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Gary W. Jackinsky
PO Box 39127
Ninilchik, AK 99639
(907-252-0275)
yabuttu2@gmail.com
January 15, 2008

RECEIVED
JAN 18 2008
BOARDS

Chairman Mel Morris
Board of Fisheries
917 Mill Bay Road
Kodiak, AK 99615

Dear Mr. Chairman,

On January 12 2008, I received an update on the Board of Fisheries Restructuring Proposals from Jim Marcotte dated January 4, 2008. I submitted proposal 113 and would like to comment on the memorandum from Frank Homan to Jim R. Marcotte dated August 3, 2007.

First of all I am going to be out of the State for the next month and won't be able to attend the meetings but I would gladly answer any questions over the phone at 907-252-0275.

The intent of this proposal is solely to be able to fish one vessel in both the Kodiak salmon area and the Cook Inlet salmon area in the same year.

I was NOT asking to allow one salmon permit holder to fish two permits. I am asking that a Kodiak salmon permit holder fish with their Kodiak salmon permit off of a particular vessel in Kodiak and a DIFFERENT permit holder be able to fish off the same vessel with a Cook Inlet permit in Cook Inlet within the same season.

I hope this comment is helpful and answers the questions that CFEC is raising.

Again please contact me if my intentions are not clear.

Respectfully,

Gary W. Jackinsky

cc: Jim R. Marcotte

45

COMMENT# 1

RECEIVED
AUG 31 2007

Alaska Board of Fisheries - Restructuring Proposal Form

BOARDS

Please answer the questions below as completely as possible. Your response will likely require multiple pages and considerable time and effort. Some questions may not be applicable to your proposal. Some questions may be quite difficult to answer; incomplete answers will not necessarily disqualify your proposal.
Please carefully read the instructions on second page before answering the questions.

- 1) What regulatory area, fishery, and gear type does this restructuring proposal affect?
- 2) Please thoroughly explain your proposal. (See Part II, Question 2 of the instructions on second page for important guidance on how to answer this question).
- 3) What are the objectives of the proposal?
- 4) How will this proposal meet the objectives in Question 3?
- 5) Please identify the potential allocative impacts of your proposal. Is there an allocation or management plan that will be affected by this proposal?
- 6) If the total value of the resource is expected to increase, who will benefit?
- 7) What will happen if your fishery is not restructured as your proposal recommends, and how is this proposal an improvement over current practices?
- 8) Considering the history of the commercial fishery, what are the potential short- and long-term positive and negative impacts on:
 - a) the fishery resource;
 - b) harvesters;
 - c) the sector, species, and regional interdependence relationships;
 - d) safety;
 - e) the market;
 - f) processors; and
 - g) local communities.
- 9) What is your understanding of the level of support for your proposal among the harvesters, processors, and local communities?
- 10) What are the potential short and long-term impacts on conservation and resource habitat?
- 11) What are the potential legal, fishery management, and enforcement implications if this proposal is adopted? What other governmental actions may need to be taken into account?

Submitted By: Name Gary W. Jackson 8-28-07 (signature required)
 Individual or Group GARY W. JACKSON
 Address P.O. Box 39127 NWILCHIK Zip Code 99639 Phone 567-3521
398-3521

10/15 2/5

COMMENT# 1

Gary W. Jackinsky
PO Box 39127
Ninilchik, AK 99639
567-3521
August 27, 2007

State of Alaska
Dept of Fish and Game
Board of Fisheries, Executive Director

Attn: Jim Marcotte

Dear Sir,

This is the response to the 11 questions ask on the Restructuring Form for Proposal 113.

Question #1: Fishery management areas Kodiak and Cook Inlet salmon fisheries for purse seine fisheries in Kodiak and Drift net fisheries in Kodiak.

Question #2

- a. No.
- b. No.
- c. Same as existing.
- d. No.
- e. No.
- f. No.
- g. Permanent change to area registration.
- h. No.
- i. No.
- j. Same as current.
- k. Only to be able to fish one boat in both areas.
- l. There are no challenges to overcome.

Question #3: The objective of this proposal is to allow one vessel to be fished in both areas. The Cook Inlet area is being fished by approximately 65% of the permit holders and the Kodiak is around 50%.

Question #4: It would allow seine boats from Kodiak to fish the Cook Inlet season in July, and allow Cook Inlet gillnet boats to fish Kodiak, June and August.

Question #5: The long range effects could mean bigger boats fishing the Inlet and picking up Cook Inlet permit holders to crew in Kodiak. Most Kodiak boats have RSW systems and it could mean a better product in the Inlet when there are large runs of salmon. Since the permit numbers are already limited, it would not mean any more or less effort and no change in management plans.

Gary W. Jackinsky 8.28.07
3/5

COMMENT# 1

Question #6: The value of the resource will not be affected except by quality of product. The vessel owners that want to fish both areas will benefit, as will the Communities they live in. The processors may get a more uniform supply of salmon from their fishermen that choose to fish both areas and there will be no effect for the State, Subsistence or Sport users.

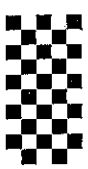
Question #7: We are already limited to a certain number of permit holders and it would be more economical to be able to fish both areas on one boat than two vessels. With the current prices of fuel, boat maintenance, insurance, and other related items being so high and the price of salmon not being so high, it makes more sense to use one boat for several different things.

Question #8:

- a. 1. No effect
2. No change in management
3. More economical for boat owners that have multiple permits on board, and deck hands that want to fish a longer season.
- b. 1. Using one boat to fish both areas will cut cost to boat owners and permit holders.
2. No impact on species since the permits are still limited.
3. Not sure what the question is. It will allow families to buy multiple permits and only have to use one fishing boat.
4. It may give a boat owner a better chance to make a dollar by catching more Salmon, however the product to the fisherman in each area won't change.
5. Will not change Market access.
- c. There will be no impact on other gear types or species. The only impact between Kodiak and Cook Inlet will be crews going from one to the other with the fishing boat.
- d. No affect on safety.
- e. 1. Access to market will remain the same unless processors follow their fishermen from one area to the other. Product may be better since most Kodiak boats have RSW.
2. Allow more Cook Inlet registered boats to participate in the early and late market.
3. Allow fishermen from both areas to have a profitable season.
4. Already being limited by regulation and season limits in both areas, it would allow fishermen to make a descent season.
- f. 1. No change in the processing function.
2. No impact on species.
3. Unknown.
4. Product value probably wouldn't change except for possibility better product during big days in Cook Inlet again by use of RSW.
5. No change in access unless processors follow their fishermen.
- g. 1. It would benefit the resident population of both communities since it would make more family operations and not rely on non-residents for crew as much.

