency Order #2S-12-78 giving a 24-hour commercial fishing period, 6:00 AM July 19 until 6:00 AM July 20 for the Central and Northern Districts was

announced on July 18 because the staff felt that the Kenai and Kasilof River escapement goals were reasonably well assured. Visual observations on July 18 indicated a large number of sockeye salmon remained along the east shore of the Central District.

The harvest of 320,000 sockeye salmon from this 24-hour fishing period confirmed the staff's opinion that many sockeye salmon remained along the east beach. The majority of the drift fleet continued to fish along the east shore close to the mouth of the Kenai River. Consequently, the drift fleet caught 191,000 sockeye salmon during this fishing period.

The standard 12-hour fishing period scheduled for July 21 was extended to 16 hours (6:00 AM until 10:00 PM) for the Central and Northern Disticts. This fishing period produced a catch of only 137,000 sockeye salmon. This reduced harvest indicated the peak of the sockeye salmon run had definately passed. However, the desired sockeye salmon escapement into the Kenai River had not yet been obtained; therefore, the staff's management efforts remained on the sockeye salmon run.

The Central District Upper Subdistrict was closed to commercial fishing with set gill nets and the entire Central District was closed to commercial fishing with drift gill nets during the regularly scheduled 12-hour fishing period on July 24. A sharp reduction in the Kenai River escapement rate on July 23 prompted this conservative action; the Kenai River was still approximately 100,000 fish short of the optimum escapement goal of 390,000 sockeye salmon.

Due to the steadily declining catches of sockeye salmon and the large numbers of pink and chum salmon being caught, the staff changed its primary management concerns from sockeye salmon to pink salmon on July 25. This resulted in an additional 12-hour fishing period for the Central and Northern Districts on Wednesday, July 26. The commercial catch of salmon from this fishing period consisted of large catches of pink and chum salmon. The relatively large number of sockeye salmon caught during this fishing period indicated to the staff that there were sufficient sockeye salmon remaining in the area to reasonably insure a good escapement into the Kenai River.

The standard fishing schedule of two 12-hour periods per week, was adhered to until August 9, when the Central and Northern Districts were given an additional 12-hour fishing period. This fishing period was the result of significant increases in the drift and eastside set net catches of pink salmon on August 7, indicating that the run of pink salmon bound for the Kenai River was strong.

The regularly scheduled 12-hour fishing period on August 11 was extended to 18 hours, (5:00 AM until 11:00 PM). The previous fishing period had resulted in continued large catches of pink salmon, primarily along the Central District eastside beach. Good escapements of all species had been achieved in the Northern District systems and the Central District westside streams. This fishing period was extended in order to harvest surplus pink salmon remaining in Upper Cook Inlet.

The Chinitna Bay, Western, Kustatan, and Kalgik Island Subdistricts of the Central District were opened to commercial fishing with set gill nets only on August 30 from 6:00 AM until 6:00 PM. This additional fishing period was the

result of good coho salmon runs to the Central District westside systems. Aerial surveys had indicated good escapements of chum and coho salmon into the westside clearwater streams. Also, the number of commercial fishermen still participating in the fishery had decreased significantly. (The Board of Fisheries policy, #77-27-FB, did not restrict commercial fishing activities on the west side of the Central District after August 15.)

The following is a summary of the 1978 season catch and escapement to the major systems:

King Salmon - The 1978 commercial catch of king salmon in Upper Cook Inlet was 17,302. The was 80% above the recent historical average of 9,631. The Central District accounted for 16,633 of these fish (96% of the total), while the Northern District catch was 669 king salmon (4%). Interestingly, this season's king salmon catch in the Central District was 261% of the Central District average annual harvest. The Northern District king salmon catch was only 18% of its average annual harvest. Prior to July 1, 2,548 king salmon were harvested in the Central District.

Sockeye Salmon - The 1978 commercial catch of 2,621,667 sockeye salmon was the largest catch in the history of commercial fishing in Upper Cook Inlet. This year's harvest was 249% of the 19-year average (1959-1977) of 1,052,903. The Central District accounted for 2,570,043 or 98% of this year's sockeye salmon catch while the Northern District catch was 51,624 sockeye, or 2%. The sockeye salmon harvest in the Central District was 268% of the Central District average annual harvest. But the Northern District sockeye salmon catch was only 56% of the Northern District average annual catch. The schooling and holding behavior of these fish in the lower portion of the Central District making them readily available to the drift fleet during the first half of the season accounts for this unbalanced catch distribution.

Prior to, and including the peak of the run on July 15, the drift fleet had caught 1,361,845 sockeye salmon. Following the peak of the run, the sockeye salmon moved northward and inshore. This resulted in a shift in the catch distribution from the drift fleet to the set netters. The Central District set netters caught 85% of their season's total of sockeye salmon during and after the period on July 15. Similarly, the Northern District set netters caught 99% of their season's total of sockeye salmon during and after the period on July 15.

1978 was a good year for sockeye salmon escapement as well as commercial catch. The Kasilof River received 115,700 sockeye salmon which is near the upper end of the range of our desired escapement goal of 120,000. Additionally, these fish were fairly evenly distributed amongst the various spawning streams around Tustumena Lake.

The Kenai River ended up with 398,900 sockeye salmon past the sonar counters. This was well within the desired escapement range and quite near the point goal of 390,000. Subtracting the number of sport-caught Kenai River sockeye salmon from the sonar counts, the actual number of sockeye salmon spawners was 341,000.

The Susitna River sonar indicated 94,400 sockeye salmon escaped into that system. The department's escapement goal for sockeye into the Susitna River

is 200,000.

In summary, the 1978 commercial salmon season in Upper Cook Inlet resulted in the largest sockeye salmon harvest in the history of Upper Cook Inlet and the best catch of all species combined since 1964. Additionally, the sockeye salmon escapements into two of the three primary systems in the area were within their escapement range.

Pink Salmon - The 1978 pink salmon catch of 1,689,098 was close to the historical even year average (1959-1977) of 1,644,920 pink salmon. The Central District caught approximately 1,362,000 of these, or 81% while the Northern District harvested 327,000 pink salmon, or 19%.

Unlike the situation with the king and sockeye salmon, the pink salmon catch was more evenly distributed between the two districts. The Central District pink salmon catch was slightly below average and the Northern District catch was 8% above average. This was due in part to a strong Susitna River pink salmon run and a relatively weak Kenai River pink salmon run.

Another factor which contributed to the pink salmon catch by district was the distribution of the Central District drift fleet during the fishing period on July 15 and subsequent fishing periods. Because the sockeye salmon were concentrated near the entrance to the Kenai River on July 15, the bulk of the drift fleet was located close to the east side beach in an area approximately five miles north and south of the Kenai River entrance. The largest portion of the drift fleet continued to fish in this area for several more periods in an effort to catch sockeye salmon. Consequently, a large number of Susitna River bound pink salmon passed through the Central District.

The Kenai River pink salmon run was several days late this year. One extra period was given to maximize the pink salmon harvest prior to August 15 to avoid any conflicts with the Board of Fisheries policy dealing with late run Kenai River coho salmon. While the Kenai River pinks were late and fewer than expected, a good escapement of pink salmon into the Kenai River was achieved.

The Susitna River received a large escapement of pink salmon (Approximately 2,500,000). This can be partially attributed to the Central District drift fleet distribution during the time when most of the fish moved northward.

Chum Salmon - The 1978 chum salmon catch of 571,959 was 92% of the 19-year (1959-1977) average of 620,146. As with the pink salmon, the chum salmon catch in the Central District was slightly below average and the Northern District catch was above average. The factors that caused this were the same ones that affected the pink salmon. Again, these were the behavior of the fish and the distribution of the drift fleet during the time when most of the chum salmon moved through the Central District headed for the Susitna River.

The Chinitna Bay chum run was early this year and strong. Most of the other streams on the Central District westside also received strong chum salmon runs. This resulted in a good escapement of chum salmon into most of the Central District westside streams. Additionally, the Susitna River drainage appears to have received a good escapement of chum salmon, an estimate of 148,000 chums salmon were enumerated past the sonar counters.

Coho Salmon - This year's commercial catch of coho salmon totaled 219,360 or slightly above the 19-year (1959-1977) average of 216,837. The commercial catch of 172,000 coho salmon in the Central District was 13% above the average of 151,546, while the Northern District catch was 28% below the average of 65,313 coho.

In addition to the "Comprehensive Management Policy for the Upper Cook Inlet", the Board adopted Option "B" for the late run of Kenai River coho salmon. This option spelled out the late Kenai River coho salmon management strategy to compliment Policy #77-27-FB. Option "B" was worded as follows:

Option B - Curtail commercial fishery catch level to attempt to provide a satisfactory recreational fishery:

> Adopt a policy that, if the commercial catch rates indicate a below average run, the commercial fishery would close. If the commercial fishery catch rates are at or above average, the maximum commercial fishing time would be two 12-hour periods.

Both Sport Fish and Commercial Fisheries personnel at Soldotna decided the three regular fishing periods scheduled for August 14, 18, and 21 would serve as the basis for determining whether the Central District eastside set net catch rates of late run coho salmon were below or above average in 1978. The years 1971-77 were used for comparative purposes since they were the only years that could be utilized for a comparable catch detailed by specific dates and periods. It was further decided if the catch rates during any two consecutive fishing periods dropped below average, the set net fishery in the Upper Subdistrict would be closed and drift gill netting would not be permitted within five miles of the east shoreline. These refinements were not specifically cited in Option B, but were felt necessary to carry out the intent of the Board for this stock. The statistic of catch per delivery was used to compensate for fluctuations in fishing effort which is a common occurrence in this set net fishery, especially late in the season.

The fishing periods on August 14 and 18 indicated a below average coho run. However, the coho catch on August 21 was considerably above average, so the eastside set nets were allowed to continue fishing two days per week. The periods on August 28 and September 1 produced below average catch rates, therefore, the Central District eastside was closed to commercial fishing with set gill nets and drift gill nets were not allowed to fish within five miles of the east shore.

1978 Subsistence Fishery

The Northern District was open to subsistence fishing for salmon from 6:00 AM July 30 until 6:00 PM September 21 during open commercial fishing periods. The Central District opened to subsistence fishing at 6:00 AM August 16, during open commercial fishing periods, and remained open until closed by emergency order.

The implementation of the Board of Fisheries policy, #77-27-FB, resulted in the Upper Subdistrict of the Central District being closed to commercial fishing with set gill nets after September 1. Consequently, some commercial fishermen elected to protest the Board's policy by obtaining subsistence fishing permits and continued to catch late run Kenai River coho salmon. These actions served to make an already controversial issue much more so.

This issue received Statewide attention by the news media, with particular emphasis on the Kenai Peninsula and in the Anchorage area.

During the special one day Board of Fisheries hearing held in Anchorage on November 11, 1978 to discuss Upper Cook Inlet, the commercial fisheries staff was asked to determine the number of commercial fishermen, and their dependents, who obtained Upper Cook Inlet subsistence fishing permits in 1978. Of particular interest were those commercial fishermen who fished after September 1. This information was to be presented to the Board of Fisheries during their regularly scheduled meeting in December.

A review of the subsistence fishing data of the Northern District indicated there was no appreciable change in the number of permits issued and no real change in the number of fish caught. However, a similar review of the Central District subsistence data showed both the number of permits issued and the number of fish caught increased sharply in 1978. The number of permits issued increased from seven-year average (1971-1977) of 73 permits to 297 in 1978. Similarly, the Central District's subsistence catch went from an average of 288 coho salmon to 3,322 coho salmon (Appendix Table 12).

The review of individuals who obtained subsistence fishing permits for the Central District, as per the Board of Fisheries request, showed 90 of the 323 permits were issued to commercial fishermen or their dependents. Of these, 78, or 87% of the permits were obtained after the Upper Subdistrict was closed to commercial fishing with set nets on September 2.

Aside from the commercial fisheremen versus non-commercial fishermen issue, the 1978 season resulted in a significant increase in the number of individuals participating in the subsistence fishery and in the number of salmon harvested.

1978 HERRING FISHERY

The 1978 commercial herring season operated under a new set of regulations. The most significant change was the complete closure of the Southern, Eastern, Outer, and Kamishak Bay Districts to herring fishing from April 15 through June 30, unless opened by emergency order. The fishery was managed using a desired exploitation rate of 10%. Purse seines were only legal type of gear in these areas during this time period.

This change in management strategies required the Department to assess the abundance of herring in an area on a regular basis to determine if a harvestable biomass was present.

To accomplish this, aerial surveys were made on a daily basis, weather permitting, in the Kamishak Bay District. Less frequent flights were made over the remaining districts, due to their lesser contribution to the herring fishery.

The 1978 commercial herring season resulted in a harvest of approximately 480 tons. The catch consisted of 402 tons of roe herring from the Kamishak Bay District, 61 tons of roe and bait herring from the Upper Cook Inlet gill net fishery, and approximately 17 tons of incidental caught herring (no directed herring fishery) from the Southern District, primarily by trawlers.

The majority of the 61 tons of herring harvested in Upper Cook Inlet came from the Chinita Bay area and were sold as roe herring. A small portion of this catch occurred on the eastside of the Upper Cook Inlet and was bait quality herring.

Roe herring sold for approximately $1,000/ton at 10% roe recovery (± $100/%) in 1978, while the bait herring was worth $200/ton. The total value to the fishermen of the 1978 commercial herring catch in Cook Inlet was approximately $400,000.

