

SB

70

FISCAL NOTE

STATE OF ALASKA
2003 LEGISLATIVE SESSION

Fiscal No. Number: _____
Bill Version: SB 70
() Publish Date: _____

Revision Date/Time (Note if correction): _____ Dept. Affected: Fish and Game
Title Relating to emergency order authority of the BRU Commissioners Office
commissioner of fish and game Component Commissioners Office
Sponsor Senator Wagoner
Requester Senate Resources Component No. 2175

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES ()						
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FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2003) cost: 0.0
Mark this box (X) if funding for this bill is included in the Governor's FY 2004 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

Prepared by: Gordy Williams Phone 465-6143
Division Commissioners Office Date/Time 3/18/03 4:09 PM
Approved by: Kevin Duffy, Acting Commissioner Date 3/18/2003
Agency Department of Fish and Game



ALASKA STATE LEGISLATURE

SENATOR THOMAS H. WAGONER
CHAIR, SENATE COMMUNITY AND REGIONAL AFFAIRS COMMITTEE
VICE-CHAIR, SENATE RESOURCES COMMITTEE

Sponsor Statement

Senate Bill 70

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

When the Legislature created the Board of Fisheries, it delegated to it specific rule-making powers. The Legislature protected the limits of these powers by vesting the Department of Fish and Game with statutes that guaranteed decision-making based upon sustained yield and conservation. The Legislature provided all the checks and balances through statute to facilitate a responsible public process and protection of the fishery resources.

Through statutes and appropriations, the Legislature enables the Department of Fish and Game to develop the science necessary for identification of conservation issues and to ensure sustainable fisheries. The Board of Fisheries is comprised of lay members whose primary duty is to allocate fishery resources among beneficial users. The Board of Fisheries meets for approximately 45 days annually on a rotational three-year cycle by area. Because of this, the Department of Fish and Game is better able to determine critical fishery decisions on a day-to-day basis.

Senate Bill 70 clarifies two of the areas the Legislature has defined for the Board of Fisheries. The first is a management tool that provides the flexibility necessary for issuing emergency orders to open or extend a fishing season in times of surpluses. This tool does not summarily change adopted management plans or allocations determined by the Board of Fisheries.

The second change places the board's own regulatory language for agenda procedures into statute. Additionally, it adds a requirement that the Department of Fish and Game must concur with the Board of Fisheries that a conservation emergency exists and cannot be resolved under a current regulation for the purposes of addressing a proposal out-of-cycle.

Providing the public with an amenable process is what the Legislature intended when it created the Board's governing statutes. I respectfully request the support of my colleagues in clarifying this vital public process as outlined in Senate Bill 70.



ALASKA STATE LEGISLATURE

SENATOR THOMAS H. WAGONER

CHAIR, SENATE COMMUNITY AND REGIONAL AFFAIRS COMMITTEE

VICE-CHAIR, SENATE RESOURCES COMMITTEE

Senate Bill 70

Sectional Analysis

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

Intent

To clarify the roles of the Board of Fisheries and the commissioner of the Department of Fish and Game relative to emergency order authority; to formalize the procedures for setting the agenda of the Board of Fisheries; and, to clarify what constitutes conservation concerns.

Sectional Analysis

Section 1.

- Amends the uncodified law by adding “Findings and Intent” language

Section 2.

- Amends AS 16.05.060 by adding a new section that clarifies the emergency order authority of the commissioner of fish and game, or his designee, relative to the management and execution of fisheries.

Section 3.

- Amends AS 16.05.300 to incorporate the board’s regulatory language as it pertains to changing adopted agendas.
- If an agenda change request states as its basis a conservation concern, the commissioner of fish and game must concur with the Board of Fisheries that a fishery conservation issue exists and that it cannot be resolved under current regulations.



ALASKA STATE LEGISLATURE

SENATOR THOMAS H. WAGONER
CHAIR, SENATE COMMUNITY AND REGIONAL AFFAIRS COMMITTEE
VICE-CHAIR, SENATE RESOURCES COMMITTEE

March 7, 2003

MEMORANDUM

To: Senator Scott Ogan, Chairman
Senate Resources Committee

From: Senator Thomas Wagoner *Tom*

Subject: SB 70 - Committee Hearing

I would appreciate your hearing Senate Bill 70 in the Resources Committee at your earliest convenience.

I have attached a sponsor statement, sectional analysis and other information pertaining to the bill.

Thank you for your time and consideration.

THE
FOLLOWING
DOCUMENT(S)
ARE
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COPIES

Cordova District Fishermen United

Celebrating 65 Years of Service to Commercial Fishermen in Cordova, Alaska
P.O. Box 939 Cordova, Alaska 99574 / phone (907) 424-3447 / fax (907) 424-3430 /
e-mail cdfu@ptialaska.net

March 13, 2003

Senate Resource Committee
c/o Senator Scott Ogan, Chair
State Capitol, MS 3100
Juneau, AK 99801-1182

SENT VIA FACSIMILE TO 907.465.3265

RE: SUPPORT FOR SB 70

Dear Members,

Cordova District Fishermen United represents the hardworking fishing families of Area E - the Copper River and Prince William Sound. We are--unfortunately--eminently qualified to comment on SB 70 having rebuffed an ACR accepted by the Alaska Board of Fisheries during the winter of 2000. The toll that it took on our fishing-dependent community was totally unwarranted and unnecessary. While any out-of-cycle consideration is time-consuming, expensive, destabilizing, and stressful, ACR 10 was particularly so for our industry and community because ADF&G advised the Board unequivocally during its ACR acceptance deliberations that there was absolutely no scientific basis for the alleged conservation purpose or reason. We are gratified to see legislation that acknowledges that science should be the guide in determining out-of-cycle considerations, and that ADF&G is the agency charged with providing substantive evidence of any conservation purpose or need.

