

**ALASKA STATE LEGISLATURE  
SENATE RESOURCES STANDING COMMITTEE**

March 24, 2003

3:36 p.m.

**MEMBERS PRESENT**

Senator Scott Ogan, Chair  
Senator Thomas Wagoner, Vice Chair  
Senator Fred Dyson  
Senator Ralph Seekins  
Senator Kim Elton  
Senator Georgianna Lincoln

**MEMBERS ABSENT**

Senator Ben Stevens

**COMMITTEE CALENDAR**

CS FOR HOUSE BILL NO. 139(RES)

"An Act approving an interim classification by the commissioner of natural resources closing certain land within the Glacier Creek and Winner Creek drainages to new mineral entry; and providing for an effective date."

MOVED CSHB 139(RES) OUT OF COMMITTEE

SENATE BILL NO. 70

"An Act relating to the emergency order authority of the commissioner of fish and game and to meetings of the Board of Fisheries."

HEARD AND HELD

**PREVIOUS ACTION**

HB 139 - No previous action to record.

SB 70 - No previous action to record.

**WITNESS REGISTER**

Representative Mike Hawker  
Alaska State Capitol  
Juneau, AK 99801-1182

**POSITION STATEMENT:** Sponsor of HB 139

Mr. George Cannelos

Heritage Land Bank  
Municipality of Anchorage  
4501 South Bragaw  
Anchorage, Alaska 99508

**POSITION STATEMENT:** Supports CSHB 139(RES)

Mr. Bob Loeffler  
Division of Mining, Land and Water  
Department of Natural Resources  
400 Willoughby Ave.  
Juneau, AK 99801-1724

**POSITION STATEMENT:** Supports CSHB 139(RES)

Mr. Robert Hall  
Houston Chamber of Commerce  
Houston, AK 99694-0027

**POSITION STATEMENT:** Opposed to SB 70

Mr. Paul Shadura II  
Kenai Peninsula Fishermen's Association  
Soldotna, AK 99669

**POSITION STATEMENT:** Supports SB 70

Mr. Lance Nelson  
Assistant Attorney General  
Department of Law  
1031 W 4th St., Suite 200  
Anchorage, AK 99501-1994

**POSITION STATEMENT:** Answered questions about SB 70

Mr. Bruce Knowles  
No address provided

**POSITION STATEMENT:** Expressed concern about SB 70

Mr. Chris Garcia  
Cook Inlet Fishermen's Fund  
PO Box 203  
Kenai, AK 99603

**POSITION STATEMENT:** Supports SB 70

Mr. Roland Maw  
United Cook Inlet Drift Association  
PO Box 530  
Kasilof, AK 99610

**POSITION STATEMENT:** Supports SB 70

Mr. Jessie Vanderzanden

Alaska Outdoor Council  
Fairbanks, AK

**POSITION STATEMENT:** Opposed to SB 70

Mr. Doug Mecum  
Division of Commercial Fisheries  
Department of Fish & Game  
PO Box 25526  
Juneau, AK 99802-5226

**POSITION STATEMENT:** Supports SB 70

**ACTION NARRATIVE**

**TAPE 03-15, SIDE A**

Number 0001

**CHAIR SCOTT OGAN** called the Senate Resources Standing Committee meeting to order at 3:36 p.m. Senators Wagoner, Dyson, Seekins, Elton and Chair Ogan were present. The committee took up HB 139.

#HB 139

**CSHB 139(RES)-CLOSING CERTAIN LAND TO MINERAL ENTRY**

REPRESENTATIVE MIKE HAWKER, sponsor of HB 139, gave the following explanation of the measure.

This is a rare opportunity for me to come before you and ask you to extend for 10 years a moratorium against mining claims. It's kind of an unusual circumstance. HB 139 affects a certain area in the upper Girdwood Valley - an area that is immediately adjacent to the current Alyeska Ski Resort development area. This land, 5,740 acres, that exists adjacent to the current ski resort, was closed to - or a mining closure was issued on this 10 years ago. That order has expired. This bill - and actually then, through the process, the Administration reauthorized the order. We, as the legislative body, need to affirm that authorization for it to remain in effect and we have until April 20 for that closure to remain in effect.

This is a 10-year extension of the moratorium on new mining claims in this area, specifically to allow the owners of the property, which is a combination of the State of Alaska, the Municipality of Anchorage (MOA), Heritage Land Bank, to issue a request for proposal

and seek for additional major world class alpine ski resort development. The area that is subject to this closure had been mined in the late 1800s. It pretty much ceased being mined in the mid-20th Century. There were additional claims staked on it in the 1980s by the Toohey (ph) family, who operates commercial and recreational mining areas on the other side of the valley - also I was going to say on the far side of this particular parcel.