The Department has utilized vessels fitted with the hydroacoustic equipment to conduct herring biomass surveys in Southeastern Alaska for several years. The M/V SUNDANCE, normally stationed in Ketchikan, was assigned to the Kamishak Bay herring fishery during the month of May in 1978. The primary purpose was to determine if the biomass of herring present in Kamishak Bay could be determined using standard hydroacoustical equipment.

The experiment was discontinued in early May because the hydroacoustic equipment did not function properly due to shallow water throughout the Kamishak Bay District (less than ten fathoms) and the lack of any large concentrations of herring. The M/V SUNDANCE remained in the Kamishak Bay District throughout May and served as a base of operations.

The first aerial survey of the 1978 herring season was conducted on May 1 and resulted in the observation of two small schools of herring in Seldovia Bay (Southern District). A large amount of spawn around Douglas Reef and a small amount of spawn, plus about 100 tons of herring in Bruin Bay, were observed in the Kamishak Bay District.

By May 4, sufficient quantities of herring had been observed in the Bruin Bay area of the Kamishak Bay District to warrant a short commercial fishing period. Additionally, a sample collected from these stocks resulted in a roe recovery rate of 11.4%. Age-weight-length samples collected from the Kamishak Bay District catch indicated the vast majority of the herring were 5-year old and younger. A six hour commercial fishing period, 1:00 PM until 7:00 PM, May 5 was announced for that portion of the Kamishak Bay District south of the latitude of Ursus Head.

After approximately two hours of commercial fishing, during which 51 tons of herring were caught the weather became too rough to fish successfully. Therefore, most of the boats retreated to the shelter of Iniskin Bay. This storm persisted for six more days. Aerial surveys on May 11 show that there were no schools of herring remaining in the Kamishak Bay District.

Subsequent aerial surveys, through May 18, showed varying numbers of small schools of herring in the Kamishak Bay District. It was felt that another commercial fishing period was warranted with a desired harvest of 300-350 tons of herring. Therefore, a commercial fishing period was announced for May 19 from 6:00 AM until 6:00 PM, with a harvest goal of 300-350 tons of herring. This commercial fishing period was extended four times as a result of the slow catch rate, finally closing at 12:00 midnight on May 22. This 90-hour commercial fishing period resulted in a harvest of 351 tons of herring. Table 5 shows the emergency orders issued during the 1978 commercial herring season.

Aerial surveys of the Kamishak Bay District continued through June 5 without significant quantities of herring being observed. This resulted in an announcement of June 5 that the Kamishak Bay District would remain closed to commercial herring fishing through 12:00 midnight June 30, at which time the season reopened to gill nets, trawls and seines according to the 1978 commercial fishing regulations. The total biomass observed by aerial surveys in Kamishak Bay during 1978 was approximately 4,000 tons.

The Southern, Eastern and Outer Districts were flown on a less frequent basis than the Kamishak Bay District because of the smaller quantities of herring in these areas and their lower probability of having a commercial fishing period. The Kamishak Bay District was managed by the Upper Cook Inlet Area Management Biologist and the Southern, Eastern and Outer Districts were managed by the Lower Cook Inlet Area Management Biologist.

Surveys of the Southern, Eastern and Outer Districts resulted in the observation of approximately 75 tons of herring in the Seward area (Outer District) and approxiamtely 300 tons of herring in the Southern District, primarily in Seldovia Bay. There were no commercial herring fishing periods in any of these districts due to low stock abundance.

The Central and Northern Districts were open to commercial herring fishing from May 1 to June 30 with gill nets only. In past years, commercial herring fishing in these districts was done almost exclusively with set gill nets, but drift gill nets were the most abundant gear type during the 1978 season. The majority of these were fished in the Chinitna Bay Subdistict of the Central District. Drift gill nets also produced the bulk of the 1978 catch of 61 tons, almost a four-fold increase over the average gill net catch of herring.

1978 RAZOR CLAM FISHERY

Division of Commercial Fisheries personnel collected bi-weekly razor clam samples from the certified beach at Polly Creek from late April to late September in 1978 for PSP (paralytic shellfish poisoning) tests. This was in accordance with an agreement between the Alaska Department of Fish and Game and the Alaska Department of Natural Resources, Division of Agriculture, which is necessary for the State of Alaska to remain a member of the National Shellfish Council. Membership in this organization is necessary if razor clams are to be exported from the State for human consumption.

Four provisional permits were issued to individuals wishing to test their mechanical or hydraulic razor clam dredges on the experimental portion of the certified beach at Polly Creek. None of these dredges proved to be economically feasible. Consequently, no permanent permits for mechanical or hydraulic were sought or issued.

A few individuals harvested razor clams using clam shovels. Most of these people dug razor clams from the Polly Creek area. The 1978 commercial razor clam harvest totaled 45,931 pounds. A breakdown of the catch into the number of pounds sold as bait and for human consumption is not available at this time. However, it is felt that the majority of these razor clams were sold for human consumption.

A major recreational fishery takes place on the beaches at Polly Creek and the Crescent River bar. The recreational harvest is unknown but believed to be significant, and the 1978 recreational harvest may have been equal to or in excess of the commercial harvest. This does not include the recreational razor clam harvest from the Clam Gulch-Ninilchik area.

MISCELLANEOUS

1978 Law Suit

The Kenai Peninsula Fishermen's Cooperative Association, Inc. (plaintiff) filed a suit against the State of Alaska, the Board of fisheries, Ronald Skoog, Commissioner of the Alaska Department of Fish and Game and Ken Middleton, Regional Supervisor, Division of Commercial Fisheries, Alaska Department of Fish and Game (defendants). This suit was filed in the Superior Court of the State of Alaska, Third Judicial District, at Kenai on December 19, 1978. The suit was assigned case No. 3KN-78-833-CIV.

The plaintiff was represented by the law firm of Kay, Christie, Fuld, Saville, and Coffey of 2500 Denail, Suite 503 Anchorage, Alaska. The defendants were represented by John Gissberg, Assistant Attorney General of the Department of Law, Office of the Attorney General, 420 "L" Street, Suite 100, Anchorage, Alaska.

The two basic issues that the plaintiff challenged in this suit were:

1) That the "Comprehensive Management Policy for the Upper Cook Inlet" (77-27-FB) was used as a regulation, not a policy. Therefore, it was improperly conceived because it did not go through the process proscribed in the Administrative Procedures Act (APA). Consequently, it was illegal and should be declared null and void.

2) That the Alaska Legislature had not granted the Board of Fisheries the authority to allocate the fishery resources of the State amongst the various user groups.

Both parties in this suit filed motions for summary judgement in July, 1979. The plaintiff's motion was denied and the defendant's motion was subsequently approved. This meant that the court felt that the plaintiff's case did not have an overwhelming amount of substantiation for its arguments and, conversely, the court did believe that the defendants did have preponderance of evidence supporting their position. This would have been the end of this controversy, except that the plaintiffs appealed the case in the State Supreme Court shortly after their loss in the Superior Court.

Oral arguments in this case were heard by the State Supreme Court in the fall of 1980. On May 22, 1981 the Alaska Supreme Court decided the suit in favor of the State. A copy of the decision is inlcuded in Appendix A.

PERSONNEL

Employee's Name	Status 1/	Classification	Title	Permanent Duty Station
Gary Sanders	(P)	Fisheries Biologist III	Area Management Biologist	Soldotna
Tom Namtvedt	(P)	Fisheries Biologist III	Research Project Leader	Soldotna
Nancy Friese	(P)	Fisheries Biologist II	Assistant Research Biologist	Anchorage
David Waltemyer	(P)	Fisheries Biologist II	Assistant Research Biologist	Soldotna
Paul Krasnowski	(P)	Fisheries Biologist III	Stock Separation Analysis	Anchorage
Michael Bethe	(P)	Fisheries Biologist II	Stock Separation Analysis	Anchorage
Bev Cross	(T)	Fisheries Biologist I	Stock Separation Analysis	Anchorage
Ken Manka	(T)	Fisheries Biologist I	Stock Separation Analysis	Anchorage
Kathy Stevens	(T)	Fisheries Biologist I	Stock Separation Analysis	Anchorage
Dave Oberg	(T)	Fisheries Biologist I	Stock Separation Analysis	Anchorage
Barbara Collins	(P)	Clerk Typist III	Secretary	Soldotna
Sandi Nordgulen	(T)	Clerk Typist II	Secretary	Soldotna
Keith Webster	(T)	Fisheries Biologist I	Field Operations Coordinator	Soldotna
Susan Regan	(T)	Fisheries Biologist I	Office Manager	Soldotna
Erika Byrd	(T)	Fisheries Technician II	Catch Sampler	Soldotna
Nancy Davidson	(T)	Fisheries Technician II	Catch Sampler	Soldotna
Ruth Gronquist	(T)	Fisheries Biologist I	Catch Sampler	Soldotna
Chris Munk	(T)	Fisheries Technician II	Catch Sampler	Soldotna
Iris Frank	(T)	Fisheries Technician II	Catch Sampler	Soldotna
Darrell Keifer	(T)	Fisheries Biologist I	Catch Sampler	Soldotna
Larry Marsh	(T)	Fisheries Technician II	UCI Herring/Beach Surveys	Soldotna
Don Seagren	(T)	Fisheries Biologist I	Kamishak Bay Herring	Soldotna
Paula Messer	(T)	Fisheries Technician II	Kenai River Test Fish	Soldotna
Barbara Bean	(T)	Fisheries Technician II	Kenai River Test Fish	Soldotna
Halldora Sigurdsson	(T)	Fisheries Technician II	Kenai River Test Fish	Soldotna
Carrol Young	(T)	Fisheries Technician II	Off Shore Test Fish	Soldotna
John Sigurdsson	(T)	Fisheries Technician II	Off Shore Test Fish	Soldotna
Leonard Vining	(T)	Fisheires Biologist I	Kenai River Sonar	Soldotna
Lee Neimark	(T)	Fisheries Biologist I	Kenai River Sonar	Soldotna
Robert Bain	(T)	Fisheries Technician III	Kenai River Sonar	Soldotna

Employee's Name	Status 1/	Classification	Title	Permanent Duty Station
Russell McMillan	(T)	Fisheries Biologist I	Kasilof River Sonar	Soldotna
Elizabeth Strell	(T)	Fisheries Technician II	Kasilof River Sonar	Soldotna
Patricia Anderson	(T)	Fisheries Biologist I	Susitna River Sonar	Susitna
Kenneth Tibbs	(T)	Fisheries Biologist I	Susitna River Sonar	Susitna
William Skamarocius	(T)	Fisheries Biologist I	Susitna River Sonar	Susitna
Kenneth Johnston	(T)	Fisheries Biologist I	Susitna River Sonar	Susitna
John Laner	(T)	Fisheries Biologist I	Susitna River Sonar	Susitna
Ronald Self	(T)	Fisheries Technician II	Susitna River Sonar	Susitna
John Terry	(T)	Fisheries Technician II	Susitna River Sonar	Susitna
Diane Calamar	(T)	Fisheries Technician II	Susitna River Sonar	Susitna

1/ (P) = Permanent
(T) = Temporary

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Figure 1.