A predictable public process is necessary to provide for community and industry stability. Out-of-cycle regulatory determinations are very serious and should be considered so by the Board; further, they must be held to a very high standard. When used for other than correction of an error in regulation or the unforeseen impacts of a regulation change, the standard simply must be only to address a conservation concern of such magnitude that the Department, through the Commissioner, determines its legitimacy. Otherwise, ACRs will continue to be used inappropriately, with indiscriminate negative impacts to the affected publics and communities. Fishing economies are already subject to uncontrollable variability. We do not need to add regulatory instability to that list.

Additionally, we fully support the clarification of the ADF&G Commissioner's authority relative to Emergency Orders. There are many examples of situations that arise in-season that require a rapid response either to protect the resource or to take advantage of a harvestable surplus. It is imperative that the Board of Fisheries, the Commissioner and the public clearly understand the chain of authority and that those responsible respond in a timely manner.

We strongly urge your support for SB 70.

Respectfully,

Sue Aspelund

Sue Aspelund
Executive Director



UNITED FISHERMEN OF ALASKA

March 17, 2003

211 Fourth Street, Suite 110
Juneau, Alaska 99801-1172
(907) 586-2820
(907) 463-2545 Fax
E-Mail: ufa@ufa-fish.org
www.ufa-fish.org

Senator Scott Ogan
Chair
Senate Resources Committee
Alaska State Legislature
State Capitol (MS 3100)
Juneau, AK 99801-1182

Dear Senator Ogan,

Re: SB 70 Board of Fisheries Meetings/Emergency Orders

We believe this bill will help remedy two problems that have been occurring with the Board of Fisheries:

- Issues have been taken up out of cycle for alleged conservation concerns that have not been validated by ADF&G biologists. This bill would raise the bar for a "conservation concern" by requiring (1) that the Commissioner of ADF&G determine that a conservation concern does exist and that the issue cannot be resolved under current regulations; and (2) that the ACR must be accompanied by substantial evidence of a conservation concern. ACRs have resulted in considerable expense to the public to attend meeting out of cycle. In addition, public testimony is often not allowed on the ACR and this circumvents public process. ACRs are supposed to be used:
 - to correct an error in a regulation;
 - to correct an effect on a fishery that was unforeseen when a regulation was adopted; or
 - for a fishery conservation purpose of reason.

However, ACRs have been used for purposes of reallocation of fisheries resources under the guise of conservation. SB 70 helps assure that this does not continue to occur.

MEMBER ORGANIZATIONS

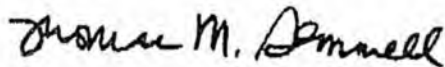
Alaska Crab Coalition • Alaska Dragger Association • Alaska Longline Fishermen's Association • Alaska Trollers Association • At-sea Processors Association • Bristol Bay Reserve
Chignik Regional Aquaculture Association • Chignik Seiners Association • Concerned Area "M" Fishermen • Cook Inlet Aquaculture Association • Cordova District Fishermen United
Crab Rationalization and Buyback Group • Douglas Island Pink and Chum • Groundfish Forum • Kenai Peninsula Fishermen's Association • Kodiak Regional Aquaculture Association
Kodiak Seiners Association • North Pacific Fisheries Association • Northern Southeast Regional Aquaculture Association • Old Harbor Fishermen's Association
Petersburg Vessel Owners Association • Prince William Sound Aquaculture Corporation • Purye Seine Vessel Owners Association • Seafood Producers Cooperative
Southeast Alaska Regional Dive Fisheries Association • Southeast Alaska Seiners Association • Southern Southeast Regional Aquaculture Association
United Cook Inlet Drift Association • United Salmon Association • United Southeast Alaska Gillnetters • Western Gulf of Alaska Fishermen

- The proposed Emergency Order authority would allow the Commissioner to supercede a regulation to allow harvest for maximum sustained yield after he/she has weighed the other considerations, allocation, escapement, and other users. The Commissioner cannot change an allocation plan. In summer 2000, the Kenai River pink run of 10M fish went unharvested at significant economic loss to fishermen, processors, and the state.

This piece of legislation is critical to stabilize the business environment so that harvesters, processors, and supporting businesses can better plan their investments.

Your consideration of this bill is appreciated

Sincerely,



Thomas M. Gemmell
Executive Director

Copy: Senator Tom Wagoner
Senator Ben Stevens
Senator Gary Stevens
Senator Fred Dyson
Senator Ralph Seekins
Senator Kim Elton
Senator Georgiana Lincoln



P.O. Box 762 • Kodiak • AK • 99615

Phone: (907) 486-6899 • Fax: (907) 486-7058 • Email: kodiak@unitedsalmon.org

Dear Senators and Representatives,

This letter is in support of HB 70.