When the mining area was first closed 10 years ago, there were no takings - I have to emphasize - there were no takings involved. The claims that folks had were purchased out, fee simple purchases, and the entire community concurred that the best and highest development for this property would not be for the commercial mining but would be for recreation resort development.

Your bill package includes the spectrum of endorsements we've got to extend this closure - probably the most important to us is the Alaska Miners' Association has specifically endorsed the continuation of this closure, then all of the community interests - the Girdwood Board of Supervisors, Heritage Land Bank, Municipality of Anchorage, the Department of Natural Resources (DNR), as well as personal conversations I've had with the Toohey family of not only non-objection, but endorsement of this project. It's important to note the [Department of] Natural Resources document here indicates that the prospect of commercial development in this area is minimal. There's very little [indisc.]. From the standpoint of mining, it's really at best a recreational mining area. The use for recreational mining is not incompatible with ski resort development. It's my understanding that that use would not be closed by this order. This order again would apply only to commercial development that would impede the ability to use this land or to further lease this land for ski resort development. I would be very happy to entertain your questions but, again, would certainly hope you'd be able to continue to help us move this bill along and get it to the Governor before April 20th.

CHAIR OGAN announced that Senator Lincoln joined the committee shortly after the meeting convened. He then asked if voting in favor of this bill would ruin his zero rating with environmental groups.

REPRESENTATIVE HAWKER expressed concern that might occur. He then said this is a unique opportunity in which very diverse interests have agreed that the highest, best, economic development of this area is for recreational activities.

CHAIR OGAN asked who is anticipated to develop this area.

REPRESENTATIVE HAWKER said he learned, in his conversations with the current management at Alyeska, that Alyeska is interested but doubts it would be the prevailing party. This bill will actually bring competition to that area.

CHAIR OGAN asked if a 10-year moratorium will create a situation in which no development will occur for 9 years and whether it would be more advantageous to implement a 5-year moratorium to encourage development sooner.

REPRESENTATIVE HAWKER said if commercial development does not begin within 10 years, the area would automatically reopen to mining. There has been some debate on the time frame and window but, considering the magnitude of the projects under consideration and current world economics, he believes a 10-year window is appropriate.

**3:45 p.m.**

SENATOR LINCOLN read from the Alaska Miners' Association letter:

...Our concern is that lands not be permanently closed to mineral entry in the case that the ski area is not developed.

She then said, according to the memorandum dated March 6 from Kathryn Kurtz, legislative counsel, Section 4 of the bill has an effective date of 2012 and provides that the repeal in Section 4 will take effect unless the commissioner of natural resources certifies on or before April 2 that development of a resort has begun in the closed area. She asked whether a minor structure would fit that description.

REPRESENTATIVE HAWKER said the reference she made to the letter from the Alaska Miners' Association referenced the first draft

of this bill. It required that an affirmative action be taken by the administration of the State of Alaska for the area to be reopened to mining. The Alaska Miners' Association preferred that the reopening happen automatically, rather than requiring an affirmative action. The bill that passed the House is a committee substitute (CS) in which the Alaska Miners' Association concern was accommodated.

SENATOR LINCOLN asked Representative Hawker to cite that section in CSHB 139(RES).

REPRESENTATIVE HAWKER said that can be found on page 3, lines 3 through 7. He explained that section provides important parameters in that someone will not be able to slap together a structure at the last minute and ask to keep the area closed to mining. The development must be in concert with the comprehensive land use plans developed for this area by the state and MOA.

SENATOR LINCOLN said she does not interpret that section to apply to development of the full resort or to a specific stage of development. It only adds that the development plan is in a land use plan. She asked if the Alaska Miners' Association has endorsed CSHB 139(RES).

REPRESENTATIVE HAWKER said it has. He repeated the 10-year window is for the beginning of the construction of a viable resort as described. It is not for completion of that facility.

SENATOR ELTON asked if anyone is planning to develop the ski resort at this time.

REPRESENTATIVE HAWKER said no one is "waiting in the wings" at this time. He said this is not special interest legislation and, in fact, the current issue of the Turnagain Times features this resort in the Girdwood 2020 organization. The article says the next step, following the passage of CSHB 139(RES), is a two-year plan to update a 10-year old feasibility study and issue a formal request for proposals to develop the area.

SENATOR ELTON asked if the only reason CSHB 139(RES) is necessary is to preclude staking that might be done on speculation.

REPRESENTATIVE HAWKER said that is correct; CSHB 139(RES) is preemptive.

SENATOR LINCOLN asked if the subsurface rights on the 5,740 acres will remain with the state.

REPRESENTATIVE HAWKER deferred to George Canelos for an answer to that question.

CHAIR OGAN said the state will still own the subsurface rights and could not lease those rights to anyone during that time.

