

SCOMM

131:17

THE
FOLLOWING
DOCUMENT(S)
ARE
POOR
ORIGINAL
COPIES

LEGAL SERVICES

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

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

130 Seward Street, Suite 409
Juneau, Alaska 99801-2105

MEMORANDUM

December 4, 1995

SUBJECT: "Open access" provisions of the Alaska Constitution and restrictions on sport fish guides (Work Order No. 9-LS1353)

TO: Representative Joseph Green

FROM: George Utermohle *GU*
Legislative Counsel

This memorandum briefly discusses the implications that the "open access" provisions of article VIII of the Alaska Constitution would have for any proposal to limit the number of sport fish guides.

Any proposal to limit the number of sport fish guides would infringe on the "open access" provisions of the Alaska Constitution, because it would have the effect of restricting free entry into the fishery. See, McDowell v. State, 785 P.2d 1 (Alaska 1989); Owsichuk v. State, 763 P.2d 488 (Alaska 1988); Bozanich v. Noerenberg, Alaska Superior Court, First Judicial District, Juneau, Case No. 70-389, March 15, 1971. Even though they are not actually engaged in sport fishing while providing guide services, the Alaska Constitution protects the open access rights of sport fish guides to use fishery resources for professional purposes. "The common use clause makes no distinction between use for personal purposes and use for professional purposes." Owsichuk, 763 P.2d at 497; see also, Tongass Sport Fishing Association, 866 P.2d 1314 (Alaska 1994); Alaska Fish Spotters Association, 838 P.2d 798 (Alaska 1992).

The "open access" provisions of article VIII of the Alaska Constitution are the "common use" section¹, "no exclusive right of fishery" clause², and the "uniform application" section³.

¹ Article VIII, sec. 3 states:

Common Use. Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use.

² Article VIII, sec. 15 states (emphasis added):

No Exclusive Right of Fishery. No exclusive right or special privilege of fishery shall be created or
(continued...)

These provisions provide that all persons shall have an equal opportunity to participate in the use of fish and game resources.

The current limited entry system for commercial fisheries (AS 16.43) would violate the open access provisions of the Alaska Constitution, unless the constitution had been amended to allow limited entry. State v. Ostrosky, 667 P.2d 1343 (Alaska 1983), appeal dismissed sub nom. Ostrosky v. Alaska, 467 U.S. 1201, 81 L.Ed.2d 339 (1984). In 1972, article VIII, section 15 was amended to create a limited entry exception to the "no exclusive right of fishery" clause. The limited entry exception provides that "[t]his section does not restrict the power of the State to limit entry into any fishery for purposes of resource conservation, to prevent economic distress among fishermen and those dependent upon them for a livelihood and to promote the efficient development of aquaculture in the State." Article VIII, sec. 15, in relevant part.

In order to place a limit on the number of sport fish guides, it would be necessary for such limitations to fall under the limited entry exception. Though the limited entry exception was largely adopted in the context of commercial fisheries, the exception does not expressly limit itself to only commercial fisheries. The courts may construe "any fishery" to include sport fisheries as well as commercial fisheries. Thus there is a possibility that the limited entry exception would authorize some form of limitation on the number of sport fish guides.

Assuming that the limited entry exception is construed broadly to include limited entry for sport fish guides, the next obstacle to be overcome is to establish that limitations or restrictions on who may become sport fish guides achieves the three purposes of the limited entry exception: resource conservation, prevention of economic distress among fishermen and others, and promotion of aquaculture. When the Alaska Supreme Court approved the commercial fisheries limited entry program, the court did not examine in any detail whether the program satisfied all of the purposes that the limited entry exception was to achieve. Ostrosky, 667 P.2d at 1190-95. In other cases where the court had occasion to review commercial fisheries limited entry, the court did not rigorously examine whether the program achieved all three of the purposes, but instead seemed to accept a challenged provision if it furthered one or two of the purposes of the limited entry exception. Johns v. Commercial

^{2/}(...continued)

authorized in the natural waters of the State. This section does not restrict the power of the State to limit entry into any fishery for purposes of resource conservation, to prevent economic distress among fishermen and those dependent upon them for a livelihood and to promote the efficient development of aquaculture in the State.

^{3/} Article VIII, sec. 17 states:

Uniform Application. Laws and regulations governing the use or disposal of natural resources shall apply equally to all persons similarly situated with reference to the subject matter and purpose to be served by the law or regulation.

Representative Joseph Green
December 4, 1995
Page 3

Fisheries Entry Commission, 758 P.2d 1256, 1263-64 (Alaska 1988); Commercial Fisheries Entry Commission v. Apokedak, 606 P.2d 1255, 1265 (Alaska 1980). The burden would fall upon the legislature to establish a substantial record in the legislative history that any legislation limiting the number of sport fish guides achieves those purposes.

If the limited entry exception cannot be construed to authorize a limitation on the number of sport fish guides, then the only remaining option is to amend the Alaska Constitution accordingly.

Please contact me, if I can provide additional information on the open access provisions of the Alaska Constitution or other issues relating to sport fish guides.

GU:glc
95-452.glc

LEGAL SERVICES

Division of Legal and Research Services
Legislative Affairs Agency
State Capitol, Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

CAP 428

(907) 465-2450 or
465-3867

FAX: (907) 465-2029
Mail Stop 3101

ROUTING SLIP

TO: REP SEATON ATTN: CAMERON

REMARKS:

AS PER YOUR REQUEST OPINION RELATING
TO SPORT FISH CHARTER FISHERIES

FROM: LAA-LEGAL G LUTERMOHLE DATE: 4/29/03

TONGASS SPORT FISHING ASSOCIATION; Ketchikan Marine Charters Association; Southeastern Lodge & Resort Owners Association; Sitka Charter Boat Owners Association; Petersburg Charter Boat Association; Sitka Sportsman's Association; Juneau Charter Boat Operator's Association; Alaska State Council of Trout Unlimited; and Alaska Sport Fishing Federation, Appellants,

v.

STATE of Alaska; Alaska Board of Fisheries; Alaska Department of Fish & Game; and Carl L. Rosier, Commissioner of Fish & Game, Appellees.

Alaska Trollers Association,
Appellee/Intervenor.

No. S-5202.

Supreme Court of Alaska.

Jan. 14, 1994.