UPPER COOK INLET SALMON DISTRICTS

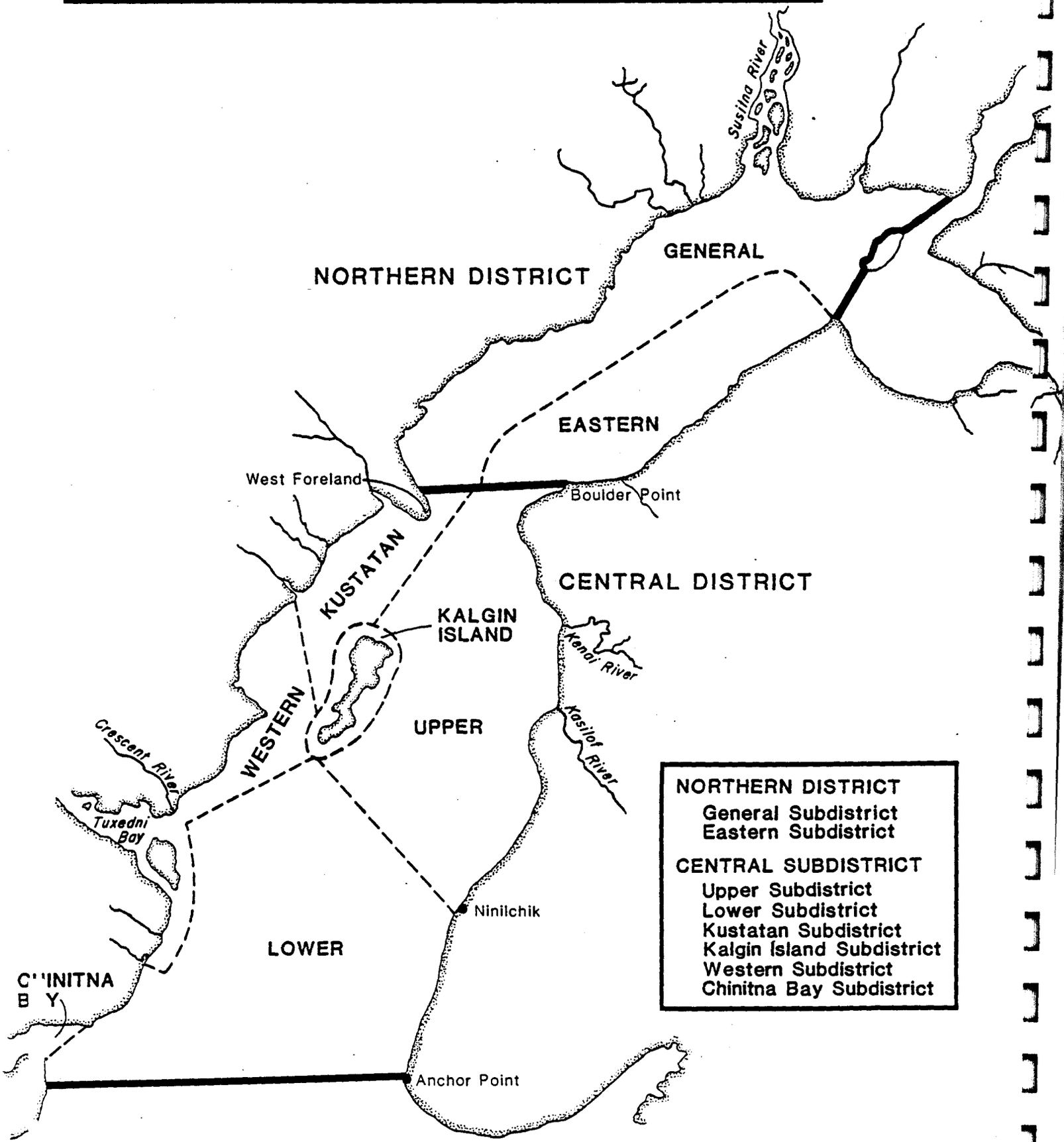
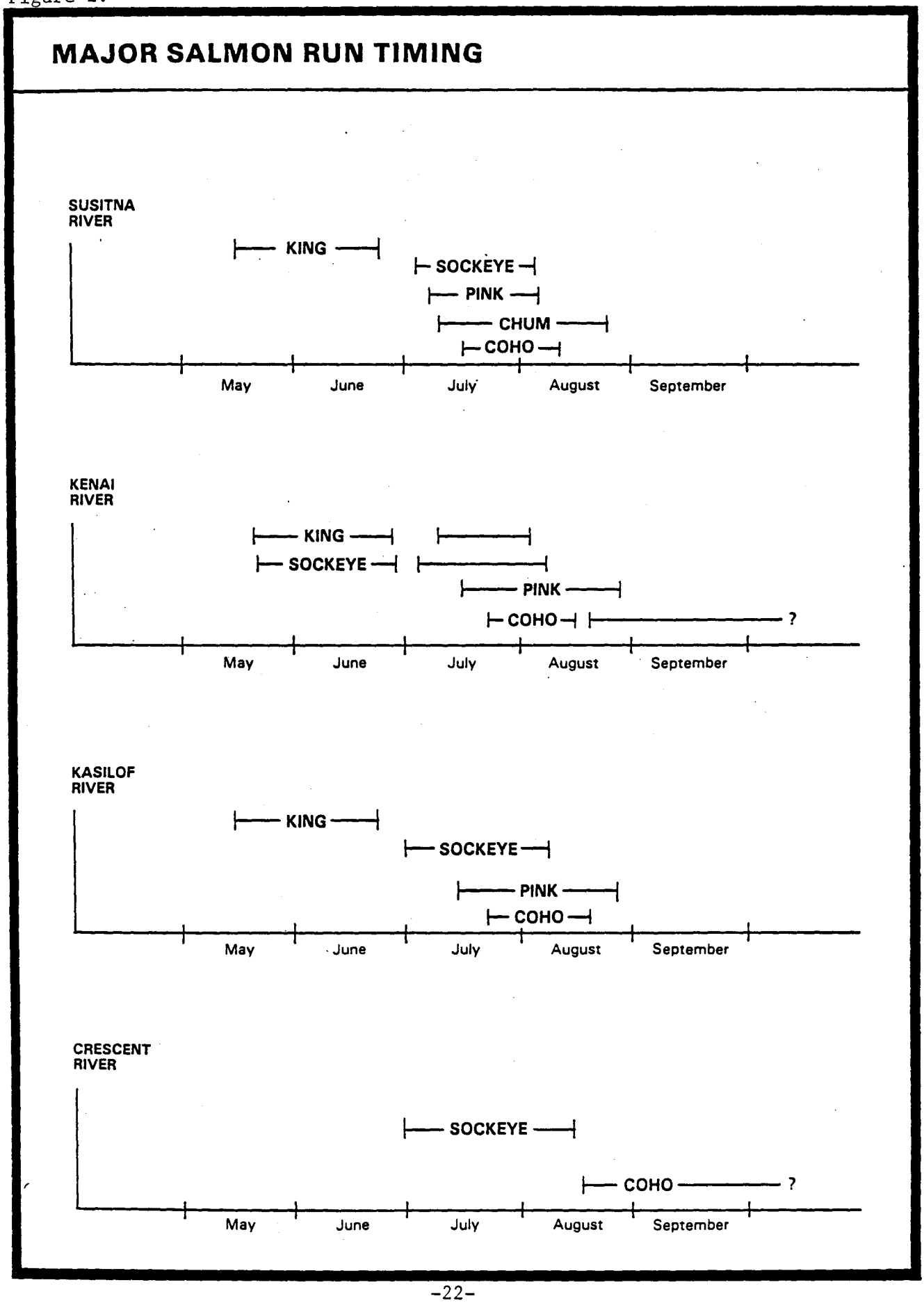


Figure 2.


MAJOR SALMON RUN TIMING
SUSITNA RIVER
KING
SOCKEYE
PINK
CHUM
COHO
May
June
July
August
September
KENAI RIVER
KING
SOCKEYE
PINK
COHO
?
May
June
July
August
September
KASILOF RIVER
KING
SOCKEYE
PINK
COHO
May
June
July
August
September
CRESCENT RIVER
SOCKEYE
COHO
?
May
June
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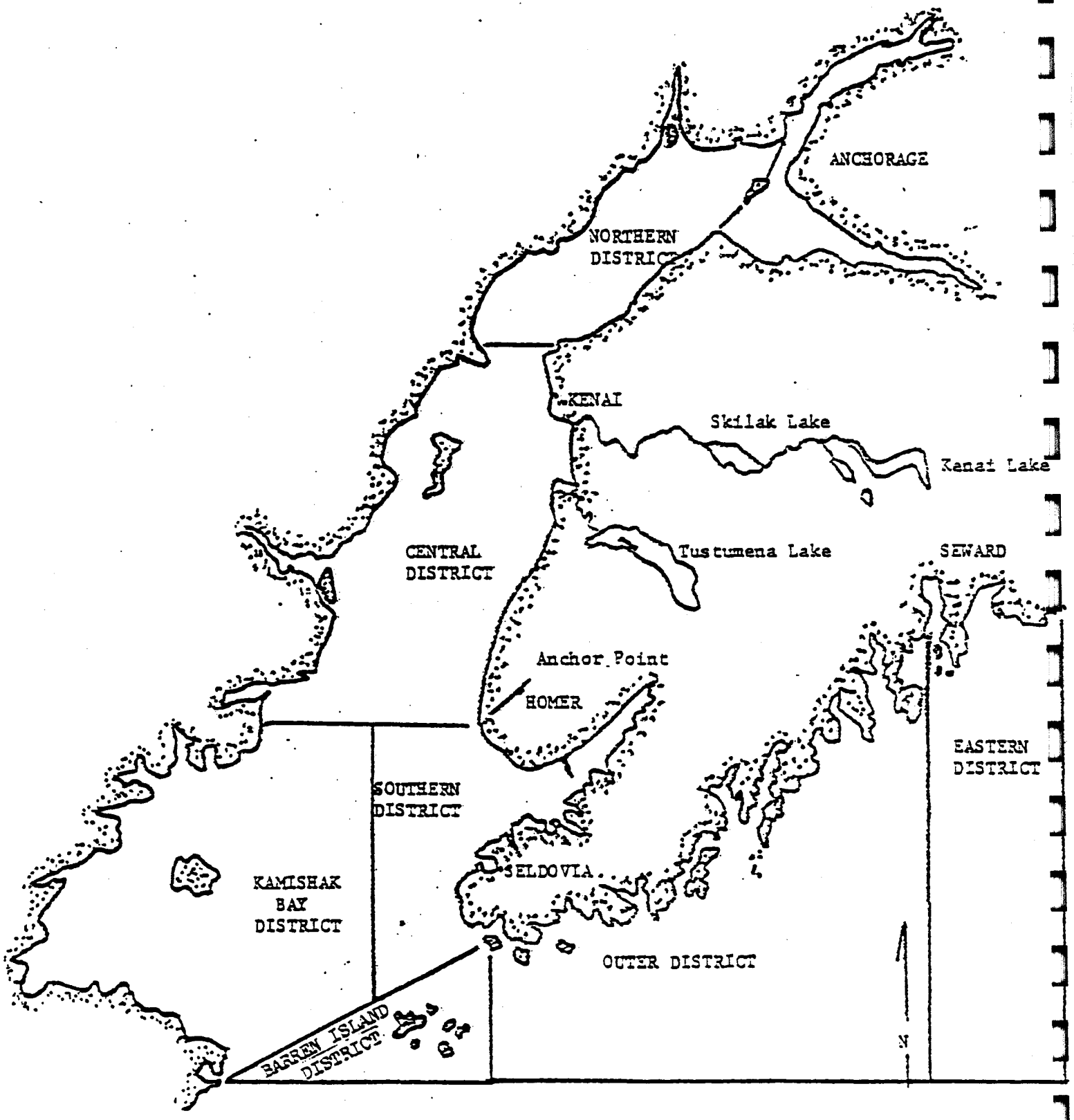
September

Figure 3.
COOK INLET HERRING DISTRICTS



MEMORANDUM State of Alaska

TO: Board of Fisheries

DATE: May 26, 1981

FILE NO:

TELEPHONE NO: 465-4108

FROM: Greg Cook
Executive Director
Boards of Fisheries and Game

G. Cook

SUBJECT: Cook Inlet Lawsuit

Friday, May 22, 1981 the Alaska Supreme Court decided the Kenai Peninsula Fisherman's suit (Lottie Edelman's group). A copy is enclosed. After discussing the matter with John Gissberg, I can offer you these points of analysis.

I. SUMMARY OF THE DECISION

The decision is a very good one for the Board (actually both Boards) and the Commissioner. The legal right of the Board to establish priorities among beneficial uses was made clear. In other words, the Court upheld Board authority to allocate. Also, the definition of what constitutes a "regulation" was made clearer. This will help us to work more effectively within the APA. Finally, the Commissioner's Emergency Order power was discussed and broadly defined, especially insofar as it relates to execution of Board directives under a management plan.

II. BOARD AUTHORITY

When the Board takes action for purposes of "conservation and development" it may establish priorities among beneficial uses. (This should serve as a reminder that it is important to state on the record the specific conservation and development reasons for a regulation.) In other words, the Court upheld Board authority to allocate. It is unfortunate that the Court used the word "users" instead of "uses," however.

Board action must be procedurally proper, i.e., it must follow the APA. Board action must also be substantively proper, i.e., the action must be one of the powers of the Board listed in the statutes (see Advisory Committee Manual, pgs. 33-37) it must be rationally related to purposes of conservation and development and it must be reasonably necessary.

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III. REGULATIONS UNDER THE APA

Alaska's APA is unique in its broad definition of what constitutes a regulation. Specific instructions to staff biologists or the Commissioner regarding fishery management "policies" are legally the same as a regulation. Therefore, these must be adopted pursuant to the APA. For the last two years, we have followed this approach with management plans, etc. In the future, our legal notice for these plans should carefully specify that such plans are of long term effect.

The Court's discussion of what constitutes a regulation and why this is so raises one potential problem. In April 1981, the Board of Fisheries adopted proposal #116 to limit the sections of the regulation book open for regulatory change. Based on the Court's discussion at pgs. 22-23, this action seems to qualify as regulatory action and should be filed as such.

IV. COMMISSIONER'S EMERGENCY ORDER AUTHORITY

The Court declined to limit the Commissioner's E.O. authority to situations of biological necessity. Instead, the Court left open the question of what he could use as a basis for making E.O. actions. The Court specifically said it was proper to base an E.O. on a Board management plan properly adopted under the APA for purposes of conservation and development. As you know, such purposes are often broader than mere biological need. This aspect of the Court's holding should help sustain E.O. action that will be taken this summer under the troll management plan.

V. CONCLUSION

Much of the Supreme Court's decision on Board authority to set priorities should sound familiar. It echoes material on Alaska's Constitution I prepared for you in 1979. (A fresh copy will soon be sent to you.) The information on the APA and E.O. authority are both welcome additions to explaining to the public our authority for acting. The way things are today with Jim Beaton's "roving band of lawyers in rural Alaska" we can use all the help we can get. This decision is good help.

Enclosure: Kenai Peninsula opinion #5072

cc: Board of Game
Larson
Gissberg
Waldrop
Pennoyer
Somerville
Kelso
✓Andrews

Table 1. 1978 Upper Cook Inlet commercial salmon catch by period, data and species.

