

SCR

61

SENATE COMMITTEE REPORT

FIRST COMMITTEE OF REFERRAL

Date of 4-14 5-DAY NOTICE
IN ACCORDANCE WITH UNIFORM RULE 23

FURTHER:

**FISCAL NOTE(S) ATTACHED **
IN ACCORDANCE WITH AS 24.08.035
(see below)

4/14/88
Mr. President:

DATE TURNED INTO OFFICE _____

Resources _____

Committee considered SCR 61

allocation of salmon among gill net fishermen using different types of gear

and recommended:

[] replace with CS _____ [] same title
[] attached amendment(s) and [] new title

[] do pass

[] do not pass

[] no recommendation

[] individual recommendations

[] further referral to _____

[] letter of intent adopted and attached

** Committee [] attached or [] adopted fiscal note(s)
[] zero [] fiscal impact

MEMBERS SIGNING DO PASS

[Signature]

OTHER RECOMMENDATIONS

[Signature] NO Rec
[Signature] NO Rec

[Signature] DO PASS
Chairman signature and recommendation

[] Committee Backup Attached

STATE OF ALASKA



SENATE JUDICIARY COMMITTEE

SEN. JAY KERTTULA
SEN. ARLISS STURGULEWSKI
SEN. JAN FAIKS
SEN. JOE JOSEPHSON
SEN. PAT RODEY

P.O. BOX V
STATE CAPITOL
JUNEAU, ALASKA 99811
(907) 465-3717
(907) 465-3771

DATE: April 20, 1988
TO: Senator Jack Coghill
FROM: Senator Jay Kerttula
RE: SCR 61, Allocation Among Salmon Among
Gillnet Fishermen

Attached is a copy of Governor Jay Hammond's statement on SCR 61 and an analysis of the bill from the Governor's Office. I wanted to send you a copy for your files since this legislation is now in the Senate Resources Committee. If I can provide you with additional information please do not hesitate to contact my office.

"FAIR SHARE" SALMON HARVEST ALLOCATION PROPOSAL

Submitted by Jay S. Hammond

March 28, 1988

The attached two items relating to allocations of salmon harvest between competing gill-net gear types are but more evidence of increasing aggravation among commercial fishermen. Since the fish board and Department of Fish and Game should neither be obliged or permitted to formulate harvest allocation policy, it appears high time the Legislature did so.

In the current policy vacuum, the peculiar spate of regulations which wildly vary between areas will serve but to make matters worse as drift and set-net fishermen jockey for increased percentages of total harvest. Consider: in Bristol Bay and Prince William Sound, drifters by regulation are allocated 150 fathoms of gill-net. Set-netters are limited to only 50. In Cook Inlet, however, the ratio is 150 fathoms drifters, 105 fathoms set-net. In the Alaska Peninsula area both are allocated 200 fathoms; while in Kodiak and Kotzebue set-netters are allocated 150 fathoms and drifters nothing.

In addition to such non-uniform gear allocations, there are substantial area differences in time of fishing allocations and even distances permitted between set and

drift gear. For example, the ex-Fish and Game Board member who was convicted for drifting within 600 feet of a set-net in Cook Inlet would have been completely legal had he fished up to but 100 feet of a set-net in Bristol Bay. This seems most curious. It would appear that these area disparities were designed not so much to serve sound resource management as reflect the political dominance of one gear type above another.

Absent a uniform harvest allocation policy, such political dominance not only inflicts itself upon local resource managers in such a way as to aggravate the problem; but also inundates the fish board with increasingly strident demands for changes in gear, time or effort allocations. Exhibit A: a suit relating to the 48 hour waiting period before which fishermen may transfer from one district to another; and Exhibit B, concerning outcry from pinched-off upper Cook Inlet set-netters urging that drifters be allocated no more gear than they have, are but two examples.

In addition, the fish board is increasingly assaulted by demands for such things as increased gear or fishing time by set-netters and equally strident and almost universally successful counter arguments from drifters.

Most fishermen believe, as do I, that, if anything, there's already too much gear within most Alaskan waters. Therefore, permitting one gear type to fish more gear is not

a likely answer. Nor is further political inhibition of management's authority to orchestrate gear transfers or openings and closures the proper way to go. On the contrary, only by reducing such splintered politically induced unfair allocation pressures through a uniform state policy, can management best achieve not only what is in the best interest of the resource but also the most equitable harvest allocation possible. Of course, establishment and adherence to such a policy would, as well, help reduce fish board workload, while neutralizing charges that one interest group or another dominates. Moreover, it would curb abuse now heaped on local resource managers who might wish to stagger gear type openings and closures to achieve better distribution of both harvest and escapement.