MR. GEORGE CANNELOS, Heritage Land Bank, MOA, said he believes the state would maintain ownership of the subsurface rights but deferred to DNR for more detailed information.

MR. BOB LOEFFLER, Division of Mining, Land and Water, DNR, affirmed that the state would maintain ownership to the subsurface rights. He noted that of the 5,740 acres, 1,000 acres are owned by the MOA and 4,700-plus acres are owned by the state.

CHAIR OGAN asked if the MOA land is fee simple.

MR. LOEFFLER said it is fee simple only with respect to the surface rights. The state retains the subsurface rights.

MR. CANNELOS stated support for CSHB 139(RES) as it provides an opportunity for the state, the MOA, and the private sector to partner together to test the feasibility of developing the Glacier Winner Creek area as the next major alpine ski resort area for Girdwood. The Heritage Land Bank wants to do two things this year. First, it would like to issue a request for a proposal to update the development concept and look at the economics of the project again. Some excellent studies were done about 10 years ago, but they need to be updated. Second, when that is concluded, it wants to go out to the private sector and solicit interest from a prime developer. Regarding the question asked about the participation of Alyeska, while Alyeska has said it probably will not be a direct partner, the \$200 million hotel was located halfway between Alyeska Mountain and the new Glacier Winner Creek resort. Regarding the 10-year period, he agrees with Representative Hawker that a project of this magnitude will be built in phases so 10 years is a reasonable time frame.

SENATOR STEVENS arrived.

MR. LOEFFLER stated support for CSHB 139(RES) and said DNR has reviewed this bill with a critical eye.

There being no further questions or testimony, SENATOR DYSON moved CSHB 139(RES) from committee with individual recommendations and its zero fiscal note.

CHAIR OGAN noted that without objection, the motion carried. He then announced the committee would take up SB 70.

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#SB 70

**SB 70-BD OF FISHERIES MEETINGS/EMERGENCY ORDERS**

SENATOR TOM WAGONER, sponsor of SB 70, told members the intent of this legislation is to help the fisheries by doing two things. First, it clarifies the emergency order authority of the commissioner of the Department of Fish and Game. Second, it strengthens the stability of the public process by legitimizing the use of the conservation purpose of the Board of Fisheries' agenda. He explained that emergency orders are not uncommon in this state; over 1,000 are issued each year for both fish and game. However, the current emergency order statute allows room for wide interpretation and abuse. Section 2 of this bill puts clarifies the commissioner's powers in statute based on Board of Fisheries' policy statements and the Alaska Supreme Court decision on the Peninsula Marketing Association versus Rosier.

SENATOR WAGONER referred to page 2 of the Peninsula Marketing Association (PMA) versus Rosier case and read:

The commissioner of the Department of Fish and Game presented a fisheries management proposal to the Board of Fisheries. The proposal was rejected. The commissioner then indicated that he intended to implement the proposal by utilizing his emergency powers, notwithstanding the Board's decision. The Superior Court enjoined the commissioner from using his emergency powers if based on information already presented to the Board but declined to enjoin him from using those powers if based on newly developed information or events occurring after the Board's rejection of this proposal.

He told members the Superior Court ruled that the commissioner is prohibited from taking any action on the fishery based upon information already presented. The Supreme Court stated its reason for hearing this case on page 9:

The issue of the commissioner's emergency power over matters previously considered by the Board will likely resurface and avoid review. By the time the court reviews the commissioner's use of emergency power, the emergency is likely to be over. Conservation and utilization of fish and game resources are important to the public interest in Alaska. For those reasons we decided to hear the merits of the case.

SENATOR WAGONER said after hearing the case, the Supreme Court concluded that the commissioner may not use emergency powers to implement a fisheries management program already considered and rejected by the Board in the absence of new information or events occurring after the Board's decision was made. He emphasized that after the Board makes a decision in the spring, many things can happen that would affect the same decision if made later on. He said SB 70 puts into statute what the commissioner needs to supersede a decision made by the Board of Fisheries.

SENATOR WAGONER told members Section 3 establishes the criteria for which the Board of Fisheries is authorized to amend and adopt an agenda. The Joint Board Petition Policy in the Alaska Administrative Code [5 AAC 96.625(d)] reads, "The public has come to rely on this regularly scheduled participatory process as the basis for changing fish and game regulations." Subsection 625(e) says that the boards find that petition can detrimentally circumvent this process.

SENATOR WAGONER said by having the criteria set in Section 3, the Board can change the date, time or order of the agenda and add new subjects to the agenda.