Sport fishing groups challenged Board of Fisheries regulation allocating number of chinook salmon harvested by commercial and sport fishers in southeast portion of state. The Superior Court, First Judicial District, Juneau, Walter L. Carpeneti, J., entered summary judgment for Board. Sport fishing groups appealed. The Supreme Court, Rabnowitz, J., held that: (1) allocational regulation did not violate "common use," "no exclusive right of fishery," or "uniform application" clauses of state constitutional article limiting laws and regulations governing natural resources; (2) Board considered relevant statutory criteria in adopting regulation; and (3) Board was not required to publish decisional document in support of regulation.

Affirmed.

1. Administrative Law and Procedure ⊞797

Fish ⊞12

Whether Board of Fisheries regulation is consistent with State Constitution is question of law which is reviewed de novo.

2. Fish ⊞12

State constitutional limitations on state's power to restrict access to natural resource user groups do not apply to state's authority to allocate fishery resources among sport, commercial, and subsistence users. Const. Art. 8, § 1 et seq.

3. Fish ⊞12

Board of Fisheries possessed authority to allocate chinook salmon subject to Pacific Salmon Treaty between sport and commercial users, and its regulation allocating number of chinook that could be harvested by commercial seiners and gillnetters, commercial trollers, and sport fishers in southeast portion of state did not violate "common use" or "no exclusive right of fishery" clauses of State Constitution, since Board's allocation decision was not limitation on admission to particular user group. Const. Art. 8, §§ 3, 15; Pacific Salmon Treaty Act of 1985, §§ 2-15, 16 U.S.C.A. §§ 3631-3644.

4. Fish ⊞12

"Uniform application" clause of State Constitution, limiting laws and regulations governing use or disposal of natural resources, was not violated by Board of Fisheries regulation allocating number of chinook salmon that could be harvested by commercial seiners and gillnetters, commercial trollers, and sport fishers in southeast portion of state, since sport and commercial users were not similarly situated. Const. Art. 8, § 17; Pacific Salmon Treaty Act of 1985, §§ 2-15, 16 U.S.C.A. §§ 3631-3644.

5. Fish ⊞12

Board of Fisheries considered relevant statutory criteria in adopting regulation allocating chinook salmon subject to Pacific Salmon Treaty between sport and commercial users in southeast portion of state, since Board took hard look at salient problems affecting southeast Treaty chinook harvests and engaged in reasoned decisionmaking, during full day of deliberations following hearings, in reaching its allocation decision, and there was no evidence that Board's allocation was unreasonable or arbitrary. AS 16.05.251(e); Pacific Salmon Treaty Act of 1985, §§ 2-15, 16 U.S.C.A. §§ 3631-3644.

6. Fish $\S$ 12

In making decision regarding allocation of fish between commercial and sport fishers, Board of Fisheries is required to take hard look at salient problems and to engage in reasoned decisionmaking. AS 16.05.-251(a)(12), (e).

7. Administrative Law and Procedure $\S$ 797Fish $\S$ 12

It is not function of Supreme Court to examine wisdom of Board of Fisheries regulation allocating fish between commercial and sport fishers.

8. Administrative Law and Procedure $\S$ 797

Effective judicial review requires that agency adequately discuss basis of regulation.

9. Administrative Law and Procedure $\S$ 408Fish $\S$ 12

Board of Fisheries was not required to publish decisional document in support of Board's regulation allocating number of chinook salmon that could be harvested by commercial and sport fishers in southeast portion of state, since record reflected that Board considered relevant salient factors in making its allocation decision, its decision showed reasoned decisionmaking, and adoption of decisional document requirement was unnecessary and would impose significant burdens upon Board and its lay members. AS 16.05.-251(a)(12), (e).

James R. Blair, Bliss Riordan, Fairbanks, for appellants.

John P. Griffin, Asst. Atty. Gen., Charles E. Cole, Atty. Gen., Juneau, for appellees.

Bruce B. Weyhrauch, Faulkner, Banfield, Doogan & Holmes, Juneau, for appellee/intervenor.

1. See generally Thomas C. Jensen, *The United States-Canada Pacific Salmon Interception Treaty: An Historical and Legal Overview*, 16 *Env'tl. L.* 363, 366 n. 1 (1986).

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

OPINION

RABINOWITZ, Justice.

This appeal concerns a regulation promulgated by the Alaska Board of Fisheries (the Board) allocating the number of chinook (king) salmon that may be harvested by commercial seiners and gillnetters, commercial trollers, and sport fishers in southeast Alaska. This appeal presents three questions. First, does the allocative regulation promulgated by the Board violate the policies expressed in Article VIII of the Alaska Constitution? Second, in promulgating this regulation, did the Board consider the relevant criteria and take a "hard look" at the salient problems involved? Third, is a decisional document supporting the regulation required, and if not, is the record sufficient to support the Board's adoption of the regulation? We determine that the superior court answered all three of these questions correctly, and affirm its grant of summary judgment to the Board.

I. BACKGROUND

The Pacific Salmon Treaty took effect in 1985. See Fisheries: Pacific Salmon, Treaty Between the United States of America and Canada, Jan. 28, 1985; 16 U.S.C. §§ 3631-3644. Since its enactment the number of chinook salmon that can be harvested in southeast Alaska by commercial net fishers (seiners and gillnetters), commercial trollers, and sport fishers, has been determined by the Pacific Salmon Commission under the terms of the treaty. For 1991 and 1992 the Commission set a harvest ceiling of 273,000 and 263,000 chinooks respectively for all user groups. Alaska Dep't of Fish and Game, *Regional Information Report No. 1J92-01, Chinook Salmon Fisheries and Harvests in Southeast Alaska 2-3* (1992).²

2. Alaska hatchery chinook may be taken in addition to these base ceilings. Cumulative deviations from the harvest ceilings are limited to 7.5% of the ceiling or approximately 20,000 fish. When cumulative deviations exceed this management range, chinook harvests must be reduced

The Alaska Board of Fisheries determines allocations among the user groups under the chinook harvest ceilings set by the Pacific Salmon Commission. Twenty thousand chinook a season are allocated to the commercial net fishers. 5 Alaska Administrative Code (AAC) 33.365(b)(10). Prior to 1992 sport fishers were able to harvest chinook subject only to bag and size limitations. The remaining chinook, under the provisions of the Pacific Salmon Treaty, were available for harvest by commercial trollers.³