Sally W. Johnson 8.28.7
415

COMMENT# 1



September 11, 2007

Comments on proposal 238

I support this proposal to include Dolly Varden in the closure from the outlet of Skilak Lake to the Upper Killey River for the period from April 15 to June 11. I am aware of individuals who target rainbows below Skilak Lake while supposedly fishing for "Dolly Varden" during this time of year. This loophole needs to be closed so that the rainbow fishery is protected during this critical period.

This is a time of the year when many of us are anxious to get a line wet but it does not justify targeting spawning rainbows which are the life blood of the Kenai River.

Comments on proposal 239

I do not support this proposal. Restricting the window for spawning provides very little benefit to the angling public and potentially risks harming spawning fish. This can be a good time of year to target local lakes while waiting for the Kenai to open up to rainbow fishing. The Kenai receives enough pressure with the existing seasons, let's not put more pressure on the resident fish.

My name is Steve Lambert. I am a resident of Alaska and an avid fisherman on the Kenai and many other rivers in Southcentral Alaska. My address is 7715 Eastbrook Drive, Anchorage, Alaska 99504. Thank you for your consideration. My e-mail address is slambert@gci.net.

RECEIVED TIME SEP. 12. 7:58AM

COMMENT# 2

KENAI AREA FISHERMAN'S COALITION

PO Box 375 Kenai, Ak. 99611 * (907) 283-1054 * dwimar@gci.net

Jim Marcotte, Executive Director
Alaska Department of Fish and Game
Board Support Section
P.O. Box 115526
Juneau, Alaska 99811-5526

14 November 2007

RECEIVED
NOV 20 2007
BOARDS

Re: Information request from Board of Fisheries members

Dear Mr. Marcotte,

At the Lower Cook Inlet Board of Fisheries (BOF) meeting two Board members requested we submit the following documents for distribution by you to the full BOF. The attached documents are:

- 1) A memorandum from George Utermohle, Legislative Counsel on the Interaction between the authority of the Commissioner of Fish and Game and the BOF(Work order 23-LS1414) to Representative Paul Seaton;
- 2) A memorandum order denying preliminary injunction for case No 3KN-04-531 issued by Harold M Brown, Superior Court Judge;
- 3) An Order Regarding Motions for Summary Judgment in case 3KN-04-531 issued by Harold M. Brown; and
- 4) RC 140 Central District Commercial Fisheries Management Plan from the 2005 Upper Cook Inlet BOF meeting.

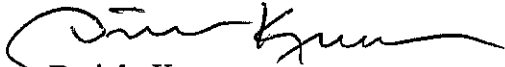
The KAFC brought these documents to the attention of the two BOF members in discussions regarding the regulatory language in some of the UCI management plans that limit hours and areas open to fishing. We noted that these restrictions are not enforceable per the Brown decision and that having them in regulation confuses the public and creates expectations that cannot be met. We strongly believe that regulations should be legal and enforceable. In addition, the limitation of ADF&G emergency order authority is in conflict with escapement goal management – we also feel strongly that escapement goals are the backbone of Alaska salmon management.

RC 140 was used by our representatives to show the BOF members what was passed at the 2005 BOF meeting after back-room discussions took place between Kenai River Sport Fishing Association and United Cook Inlet Drift Association. No advisory board representatives or other user groups were part of those discussions. This RC, with extensive changes to the existing management plans, came to the floor and passed within

20 minutes. We strongly object to this type of process and used RC 140 to indicate how management plans should not be written.

Please contact us if you have any questions regarding this request.

Respectfully Submitted,



Dwight Kramer
Chairman – KAFC
907-283-1054

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM

December 4, 2003

SUBJECT: Interaction between the authority of the Commissioner of Fish and Game and the Board of Fisheries (Work Order No. 23-LS1414)

TO: Representative Paul Seaton
Attn: Chris Knight

FROM: George Utermohle *GU*
Legislative Counsel

This memorandum is in response to your questions regarding the interaction of the authority of the commissioner of fish and game and the Board of Fisheries to manage commercial fisheries.

BACKGROUND. Among the duties of the commissioner of fish and game is the duty to "manage, protect, maintain, improve, and extend the fish, game and aquatic plant resources of the state in the interest of the economy and general well-being of the state." AS 16.05.020(2). Among the powers of the commissioner is the power, "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." AS 16.05.060(a). The commissioner may use the emergency order process to implement fishery management plans adopted by the Board of Fisheries. Kenai Peninsula Fisherman's Cooperative Association v. State, 628 P.2d 897 (Alaska 1981).

The Board of Fisheries was created for "the purposes of conservation and development of the fishery resources of the state." AS 16.05.221(a). The powers of the board include establishing open and closed seasons and areas for the taking of fish; setting quotas, bag limits, harvest levels, and sex and size limitations on the taking of fish; establishing the means and methods employed in the pursuit, capture, and transport of fish; establishing seasons, areas, quotas, and methods of harvest for aquatic plants; regulating commercial, sport, guided sport, subsistence, and personal use fishing as needed for the conservation, development, and utilization of fisheries; establishing nonexclusive, exclusive, and superexclusive registration and use areas for regulating commercial fishing; regulating resident or nonresident sport fishermen as needed for the conservation, development, and utilization of fishery resources; allocating fishery resources among subsistence, personal use, sport, guided sport, and commercial fisheries. AS 16.05.251(a) and (e). The board is also responsible for the development of policies for the management of mixed stock fisheries and of wild and enhanced salmon stocks. AS 16.05.251(h) and 16.05.730.

3 of 23

powers of conservation and development of the fishery resources of the state. AS 16.05.221(a). The powers of the board include establishing open and closed seasons and areas for the taking of fish; setting quotas, bag limits, harvest levels, and sex and size limitations on the taking of fish; establishing the means and methods employed in the pursuit, capture, and transport of fish; establishing seasons, areas, quotas, and methods of harvest for aquatic plants; regulating commercial, sport, guided sport, subsistence, and personal use fishing as needed for the conservation, development, and utilization of fisheries; establishing nonexclusive, exclusive, and superexclusive registration and use areas for regulating commercial fishing; regulating resident or nonresident sport fishermen as needed for the conservation, development, and utilization of fishery resources; allocating fishery resources among subsistence, personal use, sport, guided sport, and commercial fisheries. AS 16.05.251(a) and (e). The board is also responsible for the development of policies for the management of mixed stock fisheries and of wild and enhanced salmon stocks. AS 16.05.251(h) and 16.05.730.