SENATOR WAGONER described an instance on the Kenai Peninsula a few years ago in which a late run of pink salmon came up the Kenai River. Whether an emergency order could have been issued at that time or not, one wasn't with the excuse the commissioner had no power to do so. Therefore, an extra 1.5 to 2 million salmon went up the river, which could have been detrimental to king and silver salmon spawning areas. He gave another scenario in which a run of 4 million fish was projected to return to Cook Inlet a few years ago but 10 million returned. Toward the end of that season, the Board restricted the fleet to fish specific days and forbid the department or anyone else from allowing additional fishing time. If the ability to open that area via an executive order is taken out of the commissioner's hands, the commissioner would have to take the matter to court and, by that

time, a huge over-escapement of red salmon would occur. SB 70 would remedy such a situation.

SENATOR LINCOLN said she understands the intent of SB 70, but asked if the commissioner has the power to adopt an emergency order following a decision that might be made by the federal subsistence board.

SENATOR WAGONER said he could not answer that question.

CHAIR OGAN noted that a representative of ADF&G would be available to answer questions. He then told Senator Wagoner that he has received a lot of input on SB 70. He asked him to comment on the fear he has heard that sport fishermen will get the short end of the deal if the Board of Fisheries and commissioner of the Department of Fish and Game are pro-commercial fishing.

SENATOR WAGONER said he does not believe the strong return of kings into the upper inlet area has much to do with fishing by the commercial fleet. The drift fleet does not fish that run of kings, and he believes the opening to fish king salmon in the northern inlet is only one or two days. He does not believe SB 70 will have much of an impact on whether the board creates windows to allow silvers to go up through Cook Inlet.

CHAIR OGAN said he was not only speaking of Cook Inlet but of intercept fisheries in general. He then said he reads SB 70 as an allocation bill because it gives the commissioner the ability to reallocate based on emergencies.

SENATOR ELTON said he does not see SB 70 as an allocation bill because the board would still make the allocation decisions. He believes, after the allocations have been made, if there is an overabundance of the resource, SB 70 will give the commissioner the ability, under the emergency order authority, to allow the harvest of the additional fish.

CHAIR OGAN said the commissioner can still allocate more so it may take care of the problem of too many pinks in the Kenai River that Senator Wagoner brought up. However, there is always the law of unintended consequences and there are other fish milling among the pinks.

SENATOR ELTON said his reaction to that is that without the emergency order authority, nobody would get anything so everyone would be disadvantaged.

SENATOR WAGONER maintained that SB 70 will address very extenuating circumstances and is not designed to take place every week of the year. He cautioned against basing management decisions on the courts because they operate too slowly.

SENATOR BEN STEVENS said the Board of Fisheries and the commissioner of ADF&G are to base their decisions on scientific information. That is what the new governor has claimed as his priority when he chose nominees to the Board of Fisheries and the commissioner. He read from Section 2 on page 3 of SB 70:

...in order to prevent the loss of a biologically allowable harvest of a fishery resource that would otherwise be precluded by delayed action...This authority may not be used for the purpose of summarily changing the allocation of fishery resources....

He said if the local regional manager comes to the commissioner because of a surplus of fish, the commissioner will have the emergency order authority to open the fishery based on the confidence that the regional manager has the scientific evidence. He noted the commissioner has emergency order authority to shut a fishery down but not to open one up.

CHAIR OGAN said that not all fish and game management is based on science. He gave the example of the last administration's "gag order" on scientific statements about predator control. He said the Board listens to the scientific recommendations of the biologists and then makes a political allocation decision.

**4:16 p.m.**

SENATOR SEEKINS asked Senator Wagoner if he feels the Peninsula Marketing Association's case is a good example of the need for more flexibility.

SENATOR WAGONER said he is not as familiar with that case but it is one case on which a court decision was made. The intent of SB 70 is to avoid court cases.

SENATOR SEEKINS said when he looks at the relationship between the Board of Fisheries and the commissioner, the commissioner serves at the pleasure of the governor. Board of Fisheries members are nominated by the governor but can only be removed for cause, which provides some insulation from political pressure. He said that creates a separation of power between the board and the commissioner because the commissioner represents

the governor and is more susceptible to political pressure. He said his reading of the Supreme Court case is that the commissioner has the right to issue an order based on an emergency situation, which would have applied to the scenario described by Senator Wagoner in which the projected run of pinks was 4 million while the actual run was 10 million. He asked if the commissioner has been precluded from doing so in the past by another court case.

SENATOR WAGONER said not by a court case but because the commissioner did not believe he had the authority to do so.

SENATOR SEEKINS said as he reads the law on the responsibilities between the commissioner and the board, the commissioner has that emergency power when it is based on sound biological evidence. He said he is aware of some political in-fighting between board members and commissioners, and of situations that could be interpreted as allocation issues. He asked where the problem lies.

SENATOR WAGONER said if the Board of Fisheries says a fishery will only be open certain days, the commissioner does not have authority to invoke an emergency order to extend that season.