			Species						
Period	Date	Hours	King Period	Sockeye Period	Coho Period	Pink Period	Chum Period	Total Period	Total Accum
1 1/	619	12	153	3,397	0	0	1	3,551	3,551
2 1/	623	12	115	3,409	1	0	3	3,528	7,079
3	626	12	1,145	30,249	923	930	2,769	36,016	43,095
4	630	12	1,141	74,722	257	37	6,755	82,912	126,007
5	703	12	595	180,196	765	164	18,865	200,585	326,592
6 2/	705	12	892	266,888	895	967	40,131	309,773	636,365
7 3/	707	12	858	11,398	491	220	265	13,227	649,592
8	710	12	1,850	386,021	2,911	11,689	74,818	477,289	1,126,881
9 4/	715	12	2,361	743,839	7,942	22,813	17,635	794,590	1,921,471
10	717	12	1,443	346,697	18,176	115,551	47,364	529,231	2,450,702
11 5/	719-20	24	1,631	320,495	25,628	310,834	74,931	773,519	3,184,221
12 6/	721	16	1,117	137,496	18,525	183,752	41,733	382,623	3,566,844
13 7/	724	12	105	6,690	6,238	28,174	4,443	45,650	3,612,494
14	726	12	1,411	63,286	21,973	232,984	66,489	386,143	3,998,637
15	728	12	659	22,278	16,634	148,398	37,514	225,483	4,224,120
16	731	12	535	10,752	15,167	151,593	49,041	227,088	4,451,208
17	804	12	375	5,583	15,931	84,445	29,883	136,217	4,587,425
18	807	12	174	2,643	8,961	81,397	14,651	107,826	4,695,251
19	809	12	325	2,031	8,375	128,243	15,202	154,176	4,849,427
20 8/	811	18	185	1,213	11,678	113,228	16,121	142,425	4,991,852
21	814	12	129	608	6,120	35,747	4,789	47,393	5,039,245
22	818	12	47	1,248	8,635	31,541	5,926	47,397	5,086,642
23	821	12	26	248	5,177	4,244	1,225	10,920	5,097,562
24	825	12	16	99	5,597	1,469	565	7,746	5,105,308
25	828	12	6	20	4,628	526	483	5,763	5,111,071
26 9/	830	12	0	2	736	5	31	774	5,111,845
27 10/	901	12	1	24	2,781	87	190	3,083	5,114,928
28 10/	904	12	1	16	1,208	53	82	1,360	5,116,288
29 10/	908	12	1	3	1,128	3	33	1,168	5,117,456
30 10/	911	12	2	0	1,514	4	19	1,539	5,118,995
31 10/	915	12	3	21	365	0	2	391	5,119,386
Total			17,302	2,621,667	219,360	1,689,098	571,959		5,119,386

1/ Western Subdistricts, set net only.
2/ Central District only, set and drift.
3/ Central and Northern Districts, set net only.
4/ Central and Northern Districts set nets from 6:00 am to 6:00 pm and Central District drift nets from 12:00 noon to 6:00 pm.
5/ Central and Northern Districts, set and drift nets from 6:00 am July 19 to 6:00 am July 20. A 24 hour period.
6/ Central and Northern Districts, set and drift nets from 6:00 am to 10:00 pm. A 16 hour period.
7/ Chinitna Bay, Western, Kustatan, and Kalgin Island Subdistrict of the Central District and the Northern District, set nets only from 6:00 am to 6:00 pm.
8/ Central and Northern Districts, set and drift nets from 5:00 am to 11:00 pm. An 18 hour period.
9/ Chinitan Bay, Western, Kustatan, and Kalgin Island Subdistricts of the Central District, set nets only from 6:00 am to 6:00 pm.
10/ Chinitan Bay, Western, Kustatan, and Kalgan Island Subdistrict of the Central District and the Northern District, set net only from 6:00 am to 6:00 pm. The Upper and Lower Subdistricts of the Central District, drift nets only except within five (5) miles of the east shore from 6:00 am to 6:00 pm.

Table 2a. Daily and cumulative sonar counts by salmon species, Susitna River, 1978. 1/

Date	Sockeye		Pink		Chum		Coho		Chinook	
	Daily Count	Cumulative Count	Daily Count	Cumulative Count	Daily Count	Cumulative Count	Daily Count	Cumulative Count	Daily Count	Cumulative Counts
5/31	-	-	-	-	-	-	-	-	500	500
6/01	-	-	-	-	-	-	-	-	300	800
6/02	-	-	-	-	-	-	-	-	300	1,100
6/03	-	-	-	-	-	-	-	-	300	1,400
6/04	-	-	-	-	-	-	-	-	600	2,000
6/05	-	-	-	-	-	-	-	-	200	2,200
6/06	-	-	-	-	-	-	-	-	200	2,400
6/07	-	-	-	-	-	-	-	-	600	3,000
6/08	-	-	-	-	-	-	-	-	900	3,900
6/09	-	-	-	-	-	-	-	-	1,000	4,900
6/10	-	-	-	-	-	-	-	-	800	5,700
6/11	-	-	-	-	-	-	-	-	1,100	6,800
6/12	-	-	-	-	-	-	-	-	3,300	10,100
6/13	100	100	-	-	-	-	-	-	3,900	14,000
6/14	-	100	-	-	-	-	-	-	2,800	16,800
6/15	100	200	-	-	-	-	-	-	5,000	21,800
6/16	100	300	-	-	-	-	-	-	3,800	25,600
6/17	-	300	-	-	-	-	-	-	2,300	27,900
6/18	-	300	-	-	-	-	-	-	1,900	29,800
6/19	-	300	-	-	-	-	-	-	2,600	32,400
6/20	-	300	-	-	-	-	-	-	1,100	33,500
6/21	-	300	-	-	-	-	-	-	1,100	34,600
6/22	-	300	-	-	-	-	-	-	1,000	35,600
6/23	-	300	-	-	-	-	-	-	700	36,300
6/24	-	300	-	-	-	-	-	-	200	36,500
6/25	-	300	-	-	-	-	-	-	400	36,900
6/26	-	300	-	-	-	-	-	-	200	37,100
6/27	-	300	-	-	-	-	-	-	300	37,400
6/28	-	300	-	-	-	-	-	-	400	37,800
6/29	-	300	-	-	-	-	-	-	300	38,100
6/30	100	400	-	-	-	-	-	-	300	38,400
7/01	-	400	-	-	-	-	-	-	500	38,900
7/02	-	400	-	-	200	200	-	-	300	39,200
7/03	300	700	-	-	400	600	-	-	600	39,800
7/04	100	800	-	-	100	700	100	100	400	40,200
7/05	100	900	-	-	100	800	100	200	200	40,400

Table 2a. (Continued)

Date	Sockeye		Pink		Chum		Coho		Chinook	
	Daily Count	Cumulative Count	Daily Count	Cumulative Count	Daily Count	Cumulative Count	Daily Count	Cumulative Count	Daily Count	Cumulative Counts
7/06	0	900	-	-	0	800	0	200	100	40,500
7/07	100	1,000	-	-	100	900	100	300	300	40,800
7/08	100	1,100	-	-	100	1,000	0	300	200	41,000
7/09	100	1,200	-	-	100	1,100	0	300	200	41,200
7/10	100	1,300	-	-	100	1,200	0	300	200	41,400
7/11	0	1,300	100	100	0	1,200	0	300	0	41,400
7/12	100	1,400	200	300	0	1,200	0	300	0	41,400
7/13	200	1,600	500	800	0	1,200	100	400	100	41,500
7/14	800	2,400	1,900	2,700	0	1,200	300	700	500	42,000
7/15	600	3,000	1,400	4,100	0	1,200	200	900	400	42,400
7/16	1,300	4,300	2,800	6,900	100	1,300	400	1,300	700	43,100
7/17	1,100	5,400	1,600	8,500	800	2,100	100	1,400	0	43,100
7/18	10,200	15,600	20,300	28,800	6,900	9,000	600	2,000	0	43,100
7/19	21,100	36,700	97,900	126,700	23,500	32,500	9,100	11,000	0	43,100
7/20	10,100	46,800	113,900	240,600	18,000	50,500	6,800	17,800	0	43,100
7/21	14,300	61,100	122,000	362,600	12,300	62,800	9,000	26,800	0	43,100
7/22	2,900	64,000	65,200	427,800	4,800	67,600	2,800	29,600	0	43,100
7/23	3,600	67,600	223,000	650,800	6,800	74,400	7,700	37,300	200	43,300
7/24	2,100	69,700	135,400	786,200	5,500	79,900	4,600	41,900	0	43,300
7/25	3,100	72,800	263,900	1,050,100	8,900	88,800	10,300	52,200	0	43,300
7/26	3,300	76,100	283,000	1,333,100	9,400	98,200	7,900	60,100	0	43,300
7/27	2,300	78,400	137,300	1,470,400	9,100	107,300	2,600	62,700	200	43,500
7/28	2,400	80,800	198,200	1,668,600	10,700	118,000	3,200	65,900	0	43,500
7/29	1,400	82,200	141,700	1,810,300	5,800	123,800	3,800	69,700	0	43,500
7/30	900	83,100	136,600	1,946,900	6,200	130,000	3,200	72,900	0	43,500
7/31	800	83,900	104,300	2,051,200	3,000	133,000	3,900	76,800	0	43,500
8/01	1,000	84,900	102,800	2,154,000	3,900	136,900	4,000	80,800	0	43,500
8/02	1,200	86,100	73,400	2,227,400	3,200	140,100	5,300	86,100	0	43,500
8/03	500	86,600	21,900	2,249,300	300	140,400	1,900	88,000	0	43,500
8/04	1,400	88,000	42,300	2,291,600	400	140,800	2,100	90,100	0	43,500
8/05	1,300	89,300	46,200	2,337,800	2,400	143,200	1,800	91,900	0	43,500
8/06	800	90,100	43,400	2,381,200	1,500	144,700	1,300	93,200	0	43,500
8/07	600	90,700	22,100	2,403,300	800	145,500	1,200	94,400	0	43,500
8/08	1,000	91,700	26,900	2,430,200	1,900	147,400	2,200	96,600	0	43,500
8/09	500	92,200	8,500	2,438,700	500	147,900	800	97,400	0	43,500
8/10	200	92,400	3,100	2,441,800	200	148,100	400	97,800	0	43,500
8/11	900	93,300	16,900	2,458,700	0	148,100	1,500	99,300	0	43,500
8/12	600	93,900	6,300	2,465,000	100	148,200	800	100,100	0	43,500
8/13	500	94,400	5,100	2,470,100	200	148,400	700	100,800	0	43,500

1/ Rounded to nearest hundred fish.

Table 2b. Daily and cumulative late run sockeye salmon sonar counts, Kasilof River, 1978.

Date	Daily Apportioned Sonar Count	Daily Apportioned Sonar Count	Date	Daily Apportioned Sonar Count	Daily Apportioned Sonar Count
6/22	200	200	7/24	1,000	108,300
6/23	100	300	7/25	1,400	109,700
6/24	400	700	7/26	1,400	111,100
6/25	600	1,300	7/27	1,000	112,100
6/26	300	1,600	7/28	500	112,600
6/27	1,000	2,600	7/29	900	113,500
6/28	1,300	3,900	7/30	400	113,900
6/29	4,700	8,600	7/31	200	114,100
6/30	4,000	12,600			
			8/01	300	114,400
7/01	2,100	14,700	8/02	300	114,700
7/02	6,000	20,700	8/03	200	114,900
7/03	7,400	28,100	8/04	400	115,300
7/04	2,400	30,500	8/05	400	115,700
7/05	3,600	34,100			
7/06	2,300	36,400			
7/07	3,700	40,100			
7/08	4,600	44,700			
7/09	1,900	46,600			
7/10	1,200	47,800			
7/11	300	48,100			
7/12	1,000	49,100			
7/13	1,700	50,800			
7/14	1,500	52,300			
7/15	2,700	55,000			
7/16	13,600	68,600			
7/17	17,800	86,400			
7/18	13,500	99,900			
7/19	3,800	103,700			
7/20	1,500	105,200			
7/21	800	106,000			
7/22	800	106,800			
7/23	500	107,300			

Table 2c. Daily and cumulative sonar counts, late run sockeye salmon, Kenai River, 1978.

	Apportioned Count			Apportioned Count	
Date	Daily Number 1/	Cumulative Number	Date	Daily Number 1/	Cumulative Number
6/22	600	600	7/23	5,900	296,600
6/23	400	1,000	7/24	7,800	304,400
6/24	300	1,300	7/25	8,000	312,400
6/25	800	2,100	7/26	6,800	319,200
6/26	800	2,900	7/27	9,200	328,400
6/27	900	3,800	7/28	7,300	335,700
6/28	400	4,200	7/29	5,800	341,500
6/29	1,300	5,500	7/30	7,500	349,000
6/30	2,300	7,800	7/31	9,500	358,500
7/01	1,800	9,600	8/01	6,700	365,200
7/02	1,900	11,500	8/02	5,200	370,400
7/03	1,900	13,400	8/03	7,900	378,300
7/04	900	14,300	8/04	3,100	381,400
7/05	600	14,900	8/05	2,200	383,600
7/06	700	15,600	8/06	1,400	385,000
7/07	1,500	17,100	8/07	4,600	389,600
7/08	300	17,400	8/08	2,000	391,600
7/09	700	18,100	8/09	2,400	394,000
7/10	1,000	19,100	8/10	2,800	396,800
7/11	3,200	22,300	8/11	200	397,000
7/12	3,600	25,900	8/12	300	397,300
7/13	1,000	26,900	8/13	400	397,700
7/14	1,300	28,200	8/14	200	397,900
7/15	2,700	30,900	8/15	200	398,100
7/16	35,300	66,200	8/16	100	398,200
7/17	53,900	120,100	8/17	300	398,500
7/18	63,400	183,500	8/18	200	398,700
7/19	49,200	232,700	8/19	0	398,700
7/20	33,300	266,000	8/20	100	398,800
7/21	14,400	280,400	8/21	100	398,900
7/22	10,300	290,700	8/22	0	398,900

1/ Rounded to nearest hundred.