The power of Emergency Order (EO), is one of the powers of the ADF&G commissioner that is greatly needed for sound and effective management of the state's fisheries resources. I urge you to pass this bill to insure that the commissioner has all the tools needed to do the job you've given him.

Sincerely

Bruce Schactler

Bruce Schactler, President

NOTICE: This is subject to formal correction before publication in the Pacific Reporter. Readers are requested to bring errors to the attention of the Clerk of the Appellate Courts, 303 K Street, Anchorage, Alaska 99501, (907) 264-0607.

THE SUPREME COURT OF THE STATE OF ALASKA

PENINSULA MARKETING ASSOCIATION,)
CONCERNED AREA M FISHERMEN,)
ALEUTIANS EAST BOROUGH,)
SHUMAGIN CORPORATION, QAGAN) Supreme Court File
TAYAGUNGIN TRIBAL COUNCIL,) Nos. S-6413/6423
AGDAAGUX TRIBAL COUNCIL,)
UNGA TRIBAL COUNCIL, UNGA)
CORPORATION, NELSON LAGOON) Superior Court No.
VILLAGE COUNCIL, and FALSE PASS) 2NO-92-80 CI
TRIBAL COUNCIL,) Consolidated with
) 1JU-94-520 CI
Petitioners,)

v.)

CARL ROSIER, in his official)
capacity as Commissioner of the)
Alaska Department of Fish and)
Game, and the ALASKA DEPARTMENT)

OF FISH AND GAME,)
)
Respondents,)

and)

NATIVE VILLAGE OF ELIM, NOME)
ESKIMO COMMUNITY, KAWERAK, INC.,)
and ARCTIC REGIONAL FISH AND)
GAME COUNCIL,) OPINION

)
Respondents and)
Cross-Petitioners.) [No. 4170 - February 24,

1995]

_____)
Petition for Review from the Superior
Court of the State of Alaska, Second Judicial
District,

Nome, Richard H. Erlich, Judge.

Appearances: Michael A. D. Stanley,
Juneau, Alvin J. Ziontz and Marc D. Slonim,
Ziontz, Chestnut, Varnell, Berley and Slonim,
Seattle for Petitioners. T. Henry Wilson,
Assistant Attorney General, Anchorage, and
Bruce M. Botelho, Attorney General, Juneau,
for Respondents. Eric Smith, Anchorage, for
Respondents and Cross-Petitioners.

Before: Moore, Chief Justice,
Rabinowitz, Matthews, Compton and Eastaugh,
Justices.

COMPTON, Justice.

The Commissioner of the Department of Fish and Game
(Commissioner) presented a fisheries management proposal to the
Board of Fisheries (Board). 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 his proposal. The
superior court also purported to authorize the governor to take

emergency action. We granted a petition and cross-petition for review. See Alaska R. App. P. 402(a). We affirm the superior court's order on the single issue remaining for determination.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. FACTUAL HISTORY

The Board of Fisheries placed a cap on the number of chum salmon incidentally caught in the False Pass commercial red salmon fishery.¹ Residents of the Arctic-Yukon-Kuskokwim (AYK) region rely on chum runs for winter food; the taking of chum is an important aspect of the traditional subsistence lifestyle in the area. The effect of the incidental chum harvest in the False Pass fishery on the AYK chum returns has been a matter of controversy and debate for years. See *Peninsula Marketing Ass'n v. State*, 817 P.2d 917, 919-20 (Alaska 1991).

In 1982 and 1983 the incidental chum harvest in the False Pass fishery was unusually high. In the mid-1980s, AYK chum returns declined steadily. In response, the Board promulgated a regulation closing the False Pass fishery when the incidental harvest of chum reached a certain level. In 1986 the chum level was capped at 400,000 fish. The cap was repealed for the 1987 season, but reinstated at 500,000 for 1988 and 1989, and 600,000 for 1990 and 1991. In 1990, the Board also instituted other restrictions to reduce the incidental chum harvest. The

cap was exceeded in 1991, with a chum harvest of 771,000. For the 1992 season, the Board originally passed a variable chum cap, but later amended the regulation to provide an overall cap of 700,000 chum, with additional restrictions to reduce the chum harvest once 400,000 chum had been harvested. In adopting this approach to the chum problem,

[t]he board found however, that the data presented were insufficient to establish a direct and biologically significant cause and effect relationship between chum harvests in the June fishery and depressed returns in [the AYK area], in that reductions in the June fishery would not be likely to produce detectable increased [sic] in chums in the depressed [AYK area].

The 700,000/400,000 cap was utilized during the 1992 and 1993 seasons. The decline in the AYK chum returns continued during the early 1990s.

In 1993 there was a drastic and widespread decline in the number of chum returning to the AYK area streams. At a special non-regulatory meeting in December 1993, the Board directed the Commissioner to prepare additional measures for consideration at the Board's regular March 1994 meeting. At the March meeting, the Commissioner recommended that the chum cap be lowered to 300,000. The Board heard extensive public testimony and considered staff reports on the issue. It failed to adopt the Commissioner's proposal.²

At this meeting the Board implemented other conservation measures to preserve AYK chum stocks. In the False Pass area, the Board eliminated the fixed opening date and fishing periods, granting the Commissioner the authority to use his emergency powers in this region. "The department may open the fishing season . . . by emergency order to allow commercial fishing when the ratio of sockeye salmon to chum salmon indicates that chum salmon harvest will be minimized. The department shall establish fishing periods by emergency order." 5 AAC 09.365(d).