Alaska Department of Fish and Game data show that the sport fishers' catch of chinook gradually increased until the Board imposed ceilings.⁴ This increased sport harvest in combination with lower Treaty limits reduced the number of chinook available to southeast commercial trollers. From 1975 to 1979 the average harvest of Treaty chinook by commercial trollers was approximately 300,000 fish. From 1985 to 1991, it was less than 225,000 fish.⁵

In November 1991, the Alaska Trollers Association requested that the Board amend 5 AAC 33.365 (the Southeast Alaska-Yakutat Chinook and Coho Salmon Troll Fisheries Management Plan) to allocate a percentage of the Treaty chinook salmon quota to commercial trollers. After four days of public hearings and lengthy deliberations, the Board voted to allocate Treaty chinook between the commercial troll and sport fisheries. After deducting the 20,000 chinook allocated to the commercial net fishers, 83 percent of the remainder was allocated to the troll fishery and 17 percent to the sport fishery. Subsequently the Board adopted regulations implementing the allocation decision:

the following year to bring the cumulative deviation back within the management range. *Id.*

3. The commercial trollers were limited each year to what was left after subtracting from the Treaty's annual harvest ceiling the following: (1) the allocation to the net fishermen; (2) a pre-season projection of what sport fishermen would catch that year; and (3) the amount, if any, by which the previous year's harvest of chinook by all user groups exceeded that year's Treaty ceiling
4. The sport fishers' harvest of Treaty chinook—chinook not raised in hatcheries—grew steadily

(a) The department shall manage the Southeast Alaska Area and Yakutat Area chinook salmon sport fisheries in marine waters so that these fisheries together harvest not more than 17 percent of the annual harvest ceiling, specified by the Pacific Salmon Commission, after the commercial net harvest specified in 5 AAC 33.365(b)(10) is subtracted from the total ceiling. The management plan in this section provides the department with guidelines for pre-season and in-season adjustment of sport fishery harvest levels in order to not exceed the 17 percent ceiling.

(b) The objects of the management plan in this section are to allow uninterrupted sport fishing in marine waters for chinook salmon, while not exceeding the 17 percent ceiling established in (a) of this section, and to minimize regulatory restrictions on anglers not fishing from a charter vessel, who harvest chinook salmon at a lower catch-per-unit of effort than do anglers fishing from a charter vessel.

5 AAC 46.055(a)-(b).

Thereafter, the Tongass Sport Fishing Association, together with other sport fishing organizations, associations of charter-boat operators, and an association of lodge and resort owners (collectively Tongass) brought suit challenging the Board's regulation.⁶ On cross-motions for summary judgment the superior court ruled that (1) the Board did not violate the Administrative Procedure Act in adopting the questioned regulation; (2) the Board acted within its statutory powers regarding conservation, development, and utilization of fishery resources; (3) the Board took a hard look at all relevant factors in making the allocation; (4) the allocation regulation does not violate article VIII of the

during this time. In 1969, it was 14,000. Between 1973 and 1979, it hovered between 16,000 and 17,000. For most years from 1980 to 1988, it was approximately 20,000. Thereafter, it increased more rapidly. It was 24,720 in 1989, 34,588 in 1990, and 41,700 in 1991.

5. Trollers harvested 88-90% of the total Treaty chinook catch prior to 1980. The trollers' harvest from 1989 through 1992 was less than 80% of the total catch
6. The Alaska Trollers Association intervened in support of the Board's regulation

ument was not necessary because the administrative record adequately set forth the basis of the Board's allocation decision. Tongass appeals, challenging the last three of those rulings.

II. DOES THE BOARD'S ALLOCATION REGULATION VIOLATE THE POLICIES EXPRESSED IN ARTICLE VIII OF THE ALASKA CONSTITUTION?

[1] Tongass argues that article VIII of the Alaska Constitution, particularly the "common use" clause of section 3 and the "no exclusive right of fishery" clause of section 15, embodies a clear policy in favor of general public access to the natural resources of the state, with no special privilege accorded to any individual group.⁸ Tongass further argues that under the public trust doctrine the state has a fiduciary duty to manage the resources of Alaska for the benefit of all of the people.⁹ Given these constitutional policies, Tongass takes the position that allocating a fixed quota of chinook to the trollers creates an unconstitutional "special privi-

7. Whether a regulation is consistent with the Alaska Constitution is a question of law, which we review *de novo*. See, e.g., *Sonneman v. Knight*, 790 P.2d 702, 704 (Alaska 1990). "[S]ummary judgment may be granted only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Thus, we review *de novo* an order granting summary judgment." *Gilbert v. State, Dep't of Fish & Game*, 803 P.2d 391, 394 (Alaska 1990) (citation omitted).

8. Article VIII, section 1 of the Alaska Constitution provides:

It is the policy of the State to encourage the settlement of its land and the development of its resources by making them available for maximum use consistent with the public interest.

Article VIII, section 2 provides:

The legislature shall provide for the utilization, development, and conservation of all natural resources belonging to the State, including land and waters, for the maximum benefit of its people.

Article VIII, section 3 provides:

Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use.

Article VIII, section 4 provides:

Fish, forests, wildlife, grasslands, and all other replenishable resources belonging to the

State shall be utilized, developed, and maintained on the sustained yield principle, subject to preferences among beneficial uses.

The Board of Fisheries was created for the purposes of conservation and development of the state's fishery resources. AS 16.05-.221(a). In *Kenai Peninsula Fisherman's Cooperative Ass'n v. State*, 628 P.2d 897, 903 (Alaska 1981), we held that concepts of "conserving" and "developing" fishery resources necessarily include the concepts of managed utilization and thus allocation of these resources. See also *Alaska Fish Spotters v. State, Dep't of Fish & Game*, 838 P.2d 755, 800 (Alaska 1992). In *Meier v. State, Board of Fisheries*, 739 P.2d 172, 174 (Alaska 1987), we stated that the Board's "duty to conserve and develop fishery resources implies a concomitant power to allocate fishery resources among competing users." We also held that the Board's authority encompasses the power to allocate a fishery resource between two competing subgroups of commercial users. *Id.* at 174 (upholding Board allocation of

State shall be utilized, developed, and maintained on the sustained yield principle, subject to preferences among beneficial uses.

Article VIII, section 15 provides:

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

Article VIII, section 17 provides:

Laws and regulations governing the use or disposal of natural resources shall apply equally to all persons similarly situated with reference to the subject matter and purpose to be served by the law or regulation.