COMMENT#

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The Board of Fisheries may delegate its authority to the commissioner of fish and game to act on its behalf. AS 16.05.270.

It is evident that the Board of Fisheries has primary responsibility for the management of the state's fishery resources.¹ The role of the commissioner appears to be supplemental to the board in regard to the management of fisheries.² However, both the board and the commissioner each have their own statutory authorities in regard to fisheries and neither may limit or reduce the statutory authority of the other.

"The Commissioner's emergency powers do not explicitly include any veto over Board decisions. . . . [I]mplication of such a grant of power to the Commissioner would eviscerate powers explicitly granted to the Board under AS 16.05.251. The Legislature's goal would be frustrated. Because the Commissioner could veto any act taken by the Board, the Board would become a mere rubber stamp or advisory body for the Commissioner." Peninsula Marketing Association, 890 P.2d at 573 (footnote omitted). "Inferring a broad veto power would make superfluous the detailed provisions dividing power and authority within the Department. See AS 16.05.050; AS 16.05.241; AS 16.05.251. It would make insignificant the statutory device for resolving disagreements between the Board and the Commissioner. AS 16.05.270. Indeed, it would seem to make inoperative the entire concept of the Board delegating its regulatory powers." Id.

The Alaska Supreme Court has stated that the lack of authority for the commissioner to veto decisions of the Board of Fisheries "does not impact the Commissioner's authority to exercise his emergency powers in a true biological emergency. However, it does circumscribe his ability to override the Board's decisions where he is relying on evidence already presented to and reviewed by the Board." Id. However, both the board and the commissioner each have their own statutory authorities in regard to fisheries and neither may limit or reduce the statutory authority of the other.

¹ "The Board's powers are regulatory. The boards have regulation-making powers as set out in this chapter, but do not have administrative, budgeting, or fiscal powers." AS 16.05.241. It may regulate, in accordance with AS 44.62 (Administrative Procedure Act) almost every aspect of fishing: fish reserves, open and closed seasons, quotas or bag limits, means and methods by which fish can be taken, classifying types of fishing, etc. AS 16.05.251(a)." Peninsula Marketing Association v. Rosier, 890 P.2d 567, 572 (Alaska 1995).

² "The Commissioner is directed to 'control the department's and manage, protect, maintain, improve, and extend the fish . . . resources of the state' and is vested with all 'necessary power to accomplish the foregoing.' AS 16.05.020. This is a broad grant of authority. However, the statutory list of the specific powers and duties of the Commissioner relates principally to administration and budgeting." AS 16.05.050." Peninsula Marketing Association, 890 P.2d at 572.

do not explicitly include any veto over Board decisions. . . . [I]mplication of such a grant of power to the Commissioner would eviscerate powers explicitly granted to the Board under AS 16.05.251. The Legislature's goal would be frustrated. Because the Commissioner could veto any act taken by the Board, the Board would become a mere rubber stamp or advisory body for the Commissioner." Id.

3

COMMENT#

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

ONE: In light of the recent Kenai superior court case, does the Board of Fisheries have authority to restrict or limit the power of the commissioner of fish and game to issue emergency orders over time and area?

Earlier this year the Kenai superior court had occasion to consider whether the Board of Fisheries had the authority to limit the exercise of the emergency order power of the commissioner of fish and game to specific times and places chosen by the board. Kenai Peninsula Fisherman's Association v. Alaska Department of Fish and Game, Alaska Superior Court, Third Judicial District, Kenai, case no. 3KN-02-524 CI, Order Regarding Motions for Summary Judgment, May 28, 2003. At issue in the case was a regulation adopted by the Board of Fisheries (5 AAC 21.360) which could be construed as limiting the authority of the commissioner to issue emergency orders under AS 16.05.060. The superior court held that the board did not have authority to limit the commissioner's executive order authority and that the regulation should not be construed as limiting the commissioner's authority under AS 16.05.060. Id. at 3-4. The order of the superior court appears consistent with a common sense reading of the applicable statutes and with the Alaska Supreme Court decision in the Peninsula Marketing Association case.

TWO: In oral and written argument before the superior court, the state said that the Board of Fisheries restrictions on the commissioner's emergency order authority were allocative decisions. Can the Board of Fisheries use its allocative authority to limit the emergency order authority of the commissioner?

The emergency order authority is conferred on the commissioner by statute. AS 16.05.060. Except in regard to certain modifications of sport fishing bag limits and gear requirements, the board has no authority to limit the emergency order authority of the commissioner. AS 16.05.060(b). The board has no authority to modify the commissioner's emergency order authority in regard to commercial fisheries. The allocative authority of the board is not a basis for limiting the commissioner's emergency order authority.

The authority to allocate commercial fishery resources among user groups is exclusively a power of the board. The commissioner has no authority to use the emergency order power for the purpose of affecting allocations of fishery resources. The scope of the exercise of the commissioner's emergency order power is circumscribed by the duty of the commissioner to "manage, protect, maintain, improve, and extend the fish, game and aquatic plant resources of the state in the interest of the economy and general well-being of the state." AS 16.05.020(2). It is impossible for the commissioner to avoid allocative consequences arising from the exercise of the emergency order power, but it is not within the power of the commissioner to exercise the emergency order power for allocative purposes.

THREE: Given the wording in AS 16.05.060, can the Board of Fisheries adopt any regulations under AS 16.05.251 that restricts the commissioner's emergency order authority?

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resources among user group COMMENT#

3

The emergency order authority is conferred on the commissioner by statute, AS 16.05.060. Except in regard to certain modifications of sport fishing bag limits and gear requirements, the board has no authority to limit the emergency order authority of the commissioner. AS 16.05.060(b).

FOUR: Is there a need for legislation to clarify what constitutes new information?

I am not aware of a compelling need to define what would constitute "new information" for purposes of authorizing the commissioner to supercede regulations of the Board of Fisheries based on the receipt of new information not considered by the board at the time that the board adopted a regulation. The commissioner may exercise the emergency order power in a true biological emergency without regard to the existence of new information. Peninsula Marketing Association, 390 P.2d at 573.

FIVE: What are the regulations related to the commissioner's authority to use emergency orders to remain within the new statutorily mandated missions and measures success determination of remaining within the escapement range of a given anadromous stream system?