CHAIR OGAN took public testimony.

MR. ROBERT HALL, representing the Houston Chamber of Commerce in the Mat-Su Valley, told members the Chamber clearly understands the frustration with the Board of Fisheries process expressed in this bill and agrees that improvements could be made. However, the Chamber is strongly opposed to SB 70 because it lacks clear definition and limits and is subject to tremendous abuse. The Chamber believes this bill could be used as an end-run around the Cook Inlet salmon management plan, although it does not believe that is the sponsor's intent. Both sides in a complicated mixed stock fisheries can always argue biology on their side and, in this changing environment, one can always argue new science. Therefore, every year, both sides will be able to meet the definition of the bill and run to the commissioner to ask for more fishing opportunities.

MR. HALL said residents of Houston are at the mercy of what happens on the Kenai Peninsula, regarding fishing. The Houston Chamber is very concerned that this will turn into another political football. The Houston Chamber believes it would be very beneficial for the committee to review the board process during the interim. Current board members are stretched to the

limit and have very little time to look at problems developing on the horizon. He asked that the committee hold this bill in committee and continue studying the board process in the interim.

**TAPE 03-15, SIDE B**

SENATOR LINCOLN asked Mr. Hall how large the Houston Chamber of Commerce is and whether it only represents Houston proper.

MR. HALL said he is representing the Houston Chamber of Commerce, which is made up of 72 members, most of which are pro forma and pay dues but don't attend meetings. He suggested that he probably represents the vast majority of sentiment in the Mat-Su.

CHAIR OGAN stated for the record that he is a member of the Houston Chamber of Commerce.

SENATOR ELTON asked if Houston or the Mat-Su has a fish and game advisory board and whether Mr. Hall has spoken with that board.

MR. HALL said he got a call from one of the members of the fish and game advisory board who was quite concerned about SB 70. He said he couldn't speak for that board member but suspects that the advisory board's concerns are along the same lines as the Chamber's concerns.

CHAIR OGAN confirmed that the Houston Chamber's sentiment runs strong in his district.

SENATOR LINCOLN asked how large of an area the fish advisory board encompasses.

CHAIR OGAN said he believes the fish and game advisory board covers all of the Matanuska, Susitna, and Knik River drainages in the Mat Valley and probably some of the drainages on the western side of Cook Inlet.

MR. PAUL SHADURA II, President of the Kenai Peninsula Fishermen's Association (KPFA), stated support for SB 70. KPFA believes SB 70 is necessary to clarify ADF&G's role in management based on biological necessity rather than political or ballot box reaction. The constitutional founders and legislature believed that resource management should be shared among all branches of the government. The ADF&G commissioner's duties are detailed in statute. SB 70 clarifies the practice of

in-season management, provides the tools vital to deal in real time, and allows for the dynamics of fisheries management to either conserve the resource for future sustainability or allow the harvest of surplus stocks for the maximum benefit of all resource users. The Board designs plans to act as guidelines for fisheries managers but is unable to foresee the future. The board is a reactionary body. ADF&G must have latitude to make expedient actions that the board process cannot accommodate. KPFA believes the commissioner is the best guardian of the state's resources and is not distracted by allocation implementation. Board agenda change requests are the exception to the rule. He thanked members and offered to answer questions.

SENATOR WAGONER asked Mr. Shadura why the commissioner said he did not have the authority to open the humpy fishery when there was a surplus three years ago.

MR. SHADURA said the commissioner felt unsure about vetoing a decision made by the Board of Fisheries because the statute says the commissioner of ADF&G does not have that authority. Over the years, the Board of Fisheries has been designing what emergency order management tools the commissioner can use, leaving the commissioner in an untenable position. Therefore, the only way to clarify that was to petition the Board of Fisheries for action. In this particular situation, he and others petitioned the Board of Fisheries after General Oates came for an emergency meeting when the area was declared a disaster area. General Oates asked Commissioner Rue why the pink salmon fishery was not opened and Commissioner Rue said he could open it but wouldn't. Unfortunately, by the time the petition was filed, the majority of humpies had already passed.

CHAIR OGAN said there has been mistrust on both sides of the allocation issue and asked Mr. Shadura to suggest language changes to alleviate the fears of fishermen on the Yukon-Kuskokwim, the Copper River, and the upper Cook Inlet.

MR. SHADURA said there is a lot of fear about what might happen with a pro-commercial Board of Fisheries. He said he personally does not see the Board of Fisheries that way. However, SB 70 will protect those people with that fear. SB 70 directs ADF&G to use its professionalism to manage on an abundance-based, in-season management system. It's the system that makes Alaska unique among the states.

CHAIR OGAN said he is aware of emergency openings and closures, but those were consistent with the Board of Fisheries'

management plan. He asked that someone brief him on how the process works and what is broken.