Table 3. Aerial Survey counts of set gill nets by date and subdistrict, Upper Cook Inlet, 1978.

Year	Northern Eastern	Northern General	Upper	Central Kalgin	Central Kustatan	Western	Chinitna
6/19	-	-	-	-	-	96	-
6/23	-	-	-	-	-	52	-
6/26	-	-	479	83	-	-	-
6/30	-	-	366	67	11	136	11
7/03	36	46	426	46	-	-	-
7/05	-	-	-	52	13	109	14
7/07	87	130	403	84	-	-	-
7/10	105	238	-	88	8	119	14
7/15	71	152	521	-	16	149	20
7/17	68	157	529	-	-	-	-
7/19	75	51	543	-	-	-	-
7/21	90	162	460	67	-	-	-
7/24	116	241	-	147	21	143	18
7/26	110	194	616	-	-	-	-
7/28	78	226	562	-	-	-	-
7/31	70	242	563	-	-	-	-
8/07	79	104	-	-	-	-	-
8/09	38	80	477	98	-	-	-
8/14	-	-	478	44	-	-	-
8/18	-	-	245	36	5	-	11
8/21	-	-	54	-	-	-	-
8/25	-	-	141	-	-	-	-
8/28	-	-	131	-	-	-	-

Table 4. 1978 Emergency Order Summary Cook Inlet Salmon .

Emergency Order Number	Effective Date	Description	Reason 1/
2S-08-78	7/5	Opened the Central District for set and drift gill nets from 6:00 AM to 6:00 PM (Wednesday, extra period).	The sockeye salmon catch rate though July 3 was three times the average, or 289,000. The Kasilof River escapement was well ahead of average. Therefore this opening was to harvest surplus fish.
2S-09-78	7/7	Closes the Central District to drift gill nets for the 12-hour period 6:00 AM to 6:00 PM (Friday, standard period).	Approximately 550,000 sockeye were caught thru 7/15 predominately by drift fleet. The Kenai River escapement was lagging significantly. Few sockeye had shown on the beaches thus far.
2S-10-78	7/14	Closes the Central and Northen District to commercial fishing with set gill nets and drift gill nets from 6:00 AM to 6:00 PM (Friday, standard period).	Sockeye salmon catch on 7/10 was 388,000 (an extremely large period catch) which made the season total aboutn 944,000. Aerial surveys showed the fish were still low in the Central District an not moving. Kenai River escapement continued to lag.
2S-11-78	7/15	Opened the Central and Northern District to fishing with set gill nets from 6:00 AM to 6:00 PM and opened the Central District to fishing with drift gill nets from 12:00 noon to 6:00 PM (Saturday, extra period).	Aerial surveys showed a large volume of fish off the mouth of the Kenai River. Lesser schools were scattered along the east side of Kalgin Island as well as south of the Island. It was obvious that the fish were moving northward and onshore. Imminent movement of some fish into the Kenai River was assured.
2S-12-78	7/19	Opened the Central and Northern Districts to fishing with set gill net and the Central District to fishing with drift gill nets from 6:00 AM on 7/19 to 6:00 AM on 7/20 (Wednesday, 24 hour extra period).	Sockeye salmon catch in Central was continuing to hold strong and large numbers of fish had moved into the Northern District Kenai and Kasilof Rivers had received large numbers of fish. Test fishing and visual observations in the lower Kenai River indicated that obtaining our escapement goal was assured.

Table 4. (Continued)

Emergency Order Number	Effective Date	Description	Reason 1/
2S-13-78	7/21	Opened the Central and Northern District to fishing with set gill nets and the Central to fishing with drift gill nets from 6:00 AM to 10:00 PM (Friday, 4 hours extra fishing on regular period).	Sockye salmon harvest on 7/19 was 317,000 which was high but down slightly from earlier periods. Sockeye remain abundant in the offshore waters and are entering the major river systems. Kasilof River escapement progressing at a satisfactory rate. Large daily tides had shifted to late in the day, therefore, a longer than usual fishing period was needed to facilitate set net fishermen.
2S-14-78	7/24	Closes the Central District to fishing with drift gill nets and closes the Central District's east side (upper subdistrict) to fishing with set gill nets from 6:00 AM to 6:00 PM (Monday, standard period).	Kenai River escapement dropped sharply, still approximately 100,000 fish short of the goal. Catch rates are declining, indicating a definite decline in the abundance of sockeye.
2S-15-78	7/26	Opens the Central and Northern Districts to fishing with set gill nets and the Central District to fishing with drift gill nets from 6:00 AM to 6:00 PM (Wednesday, extra period).	The Central District east side set net and the drift gill net fisheries were closed on 7/24 to boost the low escapement into the Kenai River; the impact of which was undeter mined at this time. Due to the steadily declining sockeye catches, management strategies were turned to pinks and chums, which were abundant in the two districts at that time.
2S-16-78	8/9	Opened the Central and Northern District to fishing with set gill nets and the Central District to drift gill nets from 6:00 AM to 6:00 PM (Wednesday, extra period).	The Central District catch, both eastside set net and drift, show significant increases in the pink salmon catch. The Kenai River received a good escapement of pinks for this date. The Central District westside streams and Northern District systems had received good escapements of pink salmon. Fishing effort had decreased sharply throughout Upper Cook Inlet.

Table 4. (Continued)

Emergency Order Number	Effective Date	Description	Reason 1/
2S-17-78	8/11	Opened the Central and Northrn Districts to fishing with set gill nets and the Central District to fishing with drift gill nets from 5:00 AM to 11:00 PM (Friday, 6 hours extra fishing on regular period).	The Central District's catch from both the drift fleet and the east side set nets shows significant increase of pink salmon harvested Good escapement of all species had been achieved in the Northern District systems and most of the Central District's west side streams. Extended period to harvest surplus pink salmon.
2S-18-78	8/30	Opened the Chinitna Bay, Western, Kalgin Island, and Kustatan subdistricts of the Central District to fishing with set gill nets from 6:00 AM to 6:00 PM (Wednesday, extra period).	The west side of the Central District was in its second week of a strong coho salmon run and most west side streams had received good escapement of coho. The current Board of Fisheries policy, i.e. #77-27-FB, did not restrict commercial fishing activities after August 15 on the west side of the Central District.
2S-19-78	9/2	Closed the Upper Subdistrict of the Central District to commercial fishing with set gill nets and the Upper and Lower subdistrict of the Central District to commercial fishing with drift gill nets within five (5) miles of the east shore from 6:15 PM 9/2, to 12:00 midnight, 12/31.	The commercial catch rate of late run Kenai River coho salmon on the Central District eastside beach indicated a below average run. Therefore, to be in compliance with policy #77-27-FB as adopted by the Board of Fisheries, the Central District eastside set nets were closed for the remainder of the 1978 season. Additionally, the drift fleet was resricted from fishing within five miles of the Central District eastside beach so as not to violate the intent of this Board policy.

1/ The daily catch figures given do not correspond exactly to the daily catch figures on Table 1, but represent the daily catch figures used for in-season management decisions and are the ones used in writing Emergency Orders.

Table 5. 1978 Emergency Order Summary of Cook Inlet Herring.

Emergency Order Number	Effective Date	Description	Reason
2S-02-78	5/5	Opened the portion of the Kamishak Bay District south of the Latitude of Urus Cove from 1:00 PM, May 5, to 7:00 PM, May 5.	Herring were entering the Bruin Bay-Rocky Cove area in suffiecient quantity to warrant a fishery. A sample of these herring, taken prior to issuing this emergency order, produced a roe recovery rate of 11.4%.
2S-03-78	5/19	Opened the Kamishak Bay District to herring fishing from 6:00 AM, May 19, to 6:00 PM, May 10.	Approximately 3,100 tons of herring were observed in the Kamishak Bay District. Therefore a harvest of 300-350 tons was warranted.
2S-04-78	5/19	Extended the commercial herring opening in the Kamishak Bay District by 18 hours from 6:00 PM, May 19, to 12:00 noon, May 20.	At 4:00 PM, May 19, the total harvest of herring was estimated at 3.4 tons. In order to obtain a catch of 300-350 tons of herring the commercial opening was extended by 18 hours.
2S-05-78	5/20	Extended the commercial herring opening in the Kamishak Bay District by 24 hours from 12:00 noon, May 20, to 12:00 noon, May 21.	The initial emergency order opening the Kamishak Bay District to commercial herring fishing justified a harvest of 300-350 tons. At 10:00 AM, May 20, the total harvest was estimated at 8.4 tons. Therefore, the commercial opening was extended by 24 hours.
2S-06-78	5/21	Extended the commercial herring opening in the Kamishak Bay District by 24 hours from 12:00 noon, May 21, to 12:00 noon, May 22.	A census of the tenders indicated that the commercial harvest of herring had reached approximately 187 tons. Another 24 hour extension to the commercial opening was announced at 10:00 AM, May 21.
2S-07-78	5/22	Extended the commercial herring opening in the Kamishak Bay District by 24 hours from 12:00 noon, May 20, to 12:00 noon, May 21.	By 10:00, May 22, an estimated 254 tons of herring had been caught. It was felt that a 12 hour extension would result in a commercial harvest of an additonal 50 tons of herring, thus totaling slightly over 300 tons of herring.

MEMORANDUM State of Alaska

Copy

TO: Board of Fisheries

DATE: May 26, 1981

FILE NO:

TELEPHONE NO: 465-4108

G. Cook

FROM: Greg Cook
Executive Director
Boards of Fisheries and Game

SUBJECT: Cook Inlet Lawsuit

Friday, May 22, 1981 the Alaska Supreme Court decided the Kenai Peninsula Fisherman's suit (Lottie Edelman's group). A copy is enclosed. After discussing the matter with John Gissberg, I can offer you these points of analysis.

I. SUMMARY OF THE DECISION

The decision is a very good one for the Board (actually both Boards) and the Commissioner. The legal right of the Board to establish priorities among beneficial uses was made clear. In other words, the Court upheld Board authority to allocate. Also, the definition of what constitutes a "regulation" was made clearer. This will help us to work more effectively within the APA. Finally, the Commissioner's Emergency Order power was discussed and broadly defined, especially insofar as it relates to execution of Board directives under a management plan.

II. BOARD AUTHORITY

When the Board takes action for purposes of "conservation and development" it may establish priorities among beneficial uses. (This should serve as a reminder that it is important to state on the record the specific conservation and development reasons for a regulation.) In other words, the Court upheld Board authority to allocate. It is unfortunate that the Court used the word "users" instead of "uses," however.

Board action must be procedurally proper, i.e., it must follow the APA. Board action must also be substantively proper, i.e., the action must be one of the powers of the Board listed in the statutes (see Advisory Committee Manual, pgs. 33-37) it must be rationally related to purposes of conservation and development and it must be reasonably necessary.

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III. REGULATIONS UNDER THE APA

Alaska's APA is unique in its broad definition of what constitutes a regulation. Specific instructions to staff biologists or the Commissioner regarding fishery management "policies" are legally the same as a regulation. Therefore, these must be adopted pursuant to the APA. For the last two years, we have followed this approach with management plans, etc. In the future, our legal notice for these plans should carefully specify that such plans are of long term effect.

The Court's discussion of what constitutes a regulation and why this is so raises one potential problem. In April 1981, the Board of Fisheries adopted proposal #116 to limit the sections of the regulation book open for regulatory change. Based on the Court's discussion at pgs. 22-23, this action seems to qualify as regulatory action and should be filed as such.

IV. COMMISSIONER'S EMERGENCY ORDER AUTHORITY

The Court declined to limit the Commissioner's E.O. authority to situations of biological necessity. Instead, the Court left open the question of what he could use as a basis for making E.O. actions. The Court specifically said it was proper to base an E.O. on a Board management plan properly adopted under the APA for purposes of conservation and development. As you know, such purposes are often broader than mere biological need. This aspect of the Court's holding should help sustain E.O. action that will be taken this summer under the troll management plan.

V. CONCLUSION

Much of the Supreme Court's decision on Board authority to set priorities should sound familiar. It echoes material on Alaska's Constitution I prepared for you in 1979. (A fresh copy will soon be sent to you.) The information on the APA and E.O. authority are both welcome additions to explaining to the public our authority for acting. The way things are today with Jim Beaton's "roving band of lawyers in rural Alaska" we can use all the help we can get. This decision is good help.

Enclosure: Kenai Peninsula opinion #5072

cc: Board of Game
Larson
Gissberg
Waldrop
Pennoyer
Somerville
Kelso
✓Andrews

THE SUPREME COURT OF THE STATE OF ALASKA

KENAI PENINSULA FISHERMAN'S COOPERATIVE ASSOCIATION, INC., Appellant,	File No. 5072
v.	O P I N I O N
STATE OF ALASKA; THE BOARD OF FISHERIES: RONALD SKOOG, Commissioner of the Department of Fish and Game; and KEN MIDDLETON, Regional Supervisor, Commercial Fishing Division of the Department of Fish and Game, Appellees.	[No. 2358 - May 22, 1981]

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Kenai, Mark C. Rowland, Judge.

Appearances: Sandra K. Saville and Susan Vaillancourt, Kay, Christie, Fuld, Saville & Coffey, Anchorage, for Appellant. John A. Gissberg, Assistant Attorney General, Anchorage, and Avrum M. Gross, Attorney General, Juneau, for Appellees.

Before: Rabinowitz, Chief Justice, Connor, Burke and Matthews, Justices, and Dimond, Senior Justice. [Compton, Justice, not participating.]