The legislature failed to pass "missions and measures" legislation for fiscal year 2004. Thus there are no missions and measures statements in effect in regard to the achievement of salmon escapement objectives by the Department of Fish and Game. When missions and measures legislation has been passed by the legislature and enacted into law, the effect of the legislation is to guide state agencies in the expenditure of appropriated funds and to measure the performance of the agencies in achieving their missions. Missions and measures legislation does not provide any new substantive authority to an agency. The agency is intended to achieve its assigned missions utilizing its existing statutory authority. The Department of Fish and Game has not adopted regulations pursuant to "missions and measures" legislation.

If I may be of further assistance, please advise.

GEM:mdr
03-218.mdr

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT KENAI

KENAI PENINSULA FISHERMAN'S
ASSOCIATION and UNITED COOK
DRIFT ASSOCIATION,

Plaintiffs,

v.

ALASKA DEPARTMENT OF FISH AND
GAME and KEVIN DUFFY, Acting
Commissioner, Alaska Department of Fish
and Game,

Defendants.

Case No.: 3KN-02-524 CI

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

Order Regarding Motions for Summary Judgment

Both parties have moved for summary judgment in the above captioned case. The parties agree directly or by implication that there are no issues of material fact in dispute in this case. Defendants have also moved to strike certain exhibits attached to Plaintiffs' Motion for Summary Judgment and argue that Plaintiffs have brought this action against the wrong state entities.

Defendants argue that Plaintiffs should have named the Board of Fisheries ("Board") or the State of Alaska as a defendant rather than the Commissioner of the Alaska Department of Fish and Game ("Commissioner"). The Board is hereby joined as a party pursuant to ARCP 19(a). This joinder need not delay consideration of the pending motions for summary judgment. Had the Board been a party to this action from the beginning, the arguments advanced in support of the parties' respective positions would be same, the attorneys involved in the case would be the same and presumably the result would be the same.

Defendants challenge several exhibits attached to Plaintiffs' Motion for Summary

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COMMENT#

3

language of the challenged regulation would control

Judgment. Plaintiffs argue that Exhibits B and C are relevant to the issue of standing. Because lack of standing is not argued by the state, that issue is considered waived. Exhibits B and C will not be considered by the court in its analysis of the parties' motions. Rather, the court will rely on the record and on the existing statutory and regulatory scheme in its decision. Exhibits D, H, I and J supplement but do not contribute significantly to the court's understanding of the issues and the facts framed by the record. While they will not be stricken they are not relied upon by the court in its decision.

Plaintiffs in their complaint ask the court to declare the Optimal Escapement Goal adopted by the Board for the Kasilof River invalid. In their motion, Plaintiffs argue that the Board's adoption of an OEG was made contrary to procedures set out in 5 AAC 39.223 because the Board did not conduct a formal Yield Analysis during its consideration of the new escapement goal. But the decision of the Board was reasonable based upon the information that was available. It would have been impracticable to conduct such a Yield Analysis given the circumstances surrounding the adoption of the OEG. The Board's decision was primarily motivated by a desire to meet the lower boundary of the escapement goal for the Kenai River even if this possibly resulted in a loss of yield in the nearby Kasilof Fishery. The Board received and considered evidence that the relationship between escapement and yield was not strong in the Kasilof River, at least within the ranges contemplated by the proposed OEG. It was unlikely, under these circumstances, that a more formal Yield Analysis for the Kasilof River would produce data helpful to the Board's decision. Accordingly, Defendants are entitled to summary judgment on this issue.

Plaintiffs also seek a court ruling invalidating certain restrictions imposed by the Board on the power of the Commissioner of the Department of Fish and Game to issue Emergency Orders in... primarily motivated by a desire to...

...even if this possibly resulted in... did considered evidence that the...

the Kasilof Fishery. In the alternative they ask the court to interpret the disputed provisions as not affecting the power of the Commissioner to issue Emergency Orders inconsistent with the Board's restrictions. The court elects the latter remedy, finding that the regulation can be subjected to a saving construction.¹

AS 16.05.060 authorizes the Commissioner to issue Emergency Orders opening and closing seasons and areas to fishing. The Alaska Supreme Court delineated the outer bounds of this power in *Peninsula Marketing Ass'n v. Rosier* when it upheld the decision of the district court that an Executive Order cannot be used to implement a management plan which has been considered and rejected by the Board absent new information which had not been available to the Board at the time of its decision.²

Here, the issue is whether the Board's regulation should be read as further limiting the power of the Commissioner to issue Emergency Orders inconsistent with the Board's choosing. The court holds that it should not. Although the Board of Fisheries is granted wide ranging power to regulate the fishery under AS 16.05.251, the Board cannot place limits on the Legislature's delegation of authority to the Commissioner.

The court does not know and the parties did not address the level of information available to the Board when it promulgated that part of its regulation imposing temporal limits on Emergency Orders issued by the Commissioner. It would be inappropriate for this court to speculate what kind of information would justify the Commissioner entering an EO affecting these limits. But the court can say that to the extent that 5 AAC 21.360 can be read to prohibit the commissioner from entering an Emergency Order affecting the time limits set out in the regulation no matter the

¹ Defendants suggest that a judgment interpreting the language of the challenged regulation would constitute an advisory opinion. The court disagrees. Plaintiffs are "interested persons" under AS 44.62.300 and may seek declaratory judgment on this issue.

AS 16.05.251, the Board can

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COMMENT# 3

not address the level of information

...ed to Plaintiffs' Motion ...

circumstances, it is invalid.

Summary judgment is therefore granted in favor of Defendants regarding the issue of the necessity of a Yield Analysis during the Board's contemplation of an Optimal Escapement Goal, and in favor of Plaintiffs regarding the effect of the Board's regulations on the Commissioner's Emergency Order authority.

DATED at Kenai, Alaska, this 28th day of MAY 2003.



HAROLD M. BROWN
Superior Court Judge

... in favor of Defendants regarding ...
... and a contemplation of an Optimal ...
... the effect of the Board's regulations on the ...

CERTIFICATION OF DISTRIBUTION
I certify that a copy of the foregoing was mailed/faxed to the following at their address of record: Bauer
Maltby
Date: 5/29/03 Clerk: ZLZ

MAY 29 2003



HAROLD M. BROWN
Superior Court Judge

² 890 P.2d 567, 574 (Alaska 1995).