SENATOR SEEKINS asked Mr. Shadura if his comment about the commissioner's statement that he did not have the authority to exercise any emergency powers in the overabundance of pink salmon is from a first-hand conversation with the commissioner.

MR. SHADURA said that question came up during a disaster meeting, which he attended. General Oates directly asked the commissioner why there was no opening to alleviate the disaster and that was the commissioner's response.

SENATOR SEEKINS asked whether the commissioner attempted to intervene and was rebuffed.

MR. SHADURA repeated the commissioner's comment was that he could but wouldn't.

SENATOR SEEKINS questioned whether the commissioner did not want to.

MR. SHADURA said the commissioner's explanation was that he wasn't sure of his authority since the Board of Fisheries had regulated emergency order authority.

SENATOR SEEKINS asked if anyone knows whether Commissioner Rue wanted to intervene or wanted to hide behind the excuse that he didn't have the power.

MR. SHADURA said he only knows the commissioner said he did not believe he had clarification of his powers in that situation.

**4:40 p.m.**

SENATOR SEEKINS said it is hard for him to read into someone's statement that he or she does not have authority without attempting to exercise it.

CHAIR OGAN asked a representative from the Department of Law to address the question of the commissioner's current authority.

MR. LANCE NELSON, assistant attorney general, told members the commissioner would have to make a discretionary call as to whether the information presented was important enough to issue an emergency order in every case.

CHAIR OGAN asked Mr. Nelson if it is his opinion that the commissioner had the authority to issue an emergency order in the situation of the large return of pink salmon.

MR. NELSON said in that particular case, he vaguely recalls discussions with the commissioner. His understanding was the board had recently met and decided to keep the fishery closed for a certain period of time. The board discussed and considered the possibility of a large run in its decision. He said he believes that was one of the factors that convinced Commissioner Rue that new information was not available. He repeated the commissioner has to exercise that discretion on a case-by-case basis.

CHAIR OGAN asked whether the board considered the actual size of the run or whether the commissioner could have issued an executive order based on the fact that the board considered a smaller run.

MR. NELSON said he did not remember exactly what the board contemplated.

CHAIR OGAN asked if the commissioner enforces the policy set by the board so that, if the board had considered a bigger run, the commissioner could not set a different policy.

MR. NELSON said that is a basic restatement of the PMA decision.

CHAIR OGAN said the policy question is how much more authority a commissioner needs and whether the legislature should give the commissioner more discretionary authority.

SENATOR WAGONER reiterated that SB 70 has nothing to do with the board's authority. SB 70 has to do with unforeseen circumstances that the board did not have information about at the time it made its decisions. He reminded members that Mother Nature is not predictable. When unusual circumstances happen, such as an excess of fish, the commissioner will have a tool to address that circumstance. He told members this authority will apply to all fisheries, sport included.

CHAIR OGAN said he understands Senator Wagoner's argument and clarified that the policy call is whether to expand the commissioner's authority or whether the commissioner already has that discretion and did not exercise it.

SENATOR SEEKINS asked if his interpretation of the PMA decision, that the Supreme Court upheld the commissioner's ability to use emergency powers to implement a fisheries management program of any kind as long as the Board of Fisheries had not already considered and rejected it, is correct.

MR. NELSON said it is.

SENATOR SEEKINS said in order for the legislature to do anything to change what already exists, it would have to give the commissioner the ability to overturn a decision that had already been discussed, considered and rejected by the Board of Fisheries.

MR. NELSON said that is correct because the commissioner already has that power by virtue of the court decision.

SENATOR LINCOLN asked whether the bill will be held in committee so that she can get a response to her question about the federal subsistence board's decisions.

CHAIR OGAN said he would hold the bill in committee and that he would also like to hear from the fish and game advisory boards.

SENATOR ELTON said that AS 16 references the PMA decision under the section that delegates authority to the commissioner (AS 16.06.270). That section allows the boards to delegate authority to the commissioner to administer the statutes; however, that only applies when the Board of Fisheries has delegated its rulemaking authority to the commissioner of the department of fish and game. He asked Mr. Nelson to clarify his response to Senator Seekin's question since there is no presumption that the commissioner has the ability to make rules. That assumption must be confirmed by an affirmative act of the board because of the PMA decision.

MR. NELSON said there is a little confusion because one of the other issues in the PMA decision was the Superior Court's decision to use AS 16.05.270 as a method to resolve the difference between the Board of Fisheries and the commissioner. Section 270 was cited to refer the matter to the governor as opposed to finding in favor of the board or the commissioner. Both parties and the Supreme Court agreed that was an inappropriate use of Section 270 because that remedy of referring a conflict on to the governor only applied in a case where there had been an actual delegation of regulatory authority from the Board of Fisheries to the commissioner. The

PMA case was a conflict between the two under the rule making authority of the board and the emergency order authority of the commissioner, not under the delegation authority. Therefore, he does not believe the reference to .270 applies to the issue the committee is dealing with.