DIMOND, Senior Justice.

This case arises on appeal from summary judgment granted in favor of the state. It concerns the validity of actions taken by the Board of Fisheries (hereafter Board) and the Commissioner of Fish and Game (hereafter Commissioner) affecting recreational and commercial fisheries of the salmon stocks in the Upper Cook Inlet.

Appellant, Kenai Peninsula Fisherman's Cooperative Association, Inc. (hereafter Association), is a group of commercial fishermen who harvest salmon in the Upper Subdistrict of the Central District of Cook Inlet. The Association challenges the adoption by the Board of a comprehensive management policy and a specific policy option which established priorities of use between commercial and recreational fishermen for certain salmon stocks in the Cook Inlet. The Association also claims that subsequent actions taken by the Board and the Commissioner which follow the assertedly illegal policy and option are invalid.

We hold that, while the Board does have the authority to establish priorities of use, the policy and option establishing these priorities should have been adopted pursuant to the provisions of the Administrative Procedure Act.

SUMMARY OF FACTS

In 1977, the Department of Fish and Game prepared a document entitled "Summary Report of Cook Inlet Salmon Stocks and Their Utilization," (hereafter report). The report addressed the growing problem of competition between commercial and recreational fishermen for the salmon stocks in Cook Inlet,[1] and requested long term direction from the Board on how to proceed with the management of various stocks in the Inlet.

All five species of salmon enter Cook Inlet, with considerable overlap in timing and migration routes.[2] While the commercial fishery harvests all five species, the report identified sockeye, chum and pink salmon as the three principal commercial species because of their total number, weight and value to the commercial fishery. The recreational fishery also harvests all five species, but the report indicated that sport demand centers on king and coho salmon.

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1. According to the report, competition for stocks in Cook Inlet is probably worse than in other parts of the state. While the natural salmon runs in the Inlet are about five per cent of the statewide production capability, commercial fishermen holding entry permits make up about fourteen per cent of the statewide salmon net fishery, and nearly half of all recreational anglers in the state fish the Inlet and adjacent streams.

2. The five species of salmon are sockeye (red), chum, pink, king and coho (silver).

The report discussed eleven different runs of the various salmon species which could to some degree meet the needs of the growing sports fishery. For certain runs which presented difficult management decisions, the report suggested several specific policy options for management of the stocks. The options generally provided for either maintenance of current management policies, curtailment of recreational fishing in favor of commercial fishing, or curtailment of commercial fishing in favor of recreational fishing.

The report was distributed to the members of the Board and the public at a September/October, 1977, hearing in Anchorage regarding Cook Inlet salmon. At a meeting in December, 1977, which had been called to consider proposed changes in fishing season regulations in the state, the Board also discussed long term management strategy for Upper Cook Inlet salmon stocks, and adopted a Comprehensive Management Policy for the Upper Cook Inlet (hereafter policy). The policy established certain priorities of use between commercial and recreational fisheries based on the target species indicated for each group in the report. One consideration in adoption of the policy was the need to inform user groups of the management plan for the stocks so that they could

adjust their future uses consistent with that plan.

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3. The policy reads as follows:

COMPREHENSIVE MANAGEMENT POLICY
FOR THE UPPER COOK INLET

The dramatically increasing population of the Cook Inlet area has resulted in increasing competition between recreational and commercial fishermen for the Cook Inlet salmon stocks. Concurrently, urbanization and associated road construction has increased recreational angler effort and may adversely affect fisheries habitat. As a result the Board of Fisheries has determined that a policy must now be determined for the long-term management of the Cook Inlet salmon stocks. This policy should rest upon the following considerations:

1. The ultimate management goal for the Cook Inlet stocks must be their protection and, where feasible, rehabilitation and enhancement. To achieve this biological goal, priorities must be set among beneficial uses of the resource.

2. The commercial fishing industry in Cook Inlet is a valuable long-term asset of this state and must be protected, while recognizing the legitimate claims of the non-commercial user.

3. Of the salmon stocks in Cook Inlet, the king and silver salmon are the target species for recreational anglers while the chum, pink, and red salmon are the predominant commercial fishery.

4. User groups should know what the management plan for salmon stocks will be in order that they can plan their use consistent with the plan. Thus, commercial fishermen must know if they are harvesting stocks which in the

[continued]

[3. continued]

long-term will be managed primarily for recreational consumption so that they may plan appropriately. Conversely, as recreational demands increase the recreational user must be aware of what stocks will be managed primarily for commercial harvest in order that he not become overly dependent on these fish for recreational purposes.

5. Various agencies should be aware of the long-term management plan so that salmon management needs will be considered when making decisions in areas such as land use planning and highway construction.

6. It is imperative that the Department of Fish and Game receive long-range direction in management of these stocks rather than being called upon to respond to annually changing Board directives. Within the Department, divisions such as F.R.E.D., must receive such long-term direction.

Therefore, the Board establishes priorities on the following Cook Inlet stocks north of Anchor Point. In so doing it is not the Board's intent to establish exclusive uses of salmon stocks; rather its purpose is to define the primary beneficial use of the stock while permitting secondary uses of the stock to the extent it is consistent with the requirements of the primary user group.

1. Stocks which normally move in the Cook Inlet to spawning areas prior to June 30, shall be managed primarily as a non-commercial resource.

2. Stocks which normally move in Cook Inlet after June 30, shall be managed primarily as a non-recreational resource until August 15; however existing recreational target fish shall only be harvested incidental to the non-recreatonal use; thereafter stocks moving to spawning

[continued]

In connection with the policy, the Board also adopted a Specific Policy Option (hereafter option) with respect to the late (after August 15) Kenai coho salmon run.[4] The option directed closure of the commercial fishery of this run if the commercial catch rates were below average. The purpose of this policy was to provide a satisfactory recreational fishery of the run, which had been identified in the policy as a primarily recreational species.

On September 2, 1978, the Commissioner declared an emergency closure of commercial fishing on the late Kenai coho stocks in order to comply with the Board's policy and

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[3. continued]

areas on the Kenai Peninsula shall be managed primarily as a non-commercial resource. Other stocks shall continue to be managed primarily as a non-recreational resource.

3. The Susitna coho, the Kenai king, and the Kenai coho runs cannot be separated from other stocks which are being managed primarily as non-recreational resources; however, efforts shall be made, consistent with the primary management goal, to minimize the non-recreational catch of these stocks.

4. The Specific Policy Option provided:

Option B - Curtail commercial fishery catch level to attempt to provide a satisfactory recreational fishery:

1. Adopt a policy that, if the commercial catch rates indicate a below average run, the commercial fishery would close. If the commercial fishery catch rates are at or above average, the maximum commercial fishing time would be two 12-hour periods.

management strategy governing these stocks after August 15.[5] The order found that commercial catches of the late coho run from August 28 and September 1 were below average, and on that basis closed the commercial fishery.

In December, 1978, the Board adopted regulation 5 AAC 21.310 for the 1979 season. The regulation fixed June 25 as the opening date for commercial fishing in the Upper Subdistrict (and other subdistricts in the Central District), and August 15 as the closing date for set gill nets in the Upper Subdistrict and for drift gill nets within five miles of the eastern shore of the Upper and Lower Subdistricts. The effect of the regulation was to prevent members of the appellant association from harvesting the early king and red

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5. Regulations, which are reconsidered yearly by the Board, set the opening and sometimes the closing dates for the commercial and recreational fisheries. Prior to 1979, regulations for this area of Cook Inlet usually provided for closure by emergency order of the Commissioner.

Authorization for emergency closure comes from AS 16.05.060, which provides:

> This chapter does not limit the power of the commissioner or his authorized designee, when circumstances require, to summarily open or close seasons or areas or to change weekly closed periods on fish or game by means of emergency orders. An emergency order has the force and effect of law after field announcement by the commissioner or his authorized designee. An emergency order adopted under this section is not subject to the Administrative Procedure Act (AS 44.62).

salmon runs, as well as the late Kenai coho run. In 1979, these runs were all open to recreational fishermen.

The Association's complaint against the state challenges, on several grounds, the validity of the policy, the option and the subsequent order and regulations adopted by the Board and the Commissioner. The Association moved for summary judgment based on stipulations of fact filed jointly by the Association and the state. The state opposed that motion and filed its own cross-motion for summary judgment, based on the joint stipulation of facts. The Association filed a statement of genuine issues of fact in opposition to the state's cross-motion; however, the state's cross-motion was granted by the trial court.

On appeal, the Association seeks reversal of the trial court decision and summary judgment in its favor because "as a matter of law [it] is entitled to a judgment invalidating the Comprehensive Management Policy and all ensuing regulations and mandates." We assume that the Association is not claiming the existence of genuine issues of fact, but merely that the trial court wrongly decided the validity of the policy, option and ensuing order and regulations as a matter of law.[6]

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6. Civil Rule 56(c) provides that a grant of summary judgment is proper when there is no genuine issue of fact to be determined by the trier of fact, and the movant is entitled to judgment on law applicable to the established facts. Moore v. State, 553 P.2d 8, 15 (Alaska 1976).

I

We first consider the Association's contention that the general purposes of and the regulation-making powers delegated to the Board do not constitute sufficient authority to establish priorities among beneficial users of the fishery resources. Determination of the extent of the Board's authority requires examination of the statutes which created the Board of Fisheries and established its powers.

In 1975, a separate Board of Fisheries was established by the legislature "[f]or the purposes of the conservation and development of the fishery resources of the state." AS 16.05.221(a).[7] The legislature gave the Board certain regulation-making powers, but specifically excluded administrative, budgeting and fiscal powers from the Board's

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7. AS 16.05.221(a) provides in part:

> (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.

Prior to 1975, AS 16.05.221 provided for one Board of Fish and Game.

function.[8] In AS 16.05.251(a), the Board is delegated the power to "make regulations it considers advisable in accordance with the Administrative Procedure Act (AS 44.62)" for certain enumerated areas of fisheries management.[9]

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8. AS 16.05.241 provides:

> The boards have regulation-making powers as set out in this chapter, but do not have administrative, budgeting or fiscal powers.

The regulation-making powers set out in the chapter include: (1) AS 16.05.251(a), set out in note 9 infra; (2) AS 16.05.251(b), relating to subsistence use as a priority use; and (3) AS 16.05.260, relating to establishment of advisory committees.

9. AS 16.05.251 provides in part:

> (a) The Board of Fisheries may make regulations it considers advisable in accordance with the Administrative Procedure Act (AS 44.62) for
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> (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;
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> (2) establishment of open and closed seasons and areas for the taking of fish;
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> (3) setting quotas and bag limits on the taking of fish;
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> (4) establishment of the means and methods employed in the pursuit, capture and transport of fish;
>
> (5) establishment of marking and identification requirements for means used in pursuit, capture and transport of fish;

[continued]

The Association maintains that these statutes do not delegate to the Board the power to determine "utilization" of fish resources, and therefore the Board cannot establish priorities of use. This claim is based primarily on the

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[9. continued]

> (6) classifying as commercial fish, sport fish or predators or other categories essential for regulatory purposes;
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> (7) engaging in biological research, watershed and habitat improvement, fish management, protection, propagation and stocking;
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> (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;
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> (9) entering into cooperative agreements with educational institutions and state, federal, or other agencies to promote fish research, management, education and information and to train men for fish management;
>
> (10) prohibiting and regulating the live capture, possession, transport, or release of native or exotic fish or their eggs;
>
> (11) establishing seasons, areas, quotas and methods of harvest for aquatic plants;
>
> (12) establishment of the times and dates during which the issuance of fishing licenses, permit 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 ch. 43 of this title.

fact that, while article VIII, section 2,[10] of the Alaska Constitution gives the legislature authority to provide for utilization, development and conservation of all natural resources of the state, AS 16.05.221(a) establishes the Board for the purposes of conservation and development only. The Association argues that establishment of priorities among beneficial users comes exclusively within the ambit of "utilization," and that the legislature's failure to include "utilization" among the purposes for which the Board was created indicates that the legislature reserved this function to itself exclusively.

In support of this contention, the Association cites the passage by the legislature of the statute establishing subsistence use as the top priority use for all fish and

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10. Article VIII, section 2, of the Alaska Constitution provides:

> 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.

game resources. Ch. 151, SLA 1978.[11] In the statement of intent for that legislation, the legislature recognized the "need to develop a statewide policy on the utilization, development and conservation of fish and game resources." The Association argues that this enunciation of the entire trilogy of purposes from article VIII, section 2, to support action taken by the legislature "evidences that the legislature made a clear and intentional omission of 'utilization' from the powers delegated" to the Board.

-ONC We find no merit in the Association's suggested interpretation of Board powers. As a general rule, conser-

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11. Chapter 151, SLA 1978, provides in part:

> Section 1. INTENT. The legislature finds that there is a need to develop a statewide policy on the utilization, development and conservation of fish and game resources, and to recognize that these resources are not inexhaustible and that preferences must be established among beneficial users of the resources. The legislature further determines that it is in the public interest to clearly establish subsistence use as a priority use of Alaska's fish and game resources and to recognize the needs, customs and traditions of Alaska residents. The legislature further finds that beneficial use of those resources by all state residents should be carefully monitored and regulated, with as much input as possible from the affected users, so that the viability of fish and game resources is not threatened and so that resources are conserved in a manner consistent with the sustained-yield principle.

vation laws such as fish and game laws should be liberally construed to achieve their intended purpose. 3 C. Sands, Sutherland Statutory Construction § 71.14 at 365 (4th ed. 1974). Liberal construction of the statutes which establish the Board and delegate to it regulation-making powers leads to the conclusion that the Board has the power to make decisions affecting the utilization of fishery resources in this state.