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COMMENT# 3

Summary Judgment dated May 18,

July 7, 2004, 3KN-04-531 CI

Kenai Superior Court

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT IN KENAI

COOK INLET FISHERMAN'S FUND,)
)
Plaintiff,)
)
vs.)
)
STATE OF ALASKA, Department)
Of Fish and Game, et al)
)
Defendants.)

Case No. 3KN-04-531 CI

KENAI SUPERIOR COURT

MEMORANDUM ORDER DENYING PRELIMINARY INJUNCTION

INTRODUCTION

On July 7, 2004, the Cook Inlet Fisherman's Fund (CIFF) filed a complaint¹ for Declaratory and Injunctive Relief seeking a ruling that 5AAC 21.358, 5 AAC 21.360 and 5 AAC 21.365 which contain or reference language placing restrictions on Alaska Department of Fish and Game (ADF&G) authority under AS 16.05.060 to open or close commercial fisheries by emergency order-represented a decision by the Board of Fisheries (BOF) that exceeded its authority and that "THE REGULATIONS ARE INVALID AND UNENFORCEABLE" (emphasis added). CIFF also sought an injunction from the court enjoining enforcement of "ANY provisions of 5 AAC 21.358, 5 AAC 21.360 and 5 AAC 21.365 (emphasis added). A temporary injunction was entered by the court enjoining that part of the regulations which would appear to restrict the power of the commissioner to issue emergency orders. But the court carefully

¹ The Defendants are the State of Alaska, Department of Fish and Game, Commissioner, Kevin Duffy and the Board of Fisheries. The Defendants are hereinafter referred to as the State.

COMMENT# 3

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Department of Fish and Game

limited the scope of the temporary restraining order by stating that "the Commissioner should adhere to the decisions of the Board unless the Commissioner is acting on new information that was not before the Board". The court could have declined to issue the TRO and instead ordered that the regulations in question could not be interpreted to limit the Commissioner's authority to issue emergency orders under AS 16.05.060(a). The result would have been the same.

The relief requested in 2004 by CIEF was similar to that requested in 2002 by the Kenai Peninsula Fisherman Association (KPFA) and the United Cook Inlet Drift Association (UCIDA). At that time the court ruled that "although the BOF is granted wide ranging power to regulate the fishery under AS 16.05.251, the Board cannot place limits on the legislature's delegation of authority to the Commissioner".² In other words, the language in the regulations purporting to limit the Commissioner's EO authority should be ignored as unenforceable.³

The other parts of the same regulations were valid and enforceable.

CIEF now seeks injunctive and declaratory relief from this court rendering all provisions of the regulations in question unenforceable, although the bulk of the regulations do not explicitly limit the Commissioner's EO authority.

On Friday, July 23, a hearing on Plaintiff's Motion for

² See Order regarding Motions for Summary Judgment dated May 28, 2003, p 3 2nd full paragraph, 3KN-02-524 CI.

³ See Order Denying Reconsideration, July 7, 2003, 3KN-02-524 CI. Memorandum Order Denying Preliminary Injunction CIEF v SOA, ADF&G, 3KN-04-531 CI

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should be ignored as unenforceable

... had the right

... Injunction

a Preliminary Injunction was held. Two witnesses testified. One was Jeff Fox, the Upper Cook Inlet Area Management biologist and an employee of the Alaska Department of Fish and Game. The other was Doug Mecum, Director of Commercial Fisheries for the Department of Fish and Game. Under the rules of this court, CIFF, to be entitled to a Preliminary Injunction had the burden of demonstrating that it was faced with irreparable harm; that the opposing party was adequately protected and that CIFF had raised serious and substantial questions going to the merits of the case. If the opposing party (in this case that would include all other users of the resource) would likely suffer serious harm - that the potential damage was not "inconsiderable" - than CIFF would be required to make a clear showing of probable success on the merits. CIFF argued that it was entitled to the Preliminary Injunction. The State disagreed.

DISCUSSION

The Court found in 3KN-02-524 CI, that by employing a "savings construction," the regulations at issue should be interpreted so as to not affect the power of the Commissioner to issue Emergency Orders. Nothing presented in the pleadings or at the hearing in this case calls for re-examination of that earlier decision. CIFF argues, however, that the ADF&G, as demonstrated by its recent management of the fishery, has abdicated its authority to open and close fisheries by Emergency Order. To demonstrate this, CIFF points to recent emergency petitions to the BOF filed by the Alaska Department of Fish and Game seeking

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changes in the language of the regulations at issue. But Director Mecum testified that while there were concerns in early July, when an emergency petition was filed with the BOF, that sockeye escapement on the Kasilof could exceed Optimum Escapement Goals (OEG), he did not believe that it would be appropriate to issue an EO at that time. By July 5, 2004, when the BOF teleconferenced on the emergency petition filed by the Department even those concerns had diminished because of the drop in sockeye escapement between the time of the filing of the Emergency Petition and the teleconference. Even though there are fish that could be commercially harvested without endangering the resource that go unharvested, an "Emergency" permitting the Commissioner to exercise his inherent authority to open and close seasons may not exist. Thus, the July 5, 2004, BOG decision may, at least in part, represent an allocation decision that is clearly within the power of the BOF to make.

Director Mecum also testified that he believed at the time that a later Emergency Petition was filed with the BOF that new data indicated that an emergency existed or would shortly exist. Nevertheless, ADF&G because it had time to do so, petitioned the BOF ON July 16, 2004, to approve changes in the regulations at issue that the Department felt were necessary. During a July 19, 2004, teleconference the BOF adopted those changes. CIFF points to this conduct as illustrative of the Commissioner's failure to "summarily" exercise its EO authority when the Commissioner clearly had the right to do so.

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Consequently, the argument goes, because the language of the regulations limiting EO authority appears to negatively impact in practice the exercise of the Commissioner's statutory EO authority, the regulations in their entirety must be invalidated.

But including the BOF in the decision making process, especially under circumstances where there is time to do so, is not evidence that the Commissioner has abdicated his responsibility to exercise EO authority when he feels it appropriate. The Department points out that this is an entirely appropriate management decision under the circumstances. Whether the Commissioner decides to involve the BOF in the decision making process when he is on the cusp of a situation calling potentially for the exercise of his EO authority is a "process" decision entirely within the Commissioner's discretion.