SENATOR ELTON asked Mr. Nelson if he is saying the commissioner has the ability to make rules without a delegation from the board.

MR. NELSON said under AS 16.05.060, the commissioner has authority when he deems the circumstances require opening or closing seasons and areas for fishing. If there is no regulation on point and the board has not acted but the commissioner deems it appropriate to open the fishery, he has the authority to do so.

CHAIR OGAN continued to take public testimony.

MR. BRUCE KNOWLES listed the advisory boards in the northern districts for members' information. He told members he served on the Mat Valley advisory board until this past November. He said his concerns with SB 70 surround the fact that the consumptive users and commercial fishermen in the northern district have had their harvest opportunity reduced. The only personal use fishery in the northern district has not been open for the last several years. Commercial fishermen had their harvest opportunity reduced and they even agreed to reduce the number of nets they used in August to provide more time in July to catch sockeyes. Sports fishermen have had their Coho harvest reduced to two fish. For the last two years, the escapement goals in the Yentna River have not been met. The Board developed windows and created area wide closures to allow northern district stocks to transit central districts without over targeting certain areas. The board opened an area on the east side to drift fishermen but established windows to keep nets out of the water to allow fish up through the Yentna. He sees SB 70 as a way to stop the windows and allow area wide openings, which he is quite concerned about.

MR. CHRIS GARCIA testified in support of SB 70. He told members he has followed the fisheries issues for at least 40 years. He attended the meeting at which General Oates spoke with Commissioner Rue. He stated, "When you got one puppeteer running the whole puppet show, all the puppets stand to sing." He said SB 70 is necessary because the former Board of Fisheries went so far as to write legislation. The former board took the emergency

order power away from the commissioner. He said through the 1970s and 1980s, openings and closures were done through emergency orders. He said the resources in Cook Inlet were doing very well. However, in the 1990s, when the board decided to do everything politically, the fisheries declined. He said fisheries management has to get back to being based on sound biological principles for sustained yield.

MR. JESSE VANDERZANDEN, testifying on behalf of the Alaska Outdoor Council (AOC), asked members to hold the bill in committee to give others a chance to testify. He said AOC's legislative committee and board reviewed SB 70. It is very similar to a bill introduced by former Representative Scalzi several years ago that AOC opposed. Similarly, AOC is very concerned about this legislation. AOC's first concern is its poor timing with a new governor, new appointments to the Board of Fisheries, and a new commissioner. These people have assumed their new roles based on long standing agreements and protocols. AOC questions whether there is a problem so egregious or unworkable at this time that the legislature needs to interject itself into this process. He commented that one of the hallmarks of our political system is stability during political transition.

MR. VANDERZANDEN said AOC's second concern is that SB 70 is an attempt to fix something that is not broken. He served on Governor Murkowski's fish and game transition team. That team was comprised primarily of commercial fisheries interests from across the state and the team was presented with a lot of information about a wide array of issues. No one from any interest or user group suggested taking power from the Board of Fisheries and vesting it with the commissioner. He said regarding sections 2 and 3 of SB 70 that give the commissioner more emergency order authority and the authority to deny agenda change requests, the commissioner already has emergency order authority to open and close seasons within board approved management plans. The system is not broken. Allowing the commissioner to unilaterally supersede these management plans could usurp the public process used by the Board of Fisheries to arrive at its decisions. Department staff, including the commissioner, is present at the Board of Fisheries meetings and often writes the master plan. If more flexibility or allowances are needed for situations of over abundance, the ability to go through a public process should be written into the management plan. He asked that the committee hold the bill long enough to hear from members of the Board of Fisheries. AOC believes the

current system has served the public well without micromanagement by the legislature.

CHAIR OGAN asked all participants with prepared testimony to send a copy to the committee.

MR. ROLAND MAW, representing the Upper Cook Inlet Drift Association (UCIDA), stated support for SB 70. He gave members the following examples of the reasons UCIDA supports this legislation. If the Board of Fisheries was anticipating a run of 500,000 fish, it goes through the public process and allocates between sport, commercial, subsistence and the personal use fisheries. The allocation is implemented through limits on each group as to days, times, and methods of catching fish. If an additional 2 million fish show up in that run, policy makers must decide how to deal with the additional fish. If nothing is done, the additional 2 million fish will enter the stream and can be caught by the end user, in fact creating a de facto allocation. He said that does not meet the legislative intent of the Constitution. The question then becomes how to put those additional fish into a harvest regime. In the Kenai last year, an additional 2 million Cohoes showed up. The board said that extra emergency orders would not be allowed in the commercial fisheries, based on the hypothetical run of 500,000. In the case of the overabundance of pink salmon in 2000, the institutions could not respond in a timely fashion.