Governor Walter J. Hickel then directed the Commissioner to use his emergency powers to increase the chum escapement into various river systems, notwithstanding the Board's failure to adopt the Commissioner's proposal to lower the chum cap.

B. PROCEDURAL HISTORY

On April 28, 1994, the Peninsula Marketing Association and others (PMA) filed suit in superior court in Juneau to enjoin the Commissioner from implementing the Governor's directive. The Native Village of Elim and others (Elim) resurrected a suit they had filed two years earlier in Nome, in which they sought to enjoin the 1992 700,000/400,000 chum cap.

Elim filed a motion to consolidate the Nome suit with the suit filed by PMA; the motion was granted over PMA's

objection. Elim then filed a motion to enjoin (compel) the Commissioner to implement the 300,000 chum cap he had recommended to the Board. It requested expedited consideration of its motion. PMA filed a motion for declaratory relief on its claims, also requesting expedited consideration. Hearings on the motions were held in Anchorage.

The court ruled from the bench on June 8, essentially granting PMA the relief it had requested:

In this specific circumstance where the Board has disagreed with the Commissioner's conclusion, it is important to clarify his emergency order authority. . . . Given the full review of the conservation issues presented to the Board in both December and March meetings, the Commissioner is prohibited from taking any action on the [False Pass] fishery based upon the information already presented. That does not prevent the Commissioner from taking emergency order authority on the [False Pass] fishery based on some additional information not available previously, and using the information he already has. However, if all the information available is only that which was available at the Board meeting the Commissioner is prohibited from taking emergency order action.

In addition, the court sua sponte directed that the question be submitted to the Governor for determination. The court analogized the dispute between the Board and Commissioner to that described in AS 16.05.270.3 The Governor responded by lowering the chum cap to 350,000, although the Governor expressed

doubts concerning his power to do so.

PMA petitioned this court for review of the superior court's order directing submission of the issue to the Governor for determination. See Alaska R. App. P. 402(a). It also requested "an appropriate writ" prohibiting the Governor from implementing his decision to lower the chum cap to 350,000. Elim filed a cross-petition for review, requesting that this court vacate the injunction imposed on the Commissioner by the superior court. Both parties filed emergency motions to obtain interim relief. A single justice entered an order granting PMA's motion to stay enforcement of the Governor's recommendation to lower the chum cap to 350,000, and denying Elim's motion to stay the injunction against the Commissioner. See Alaska R. App. P. 503(f). Elim sought full court reconsideration of the single justice order. See Alaska R. App. P. 503(g). Full court reconsideration was denied. The petition and cross-petition were granted. See Alaska R. App. P. 402(b).

II. DISCUSSION

We granted review on only two issues: (1) "did the superior court err in submitting the determination of the chum cap to Governor Walter J. Hickel under AS 16.05.270?" and (2) "did the superior court err in precluding Commissioner Carl J. Rosier from employing his emergency powers under AS 16.05.060(a)

to a question which has been considered and resolved by the Board of Fisheries by regulation, in the absence of significant new facts?"

Consideration of the first issue has been waived by the parties. At oral argument the parties agreed that AS 16.05.270 only applies where the Board has delegated its rule-making authority to the Commissioner, and later disagrees with the use the Commissioner makes of this delegated authority. This was not the situation presented to the superior court. Additionally, the parties essentially did not brief the issue. "[W]here a point is given only a cursory statement in the argument portion of a brief, the point will not be considered on appeal." *Adamson v. University of Alaska*, 819 P.2d 886, 889 n.3 (Alaska 1991) (citations omitted).⁴ Therefore, the sole issue before the court is the scope of the Commissioner's emergency powers.

A. MOOTNESS

The issue presented is technically moot. However, we accepted this petition and cross-petition because they fall under the public interest exception to the mootness doctrine. In applying the public interest exception we consider

(1) whether the disputed issues are capable of repetition, (2) whether the mootness doctrine, if applied, may repeatedly circumvent review of the issues and, (3) whether the issues presented are so important

to the public interest as to justify overriding the mootness doctrine.

Hayes v. Charney, 693 P.2d 831, 834 (Alaska 1985). These factors are only guidelines; application of the exception is discretionary with the appellate court. Peninsula Marketing Ass'n v. State, 817 P.2d 917, 920 (Alaska 1991). 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 these reasons we decided to hear the merits of this case.⁵

B. THE ALASKA CONSTITUTION AND THE STATUTORY FRAMEWORK

The Alaska Constitution delegates to the Alaska State Legislature (Legislature) the allocation of power between boards and commissioners. "The head of each principal department shall be a single executive unless otherwise provided by law." Alaska Const. art. III, 25 (emphasis added). "When a board or commission is at the head of a principal department . . . its members shall be appointed by the governor, subject to confirmation by a majority of the members of the legislature" Alaska Const. art. III, 26.