9. See *Ovrichuk v. State, Guide Licensing & Control Bd.*, 763 P.2d 488, 495 (Alaska 1988). *CWC Fisheries, Inc. v. Bunker*, 755 P.2d 1115, 1117-18 (Alaska 1988).

10. Troll fleet participation is controlled through the limited entry program. AS 16.43.010-800, see *Rutter v. State*, 668 P.2d 1343 (Alaska 1983); *State v. Ostrosky*, 667 P.2d 1184 (Alaska 1983). *appeal dismissed sub nom. Ostrosky v. Alaska*, 467 U.S. 1201, 104 S.Ct. 2379, 81 L.Ed.2d 339 (1984).

salmon between setnet and driftnet fishers). Subsequently, in *Gilbert v. State, Department of Fish & Game*, 803 P.2d 391, 399 (Alaska 1990), we recognized that the Board possessed authority to allocate among different fisheries.

[2] We have held that the "common use" clause of article VIII, section 3, the "no exclusive right of fishery" clause of section 15, and the "uniform application" clause of section 17 are not implicated unless limits are placed on the admission to resource user groups. *McDowell v. State*, 785 P.2d 1, 8 & n. 14 (Alaska 1989); see also *Owsichuk v. State, Guide Licensing & Control Bd.*, 763 P.2d 488, 492 (Alaska 1988). Article VIII limitations on the state's power to restrict access to natural resource user groups do not apply to the state's authority to allocate fishery resources among sport, commercial, and subsistence users.¹¹ In *Kenai Peninsula*, we said:

While section 15 does prohibit granting monopoly fishing rights, that section was not meant to prohibit differential treatment of such diverse user groups as commercial, sports, and subsistence fishermen. To conclude that, because a certain species is made available for sport fishing in a given area, commercial fishing of the same species in the same area must also be allowed, would be to go far beyond the purpose of the section.

628 P.2d at 904.

[3] On the basis of these authorities we conclude that the Board possessed the authority to allocate Treaty chinook between sport and commercial users. The Board's allocation decision was not a limitation on admission to a particular user group. Therefore, we hold that the regulation is not violative of the "common use" or "no exclusive right of fishery" clauses of article VIII of the Alaska Constitution.

11. In *McDowell* we said, "The state may, indeed must, make allocation decisions between sport, commercial, and subsistence users. That authority, however, does not imply a power to limit admission to a user group." 785 P.2d at 8.

12. Alaska Statute 16.05.251(e) provides in part:

[4] Furthermore, the regulation does not conflict with the "uniform application" clause of article VIII. Since sport and commercial users are not similarly situated, the uniform application clause is not implicated. *Gilbert*, 803 P.2d at 399.

III. IN PROMULGATING THE REGULATION, DID THE BOARD CONSIDER RELEVANT CRITERIA AND TAKE A "HARD LOOK" AT THE CONFLICTING FACTORS IN MAKING ITS ALLOCATION DECISION?

The legislature has authorized the Board to adopt regulations that the Board considers advisable for "regulating commercial, sport, guided sport, subsistence, and personal use fishing as needed for the conservation, development, and utilization of fisheries." AS 16.05.251(a)(12). The legislature also directed the Board to establish criteria for the allocation of fishery resources among personal use, sport, and commercial fishing. AS 16.05.251(e).¹² The legislature further provided that such criteria may include factors such as

- (1) the history of each personal use, sport, guided sport, and commercial fishery;
- (2) the number of residents and nonresidents who have participated in each fishery in the past and the number of residents and nonresidents who can reasonably be expected to participate in the future;
- (3) the importance of each fishery for providing residents the opportunity to obtain fish for personal and family consumption;
- (4) the availability of alternative fisheries resources;
- (5) the importance of each fishery to the economy of the state;
- (6) the importance of each fishery to the economy of the region and local area in which the fishery is located;

The Board of Fisheries may allocate fishery resources among personal use, sport, guided sport, and commercial fisheries. The board shall adopt criteria for the allocation of fishery resources and shall use the criteria as appropriate to particular allocational decisions.

- (7) the importance of each fishery in providing recreational opportunities for residents and nonresidents.

Id. In response to this legislation the Board adopted 5 AAC 75.017:

Before adopting regulations that allocate fish among personal use, sport, and commercial fisheries, the board will, as appropriate to particular allocation decisions, consider factors such as those set out in AS 16.05.251(e).

(Emphasis added).

Tongass asserts that the Board failed to follow the criteria set out in AS 16.05.251(e) and 5 AAC 75.017 in adopting its allocational regulation. The essence of Tongass's argument is that although the Board members were aware of the relevant criteria, and some members did mention criteria from time to time, there is no indication in the record that the Board ever weighed the criteria in making its allocation decision. As Tongass notes, an agency must at least consider all relevant criteria. See *State, Dep't of Transp. & Pub. Facilities v. 0.644 Acres, More or Less*, 613 P.2d 829, 833 n. 13 (Alaska 1980).

[5] Upon its review of the transcript of the four-day hearing and the Board's deliberations, the superior court found that the Board had considered the relevant statutory criteria. Review of the record leads us to the same conclusion. The record shows that during a full day of deliberations following the hearings the Board did consider the relevant criteria before reaching its allocation decision.

[6,7] In making its allocation decision the Board was required to take a "hard look" at the salient problems and to engage in reasoned decisionmaking. *Gilbert*, 803 P.2d at 398; *Trustees for Alaska v. State, Dep't of Natural Resources*, 795 P.2d 806, 809 (Alaska 1990); *Alaska Survival v. State, Dep't of Natural Resources*, 723 P.2d 1281, 1287 (Alaska 1986). Our review of the record persuades us that the Board did take a hard look at the salient problems affecting the southeast Treaty chinook harvests and en-

gaged in reasoned decisionmaking in reaching its allocation decision. There is no evidence that the Board's allocation was unreasonable or arbitrary. It is not our function to examine the wisdom of the allocation regulation. *Gilbert*, 803 P.2d at 397; *Meier*, 739 P.2d at 174.