CIFF, given the prior ruling of this court and especially under the circumstances that currently exist, has not shown that it has been or will be irreparably damaged.⁴ More importantly, it is not at all clear that there are serious and

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authority when
that this is
for the circumstances
we the BOF in the deci
of a situation calling

⁴ An amended complaint was filed on July 22, 2004. CIFF in the amended complaint seeks the same relief but also challenges the validity of the regulations at issue as modified by the BOF on July 19, 2004. The court has reviewed the amended complaint nothing in the amended complaint changes the result here today.

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substantial issues going to the merits of the case. Consequently, CIFF's Motion for Preliminary Injunction is DENIED.

Dated at Kenai, Alaska this 27th day of July, 2004.



HAROLD M. BROWN
Superior Court Judge

KENAI SUPERIOR COURT

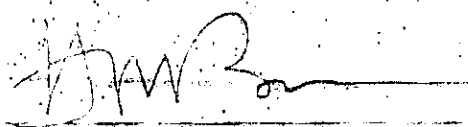
CERTIFICATE OF DISTRIBUTION

faxed

I certify that a copy of the foregoing was mailed to the following at their addresses of record: Robinson, AGO-Goltz

Date: 7/27/04 Clerk: LPL

Injunction is DENIED.



HAROLD M. BROWN
Superior Court Judge

CENTRAL DISTRICT COMMERCIAL FISHERIES MANAGEMENT PLAN

The late-run Kenai River Sockeye Salmon Management Plan, the Northern District Salmon Management Plan, and the Coho Salmon Conservation Plan provide complex set of directions to Department staff that address both conservation and allocative concerns. There are provisions in these management plans which modified and incorporated in a new plan.

Based on the experience of implementing these plans, there are some areas that need to be modified.

These areas include:

- Manage for large runs (greater than 4 million)
- Adjustments for mid range run to
 - afford additional commercial fishing power
- windows have priority over the inriver goal
- No change in the SEG (500,000 to 800,000)
- Change in the current inriver goals to reflect sport harvest
 - 650,000 at the lower end.
- Continue existing commercial priority for sockeye and chum salmon and sport priority for king and coho salmon
- Continue to manage in a manner that allows passage of fish to the Northern District

Commercial Fishing Season

- 1) Continue the abundance based management plan in the set gill net fishery until August 10th or until the harvest from 1 fishing period is equal to or less than one percent (1%) the cumulative total sockeye harvest to date.
- 2) Extend the drift gill net fishery for sockeye until August 10th.
- 3) In the Kasilof River provide for a season opener, when the sonar estimated passage is greater than 50,000 fish, south of the mouth of the Kasilof River. (No opening date required, opening by abundance only).
- 4) In the Kasilof River provide for a season opener, when the sonar estimated passage is greater than 75,000 fish, in the area north of the mouth of the Kasilof River and south of the Blanchard line.

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Set Gill Net Fishery

Management for Runs Below 2 Million

No Change in Current Plan

Management for runs between 2 to 4 million

- 1) When run strength is between 2 and 4 million allowable fishing time is 72 hours out of the possible 168 hours.
 - a. Two (2) regular 12 hour periods
 - b. Increase EO authority from 36 hours to 51 hours

- 2) Change the 48-hour window to 1 36-hour window and 1 24-hour window.
 - a. The 36 hour window be prescriptive the 24 hour window will be established by management.
 - b. The prescriptive window would start no earlier than Thursday at 7:00 pm and no later than Friday at 7:00 am (12-hour variation for flexibility).

Management for runs greater than 4.0 million

- 1) When run strength is in excess of 4 million allowable commercial fishing time is 96 hours out of the possible 168.
 - a. Two (2) regular 12- hour periods
 - b. Increase EO authority from 60 hours to 84 hours

- 2) Provide for a single 36-hour prescriptive window
 - a. The prescriptive window would start no earlier than Thursday at 7:00 pm no later than Friday at 7:00 am (12-hour variation for flexibility).
 - b. The prescriptive window would start no earlier than Thursday at 7:00 pm and no later than Friday at 7:00 am (12-hour variation for flexibility).

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... periods

COMMENT 3

Drift Gill Net Fishery

The drift gillnet fishery may be managed independent of the Upper Sub-district set gillnet fishery to enhance product quality or for other management and conservation purposes; (this language from existing plan) (Priority of opening deleted).

In the Central District commercial drift gillnet fishery, weekly fishing periods described in 5 AAC 21.320(b) shall be as follows:

(1) [Open the fishery third Monday of June or June 19th which ever is later]. **BOARD DECISION**

(2) For two regular fishing period designated from July 9 through July 15, the department shall restrict fishing to the Kenai and Kasilof Sections of the Upper Sub-district and/or to that portion of the Central District south of Kalgin Island (Area 1, see attached map); {this provision moved from ND plan section (e) (1)}.

(3) From July 16 through August 10th the drift gillnet fishery shall be managed based upon abundance. Based on pre-season forecasts and in season evaluations of the total Kenai River late-run sockeye salmon return during the fishing season, the run will be managed as follows

(A) at run strengths of less than 2,000,000 sockeye salmon the department shall restrict fishing for two regular periods to the Kenai and Kasilof Sections of the Upper Sub-district and/or to that portion of the Central District south of Kalgin Island (Area 1, see attached map);

1) The remaining regular periods shall be area wide [except in statistical area 245-70] **BOARD DECISION.**

2) The Department may allow extra periods on Kenai River late run sockeye salmon only in the Kenai and Kasilof sections of the upper sub district.

(B). At run strengths of 2,000,000 - 4,000,000 sockeye salmon, the department shall restrict fishing for two regular periods to the Kenai and Kasilof Sections of the Upper Sub-district and/or to that portion of the Central District south of Kalgin Island and/or the expanded corridor (Areas 1 and 2, See attached map);

1) The remaining regular periods shall be area wide [except in statistical area 245-70] **BOARD DECISION.**

at run strengths of less than 2,000,000 sockeye salmon the department shall restrict fishing for two regular periods to the Kenai and Kasilof Sections of the Upper Sub-district and/or to that portion of the Central District south of Kalgin Island (Area 1, see attached map);

1) The remaining regular periods shall be area wide [except in statistical area 245-70] **BOARD DECISION.**

2) The Department may allow extra periods on Kenai River late run sockeye salmon only in the Kenai and Kasilof sections of the upper sub district

(C). At run strengths greater than 4,000,000 sockeye salmon, there shall be no restrictions on regular periods [except in statistical area 245-70] **BOARD DECISION.**

1) The Department may allow extra periods on Kenai River late run sockeye salmon only in the Kenai and Kasilof sections of the upper sub district.