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.[12] If the Board is going to accomplish its designated purposes, it is necessarily going to make decisions concerning utilization of the resources it is charged with managing.

The legislature's statement in ch. 151, SLA 1978, does not indicate that it intended to reserve to itself the exclusive power to decide questions of utilization of fishery

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12. See Webster's New Collegiate Dictionary (1973), which defines "conservation" as "planned management of a natural resource to prevent exploitation, destruction, or neglect"; and defines "develop" as "to make available or usable."

resources. That legislation created a statewide preference among beneficial users and affected all fish and game resources in the state. Such broad scale action is not evidence of an intent to deprive the Board of the ability to make the various other utilization decisions necessary to effectively conserve and develop the many fishery resources of the state.

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Under this construction, the scope of Board action is not wholly without limitation. The Board must act under its specifically delegated regulatory powers, and actions taken must be premised on the need to effectuate conservation and development purposes. For example, in AS 16.05.251(a), the legislature delegated to the Board the power to "make regulations it considers advisable" for the twelve areas set out in the subsection. The quoted language indicates that the legislature intended to give the Board discretion to decide methods of regulation in these areas.[13] If, as is

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13. A grant of broad discretion to an administrative agency may be advisable where the agency functions in an area "where social or economic controls of private activity are deemed desirable, but where the legislature despairs of formulating a general rule which will be capable of precise and equitable application to all the contingencies that are anticipated." 1 F. Cooper, State Administrative Law 35 (1965).

likely, the method of regulation affects the utilization of fishery resources by various user groups,[14] it will still be within the Board's powers as long as the regulation is based on the need to conserve and develop the affected fishery. An establishment of priorities of use which meets these criteria would be within the Board's delegated powers.

Rest

The Association also claims that article VIII, section 15,[15] prohibits an establishment of priorities because that section precludes the creation of an exclusive

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14. Many of the specific areas of regulation set out in AS 16.05.251(a) inevitably will involve regulation of the use of the fishery resources. For example, the Board cannot make regulations establishing open and closed seasons, set quotas, classify fish, or make fish management decisions without somehow directing the use of the fishery resources.

15. Article VIII, section 15, states:

> No exclusive right or special privilege of fishery shall be created or authorized in the natural waters of the State. This section does not restrict the power of the State to limit entry into any fishery for purposes of resource conservation, to prevent economic distress among fishermen and those dependent upon them for a livelihood and to promote the efficient development of aquaculture in the State.

right or special privilege of fishery.[16] Again, the Association's contention is without merit. While section 15 does prohibit granting monopoly fishing rights, that section was not meant to prohibit differential treatment of such diverse user groups as commercial, sports, and subsistence fishermen. To conclude that, because a certain species is made available for sport fishing in a given area, commercial fishing of the same species in the same area must also be allowed, would be to go far beyond the purpose of the section.[17]

II.

The Association next contends that the comprehensive management policy and the specific policy option adopted by the Board in December, 1977, are invalid because they were not adopted in accordance with the provisions for adoption of regulations set out in the Administrative Procedure Act, AS 44.62 (hereafter APA). The Board is required

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16. The Association has raised a number of constitutional arguments concerning the Board's actions. Because we hold that the policy is invalid on the ground that it was not adopted according to proper APA procedures, infra, we need not consider the equal protection, due process, and other issues raised regarding the validity of the actual policy adopted. We will, however, consider the constitutional issue raised concerning the general validity of establishment of priorities of use as a means of resource management.

17. See Hynes v. Grimes Packing Co., 165 F.2d 323, 326 (9th Cir. 1947), vacated and remanded, 337 U.S. 86, 93 L. Ed. 1231 (1949); Metlakatla Indian Community v. Egan, 362 P.2d 901 (Alaska 1961), vacated and remanded, 369 U.S. 45, 7 L. Ed. 2d 562 (1962).

to follow APA procedures when adopting regulations pursuant to its statutorily delegated authority.[18] We have determined that an establishment of priorities of use may be adopted pursuant to a valid exercise of the Board's delegated regulatory powers. The state acknowledges that the policy and the option were not adopted according to APA procedures, but maintains that compliance was not necessary because they are not regulations; instead, they are merely general guidelines, adopted for the convenience of the public and other state agencies, to inform them of the Board's thinking on critical management issues in areas within its delegated authority.

AS 44.62.640(a)(2) defines "regulation" in part as:

> every rule, regulation, order, or standard of general application or the amendment, supplement or revision of a rule, regulation, order or standard adopted by a state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, except one which relates only to the internal management of a state agency; . . . "regulation" includes "manuals," "policies," "instructions," "guides to enforcement," "interpretive bulletins," "interpretations," and the like, which have the effect of rules, orders, regulations or standards of general application, and this and similar phraseology shall not be used to avoid or circumvent

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18. See AS 16.05.251(a) and (b); AS 16.05.260.

> this chapter; whether a regulation, regardless of name, is covered by this chapter depends in part on whether it affects the public or is used by the agency in dealing with the public. [Emphasis added.]

The Alaska APA is modeled after the California Administrative Procedure Act, Cal. Gov. Code § 11370 et seq., and the Model State Administrative Procedure Act. House Journal 1959 at 397. However, the Alaska APA goes beyond the definition of regulation contained in either of these statutes[19] by stating, "'[R]egulation' includes 'manuals,' 'policies,' 'instructions,' 'guides to enforcement,' . . . ." One commentator has found the Alaska definition noteworthy "[i]n view of the tendency of many administrative officers to avoid compliance with the rulemaking requirements of the applicable statutes by utilizing a name other than 'rule' or 'regulation' to describe agency statements which have the effect of rules." 1 F. Cooper, State Administrative Law 115 (1965).

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19. See Cal. Gov. Code § 11342 (Deering's Supp. 1980) (former Gov. Code § 11371); Model State Administrative Procedure Act § 1 (Revised 1961).

The California APA has been commented on as demonstrating "a desire to achieve . . . a much greater coverage of rules than Congress sought in the federal APA." Armistead v. State Personnel Bd., 583 P.2d 744, 745 (Cal. 1978) (footnote omitted). The federal act creates specific exceptions from notice and hearing requirements for interpretive rules and general statements of policy. 5 U.S.C. § 553(b)(A).

Clearly, then, the label placed on a particular statement by an administrative agency does not determine the applicability of the APA. Under the Alaska statute, "regulation" encompasses many statements made by administrative agencies, including policies and guides to enforcement. However, the state maintains that the policy and the option do not have the effect of rules, orders, regulations or standards of general application, and therefore are not covered by the statute. We disagree.

CONC

Under AS 44.62.640(a)(2), an indicia of a regulation is that it implements, interprets or makes specific the law enforced or administered by the state agency. As previously discussed, the Board is charged with management of the fishery resources of this state for conservation and development purposes. The policy and the option make specific the management policies of the Board for the Upper Cook Inlet fishery resources.

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The wording of the policy suggests that it was intended to regulate future management of the salmon stocks in the Upper Cook Inlet. In the policy, the Board states that it "establishes priorities" of use for certain stocks, not that it intends to establish priorities in future regulations. The priorities established in the policy are based on the targeting of certain species as primarily commercial

or primarily recreational. This classification of fish was undertaken without notice to commercial or recreational fishermen, who are obviously affected by the action. Furthermore, the policy directs that, on the basis of these established priorities, certain stocks "shall be managed" primarily as either noncommercial or nonrecreational resources. The mandatory language here is indicative of an intent to have the policy establish a course for future Board and Commissioner conduct affecting fishery rights in the Upper Cook Inlet.[20]

Another indicia of a regulation is that it "affects the public or is used by the agency in dealing with the public." Actions taken by the Board and the Commissioner demonstrate that the policy and the option served as a basis for decisions affecting commercial and recreational fishermen and were used by the Board in dealing with these groups.

The clearest instance of the policy and the option directly affecting commercial and recreational fishermen is the September, 1978, emergency closure of the late Kenai

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20. See People v. Cull, 176 N.E.2d 495 (N.Y. App. 1961), wherein the New York court held that the term "rule" or "regulation" encompassed "any kind of legislative or quasi-legislative norm or procedure which establishes a pattern or course of conduct for the future." Id. at 497 (emphasis added). In that case, the New York Constitution required that, in order to be effective, all rules and regulations had to be filed with the appropriate department of the state. The court concluded that an order setting a maximum speed limit, which was made by the state traffic commissioner, was a rule or regulation subject to the constitutional provision.

coho run to commercial fishermen. On August 11, 1978, the Commissioner announced that, because of the Board's policy and specific option concerning the late Kenai coho run, the Department of Fish and Game would use the catches from three commercial fishing periods in mid and late August to determine the strength of the run. If the catches were below average, that commercial fishery would be closed pursuant to the direction of the policy and the option. The emergency order, issued September 2, 1978, stated that because commercial catches were below average "commercial fishing on the late run Kenai River coho salmon stocks must be curtailed to comply with the Board of Fisheries' policy and management strategy governing these stocks after August 15." (Emphasis added.)

The staff of the Department of Fish and Game also used the policy as a guideline for proposing regulations setting opening and closing dates for the 1979 commercial season in the Upper Cook Inlet. The regulation adopted established opening and closing dates which were consistent with the priorities of use set out in the policy. In connection with the adoption of this regulation, the Board rejected a proposal from an area advisory committee which would have opened commercial fishing before July 1 in the Upper Subdistrict, and cited the policy as a reason for its

action. In response to a letter to the governor criticizing the August 15 closure in the 1979 regulation, the governor wrote, "It is my understanding that the allocation to the sport fishery [of the salmon runs after August 15] is in keeping with the Upper Cook Inlet comprehensive management policy adopted by the Board in 1977. The policy has established long term direction for management of Cook Inlet salmon stocks . . . ."

flimsy.

We conclude that the policy and the option make specific management policies for Upper Cook Inlet salmon stocks, and have the effect of regulations or standards of general application for the management of those stocks. As such, they are regulations, and should have been adopted according to APA procedures. The state acknowledges that the policy and the option were not adopted according to APA procedures;[21] therefore, they are invalid. Coghill v. Boucher, 511 P.2d 1297, 1304-05 (Alaska 1973). There can be

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21. The state contends in its brief that all the Board would have to do to comply with the APA would be to complete the appropriate filing procedures under AS 44.62.040-.125. This contention seems to be based on the fact that the notice for the December, 1977, meeting specified that at the meeting fishing season dates would be set. AS 44.62.200 requires that the notice of a proposed adoption of a regulation must include "an informative summary of the proposed subject of agency action." The notice of the December, 1977, meeting made no mention of planned adoption of a long-term management policy for the area. Therefore, it was insufficient notice of the Board's adoption of the comprehensive management policy.

legal notice

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no future reliance on this particular policy or option either in the regulation-making process or as a basis for emergency orders until the procedures required by the APA are observed.

III.

The Association also raises several issues concerning the validity of subsequently adopted regulations and the emergency order.

A.

The Association contends that the invalidity of the policy also renders the 1978, 1979, and future regulations invalid. In response, the state argues that the invalidity of the policy should have no effect on regulations establishing fishing seasons because these regulations are adopted according to APA procedures. The state reasons that the regulations stand independent of the policy and, though a review of the factual bases for the regulation may reveal many of the same concerns expressed in the policy, this duplication should not invalidate the regulations. We do not have sufficient information in the record to determine the validity of the regulations. However, we will briefly review the process for deciding this question.

Do not reach issue, Dictum?

Our review of regulations adopted by an agency in its quasi-legislative capacity is set out in Kelly v. Zamarello, 486 P.2d 906 (Alaska 1971). If adopted according to APA procedures and within the discretion vested in the Board by the legislature, our review is limited to (1) whether the regulation is consistent with the statute (i.e., within the scope of the Board's authority) and reasonably necessary to its purposes, and (2) whether the regulation is reasonable and not arbitrary. Id. at 911. The record indicates that the policy served as a guide for the regulation proposed and adopted in 1979. Because the policy was invalidly adopted, it was improperly relied upon. If, however, the regulations adopted were reasonable and not arbitrary, based on the total information before the Board at the time each was adopted and excluding the management priorities established in the policy, the invalidity of the policy would not affect the validity of the fishing season regulations.

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Although the emergency order has long since expired, the Association asserts that the question of its validity is not moot because of "the prospect that the power may similarly be misused [by the Commissioner] in the future." It is the Association's contention that the Commissioner has

misinterpreted the scope of the power conferred on him by AS 16.05.060.[22]

The Association first claims that the Commissioner cannot order emergency openings or closures for the purpose of implementing a management plan or policy, but can only make such an order on the basis of a biological emergency endangering current fish stocks. AS 16.05.060 authorizes the Commissioner "when circumstances require, to summarily open or close seasons or areas . . . by means of emergency orders." AS 16.05.060 does not provide a guide as to what the "circumstances" are which might necessitate an emergency order. It is the Association's contention that "circumstances" can only mean biological emergencies.

We disagree. Where a statute delegating authority to an administrative agency does not expressly provide a standard, the standard may be implied from the general policy and purposes underlying the legislative enactment. Turner v. Board of Trustees, Calexico Unified School District, 548 P.2d 1115, 1120 (Cal. 1976). The extent of the Commissioner's power under AS 16.05.060 should therefore be interpreted in light of the overall purpose of the constitutional and legislative scheme of management of state resources prescribed by other provisions of the law. Thus, if the Board properly

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22. See note 5 supra for text of AS 16.05.060.

adopted a plan for the management of state fishery resources, the Commissioner could enforce that policy through the emergency order process. The 1978 emergency order was invalid because it was premised on compliance with the invalidly adopted policy and option.[23] However, future emergency closures which are ordered to implement properly adopted management policies would be valid.