IV. IS A DECISIONAL DOCUMENT REQUIRED? IF NOT, IS THE RECORD SUFFICIENT TO SUPPORT THE BOARD'S ALLOCATION DECISION?

[8,9] Tongass asks us to invalidate the Board's allocation regulation because the Board did not publish a decisional document in its support. Effective judicial review requires that an agency adequately discuss the basis of a regulation:

For a court to determine that an agency acted within its authority in adopting a regulation, it is vital that the agency clearly voice the grounds upon which the regulation was based in its discussions of the regulations or in a document articulating its decision.

Alaska Fish Spotters Ass'n v. State, Dep't of Fish & Game, 838 P.2d 798, 801 (Alaska 1992).

We have expressly held that decisional documents are not required in the circumstances where an agency exercises its rulemaking powers. *Johns v. Commercial Fisheries Entry Comm'n*, 758 P.2d 1256, 1260-61 (Alaska 1988); see also *State v. Hebert*, 743 P.2d 392, 396-97 (Alaska App.1987). We are not persuaded by Tongass's arguments that we should modify *Johns* to require a decisional document from an administrative agency when it exercises its (quasi-legislative) rulemaking authority. As noted in the previous section, the record in this case indicates that the Board took a hard look at the relevant and often competing salient factors in making its allocation decision and that its decision reflects reasoned decisionmaking. Adoption of a decisional document requirement is unnecessary and would impose significant burdens upon the Board.¹³

13. As the state notes:

These Boards are citizen boards, whose members generally pursue full-time careers in addi-

The superior court's grant of summary judgment to the state is **AFFIRMED**.



James C. LOWE, Appellant,

v.

STATE of Alaska, Appellee.

No. A-5008.

Court of Appeals of Alaska.

May 11, 1991.

Defendant was convicted in the Superior Court, Third Judicial District, Anchorage, Karl S. Johnstone, J., of manslaughter, and he appealed. The Court of Appeals, Coats, J., held that three-judge panel properly considered and rejected claim that defendant's extraordinary potential for rehabilitation rendered imposition of presumptive five-year sentencing term manifestly unjust.

Affirmed.

1. Criminal Law ⇨996(4)

A three-judge panel properly considered and rejected claim that manslaughter defendant's extraordinary potential for rehabilitation rendered imposition of presumptive five-year sentencing term manifestly unjust; in anger and frustration, defendant had emptied revolver at fleeing persons who presented no danger to him, and consequences of his reckless actions were entirely foreseeable. AS 12.55.175(b).

tion to their agency obligations; the number of meetings they can hold and proposals they can consider are limited. Nevertheless, in its 1990-91 meeting cycle, the Board of Fisheries met for 58 days and considered approximately 393 proposals to change or adopt new regula-

2. Criminal Law ⇨1263

Courts may deviate from presumptive sentences only when there are good reasons to do so.

William P. Bryson and Shelley K. Chaffin, Law Office of William P. Bryson, Anchorage, for appellant.

James L. Hanley, Asst. Atty. Gen., Office of Special Prosecutions and Appeals, Anchorage, and Charles E. Cole, Atty. Gen., Juneau, for appellee.

Before COATS and MANNHEIMER, JJ., and WOLVERTON, District Court Judge.

OPINION

COATS, Judge.

On the evening of May 9, 1992, eighteen-year-old Clyde Thompson and several friends were participating in a scavenger hunt organized by students at Service High School. One item on their list was a promotional balloon tethered to the roof of the Lo-Mark Furniture Store on Gambell Street. The youths obtained a pair of scissors and a knife to cut the balloon free and drove to the Lo-Mark Furniture Store parking lot. Several students scaled the roof of the store while others waited below.

At that time, the owner of the Lo-Mark Store, James C. Lowe, and his wife drove their motor home into the parking lot of the furniture store. They noticed two people on the roof who appeared to be stealing the balloon. Lowe yelled at the individuals and retrieved a six-shot .38 caliber revolver from his motor home. Lowe told his wife, "I'm gonna scare 'em to death this time." Lowe ran around the building, saw the individuals running toward a car, and fired six shots in their general direction.

One of Lowe's shots struck Clyde Thompson in the back. Thompson's companions realized that he had been seriously wounded

tions. Current limitations in staff, in agency budgets, and in the time commitments of lay Board members make it impossible to reduce every one of these hundreds of decisions to a written "findings and conclusions" document.

and drove him to the Alaska Medical Center for help. The bullet had pierced Thompson's heart, and he died at the hospital.

When the police investigated the incident, they found that three other shots which Lowe fired had struck rooms in the Samovar Inn. Two bullets had entered room number 40, striking a television set and mirror. This room was occupied by a man and his wife who fortunately were out to dinner when the bullets struck. Another bullet entered an unoccupied room.

Following the investigation, the state charged Lowe with murder in the second degree. Following a trial, a jury convicted Lowe of manslaughter.

Manslaughter is a class A felony with a maximum sentence of twenty years' imprisonment. AS 11.41.120 and AS 12.55.125. There is a presumptive sentence of five years' imprisonment for a first-felony offender, ten years for a second-felony offender, and fifteen years for a third-felony offender. AS 12.55.125(c). At the time of sentencing, Lowe was forty-eight years old and had no prior convictions.

Superior Court Judge Karl S. Johnstone found that two aggravating factors applied to Lowe's offense: that "the defendant employed a dangerous instrument in furtherance of the offense" and that "the defendant's conduct created a risk of imminent physical injury to three or more persons, other than accomplices[.]" AS 12.55.155(c)(4) and (6). Judge Johnstone found that no mitigating factors were applicable. Lowe does not contest these findings.

In the absence of mitigating factors, Judge Johnstone was required by law to impose at least the five-year presumptive sentence. Lowe contended that sentencing him to five years' imprisonment was manifestly unjust, and urged Judge Johnstone to refer the case to a three-judge panel pursuant to AS 12.55.165.

Alaska Statute 12.55.165 provides:

If the defendant is subject to sentencing [under presumptive sentencing] and the court finds by clear and convincing evidence that manifest injustice would result from failure to consider relevant aggravating

or mitigating factors not specifically included in AS 12.55.155 or from imposition of the presumptive term, whether or not adjusted for aggravating or mitigating factors, the court shall enter findings and conclusions and cause a record of the proceedings to be transmitted to a three-judge panel for sentencing under AS 12.55.175.

A three-judge panel must adjust a defendant's sentence if it finds "that manifest injustice would result from failure to consider relevant aggravating or mitigating factors not specifically included in AS 12.55.155 or from imposition of the presumptive term." AS 12.55.175(b).