Any fishing harvest allocation policy should assure, to the best degree possible, equitable division among competing interest groups; especially in those instances where current practices had denied a "fair share" to the type of gear operated by the greatest percentage of Alaskan residents. Of course, since I was once a drifter and am now a set-netter, it will be charged that my concerns are prompted by belief that under present incidental harvest allocations set-netters in Bristol Bay are not accorded their "fair share". These charges are completely true. However, I would hope that I never will be blinded to inequity simply because by directing focus to it I might profit. Let me stress might, for it is not at all assured that such would be the case.

However, you, not biased, competing, fishermen, should judge whether the following example abuses or approximates fair share allocation: in Bristol Bay though set-nets comprise 16 percent of the total effort and are 76 percent resident dominated, they catch an average of but 9 percent. Drifters, by contrast constituting 84 percent of the effort, yet one third less resident dominated, catch 91 percent.

Moreover, the drift fleet has become comparatively much more efficient since the days of wooden sailboats when the 50 fathoms allocated set-nets versus three times that amount of gear for drifters was more appropriately deemed a "fair share" allocation. As a consequence, in many cases set-net harvests have so dwindled in recent years that the collective harvest in some districts has been as low as 4 percent with large banks of set-netters catching no fish whatsoever. By contrast set-netters in Cook Inlet, fishing more than twice the gear allotted set-netters in the Bay, catch almost 40 percent of the total harvest. In other districts one type of gear or another seems to have been accorded unfair advantage.

Rather than try to make uniform such things as gear length transfer time, or means and methods, state policy should simply obligate as best as possible "fair share" harvest allocation.

What then is a "fair share"? Some contend fair share

allocation should be based on historical precedence. Since back in those sailboat days set-nets took a far greater percentage of the harvest than their percentage of the total gear, that might be fine with me. But it would be unfair to drifters. By contrast, to take an average between them now each year would simply further aggravate the seemingly unfair allocation now occurring in the Bay.

Others will assert that fair share allocation should be based on comparative investment magnitude. While this again might be fine with me, the fact that I, as do many set-netters, have far more invested in our operations than do many drifters, should not accord me by regulation any greater harvest share through added fishing time than that old Native lady down the beach who cannot afford to match my investment.

Still others would assert that "fair share" allocation can better be achieved by permitting both types of gear precisely equal fishing time. Again, I would be delighted. However, I fear the drift fleet harvest would fall far below its fair share if they were compelled to wait until my set-nets were flooded and then pull their gear when mine went dry.

Any only fair share harvest policy upon which most fair-minded gill-net fishermen agree seems to be one which would, as best as possible, collectively permit each fathom of gill-net the opportunity to catch the same amount as any other

fathom. In other words, a collective fair share of the harvest for each gear type would seem to be a percentage of the total harvest equal to their percentage of the total fathoms fished by both gear types.

Obviously, there is no way possible to insure that every fathom will catch the same amount. However, this objective can be collectively far better met than now occurs absent any policy at all.

How such a policy might be achieved without change of regulations is very simple. By merely staggering openings and closures for respective gear types, virtually any harvest allocation desired can be achieved. Absent any policy direction, local fishery management personnel are understandably reluctant to employ such staggered openings when to do so will bring down the wrath of whatever interest group enjoys the unfair incidental allocation of the moment.

The attraction of this management approach compared to attempting to meet the demands of competing gear types through any of the aforementioned regulation changes requiring board action is its simplicity and flexibility. Unlike, say, a regulation changing gear ratios which, once in place, might for years dramatically distort fair share allocation; through staggered openings and closures, a fine tuning of fair share allocation could be made on almost a daily basis.

Conversely, to counter pleas from those who feel unfairly treated, management is compelled to piously assert that it is not within their province to concern themselves with harvest allocation. Yet by continuing past practices which have led to unfair shares being harvested by one gear type or another, they are doing now precisely what they contend they won't: perpetuating allocations which seem blatantly unfair.

Absent a state policy on this matter, you can count on nothing but increased aggravation; increased demands that set-netters be appointed to the board; increased accusations of self interest bias against incumbent drifters on the board; increased efforts to reconstitute the board with full-time professionals not engaged in fishing; increased requests that the percentage of one gear type be increased at the expense of another; and increased reluctance of local managers to do anything at all to keep the situation from further degenerating. Meanwhile, you can expect a rolling snowball of litigation. Adoption of a long overdue firm, fair state policy on this matter could go far to staunch what will otherwise continue to draw blood.