The Association next contends that the method used by the Commissioner to implement the 1978 emergency closure was outside the scope of his authority. In the emergency order, the Commissioner sought to close commercial fishing of the late Kenai coho run in the Upper Cook Inlet. He did this by amending the 1978 gear regulations for set gill nets and drift gill nets in the central district because these were the gear types commercially harvesting this run in the Upper Cook Inlet. The Association claims that the Commissioner's power under AS 16.05.060 is limited to ordering closure of a season or an area, but does not extend to amending gear regulations so as to close a season or an area to one gear type but not to others.

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23. The emergency order was issued only after it was determined that commercial catch rates were below average. Thus, there was arguably an alternative independent rationale for ordering closure separate from the policy and the option. However, both the news release and the order itself indicate that it was issued specifically to comply with the policy and the option.

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We have already concluded that the Board may validly adopt a management policy which establishes priorities of use, and that the Commissioner may use the emergency order process to implement a properly adopted management policy. The Commissioner may therefore use the emergency order process to close down one type of fishery and not another in order to implement a policy establishing priorities of use.

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The effect of the gear regulation amendment was to close the commercial fishing season for the Kenai coho run in the area of the Upper Cook Inlet where this species was commercially fished. Because closure by season or by area was within the Commissioner's powers, and the amendment of the gear regulation had that effect, we conclude that the method of implementing the emergency closure was not outside the Commissioner's delegated authority.

IV.

The trial court found that the policy adopted by the Board did not violate the Association's constitutional rights of equal protection and due process, nor did it violate the provisions of article VIII of the Alaska Constitution. Because we find that the policy was not adopted according to proper APA procedures, we do not feel it is proper to reach the constitutional validity of the actual

but cf p18, FN.

unless they only mean class. = pro, due process, etc

policy adopted. The purpose of the notice and hearing provisions of the APA is two-fold. First, it gives notice to interested parties of proposed agency actions which may affect their interests. Next, it gives the administrative agency the opportunity to receive information and comments from those interested parties on its proposed action.[24] Both the Board and interested fishermen should have full benefit of these opportunities before a review is made of the validity of the policy adopted.

The decision of the superior court that the Comprehensive Management Policy need not be adopted according to APA procedures is REVERSED.

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24. See Cheshire Convalescent Ctr. v. Comm'n on Hospitals, 386 A.2d 264, 271 (Conn. C.P. 1977); Bassett v. State Fish & Wildlife Comm'n, 556 P.2d 1382, 1384 (Ore. App. 1976).

legal notice?

Appendix Table 1. Commercial harvest of Upper Cook Inlet king salmon in percent by gill net gear type, 1966-1978.

Year	Total UCI % Drift	Central District % Set Net	Northern District % Set Net
1966	4	81	15
1967	6	92	2
1968	4	86	10
1969	3	74	23
1970	4	78	18
1971	1	50	49
1972	2	67	31
1973	5	92	3
1974	6	91	3
1975	5	92	3
1976	7	86	7
1977	23	73	4
1978	17	77	6
Average	6.7	79.9	13.4

Appendix Table 2. Commercial harvest of Upper Cook Inlet sockeye salmon in percent by gill net gear type, 1966-1978.

Year	Total UCI % Drift	Central District % Set Net	Northern District % Set Net
1966	60	33	7
1967	64	27	9
1968	51	35	14
1969	54	40	6
1970	63	28	9
1971	67	26	7
1972	58	32	10
1973	56	34	10
1974	54	37	9
1975	54	36	10
1976	57	38	5
1977	51	44	5
1978	70	28	2
Average	58.4	33.7	7.9

Appendix Table 3. Commercial harvest of Upper Cook Inlet coho salmon in percent by gill net gear type, 1966-1978.

Year	Total UCI % Drift	Central District % Set Net	Northern District % Set Net
1966	29	34	37
1967	30	42	28
1968	36	27	37
1969	36	37	27
1970	41	27	32
1971	35	40	25
1972	28	46	26
1973	30	38	32
1974	41	32	27
1975	40	43	17
1976	38	40	22
1977	58	31	11
1978	37	39	24
Average	36.9	36.6	26.5

Appendix Table 4. Commercial harvest of Upper Cook Inlet pink salmon in percent by gill net gear type, 1966-1978.

Year	Total UCI % Drift	Central District % Set Net	Northern District % Set Net
1966	29	51	20
1967	23	48	29
1968	39	36	25
1969	25	47	28
1970	42	37	21
1971	21	50	29
1972	18	66	16
1973	28	28	44
1974	29	61	10
1975	35	37	29
1976	48	40	12
1977	50	30	20
1978	56	26	18
Average	34.0	42.9	23.1

Appendix Table 5. Commercial harvest of Upper Cook Inlet chum salmon in percent by gill net gear type, 1966-1978.

Year	Total UCI % Drift	Central District % Set Net	Northern District % Set Net
1966	82	2	16
1967	82	7	11
1968	92	2	6
1969	90	6	4
1970	90	7	3
1971	84	10	6
1972	90	7	3
1973	93	2	5
1974	87	4	9
1975	93	4	3
1976	87	10	3
1977	91	7	2
1978	84	10	6
Average	88	6	6

Appendix Table 6. Commercial harvest of Upper Cook Inlet salmon in percent by gill net gear type, 1966-1978.

Year	Total UCI % Drift	Central District % Set Net	Northern District % Set Net
1966	47	37	16
1967	63	26	11
1968	53	27	20
1969	60	32	8
1970	62	25	13
1971	66	24	10
1972	54	35	11
1973	63	21	16
1974	53	35	12
1975	66	23	11
1976	57	35	8
1977	63	30	7
1978	65	26	9
Average	59.4	28.9	11.7

Appendix Table 7. Commercial catch of Upper Cook Inlet salmon in numbers of fish by species, 1954-1978.

Year	King	Sockeye	Coho	Pink	Chum	Total
1954	63,780	1,207,046	321,525	2,189,307	510,068	4,291,726
1955	45,926	1,027,528	170,777	101,680	248,343	1,594,254
1956	64,977	1,258,789	198,189	1,595,375	782,051	3,899,381
1957	42,158	643,712	125,434	21,228	1,001,470	1,834,002
1958	22,727	477,392	239,765	1,648,548	471,697	2,860,129
1959	32,651	612,676	106,312	12,527	300,319	1,064,485
1960	27,512	923,314	311,461	1,411,605	659,997	3,333,889
1961	19,737	1,162,303	117,778	34,017	349,628	1,683,463
1962	20,210	1,147,573	350,324	2,711,689	970,582	5,200,378
1963	17,536	942,980	197,140	30,436	387,027	1,575,119
1964	4,531	970,055	452,654	3,231,961	1,079,084	5,738,285
1965	9,741	1,412,350	153,619	23,963	316,444	1,916,117
1966	9,541	1,851,990	289,690	2,006,580	531,825	4,689,626
1967	7,859	1,380,062	177,729	32,229	296,037	1,894,716
1968	4,536	1,104,904	470,450	2,278,197	1,119,114	4,977,201
1969	12,398	692,254	100,952	33,422	269,855	1,108,881
1970	8,348	731,214	275,296	813,895	775,167	2,603,920
1971	19,765	636,303	100,636	35,624	327,029	1,119,357
1972	16,086	879,824	80,933	628,580	630,148	2,235,571
1973	5,194	670,025	104,420	326,184	667,573	1,773,396
1974	6,586	497,160	199,883	483,977	398,153	1,585,759
1975	4,773	678,736	221,547	335,629	950,981	2,191,666
1976	10,867	1,664,131	208,565	1,256,743	469,806	3,610,112
1977	14,792	2,054,020	192,975	554,184	1,233,733	4,049,704
1978	17,302	2,621,667	219,360	1,689,098	571,959	5,119,386

Appendix Table 8. Cook Inlet herring catches in tons by district, 1961-1978.

Year	Southern	Kamishak	Eastern	Outer	Central	Northern	Total
1961	0	0	0.6	0	0	0	0.6
1962	0	0	0	0	0	0	0
1963	0.8	0	0	0	0	0	0.8
1964	0.2	0	0	0	0	0	0.2
1965	1.6	0	0	0	0	0	1.6
1966	0	0	6.6	0	0	0	6.6
1967	0	0	0	0	0	0	0
1968	20.0	0	0	0	0	0	20.0
1969	550.5	0	758.0	38.0	0	0	1,346.5
1970	2,708.7	0	2,100.3	0	0	0	4,809.0
1971	12.5	0	831.0	0	0	0	843.5
1972	1.0	0	30.0	0	0	0	31.0
1973	203.8	243.1	830.8	300.5	13.9	0	1,592.1
1974	109.7	2,113.7	47.2	384.0	36.2	0.5	2,691.3
1975	24.4	4,118.6	0	0	6.2	0	4,149.2
1976	0	4,842.2	0	0	5.8	0	4,848.0
1977	291.0	2,907.5	0	0	17.1	0.2	3,215.8
1978	16.6	401.9	0	0	60.8	0	479.8
Total	3,940.8	14,627.0	4,604.5	722.5	140.0	0.7	24,035.5
Average	303.1	2,437.8	575.6	240.8	23.3	0.3	1,502.2

Appendix Table 9. Commercial harvest of razor clams in Cook Inlet, 1919-1978.

Year	Pounds	Year	Pounds
1919	76,968	1950	304,073
1920	11,952	1951	112,320
1021	72,000	1952	0
1922	510,432	1953	0
1923	470,280	1954	0
1924	156,768	1955	0
1925	0	1956	0
1926	0	1957	0
1927	25,248	1958	0
1928	0	1959	0
1929	0	1960	372,972
1930	0	1961	277,830
1931	No Record	1962	195,650
1932	93,840	1963	0
1933	No Record	1964	0
1934	No Record	1965	0
1935	No Record	1966	0
1936	No Record	1967	0
1937	8,328	1968	0
1938	No Record	1969	0
1939	No Record	1970	0
1940	No Record	1971	15,171
1941	0	1972	32,166
1942	0	1973	56,759
1943	0	1974	No Record
1944	0	1975	10,020
1945	15,000	1976	No Record
1946	11,424	1977	1,762
1947	11,976	1978	45,931
1948	2,160		
1949	9,672		

Appendix Table 10. Exvessel value of Upper Cook Inlet commercial salmom harvest in thousands of dollars by species, 1960-1978.

Year	King	Sockeye	Coho	Pink	Chum	Total
1960	140	1,334	307	663	343	2,787
1961	100	1,687	118	16	204	2,125
1962	100	1,683	342	1,274	582	3,981
1963	89	1,388	193	13	236	1,919
1964	20	1,430	451	1,131	646	3,687
1965	50	2,099	109	70	230	2,558
1966	50	2,727	295	823	338	4,233
1967	49	2,135	187	13	202	2,586
1968	30	1,758	515	1,209	843	4,355
1969	70	1,231	109	23	204	1,637
1970	49	1,135	354	387	745	2,670
1971	189	1,102	143	22	316	1,772
1972	179	1,980	224	478	1,214	4,075
1973	97	2,587	255	330	1,449	4,718
1974	194	2,987	923	955	1,583	6,642
1975	68	2,680	847	418	2,747	6,760
1976	269	8,648	837	1,876	1,985	13,615
1977	463	13,292	857	786	5,187	20,585
1978	418	20,592	935	1,332	2,367	25,644

Appendix Table 11. Number of interim-use and permanent permits issued and fished in Cook Inlet, 1975-78.

Fishery and Year		Number of Permits Issued		Number of Permits Fished
		Interim-use	Permanent	
Purse seine	1975	51	49	56
	1976	16	63	47
	1977	10	72	59
	1978	9	74	62
Drift Gill Net	1975	331	453	438
	1976	82	514	472
	1977	36	539	501
	1978	42	549	537
Set Gill Net	1975	376	652	530
	1976	7	712	521
	1977	2	731	524
	1978	5	742	581

Data compiled by Commercial Fisheries Entry Commission.

Appendix Table 12. Upper Cook Inlet subsistence fishery by district and species, 1971-78.

Year	District	King	Sockeye	Coho	Pink	Chum	Total	Permits Issued
1971	Northern	-	-	10	-	-	10	9
	Central	-	-	138	-	-	138	28
	Total	-	-	148	-	-	148	37
1972	Northern	-	4	23	10	15	52	9
	Central	-	-	32	17	-	49	21
	Total	-	4	55	27	15	101	30
1973	Northern	-	24	104	3	37	168	19
	Central	-	11	228	9	-	248	104
	Total	-	35	332	12	37	416	123
1974	Northern	-	13	27	-	1	41	12
	Central	1	1	264	17	1	284	97
	Total	1	14	291	17	2	325	109
1975	Northern	-	-	68	-	14	82	17
	Central	1	4	591	8	78	682	97
	Total	1	4	659	8	92	764	114
1976	Northern	-	6	111	24	5	146	21
	Central	-	15	456	89	8	568	90
	Total	-	21	567	113	13	714	111
1977	Northern	-	2	17	-	12	31	10
	Central	2	11	310	3	2	328	73
	Total	2	13	327	3	14	359	83
1978	Northern	-	-	207	32	8	247	26
	Central	5	42	3,322	96	23	3,488	297
	Total	5	42	3,529	128	31	3,735	323