Although Elim concedes that the Legislature :

complete authority to allocate power within the departments, it nonetheless argues that there is a preference for strong department heads. It contends that those who drafted the Alaska Constitution "left the matter to the legislature to resolve, but within the context of an overall preference to establish strong departmental heads to administer programs." This preference is not supported by proceedings of the Alaska Constitutional Convention.⁶ Although the proposal at the Constitutional Convention placing all regulatory and administrative power over fish and game in a board was defeated, the result was not to place the department head in a position of authority over this board.

In reviewing debate at a constitutional convention, as with any other law-making body, it is imperative to keep issues separate. Although Elim provides a variety of quotations from delegates to the Alaska Constitutional Convention to demonstrate that the framers preferred strong department heads to boards, these quotations are used out of context and come from debates regarding different issues. Also, not one is an excerpt of a discussion regarding how much authority commissioners would have in relation to boards or commissions.

Elim quoted Delegate McCutcheon as saying,

We are a group of citizenry here who

are, by and large, tired of rule by board. It may have been necessary in a protection in past years in order to eliminate too much influence from an absentee governor, or one appointed by absentees, in dominating our Territorial affairs. We have created boards for the purpose of getting away from Washington, D.C., and controlling our own affairs, but when we can elect our own governor, he sets up his upper cabinet and operates the government in conjunction with the legislative branch. . . . [I] am absolutely opposed, predicated on experience and analysis of this thing, that we strike this particular thing.

This statement was made in opposition to an amendment that would have deleted the requirement in article III, section 26 that the appointment of an executive officer of a principal department be subject to the approval of the governor. 3 Proceedings of the Alaska Constitutional Convention (PACC) 2249 (Jan. 16, 1956). McCutcheon made the quoted declaration because he wanted to ensure that the responsibility for the departments being established was affixed to the governor.

Delegate McNealy's comments, also quoted by Elim to demonstrate the intent of the framers, relate to a wholly different issue. Elim quotes Delegate McNealy:

Delegate McNealy accordingly forcefully argued against mandating the commission form of government on the ground that it should be left to the legislature to decide "if they want to set up one commission, well and good, or if they feel it is necessary to set up two commissions under it, or under a principal department head, or however they care to do

this . . . "

However, Delegate McNealy's comments do not support Elim's position that the framers intended the Commissioner to be more powerful than the Board. Delegate McNealy's comments were made in opposition to a proposal, adopted in article III, section 22, authorizing the Legislature to establish regulatory and quasi-judicial agencies. 4 PACC 2508 (Jan. 18, 1956). He was concerned about combining rulemaking and enforcement powers in the same body. All that Delegate McNealy's comments reveal is that the framers intended to leave the structure of the department to the Legislature.

Thus, Elim's argument that while the constitutional convention delegates "did not expressly reject the use of a board, they remained concerned that any such board should be placed within a principal department with a head who would be accountable directly to the governor" is unpersuasive. The discretion granted to the Legislature by article III, section 25 of the Alaska Constitution, belies the argument that the Alaska Constitution evidences an overall preference for strong department heads and, implicitly, for weak boards and commissions. See 3 PACC 2203-11 (Jan. 14, 1956); 3 PACC 2249-52 (Jan. 16, 1956); 4 PACC 2502-22 (Jan. 18, 1956). The authors of the Alaska Constitution explicitly chose to leave the structure

of the department to the Legislature. Thus, the answer to the question before us lies not in an analysis of constitutional debate, but rather in the statutory framework.

C. STATUTORY FRAMEWORK -- THE COMMISSIONER DOES NOT HAVE VETO POWER OVER BOARD DECISIONS

The statutory structure of the Department reflects a legislative objective: (1) to divide rule-making and administrative authority, (2) to insure that fish and game decisions are made by knowledgeable persons, and (3) to limit the direct influence of the Governor on daily fish and game management issues.

Responsibility for fisheries management is divided between the Commissioner and the Board. The Commissioner is directed to "control the department" 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. The Board specifically is directed to adopt regulations "establishing open and closed seasons and areas for the taking of fish" and "setting . . . harvest levels." AS 16.05.251(2) & (3).7

By statute, the Commissioner and the members of the

Board are expected to be knowledgeable and experienced in fisheries protection and management. AS 16.05.010; AS 16.05.221(a). The Commissioner is appointed to a five-year term. AS 16.05.010. The members of the Board serve staggered three-year terms. AS 16.05.221(c). Appointed members must be approved by the Legislature in joint session and can only be removed for specified misconduct. AS 16.05.221; AS 16.05.280. These protective measures were instituted to ensure that fisheries decisions are made by knowledgeable persons based on their independent judgment, rather than immediate political pressure.

Elim concludes from the constitution and statutory structure of the Department that the Commissioner "has independent authority to regulate fishing on the basis of emergency orders, either to implement the management plan or to avoid a biological emergency that would arise should the management plan . . . be implemented."8 The State asserts that the Commissioner has the power to issue two types of emergency orders: (1) field orders, which implement but do not contradict Board regulations; and (2) true emergency orders, which can be used to address biological crises and may contravene Board regulations. Neither Elim nor the State suggest that there is a limitation on the Commissioner's power to declare a biological emergency and overrule the Board. Both rely on the unconditional

language through which AS 16.05.060(a) conveys emergency power to the Commissioner. "This chapter does not limit the power of the commissioner . . . 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). They point out that the Commissioner's other emergency powers are explicitly limited in AS 16.05.060(b). "The commissioner . . . may, under criteria adopted by the Board of Fisheries, summarily increase or decrease sport fish bag limits or modify methods of harvest for sport fish by means of emergency orders." AS 16.05.060(b) (emphasis added).