Lowe requested that Judge Johnstone refer his case to a three-judge panel on two grounds: (1) that manifest injustice would result from failure to consider Lowe's exceptional prospects for rehabilitation, and (2) that manifest injustice would result from imposition of the presumptive five-year term.

Judge Johnstone concluded that Lowe's case was appropriate for referral to a three-judge panel. In making this referral, Judge Johnstone found that although Lowe acted out of anger and frustration, he had not intended to shoot anyone. Judge Johnstone also found that while Lowe had acted recklessly in firing the shots, he had generally been a productive citizen who was extremely and genuinely remorseful. Judge Johnstone concluded that Lowe had excellent prospects for rehabilitation. He noted that this court has encouraged referral of debatable cases to a three-judge panel. *Bossie v. State*, 835 P.2d 1257, 1259 (Alaska App.1992); *Lloyd v. State*, 672 P.2d 152, 155 (Alaska App.1983).

A three-judge panel concluded that it would not be manifestly unjust to impose the presumptive five-year term and remanded the case back to Judge Johnstone. Judge Johnstone imposed the five-year presumptive sentence.

[1] On appeal, Lowe contends that the three-judge panel failed to consider the issue of whether it was manifestly unjust to sentence him without considering his exceptional potential for rehabilitation. Having carefully reviewed the findings of the three-judge panel, we believe that the panel properly consid-

result of combining those two i.e. extra delay and extra cost to a new judge that is trying to relitigate issues prior judge—requires an extra 42(c). Its arguments, however, convince us that a straightforward rule yields so extreme or it in this case as to require us in language of the rule.

VISION

USE the superior court's order change judges and REMAND is consistent with this opinion.



Ashbrook v. Northwest Explor., Inc., J. No. 776 at 5-6 (Alaska, May 10, 1994) (original party Ashbrook's allocation issues).

Sigurd RUTTER, Appellant,

v.

STATE of Alaska, Alaska Board of Fisheries, Alaska Department of Fish and Game, and Frank Rue, Commissioner, Department of Fish and Game, Appellees.

No. S-7729.

Supreme Court of Alaska.

Aug. 7, 1998.

Commercial troll fisherman challenged Board of Fisheries regulation reallocating from commercial troll fisheries to sports fisheries 3% of the chinook (king) salmon harvestable in southeast Alaska. The Superior Court, First Judicial District, Sitka, Larry C. Zervos, J., granted summary judgment for state and Board. Fisherman appealed. The Supreme Court held that the Board was not required to treat sport fishing and guided sport fishing as separate categories for purposes of allocating fishery resources.

Affirmed.

Fish ☞ 12

Board of Fisheries, in promulgating regulation reallocating from commercial troll fisheries to sports fisheries 3% of the chinook (king) salmon harvestable in southeast Alaska, was not required to treat sport fishing and guided sport fishing as separate categories for allocation purposes; statute providing that Board "may allocate fishery resources among personal use, sport, guided sport, and commercial fisheries" and that Board "may" apply the statute's allocation criteria was discretionary rather than mandatory. AS 16.05.251(e); Alaska Admin. Code title 5, § 47.055(a).

1. Under the Pacific Salmon Treaty, the Pacific Salmon Commission determines the maximum number of chinook salmon that may be harvested in southeast Alaska. See *Tongass Sport Fishing Ass'n v. State*, 866 P.2d 1314, 1315 (Alaska 1994). The Commission set the harvest ceiling for all user groups in southeast at 273,000 in 1991 and

RUTTER v. STATE

Cite as 963 P.2d 1007 (Alaska 1998)

Alaska 1007

Sheila Bacchus, Sitka, for Appellant.

Steven A. Daugherty, Assistant Attorney General, and Bruce M. Botelho, Attorney General, Juneau, for Appellee.

Before MATTHEWS, C.J., and COMPTON, EASTAUGH, FABE and BRYNER, JJ.

OPINION

PER CURIAM.

In 1992 the Alaska Board of Fisheries (Board) allocated to the sports fishery 17% of the treaty chinook (king) salmon harvestable in southeast Alaska; the Board allocated 83% to the commercial troll fishery.¹ See 5 Alaska Administrative Code (AAC) 46.055(a) (repealed 1994). This court subsequently upheld the allocation, finding it neither unreasonable nor arbitrary. See *Tongass Sport Fishing Ass'n v. State*, 866 P.2d 1314, 1319 (Alaska 1994). In January 1994, after three days of public testimony and a full day of deliberations, the Board adopted a new regulation, 5 AAC 47.055(a) (am.5/2/97). That regulation reallocated from the commercial troll fishery to the sport fishery—over a three-year period—3% of the harvestable treaty salmon, thereby giving the sport fishery 20% and the commercial fishery 80%. The sport fishery category includes guided and unguided sport fishing. See AS 16.05.940(5), (29).

Sigurd Rutter, a commercial troll fisherman in Sitka, filed suit in June 1994, challenging the newly adopted regulation.² The State filed a motion for summary judgment; Rutter filed a cross-motion. On March 21, 1996, Superior Court Judge Larry C. Zervos issued a decision addressing the opposing motions, concluding that the reallocation regulation was reasonable and valid, and granting summary judgment in favor of the State.

at 263,000 in 1992. Alaska currently uses the 1992 ceiling as its harvest guideline.

2. Rutter also challenged the validity of 5 AAC 39.270(h)(4) (defining "downrigger"). On appeal, Rutter has abandoned his challenge to that regulation.

Rutter appeals. Although the particulars of Rutter's arguments differ somewhat from the arguments he raised below, the core of his complaint remains the same: "This is a little case with a big issue: ... how can the State redistribute scarce chinook resources between commercial and non-commercial groups when the non-commercial group includes resource users with commercial interests?"