2) The Department may also allow 24-hours of additional fishing time by EO in the expanded corridor (Area 1 and 2, see attached map).

3) At this level of abundance the OEG on the Yentna River shall 75,000 to 180,000 (Previously 90,000 to 160,000).

NOTES:

- 1) DELETE SECTIONS F AND G IN THE NORTHERN DISTRICT SALMON MANAGEMENT PLAN (5 AAC 21.358).
- 2) DELETE SECTION (e) (1) and (e) (2). ~~THEY HAVE BEEN ADDED TO THIS PLAN.~~ [except in statistical area 245-70]
- 3) DELETE SECTIONS (c) (1) (A), (c) (2) (A), and (c) (3) (A) OF THE KENAI RIVER LATE RUN SOCKEYE SALMON MANAGEMENT PLAN (5AAC 21.360).
- 4) DELETE SECTIONS (a) (1), (a) 2, AND (a) (3) AND SECTION (b) OF KENAI RIVER COHO SALMON CONSERVATION MANAGEMENT PLAN (5AAC 21.357). (Area 1 and 2, see map)
 - i. DELETE THE WORD "CONSERVATION" FROM THE AMENDED COHO PLAN (5AAC 21.357). Yentna River
- 5) REAUTHORIZE THE PINK SALMON PLAN (5AAC 21.356) AND
 - a. REMOVE THE MESH SIZE RESTRICTION OF 4 ¾.
 - b. KEEP THE AREA THE SAME AS IN REGULATION
 - c. IN EVEN YEARS ADD THREE REGULAR PERIODS AFTER THE 10TH OF AUGUST AAC 21.358).

Central District Commercial Fisheries Management Plan Drift Net

July 9-15 (2 periods)	EO	July 16-31 (5 periods)	EO	Abundance	Area
2 corridor &/or 2 south of Kalgin (Area 1)	As is (EO in corridor)	2 south &/or corridor 3 area-wide (245-70)	As is (EO in corridor)	< 2 million	Area 1 & corridor
5 area-wide	12 hr EO 10 in south	2 south (expanded Areas 1 & 2) 3 area wide (245-70)	As is (EO in corridor)	2 - 4 million	Areas 1 & 2 plus corridor
5 area-wide	24 hrs Area 2 Expanded Corridor	> 5 area-wide	Areas 1 & 2 plus Expanded Corridor	> 4 million	Areas 1 & 2 plus corridor
Season Start Date (Board Decision)		245-70 Yentna (Board Decision)	OEG 75,000	Yentna	OEG 75,000 Delete section

21 & 23

Delete section (F) & (g) from Northern District Salmon Management Plan (5 AAC 21.358)

Delete sections (c) (1) (A), (c) (2) (A), and (c) (3) (A) of the Kenai River late run sockeye salmon management plan (5 AAC 21.360)

Delete section (a) (1), (a) (2), and (a) (3) and section (b) of the Kenai River coho salmon conservation management Plan (5 AAC 21.357).

Delete the word "conservation" from the amended coho plan (5 AAC 21.357).

W

AG 21.357

Delete section

Delete section

Delete section

Delete section

Delete section

Delete section

Central District Commercial Fisheries Management Plan Set Net

Abundance	Reg	EO	Windows	Comments
< 2 million	2 x 12 hrs	24 hrs	No prescribed windows	No changes – current plan
2 - 4 million	2 x 12 hrs	51 hrs	1 x 36 hr window (prescriptive) 1 x 24 hr floating	Adds EO length Reduces length of window from 48 hr Adds fishing time
> 4 million	2 x 12 hrs	84 hrs	1 x 36 hr window (prescriptive)	Adds EO length Adds fishing time
Mountain Season - Plan to August 15 or				
				Extends abundance-based plan to August 10 or 1% (whichever comes first)

22 8 21
District Delete section (F) & (g) from Northern District Salmon Management Plan (5 AAC 21.358)

(c) (Delete sections (c) (1) (A), (c) (2) (A), and (c) (3) (A) of the Kenai River late run sockeye salmon management plan (5 AAC 21.360)

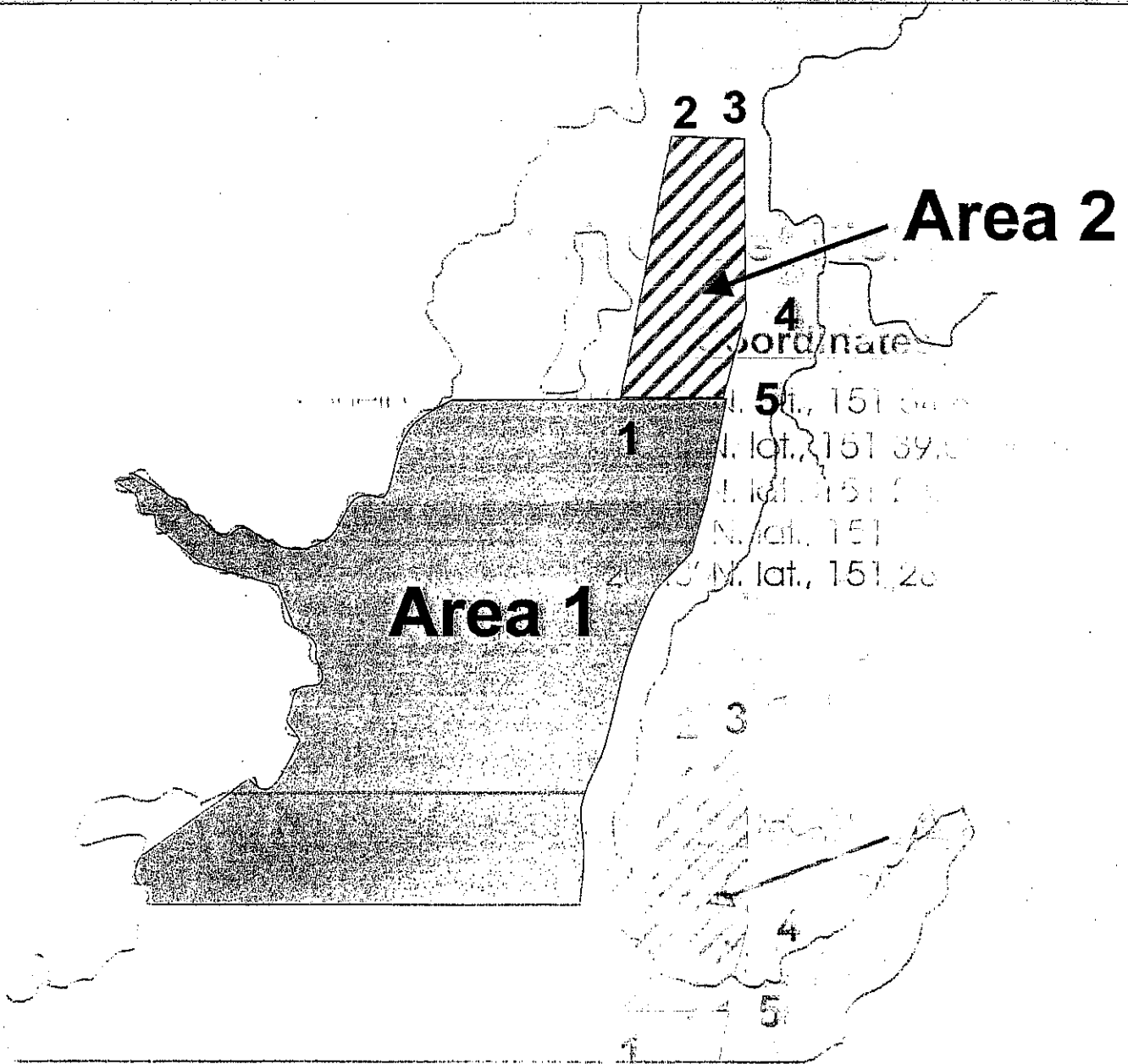
Delete section (a) (1), (a) (2), and (a) (3) and section (b) of the Kenai River coho salmon conservation management Plan (5 AAC 21.357).