Accordingly, I would urge the committee to hold hearings on this matter and once you determine for yourselves what the best "fair share" allocation policy may be for gill-net fisheries, urge the governor through resolution to direct the

Department of Fish and Game to utilize whatever emergency powers are accorded them to achieve it.

Attachments

exceed ninety days if the assigned judge consents or the chief justice so orders. Thus, we conclude that Administrative Rule 24 does not support Kochutin's position.

[5] "Temporary" has been defined as "[t]hat which is to last for a limited time only, as distinguished from that which is perpetual, or indefinite, in its duration. Opposite of permanent." *Black's Law Dictionary* 1312 (5th ed. 1979). Each of the special orders assigning Judge Fuld is expressly limited in duration or subject matter. None purport to confer upon him all the benefits of regular superior court service.⁸ These assignments do not interfere with the legislature's power to fix the number of superior court judges,⁹ nor do they prevent the governor and judicial council from filling a vacancy on the superior court.¹⁰ The assignments of Judge Fuld were clearly not permanent. We therefore conclude that they were temporary assignments within the constitutional authority of the chief justice.¹¹

AFFIRMED.

RABINOWITZ, C.J., not participating.



Joseph M. MEIER, Appellant,

v.

STATE of Alaska, BOARD OF FISHERIES, Appellee.

No. S-1704.

Supreme Court of Alaska.

July 10, 1987.

Commercial salmon fisherman who operated drift gillnet gear challenged validity

8. For example, the district court judge does not receive the salary of a superior court judge. Compare AS 22.10.190(a) with AS 22.15.220(a). Furthermore, he remains subject to retention elections every four years, whereas a superior court judge faces retention every six years. Compare AS 15.35.100 with AS 15.35.060.

of regulation of the Board of Fisheries requiring salmon fishermen who wished to transfer from one district to another in bay fishing area to register in new district at least 48 hours before transferring, and cease fishing in any district during that 48-hour period. The Superior Court, First Judicial District, Juneau, Rodger W. Pegues, J., entered summary judgment upholding regulation, and appeal was taken. The Supreme Court, Moore, J., held that: (1) power of Board of Fisheries to control fishery resource utilization allowed Board to promulgate challenged regulation, and (2) regulation of Board of Fisheries was not arbitrary or unreasonable.

Affirmed.

1. Fish ⇐12

Power of Board of Fisheries to control fishery resource utilization allowed Board to allocate salmon harvest between two competing subgroups of commercial users by requiring commercial salmon fisherman who wished to transfer from one district to another in bay fishing area to register at least 48 hours before transfer, and to cease fishing in any district during that 48-hour period.

2. Fish ⇐12

Regulation of Board of Fisheries requiring that salmon fishermen who wished to transfer from one district to another in bay fishing area to register at least 48 hours before transfer, and to cease fishing in any fishing district during that 48-hour period, was not arbitrary or unreasonable; record showed that deviating from 48-hour rule had altered allocation of harvest and that regulation was consistent and reasonably necessary to conservation and development of Alaska fishing resources.

9. Alaska Const. art. IV, § 3; AS 22.10.120.

10. Alaska Const. art. IV, § 5.

11. We further conclude that Kochutin's claim that the chief justice abused his discretion is without merit.

Richard M. Burnham, Findley & Burnham, Juneau, for appellant.

Larri Irene Spengler, Asst. Atty. Gen. and Ronald W. Lorensen, Acting Atty. Gen., Juneau, for appellee.

John W. Hendrickson, Anchorage, for amici curiae.

Before RABINOWITZ, C.J., and BURKE, MATTHEWS, COMPTON and MOORE, JJ.

OPINION

MOORE, Justice.

Joseph Meier challenges the validity of 5 AAC 06.370(b), a Fish and Game regulation governing commercial sockeye salmon fishing in Bristol Bay. Meier is a commercial salmon fisherman who operates drift gillnet gear in Bristol Bay. The superior court entered summary judgment upholding the regulation.¹ We affirm.