For the reasons stated in Judge Zervos's thorough and thoughtful summary judgment decision, relevant portions of which we set out in Appendix A, we affirm the superior court's order upholding the validity of 5 AAC 47.055(a). We add the following with respect to points specifically raised on appeal:

1. We reject Rutter's contention that the superior court erred in granting summary judgment because genuine issues of material fact had been raised concerning the Board's failure to determine "the extent of the commercial interest" of the guided sport fishery. Below, Rutter repeatedly acknowledged that there were no disputed facts for trial and that the case could be disposed of on summary judgment. He pointed to no information that the Board had refused to consider. Although Rutter mentioned certain 1994-95 registration statistics that he thought relevant, there is no indication that these statistics, standing alone, would have raised genuine issues of material fact. Rutter made no specific offer of additional admissible evidence concerning the extent of the commercial interest of the guided sport fishery. Our review of the record discloses no genuine issue of material fact for trial. Summary judgment was appropriate under these cir-

3. To the extent that Rutter suggests that the reasonableness of the Board's decisions always presents an issue of fact that is immune from summary judgment, he is incorrect. The role of the court in deciding whether the Board's decision was reasonable is limited to determining whether the Board "[took] a 'hard look' at salient problems and ... engage[d] in reasoned decisionmaking." *Tongass*, 866 P.2d at 1319 (citing *Gilbert v. State, Dep't of Fish & Game*, 803 P.2d 391, 398 (Alaska 1990)). "It is not our function to examine the wisdom of the allocation regulation." *Id.* Under this standard, when no facts material to the Board's decision are disputed, the ultimate issue of reasonableness presents a ques-

cumstances. See *Trigg v. City of Nome*, 929 P.2d 1273, 1274 n. 1 (Alaska 1996).

2. For similar reasons, we reject Rutter's claim that the reasonableness of the Board's decision to classify guided sport fishing as a form of sport fishing rather than as a form of commercial fishing presented a question of disputed legislative fact for trial. No disputed facts bore on this determination.³

3. We find no merit in Rutter's contention that the Board was required to consider the criteria listed in AS 16.05.251(e) separately as they related to the guided and unguided sport fisheries. The Board must consider the criteria listed when it decides to allocate fish among fisheries. See *Peninsula Mktg. Ass'n v. State*, 817 P.2d 917, 921 (Alaska 1991); 5 AAC 39.205, 75.017 (1996). The Board "may" allocate the resources "among personal use, sport, guided sport, and commercial" fisheries. AS 16.05.251(e). But it need not; the provision's use of the permissive word "may," indicates that the Board has discretion to treat sport and guided sport fishing as separate categories for allocation purposes. Here, after taking a "hard look" at the subject, the Board decided against separate allocations for sport fishing, on the one hand, and guided sport fishing, on the other. Instead, it elected to treat guided and unguided sport fishing as a single category and to make a separate allocation to the commercial trolling fishery. See 5 AAC 47.055(a), (n). The Board fully considered the statutory criteria in relation to the two categories adopted in the allocation—sport and commercial; in so doing, it fully discharged its obligations under AS 16.05.251(e).

The judgment entered by the superior court is AFFIRMED.

tion of law capable of summary adjudication. Cf. *Holloway v. Pigman*, 884 F.2d 365, 366 (8th Cir. 1989) ("The mere existence of a factual dispute is insufficient alone to bar summary judgment; rather, the dispute must be outcome determinative under prevailing law."); *Center for Auto Safety v. Bowers*, 466 F.Supp. 829, 835 (D.D.C. 1979) (holding that, where sufficient evidence is before an agency, a court may find a regulation reasonable as a matter of law on summary judgment). We decline Rutter's invitation to adopt a more stringent standard of review in cases involving the allocation of scarce environmental resources, since Rutter raises this issue for the first time in his reply brief.

APPENDIX A *

ORDER GRANTING SUMMARY
JUDGMENT

The State of Alaska, Department of Fish and Game ("the State") moves for summary judgment on all issues raised in Mr. Rutter's complaint. Mr. Rutter opposes and cross-moves for summary judgment.

III. VALIDITY OF THE
REGULATIONS¹

In deciding the validity of the regulations, this court must give substantial deference to the actions of the Board. See *Stepovak-Shumagin Set Net Ass'n v. State, Bd. of Fisheries*, 886 P.2d 632, 636 (Alaska 1994); see also *State v. Kenaitze Indian Tribe*, 894 P.2d 632, 641 (Alaska 1995).

[W]here an administrative regulation has been adopted in accordance with the procedures set forth in the Administrative Procedure Act, and it appears that the legislature has intended to commit to the agency discretion as to the particular matter that forms the subject of the regulation, we will review the regulation in the following manner: First, we will ascertain whether the regulation is consistent with and reasonably necessary to carry out the purposes of the statutory provisions conferring rule-making authority on the agency. This aspect of review insures that the agency has not exceeded the power delegated by the legislature. Second, we will determine whether the regulation is reasonable and not arbitrary.

Stepovak-Shumagin, 886 P.2d at 636-37 (quoting *Kelly v. Zamarello*, 486 P.2d 906, 911 (Alaska 1971)). The court must not sub-

stitute its judgment for the Board's determination because "highly specialized agency expertise is involved." *Id.* at 637 (quoting *Meier v. State, Bd. of Fisheries*, 739 P.2d 172, 174 (Alaska 1987)). The court should not question the wisdom of the regulations, but rather must "ensure only that the agency has taken a 'hard look' at the salient problems and has 'genuinely engaged in reasoned decision making.'" *Id.* (quoting *Gilbert v. State Dep't of Fish & Game*, 803 P.2d 391, 398 (Alaska 1990)).

The legislature created the Board "[f]or the purposes of the conservation and development of the fishery resources of the state." AS 16.05.221(a). The Supreme Court has held that the Board, in serving the purposes of conservation and development, is necessarily going to have to make decisions regarding the utilization of the fishery resources. See *Kenai Peninsula Fisherman's Coop. Ass'n v. State*, 628 P.2d 897, 903 (Alaska 1981).

Thus, in determining the validity of a regulation adopted by the Board, the court must first determine whether the regulation is reasonably necessary to conserve and develop the fisheries resource. If the regulation is reasonably necessary for these purposes, then the court must determine whether the regulation, as adopted, is reasonable and not arbitrary.

A. The 3% Reallocation Regulation

The legislature has granted the Board the power to adopt regulations that it deems advisable for "regulating commercial, sport, guided sport, subsistence, and personal use fishing as needed for the conservation, development, and utilization of fisheries." *Tongass Sport Fishing Ass'n v. State*, 866 P.2d 1314, 1318 (Alaska 1994) (quoting AS 16.05.251(a)(12)). This rule-making power

that, in adopting the regulations, the Board followed the proper procedure. See AS 44.62.100 ("The filing of a certified copy of a regulation ... raises the rebuttable presumption[] that ... all requirements of [the Administrative Procedure Act] and the regulations relative to the regulation have been complied with."); *Gilbert v. State, Dep't of Fish & Game*, 803 P.2d 391, 394 (Alaska 1990) ("A regulation ... is considered procedurally presumptively valid once a certified copy has been filed.")