MR. MAW said one of the intentions behind SB 70 is to provide flexible authority to the commissioner to address these kinds of situations without reallocating, but instead by fulfilling the board's original intent. He said in the PMA case, the commissioner tried to change an allocation out west, prior to the season. At the time, the commissioner had no new information to base his decision on. He urged members to support SB 70.

MR. JEFF BEAUDOIN, Kenai Peninsula Fishermen's Association (KPFA), addressed the portion of the bill that deals with new information. He said the Division of Commercial Fisheries projected a return of 1.7 million sockeye in the Kenai River. The actual return was 3.1 million. Managers used every hour available to them but could not issue one extra minute of fishing time. He noted that ADF&G accurately determined the run strength on July 20.

**TAPE 03-16, SIDE A**

MR. BEAUDOIN told members that a resurgence of pink salmon returns to the Kenai River system occurred in 1998, 2000, and 2002. Approximately 5 million fish returned to the Kenai River each of those years. The 2002 petition was denied. He said that examples of the problem are numerous. He said the board recognizes the commissioner's emergency order authority when a stock needs to be protected: the commercial fisheries are closed. Commercial fishermen understand the need to protect those stocks but the commercial fisheries are excluded when there is surplus stock and that is the issue that needs to be addressed. He understands the parameters set up in the allocation, but when all of the systems are being met in a mixed stock fishery and the management plans are filled with restraints, he is asking for the opportunity to harvest when stocks are abundant.

MR. DOUG MECUM, Director of the Division of Commercial Fisheries, ADF&G, told members he was available to answer questions.

SENATOR WAGONER asked Mr. Mecum to comment on Mr. Nelson's statement that without this legislation, the commissioner has the authority to issue an emergency order in the following hypothetical example. The board opens the Kenai gillnet and set net fisheries two days per week. During the third week of July, the peak of the red run, ADF&G estimates that instead of a run of 2.1 million, the run will be about 4.5 million. If the fisheries are not allowed additional time, those fishermen cannot harvest the extra fish.

MR. MECUM said that SB 70 simply codifies the current law as stated in the PMA case - that being the commissioner cannot supersede or veto a regulation or management plan adopted by the board without significant new information. He said he has been directly involved with over the years in instances in which the commissioner issued an emergency order that contravened a regulation adopted by the board. In those cases, it was clear that new information was available that had not been available to the board. The emergency orders did not overturn any allocations or other conservation or management objectives identified by the board. He said the decision to issue an executive order must be made on a case-by-case basis.

SENATOR WAGONER asked if he was restating what Mr. Nelson said, that the authority already exists.

MR. MECUM said that is correct. He noted ADF&G felt the bill introduced by former Representative Scalzi went too far into the realm of allocation. He stated:

We don't believe the commissioner should substitute his judgment for the Board of Fish on matters of allocation. There's a reason why there's a commissioner of fish and game and a board of fish and there's some separation of power there with respect to allocation.

He said the division worked with Representative Scalzi and the Department of Law to modify that language and address that concern, which is the language in SB 70. The division does not believe that the language in SB 70, as relates to the commissioner's emergency order authority, does anything other than codify the PMA case.

MR. NELSON said he wanted to flag two issues for members, one in Section 2, the other in Section 3. In Section 2, the simple term "new information" could be interpreted very broadly because there will always be at least a scintilla of new information when the commissioner is considering use of emergency order authority. He suggested adding a qualifier, such as "significant" or "material," to narrow the scope. His concern with Section 3 is that the language in response to a request to consider a matter that is not on the adopted agenda could be applied to board-generated agenda changes as opposed to just requests that come from the public. He noted that Section 1(c)(3) says the intent is to follow the customary practice in regard to board agenda requests, but the customary practice has been that the regulations have never been interpreted to bind the board itself but only in the way it responds to public requests.

CHAIR OGAN asked Mr. Nelson to explain the customary practice.

MR. NELSON said the standards in the agenda change request regulation have consistently been interpreted as applying only to requests that come from outside of the board. They do not restrict the board from changing its own agenda as it sees fit. If the intent of Section 1 is to maintain the customary practice, then it would only apply to outside requests. He suggested the committee consider an amendment or provide legislative history to clarify that Section 3 only applies to agenda change requests coming from outside of the board and that it would not interfere with the board's ability to move topics

from one meeting to another to allow more public input or to gather more relevant information.

CHAIR OGAN asked Mr. Nelson to provide his suggestions to the committee in writing. There being no further testimony, CHAIR OGAN said he would the hold the bill in committee to allow others to weigh in on it and adjourned the meeting.

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