Fish and Game regulations divide Bristol Bay into a number of fishing districts. 5 AAC 06.200. A commercial salmon fisherman must register in a district before he may fish there 5 AAC 06.370(a). The regulation challenged in this appeal, 5 AAC 06.370(b), requires a salmon fisherman who wishes to transfer from one district to another to register in the new district at least 48 hours before transferring, and to cease fishing in any district during the 48-hour period.² The waiting period is not insignificant, since the typical sockeye salmon run lasts only about ten days.

The Board of Fisheries promulgated 5 AAC 06.370 in 1986. In so doing, the Board returned to a scheme it had relied on for many years. The Board deviated from the 48-hour waiting period for only one year, in 1985. Regulations effective during 1985 permitted a fisherman to transfer 24 hours after registering in a new district,

and to fish in the original district during those 24 hours.

Commercial salmon fishermen may operate either set gillnet gear or drift gillnet gear in Bristol Bay. 5 AAC 06.330. Setnet fishermen work from shore, and generally remain at the same location throughout the season. Driftnet fishermen work exclusively from boats, and are by definition more mobile. Although some driftnetters confine their activities to one area of the Bay, others prefer to "follow the fish." The percentage of the total fish harvest achieved by setnetters depends on the number of driftnetters fishing offshore. If driftnetters saturate an area, few fish reach the beach where setnetters have an opportunity to catch them.

An obvious effect of the waiting period in 5 AAC 06.370(b) is to discourage mobility among Bristol Bay salmon fishermen. Because driftnetters are more mobile than setnetters, the waiting period burdens driftnetters more heavily.

There is no question that the Board of Fisheries complied with the Administrative Procedure Act in promulgating 5 AAC 06.370(b). Accordingly, our inquiry on review is two-fold. First, we must consider whether the Board exceeded its statutory mandate in promulgating the regulation, either by pursuing impermissible objectives or by employing means outside its powers. Second, we must consider whether the regulation is reasonable and not arbitrary. *Kelly v. Zamarello*, 486 P.2d 906, 911 (Alaska 1971).

The Board of Fisheries' undisputed purpose in promulgating 5 AAC 06.370(b) was to "assist in maintaining the historic [pre-1985] harvest percentages between the setnet and drift gillnet fisheries." Meier argues that this objective is outside the Board's statutory mandate because it is not consistent with and reasonably necessary

1. Meier moved for a preliminary injunction to bar enforcement of the regulation while his suit for declaratory relief was pending. With the parties' agreement, the court treated the motion as a motion for summary judgment.

2. The regulation directs the Commissioner of the Department of Fish and Game to waive the 48-hour waiting period when continuous commercial fishing is allowed in a district. 5 AAC 06.370(f). At other times, the Commissioner may reduce the waiting period by announcement. 5 AAC 06.370(b).

to the purposes for which the Board was created. *Id.* We disagree.

The Alaska legislature created the Board of Fisheries "[f]or purposes of the conservation and development of the fishery resources of the state..." AS 16.05.221. We have previously held that the duty to conserve and develop fishery resources implies a concomitant power to allocate fishery resources among competing users. *Kenai Peninsula Fisherman's Co-op Ass'n v. State*, 628 P.2d 897, 903 (Alaska 1981).

In *Kenai Peninsula*, an association of commercial fishermen challenged a Board of Fisheries management policy for Upper Cook Inlet which established priorities for use between commercial and recreational fishermen. Like Meier, the association argued that establishing priorities among competing users was not related to conservation or development, and therefore was outside the Board's powers. We rejected the association's argument, reasoning that

[t]he legislature established the Board for the purposes of conserving and developing fishery resources. The terms "conserving" and "developing" both embody concepts of utilization of resources. "Conserving" implies controlled utilization of a resource to prevent its exploitation, destruction, or neglect. "Developing" connotes management of a resource to make it available for use. If the Board is going to accomplish its designated purposes, it is necessarily going to make decisions concerning utilization of the resources it is charged with managing.

628 P.2d at 903 (footnote omitted). We went on to hold that the Board's power to control resource utilization permitted it to establish priorities for use between commercial and recreational fishermen as a response to sharp competition between the two groups for a limited fishery resource. *Id.*

[1] Competition between setnet and driftnet fishermen for Bristol Bay sockeye salmon is equally keen, and our reasoning

3. AS 16.05.251 was amended in June, 1986. Prior to that time, this subsection was numbered

in *Kenai Peninsula* is equally applicable. Therefore, we hold that the Board's power to control fishery resource utilization allows it to allocate the salmon harvest between these two competing subgroups of commercial users.