COMMENT: Delete the word "conservation" from the amended coho plan (5 AAC 21.357).

W

July 16 - August 10 Drift Gillnet Fishing Areas

<u>Location</u>	<u>Coordinates</u>
1. S. Kalgin Island & Shell C	60 20.43' N. lat., 151 54.83' W. Long.
2. Collier's Dock line	60 41.08 N. lat., 151 39.00' W. Long.
3. Collier's Dock Line	60 41.08 N. lat., 151 24.00' W. long.
4. Line S. Of Kalgin Island	60 27.10' N. lat., 151 25.50' W. long.
5. S. Kalgin Island & Corridor	60 20.43' N. lat., 151 28.55' W. long.



Maria and Colin Towse
 dba Dinglishna Lodge
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 907-733-3010
metowse@mtaonline.net
 November 25, 2007

Alaska Dept. of Fish & Game
 Board Support Section
 P.O. Box 115526
 Juneau, AK 99811-5526

Subj: BOF Comments: Alexander Creek, Alaska

Hi Folks

My name is Colin Towse and along with my wife, Maria, own the Dinglishna Lodge at Mile 2 Alexander Creek. This property was previously owned by Leon and Arlette Osowski. The reason that I am writing is to gain insight into the rumor that king salmon fishing may be halted on Alexander Creek in 2008. I understand that a board will convene in February 2008 followed by a decision in March 2008. I further understand that this decision will affect 2008 king salmon fishing rules on Alexander Creek.

It is very difficult, as a small business, to operate on this limited information. My Clients (Europeans, numbering about 15) make their plans and purchase their airline tickets at this time of year (Oct., Nov., Dec.). To be honest with them, I share the limited information that I have. They would like more assurance before they book. I cannot tell them to wait until March before they make their plans or they will be lost as clients. These clients are my bread and butter. If I had a reasonable amount of time to respond to a closure I could make alternative plans. I realize the importance of maintaining the fishery (I am a lifelong Alaska resident of 64 years) and am very willing to do all that I can to enhance it, but I do not comprehend the destroying of my business in such an arbitrary way. If the State could extend the common courtesy of more advanced notice, it would allow small businesses, such as mine, to adapt to changes without going bankrupt. Setting the changes for the following year from the Board decision would be of great help. If emergency regulations are required they can be installed on short notice. The spring and summer of 2007 were extremely unusual. Alexander Creek water levels were lower than anyone has seen before. I am referring to recollections that go back 30 to 45 years. There have been many here that have questioned the validity of the helicopter count of kings. There were a significant number of late kings that occurred after that count. As I said, it was a most unusual season, hardly one to base such an important decision on. I realize that some of my neighbors advocate closing this fishery. This is their backward and human nature, being what it

1 of 3

COMMENT# 4

RECEIVED TIME JAN. 2. 8:09AM

PRINT TIME JAN. 2. 8:13AM

is: they want the fishery to themselves regardless of fish counts. This is a minority albeit a vocal minority. I find most of my neighbors would rather take a broader look as I am advocating here. In conclusion, I would urge you folks to understand the economic impact of closing this fishery in 2008 using the limited information of a very unusual year. If we experience a problem with this fishery, let us address it in an informed manner and implement the necessary changes on a time scale that allows small business to adapt.
Thanks for your time. Hope this finds you all well and happy

Best Regards,

Maria @ Colin Towse

2 of 3

COMMENT# 4

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PRINT TIME JAN. 2. 8:13AM

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NO: 6359880 P: 1

FAX COVER SHEET

TO	BOF COMMENTS
COMPANY	BOF OF BOARD Game
FAX NUMBER	1867485509
FROM	Colin Towse
DATE	2007-11-26 11:01 AM
NO	18664895080

COVER MESSAGE

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 NOV 26 11 01 AM
 FAX BOARD

Colin
 This is all I received of your
 comments for the upcoming meeting.
 could you please re fax your
 comment. Thank you
 Shanna Boards

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www.ctax.com

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- 100%

3 of 3

4

Maria and Colin Towse
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mctowse@mtaonline.net
November 25, 2007

RECEIVED
NOV 30 2007
BOARDS

Alaska Dept. of Fish @ Game
Board Support Section
P.O. Box 115526
Juneau, AK 99811-5526

Subj: BOF Comments: Alexander Creek, Alaska

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These clients are my bread and butter. If I had a reasonable amount of time to respond to a closure I could make alternative plans.

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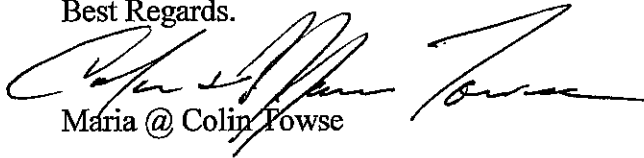
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COMMENT#

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Best Regards.



Maria @ Colin Fowse

COMMENT# 5