Although both PMA and Elim emphasize the difference in the language used in AS 16.05.060(a) and AS 16.05.060(b), their conclusions about the meaning of this dissimilarity are disparate. Under the interpretation advocated by Elim and the State, the Commissioner would possess the authority to implement regulations even when the Board had expressly rejected those regulations. This in effect would give the Commissioner a veto over the Board.

The Commissioner's emergency powers do not explicitly include any veto over Board decisions.⁹ Under both subsections of AS 16.05.060, any veto power must be implied. However, implication 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.

Stated differently, rules of statutory construction do not permit an interpretation of AS 16.05.060 which effectively nullifies the explicit grant of power to the Board under AS 16.05.251. Implying a grant of veto power to the Commissioner under AS 16.05.060 would have just that effect. "A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." 2A Norman J. Singer, Sutherland Statutory Construction 46.06 (5th ed. 1992) (citations 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.

We conclude that the superior court correctly identified the Commissioner's emergency powers and the limits on

those powers. This holding 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.

D. THE BOARD MADE A FINAL DETERMINATION TO NOT LOWER THE CHUM CAP FOR THE 1994 SEASON

As we have concluded that the Commissioner does not have the authority to effectively veto a decision of the Board, the only question left to address is whether the Board officially decided not to lower the chum cap in accordance with the management plan submitted by the Commissioner. According to the superior court, the Board "explicitly voted to reject the Commissioner's proposal." PMA agrees with this characterization.¹⁰ However, Elim argues that "since there was no vote by four members of the Board on this matter, there was no formal decision by the Board." The State appears to concede that the Board made a decision.

Elim correctly argues that AS 16.05.320 requires that "a majority of the full board membership is required to carry all motions, regulations, and resolutions." AS 16.05.320. Thus, a vote of three to two would not have sufficed to have carried the Commissioner's proposal. However, where an amendment is offered

and it does not receive the required number of votes, and then the proposal as a whole is voted on and is approved by the requisite majority, a decision has been made to reject the amendment. See Robert's Rules of Order Newly Revised 12 (9th ed. 1990). The Board may have voted three to two to deny the chum cap reduction, but it voted five to zero to approve the management plan for the 1994 False Pass fishery without a chum cap reduction. Thus, we agree with the superior court that there was a decision by the Board to reject the Commissioner's proposal. If the Commissioner were to institute such a chum cap, based solely on the information he had already presented to the Board, he would be vetoing the Board's decision not to reduce the chum cap.

III. CONCLUSION

We AFFIRM the superior court's decision and hold that the Commissioner may not use his emergency powers to implement a fisheries management program already considered and rejected by the Board, in the absence of newly developed information or events occurring after the Board's decision.

1 The parties refer to this fishery variously as the False Pass fishery, the June fishery, and the Area M fishery. To avoid confusion, we will refer to this as the False Pass fishery.

2 The Board consists of seven members. To enact or amend a regulation, four members of the Board must vote for the measure. AS 16.05.320. Prior to voting on this proposal, the

Board Chair had disqualified two Board members.

The Commissioner's proposal failed with three votes for and two against. After reconsideration, one Board member changed his vote from for to against; again the proposal failed, this time with two votes for and three against.

3 Alaska Statute 16.05.270 provides:

For the purpose of administering AS 16.05.251 and 16.05.255, each board may delegate authority to the commissioner to act in its behalf. If there is a conflict between the board and the commissioner on proposed regulations, public hearings shall be held concerning the issues in question. If, after the public hearings, the board and the commissioner continue to disagree, the issue shall be certified in writing by the board and the commissioner to the governor who shall make a decision. The decision of the governor is final.

4 Elim declined to address the issue, except to note that the superior court utilized AS 16.05.270 only by analogy and did not purport to be operating under its letter. The State concedes that the statute applies only when the Commissioner operates "under a specific delegation of rule-making authority from the Board." There was no such delegation in the present case. PMA throughout its brief and oral argument opposed the superior court's use of the statute to submit the issue to the Governor.

5 In *Peninsula Marketing Ass'n v. State*, 817 P.2d 917 (Alaska 1991), we discussed the application of the mootness doctrine to disputes about the False Pass fishery. In that case, PMA challenged (1) the reasonableness and constitutionality of the 1988 chum cap of 500,000 fish, and (2) the Board's statutory power to set the cap. In the second argument, PMA asserted that the statutory authority to "establish criteria for the allocation of fishery resources among personal use, sport, and commercial fishing" did not give the Board the power to allocate fishery resources between two or more commercial uses. *Peninsula Marketing*, 817 P.2d at 920; see AS 16.05.251(e). PMA distinguished between inter-group and intra-group allocations. We held that this second argument, although technically moot, met the requirements of the public interest exception. We held that the first argument, the challenge to the level of the cap, was moot and did not meet these requirements. *Id.* at 920.