Not only was the Board's purpose in promulgating 5 AAC 06.370(b) permissible, but the means it employed were within its powers. Alaska Statute 16.05.251(a)(11) explicitly vests power in the Board to adopt regulations it considers advisable for "establishing the times and dates during which the issuance of fishing licenses, permits and registrations and the transfer of permits and registrations between registration areas is allowed."³

[2] In considering whether 5 AAC 06.370(b) is arbitrary or unreasonable, this court's task is simply to determine whether the regulation is reasonably related to its goal of allocating the salmon harvest between driftnet and setnet fishermen. We have no authority to substitute our own judgment for the Board of Fisheries', particularly since highly specialized agency expertise is involved. "The 'wisdom' of the regulation is not a subject of review." *Kingery v. Chapple*, 504 P.2d 831, 835 (Alaska 1972).

The Board reasoned that "[r]eimposing and improving the enforceability of the 48-hour waiting period will assist in slowing down the movement of the more mobile component of the drift gillnet fishery, which will spread out the harvest more evenly among all participants promoting a more orderly fishery and enhancing economic stability as a whole."—Bristol Bay's experience during 1985 provides a sound basis for this conclusion.

Apparently as a result of eliminating the waiting period, the number of fishermen transferring between districts dramatically increased during the 1985 season. The number of transfers effected through the King Salmon Fish and Game office, for example, rose from an eleven-year average

AS 16.05.251(a)(12).

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of 945 to 3,876 in 1985. The number effected through the Dillingham office rose from a nine-year average of 403 to 957.

At the same time, setnetters' share of the total Bristol Bay salmon harvest fell from a pre-1985 average of 11% to 9%.⁴ Setnetters fared worst in the Egegik and Ugashik districts of Bristol Bay, where salmon runs were especially strong. A Fish and Game biologist reported that fleet sizes in those districts "vastly exceeded historic peak levels while other districts' effort decreased accordingly." In Egegik, setnetters' share of the total harvest fell from a ten-year average of 15% to 6%. In Ugashik, their share fell from 11% to 3%. Not surprisingly, "[d]iscontent among the setnet communities at both Egegik and Ugashik increased due to increased competition for fish in both districts."⁵

We cannot say whether returning to a more restrictive regulation governing transfer is the best or most efficient way to protect setnetters' historic share of the salmon harvest. But the record shows that deviating from the 48-hour rule in 1985 altered the allocation of the harvest in a specific way. If the Board's goal was to restore the pre-1985 allocation, then returning to the 48-hour rule was clearly a reasonable approach.

We are convinced that 5 AAC 06.370(b) is consistent with and reasonably necessary to the conservation and development of Alaska fishery resources, and therefore that the Board of Fisheries acted within its mandate in promulgating the regulation. We are further convinced that the regulation is reasonable and not arbitrary. Accordingly, the superior court is AFFIRMED.



⁴ Setnetters' share of the harvest was 9% during 1965-1974 and 12% during 1975-1985, a twenty-year weighted average of 11%. Setnetters' share during 1983 and 1984 was 10%.

⁵ By contrast, setnetters in districts with weak salmon runs appear to have benefitted under the 1985 regulation. As large numbers of drift-

Nathan McREYNOLDS, Appellant,

v.

STATE of Alaska, Appellee.

No. A-924.

Court of Appeals of Alaska.

June 26, 1987.

Defendant was convicted by jury in the Superior Court, Third Judicial District, Anchorage, Joan M. Katz, J., of sale of heroin in the second degree and was sentenced to adjusted presumptive term of five years with one year suspended, and he appealed. The Court of Appeals, Bryner, C.J., held that: (1) evidence was insufficient to sustain entrapment defense; (2) sentencing goals of rehabilitation and personal deterrence did not independently justify imposition of unsuspended imprisonment above statutorily authorized two and one-half year minimum; and (3) sentence could not exceed five years with two and one-half years suspended.

Conviction affirmed; sentence vacated and remanded.

1. Criminal Law §569

Evidence that undercover informant told defendant he was sick and asked defendant "to stand pat" for him, in effect, guaranteeing that money would be paid to heroin distributor, and that later, upon belief that heroin had been delivered to informant, defendant accepted money from informant for payment to distributor, was insufficient to sustain defendant's entrapment defense in trial for sale of heroin in the second degree; there was no evidence

netters left those districts in search of stronger runs, the setnetters took a larger share of what fish there were. In Naknek-Kvichak, setnetters' share of the total harvest rose from a ten-year average of 10% to 12% in 1985. In Nushagak, their share rose from 17% to 30%; in Togiak, from 17% to 24%.

Set-netters step up campaign to even out fish allocations

By Harry McFarland
Times Business Writer

Two Anchorage set-netters have been steadily waging a campaign to convince politicians and business leaders in the community that the northern district of Cook Inlet is being shorted by the state Board of Fisheries' annual allocations.

But Ted Whip and Roland Elledge aren't finding necessarily sympathetic ears in the spots they need them most: on the fish board and in the Department of Fish & Game fisheries management.

"The board's policy has always been that a Cook Inlet fish is a Cook Inlet fish," said John Hilsinger, regional resources management biologist with Fish & Game. "The major problem is that all the northern district fish have to go through all the other districts."

Whip and Elledge have made several recommendations that they say will allow more fish to reach the northern district to

spawn.

The recommendations include:

- Moving the drift opening date to July 10. The normal opening is the first Monday or Friday after June 25. By delaying the opening by two weeks, Whip and Elledge believe salmon runs bound for the Susitna River will make it to Barber's Triangle, an area about 60 miles southwest of Anchorage.

"We don't want to kill the drifters," Whip said. He believes they still will have plenty of fish bound for the Kenai and Kaslof rivers.

- Limit the size of drift gill-nets to 105 fathoms. The current maximum is 150 fathoms. "That would really increase the efficiency of the drifters," Hilsinger said.

- Remove Paul Reusch, who is the area management biologist in Soldotna. The fishermen say Reusch has not implemented any plan ensuring northern district

See Inlet, page A-7

Inlet

Continued from page A-1

salmon escapement for spawning goals.

Hilsinger termed that unfair to Reusch, who has been on the job since 1981. Reusch has proved to be an "extremely capable" manager of salmon. Cook Inlet now is seeing the results of "parent runs" during Reusch's first years on the job, Hilsinger said; salmon and runs are catches are increasing.

The fish board has rejected setting goals that ensure a northern district allocation, Hilsinger said, because "anything you do in one part of Cook Inlet affects another part."

Whip and Elledge have not launched a new campaign. It's been a perennial battle since about 1948, the year that is generally acknowledged as the birth-date of the driftnet fleet. Prior to that, northern district set-netters hauled in 20 to 30 percent of the annual Cook Inlet catch. Since their percentage of the harvest has been marked in single digits: 3, 4, 8 percent.

Hilsinger said northern district catches are "above average" when compared to the number of salmon produced by the river systems in the area.

He estimated that 1.5 million fish annually migrate into the Susitna River, the largest drainage system in upper Cook Inlet; northern district catches in recent decades have averaged about 20 to 25 percent of that total.

Fish & Game is caught in the middle, Hilsinger said.

Item A.

exceed ninety days if the assigned judge consents or the chief justice so orders. Thus, we conclude that Administrative Rule 24 does not support Kochutin's position.

[5] "Temporary" has been defined as "[t]hat which is to last for a limited time only, as distinguished from that which is perpetual, or indefinite, in its duration. Opposite of permanent." *Black's Law Dictionary* 1312 (5th ed. 1979). Each of the special orders assigning Judge Fuld is expressly limited in duration or subject matter. None purport to confer upon him all the benefits of regular superior court service.⁸ These assignments do not interfere with the legislature's power to fix the number of superior court judges,⁹ nor do they prevent the governor and judicial council from filling a vacancy on the superior court.¹⁰ The assignments of Judge Fuld were clearly not permanent. We therefore conclude that they were temporary assignments within the constitutional authority of the chief justice.¹¹

AFFIRMED.

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8. For example, the district court judge does not receive the salary of a superior court judge. Compare AS 22.10.190(a) with AS 22.15.220(a). Furthermore, he remains subject to retention elections every four years, whereas a superior court judge faces retention every six years. Compare AS 15.35.100 with AS 15.35.060.

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Affirmed.

1. Fish ⇌ 12

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Richard M. Burnham, Findley & Burnham, Juneau. *Appellant.*

Larri Irene Spengler, Asst. Atty. Gen. and Ronald W. Lorensen, Acting Atty. Gen., Juneau, for appellee.

John W. Hendrickson, Anchorage, for amici curiae.

Before RABINOWITZ, C.J., and BURKE, MATTHEWS, COMPTON and MOORE, JJ.

OPINION

MOORE, Justice.