6 It is a time honored practice to review debate at a constitutional convention to interpret constitutional provisions. Similarly, legislative history is reviewed in interpreting statutes. However, Elim takes these practices a step beyond their ordinary application. It has reviewed debate at the Alaska Constitutional Convention to interpret the Legislature's intent when it enacted statutes establishing the structure of the Department of Fish and Game. Elim provides no authority to support this analytical framework which transfers the intent of one body to the product of another body.

7 "For purposes of the conservation and development of the fishery resources of the state, there is created the Board of Fisheries . . ." AS 16.05.221(a). 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).

8 The Commissioner's emergency powers under AS 16.05.060 do not explicitly grant the Commissioner the authority to veto actions taken by the Board. The single justice order entered on July 15, 1994, upheld the superior court's stay of the Commissioner's use of his emergency powers based on an analysis of the statutory framework of the Department. The single justice concluded:

The Board has the rule-making authority for fisheries policy in the Department. The Commissioner is empowered to effectuate these policies. The emergency powers granted to the Commissioner do not give the Commissioner a veto over the action of the Board. This would be contrary to the statutory structure and purpose of the Department. . . . [T]he Commissioner's emergency powers to close a fishery may be invoked only when new evidence or events reveal a threat to the resource and there is insufficient time for a formal regulatory response by the Board.

9 PMA cites Kenai Peninsula Fisherman's Cooperative Ass'n

v. State, 628 P.2d 897 (Alaska 1981), for this proposition. In that case, the Board and Commissioner together sought the same result. The court's conclusion that "the Commissioner may use the emergency order process to implement a properly adopted management policy" does not necessarily mean that the Commissioner may only use his emergency powers in conformity with the Board's decision. See *id.* at 907. In that case the court simply did not address the issue of a dispute between the Board and the Commissioner.

10 PMA submitted unsigned "draft findings" from the Board's March meeting which support the conclusion that the Board explicitly rejected the lower chum cap. Attached was an affidavit from Executive Director of the Board support section of the Alaska Department of Fish and Game, Laird Jones stating that the draft findings had been "approved" by four members and would be "adopted" at the October 1994 meeting. Elim objects to the use of this document because (1) one of the approving members was disqualified and another member "has since failed to be confirmed by the Legislature," and (2) "neither the State nor PMA relied on the draft" before the superior court. Elim cites no authority on these points. The State does not object to use of the draft findings. It is clear from the transcript of the Board's March 1994 meeting that the Board considered a number of conservation options and that they failed to adopt the Commissioner's suggested limit. As we do not need to rely on the draft findings, we need not address Elim's concerns about the validity of these documents.

5 AAC 96.625. Joint board petition policy

Statute text

(a) Under AS 44.62.220 , an interested person may petition an agency, including the Boards of Fisheries and Game, for the adoption, amendment, or repeal of a regulation. The petition must clearly and concisely state the substance or nature of the regulation, amendment, or repeal requested, the reason for the request, and must reference the agency's authority to take the requested action. Within 30 days after receiving a petition, a board will deny the petition in writing, or schedule the matter for public hearing under AS 44.62.190 - 44.62.210, which require that any agency publish legal notice describing the proposed change and solicit comment for 30 days before taking action. AS 44.62.230 also provides that if the petition is for an emergency regulation, and the agency finds that an emergency exists, the agency may submit the regulation to the lieutenant governor immediately after making the finding of emergency and putting the regulation into proper form.

(b) Fish and game regulations are adopted by the Alaska Board of Fisheries and the Alaska Board of Game. At least twice annually, the boards solicit regulation changes. Several hundred proposed changes are usually submitted to each board annually. The Department of Fish and Game compiles the proposals and mails them to all fish and game advisory committees, regional fish and game councils, and to over 500 other interested individuals.

(c) Copies of all proposals are available at local Department of Fish and Game offices. When the proposal books are available, the advisory committees and regional councils then hold public meetings in the communities and regions they represent, to gather local comment on the proposed changes. Finally, the boards convene public meetings, which have lasted as long as six weeks, taking department staff reports, public comment, and advisory committee and regional council reports before voting in public session on the proposed changes.

(d) The public has come to rely on this regularly scheduled participatory process as the basis for changing fish and game regulations. Commercial fishermen, processors, guides, trappers, hunters, sport fishermen, subsistence fishermen, and others plan business and recreational ventures around the outcome of these public meetings.

(e) The Boards of Fisheries and Game recognize the importance of public participation in developing management regulations, and recognize that public reliance on the predictability of the normal board process is a critical element in regulatory changes. The boards find that petitions can detrimentally circumvent this process and that an adequate and more reasonable opportunity for public participation is provided by regularly scheduled meetings.

(f) The Boards of Fisheries and Game recognize that in rare instances circumstances may require regulatory changes outside the process described in (b) - (d) of this section. Except for petitions dealing with subsistence hunting or fishing, which will be evaluated on a case-by-case basis under the criteria in 5 AAC 96.615(a) , it is the policy of the boards that a petition will be denied and not scheduled for hearing unless the problem outlined in the petition justifies a finding of emergency. In accordance with state policy expressed in AS 44.62.270 , emergencies will be held to a minimum and are rarely found to exist. In this section, an emergency is an unforeseen, unexpected event that either threatens a fish or game resource, or an unforeseen, unexpected resource situation where a biologically allowable resource harvest would be precluded by delayed regulatory action and such delay would be significantly burdensome to the petitioners because the resource would be unavailable in the future.