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The Board of Fisheries promulgated 5 AAC 06.370 in 1986. In so doing, the Board returned to a scheme it had relied on for many years. The Board deviated from the 48-hour waiting period for only one year, in 1985. Regulations effective during 1985 permitted a fisherman to transfer 24 hours after registering in a new district,

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There is no question that the Board of Fisheries complied with the Administrative Procedure Act in promulgating 5 AAC 06.370(b). Accordingly, our inquiry on review is two-fold. First, we must consider whether the Board exceeded its statutory mandate in promulgating the regulation, either by pursuing impermissible objectives or by employing means outside its powers. Second, we must consider whether the regulation is reasonable and not arbitrary. *Kelly v. Zamarello*, 486 P.2d 906, 911 (Alaska 1971).

The Board of Fisheries' undisputed purpose in promulgating 5 AAC 06.370(b) was to "assist in maintaining the historic [pre-1985] harvest percentages between the setnet and drift gillnet fisheries." Meier argues that this objective is outside the Board's statutory mandate because it is not consistent with and reasonably necessary

1. Meier moved for a preliminary injunction to bar enforcement of the regulation while his suit for declaratory relief was pending. With the parties' agreement, the court treated the motion as a motion for summary judgment.

2. The regulation directs the Commissioner of the Department of Fish and Game to waive the 48-hour waiting period when continuous commercial fishing is allowed in a district. 5 AAC 06.370(f). At other times, the Commissioner may reduce the waiting period by announcement. 5 AAC 06.370(b).

Nathan McREYNOLDS, Appellant.

v.

STATE of Alaska, Appellee.

No. A-924.

Court of Appeals of Alaska.

June 26, 1987.

Defendant was convicted by jury in the Superior Court, Third Judicial District, Anchorage, Joan M. Katz, J., of sale of heroin in the second degree and was sentenced to adjusted presumptive term of five years with one year suspended, and he appealed. The Court of Appeals, Bryner, C.J., held that: (1) evidence was insufficient to sustain entrapment defense; (2) sentencing goals of rehabilitation and personal deterrence did not independently justify imposition of unsuspended imprisonment above statutorily authorized two and one-half year minimum; and (3) sentence could not exceed five years with two and one-half years suspended.

Conviction affirmed; sentence vacated and remanded.

1. Criminal Law §569

Evidence that undercover informant told defendant he was sick and asked defendant "to stand pat" for him, in effect, guaranteeing that money would be paid to heroin distributor, and that later, upon belief that heroin had been delivered to informant, defendant accepted money from informant for payment to distributor, was insufficient to sustain defendant's entrapment defense in trial for sale of heroin in the second degree; there was no evidence

of 945 to 3,876 in 1985. The number effected through the Dillingham office rose from a nine-year average of 403 to 957.

At the same time, setnetters' share of the total Bristol Bay salmon harvest fell from a pre-1985 average of 11% to 9%. Setnetters fared worst in the Egegik and Ugashik districts of Bristol Bay, where salmon runs were especially strong. A Fish and Game biologist reported that fleet sizes in those districts "vastly exceeded historic peak levels while other districts' effort decreased accordingly." In Egegik, setnetters' share of the total harvest fell from a ten-year average of 15% to 6%. In Ugashik, their share fell from 11% to 3%. Not surprisingly, "[d]iscontent among the setnet communities at both Egegik and Ugashik increased due to increased competition for fish in both districts."⁴

We cannot say whether returning to a more restrictive regulation governing transfer is the best or most efficient way to protect setnetters' historic share of the salmon harvest. But the record shows that deviating from the 48-hour rule in 1985 altered the allocation of the harvest in a specific way. If the Board's goal was to restore the pre-1985 allocation, then returning to the 48-hour rule was clearly a reasonable approach.

We are convinced that 5 AAC 06.370(b) is consistent with and reasonably necessary to the conservation and development of Alaska fishery resources, and therefore that the Board of Fisheries acted within its mandate in promulgating the regulation. We are further convinced that the regulation is reasonable and not arbitrary. Accordingly, the superior court is AFFIRMED.



4. Setnetters' share of the harvest was 9% during 1965-1974 and 12% during 1975-1985, a twenty-year weighted average of 11%. Setnetters' share during 1983 and 1984 was 10%.

5. By contrast, setnetters in districts with weak salmon runs appear to have benefitted under the 1985 regulation. As large numbers of drift-

netters left those districts in search of stronger runs, the setnetters took a larger share of what fish there were. In Naknek-Kvichak, setnetters' share of the total harvest rose from a ten-year average of 10% to 12% in 1985. In Nushagak, their share rose from 17% to 30%; in Togiak, from 17% to 24%.

SUGGESTED RESOLUTION

WHEREAS, the Legislature finds that there is increasing aggravation among commercial salmon drift and set-net fishermen over alleged inequitable allocations of salmon harvests among gear types; and

WHEREAS, the situation is aggravated by confusing and inconsistent allocations between gear types in different areas which in some cases run all the way from permitting set-net fishing only, while in others allowing drifters and set-netters both to fish 200 fathoms; in others restricting drifters but one third more than allocated set-netters; while in still others drifters are permitted to fish 3 times the gear allocated set-netters; and

WHEREAS, these allocations of gear seem not so much to serve sound management ends as perhaps reflect the political dominance of one gear type over another; and

WHEREAS, most of these gear allocations were established years ago under entirely different circumstances; and

WHEREAS, changes in those circumstances have altered the resultant allocation of harvest between gear types in a manner which can deny one type or the other their "fair share" of the harvest; and

WHEREAS, the Legislature believes a collective "fair share" of any gill-net harvest should be a percentage of the total harvest equal to the percentage of total fathoms of gill-net fished by either drift or set-netters; and

WHEREAS, in many districts the type of gear most often disadvantaged is the one fished by the greatest percentage of Alaskan residents;

NOW, THEREFORE, BE IT RESOLVED: The Legislature urges the Governor to direct the Department of Fish and Game to so manage such gill-net fisheries as to best assure fair share allocation through such means as staggering or adjustment of openings and closures during which the respective types of gear are permitted to fish;

AND, BE IT FURTHER RESOLVED, that close monitoring of efforts to secure a "fair share" harvest be undertaken; especially in those districts where one type of gear is significantly more predominantly operated by Alaskan residents, to assure they are not penalized as now appears to be the case.



STATE OF ALASKA
OFFICE OF THE GOVERNOR
BILL ANALYSIS

DEPARTMENT Fish and Game	DIVISION Commercial Fish	BILL NUMBER SCR 61	SPONSOR Senate Judiciary
SHORT TITLE OF BILL Allocation of salmon among gill net fishermen using different types of gear			
DEPARTMENT POSITION Neutral			
PREPARED BY <i>Robert C. Clasby</i> Robert C. Clasby	DATE 4/19/88	COMMISSIONER'S SIGNATURE <i>[Signature]</i>	DATE 4/19/88

SUMMARY

OTHER AGENCIES AFFECTED BY BILL Unknown	CONSTITUENT GROUP(S) AFFECTED BY BILL Commercial salmon gill net fishermen
ORGANIZATIONAL SUPPORT FOR BILL Unknown	ORGANIZATIONAL OPPOSITION TO BILL Unknown
FISCAL IMPACT: <input checked="" type="checkbox"/> NONE <input type="checkbox"/> FISCAL NOTE ATTACHED	

BACKGROUND/LEGISLATIVE INTENT

The resolution is an attempt by the legislature to address increasing complaints by salmon setnetters, particularly those who fish in Bristol Bay, that they are not receiving what they believe to be their fair share of the harvest.

ANALYSIS OF BILL/PROGRAM EFFECTS

Currently there are no commercial salmon gill net fisheries being managed inseason by time or area to achieve predetermined allocations between the drift net and set net components of the fleet. The Board of Fisheries uses techniques such as area, gear length, season, etc., to achieve their allocation objects. Changes are not made inseason, but the allocation patterns are reviewed on a fairly regular basis to determine if adjustments are needed. A shift to inseason management will place an additional burden on the staff. Lacking experience in this type of management, the staff may appear to be overly conservative in their actions.

AMENDMENTS PROPOSED

PLEASE ATTACH A SEPARATE SHEET FOR ADDITIONAL COMMENTS OR ANALYSIS.

FISCAL NOTE

REQUEST:

Revision Date: 4/14/88
 Title: Allocation of salmon among gill net fishermen using different gear.
 Sponsor: Senate Judiciary
 Requestor: Senate Resources
 Agency Affected: Fish and Game
 BRU: Commercial Fisheries
 Components: _____

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL	0	0	0	0	0	0
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	0	0	0	0	0	0

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)

Prepared by: Robert Clasby Phone: 465-4210
 Division: Commercial Fisheries Date: 4/18/88

Approved by Commissioner: *Norman* Date: 4/18/88
 Agency: Fish and Game

Distribution (by preparer) :

- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)