History

History: Eff. 9/22/85, Register 95; am 8/17/91, Register 119; readopt 5/15/93, Register 126

Annotations

Authority: AS 16.05.251

AS 16.05.255

AS 16.05.258

Editor's note: At its November 1 - 7, 1992 meeting, the Joint Board of Fisheries and Game readopted 5 AAC 96.625 in its entirety, without change, under ch. 1, SSSLA 1992 (the 1992 subsistence law), which repealed and reenacted AS 16.05.258 .

Sec. 16.05.060. Emergency orders. (a) This chapter does not limit the power of the commissioner or an authorized designee, when circumstances require, to summarily open or close seasons or areas or to change weekly closed periods on fish or game by means of emergency orders.

(b) The commissioner or an authorized designee may, under criteria adopted by the Board of Fisheries, summarily increase or decrease sport fish bag limits or modify methods of harvest for sport fish by means of emergency orders.

(c) An emergency order has the force and effect of law after field announcement by the commissioner or an authorized designee. An emergency order adopted under this section is not subject to AS 44.62 (Administrative Procedure Act). (§ 12 art I ch 94 SLA 1959; am § 1 ch 4 SLA 1963; am § 1 ch 78 SLA 1989)

Revisor's notes. — Section 1, ch. 78, SLA 1989 added a new subsection (b) to this section. The new subsection contained the sentence set out above as (b) and two other sentences which duplicated the second and third sentences of the section as it existed before the amendment. When incorporating the 1989 amendment into this section, the first sentence of the existing text was designated as (a), and the second and third sentences were designated as (c). The second and third sentences of § 1, ch. 78, SLA 1989 were not codified.

Effect of amendments. — See the revisor's note.

Opinions of attorney general. — There is no reason why the Department of Fish and Game could not issue different categories of emergency orders under this section in cases of, for example, true biological emergency, and possible "field" orders for other situations, although it would be advisable to adopt a regulation describing how the department intends to apply this section. Also, it probably would be advisable for clarity's sake to include the statutory cite in the title of the order — "AS 16.05.060 emergency order" and "AS 16.05.060 field order." July 27, 1989 Op. Att'y Gen.

NOTES TO DECISIONS

Effect of orders. — Authorized by this section, emergency closure orders have the force and effect of law. *F/V Am. Eagle v. State*, 620 P.2d 657 (Alaska 1980), appeal dismissed, 454 U.S. 1130, 102 S. Ct. 985, 71 L. Ed. 2d 284 (1982).

Vagueness of order. — An emergency order closing a shellfish district was not in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, in violation of the due process rights of a fishing vessel's owners. *F/V Am. Eagle v. State*, 620 P.2d 657 (Alaska 1980), appeal dismissed, 454 U.S. 1130, 102 S. Ct. 985, 71 L. Ed. 2d 284 (1982).

Area closures. — This section does not prohibit the closure of an entire statistical area of king crab stocks or district thereof. *F/V Am. Eagle v. State*, 620 P.2d 657 (Alaska 1980), appeal dismissed, 454 U.S. 1130, 102 S. Ct. 985, 71 L. Ed. 2d 284 (1982).

Use to enforce resource management plan. — If the Board of Fisheries properly adopted a plan for the management of state fishery resources, the Commissioner of Fish and Game could enforce that policy

through the emergency order process. *Kenai Peninsula Fisherman's Coop. Ass'n v. State*, 628 P.2d 897 (Alaska 1981).

Selective closures. — The Commissioner of Fish and Game may use the emergency order process to close down one type of fishery and not another in order to implement a policy establishing priorities of use. *Kenai Peninsula Fisherman's Coop. Ass'n v. State*, 628 P.2d 897 (Alaska 1981).

Veto power. — The Commissioner of the Department of Fish and Game does not have the authority to effectively veto a decision of the Board of Fisheries. *Peninsula Mktg. Ass'n v. Rosier*, 890 P.2d 567 (Alaska 1995).

Duty to use reasonable care. — The Alaska Department of Fish and Game does not owe commercial or subsistence fishermen an actionable duty to use reasonable care in fisheries data collection and management. *Mesiar v. Heckman*, 964 P.2d 445 (Alaska 1998).

Cited in *Jensen v. Goresen*, 881 P.2d 1119 (Alaska 1994).

Sec. 16.05.065. Application extension. (a) The commissioner shall extend the time and dates during which application may be made for fish or game registration if the commissioner finds that

(1) the conservation and management of the fish or game resource will not be affected adversely; and

(2) the failure to timely apply is the result of excusable neglect.

(b) The fee for an extension granted under this section is \$45.

(c) As used in this section, "excusable neglect" does not include unfamiliarity with or ignorance of applicable laws and regulations. In order to show excusable neglect, a person must have demonstrated, before the registration deadline, an intent to harvest fish or game. (§ 2 ch 196 SLA 1970; am § 1 ch 105 SLA 1977)

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