¹As reprinted in this Appendix, the superior court's summary judgment order has been redacted to delete extraneous discussion. The original labeling of the section headings of the superior court order has been retained, but footnotes and pages have been renumbered. The order has also been technically edited in accordance with this court's Manual of Technical Rules for publication.

²Mr. Rutter does not argue that the regulations were adopted in violation of the Administrative Procedure Act. Therefore, this court presumes

APPENDIX A—Continued

includes the authority to allocate fishery resources between sport, subsistence, and commercial users. See *Peninsula Mfg. Ass'n v. State*, 817 P.2d 917, 921 (Alaska 1991). It also includes the power to allocate resources between users in the same group. See *id.* at 920-21.

In this case, the 3% allocation regulation is an allocative decision between the sport fishery and the commercial troll fishery. Allocative decisions are reasonably necessary to conserve and develop the resource. See *Meier v. State, Bd. of Fisheries*, 739 P.2d 172, 174-75 (Alaska 1987). Therefore, the question presented is whether the 3% reallocation regulation was reasonable and not arbitrary.

As already noted, the court's role is not to question the wisdom of a particular regulation, but rather to ensure that the Board has taken a "hard look" at the relevant problems and has actually engaged in reasoned decision making. *Stepovak-Shumagin*, 886 P.2d at 637. In making allocative decisions, however, the Board must consider criteria such as the following:

- (1) the history of each personal use, sport, guided sport, and commercial fishery;
- (2) the number of residents and nonresidents who have participated in each fishery in the past and the number of residents and nonresidents who can reasonably be expected to participate in the future;
- (3) the importance of each fishery for providing residents the opportunity to obtain fish for personal and family consumption;
- (4) the availability of alternative fisheries resources;
- (5) the importance of each fishery to the economy of the state;
- (6) the importance of each fishery to the economy of the region and local area in which the fishery is located;
- (7) the importance of each fishery in providing recreational opportunities for residents and nonresidents.

2. The issue of whether Alaska has violated the Pacific Salmon Treaty by failing to reduce its total king salmon harvest in Southeast below the 263,000 ceiling is being litigated in the federal

AS 16.05.251(e); see 5 AAC 75.017 (1996) ("Before adopting regulations that allocate fish among personal use, sport, and commercial fisheries, the board will, as appropriate to particular allocation decisions, consider factors such as those set out in AS 16.05.251(e).").

In order to evaluate whether the Board's actions in adopting the 3% reallocation regulation were reasonable and not arbitrary, the court must briefly discuss the Pacific Salmon Treaty and the Board's initial decision to allocate king salmon between the commercial troll and sport fisheries. The Pacific Salmon Treaty between the United States and Canada, which took effect in 1985, limited the number of king salmon that may be taken by all users in Southeast Alaska. See *Tongass Sport Fishing Ass'n*, 866 P.2d at 1315. The treaty set the harvest ceiling of king salmon in Southeast in 1991 at 273,000 and in 1992 at 263,000. Treaty Between the Government of Canada and the Government of the United States of America Concerning Pacific Salmon, Jan. 25, 1985, U.S.-Can., annex 4, ch.3, § 1(c), T.I.A.S. No. 11091 [hereinafter *Pacific Salmon Treaty*]; *Tongass Sport Fishing Ass'n*, 866 P.2d at 1315. Subsequent harvest ceilings are to be set based on the recommendations of the Pacific Salmon Commission, the implementing body for the Pacific Salmon Treaty. Alaska has been using the 1992 ceiling of 263,000 king salmon as its harvest guideline.²

Prior to 1992, the Board did not allocate the treaty salmon between the commercial troll fishery and the sport fishery on a percentage basis. See *Tongass Sport Fishing Ass'n*, 866 P.2d at 1316. Instead, sport fishers were able to harvest treaty salmon subject only to bag limits and size restrictions. See *id.* Commercial troll fishers were able to harvest the number of fish left each year after subtracting from the annual harvest ceiling the following: (1) 20,000 fish for the commercial net fishermen; (2) the pre-season projection of the number of fish the sport fishers would take that year; and (3) the number of fish, if any, by which the previous

courts. See *Confederated Tribes & Bands of the Yakama Nation v. Baldrige*, 898 F Supp. 1471 (W.D.Wash.1995).

APPENDIX A—Continued

APPENDIX A—Continued

year's king harvest by all user groups exceeded that year's harvest ceiling. See *id.* at 1316 n. 3. In 1992, the Board changed this procedure by allocating 17% of the treaty salmon to the sport fishery and 83% to the commercial troll fishery, after first subtracting 20,000 fish for the commercial net fishers. See *id.* at 1316.

In making the 1992 allocation, the Board hoped to stabilize the commercial troll and sport fisheries. Some Board members, however, stressed that they did not want or intend to prohibit the majority of the public—those categorized as sport fishers as opposed to commercial troll fishers—to be denied access to the resource, particularly personal use sport fishers. Additionally, several members of the Board indicated their belief that the 17% allocation for sport fishing would likely have to be adjusted in the future because it may not be the right percentage needed to accommodate both the expectations of commercial troll fishers and the increasing demand in the sport fishery.

Various sport fishing associations, charter-boat organizations, and associations of lodge owners brought suit challenging the 1992 allocation regulation. See *id.* In addition to ruling that the regulation did not violate the "common use"² and "no exclusive right of fishery"⁴ clauses of the Alaska Constitution, the Supreme Court ruled that

the Board did take a hard look at the salient problems affecting the southeast

Treaty [king] harvests and engaged in reasoned decisionmaking in reaching its allocation decision. There is no evidence that the Board's allocation was unreasonable or arbitrary.

Id. at 1318-19.

Neither the sport fishers, nor all commercial troll fishers, were satisfied with the 1992 allocation. Eight different proposals to amend or repeal the 1992 allocation were submitted to the Board for the 1993/1994 session. The proposals submitted by the sport fishery interests ranged from repealing the 17% allocation so that sport fishers were again able to take treaty salmon subject only to bag and size limits, to allocating 50% of the treaty salmon to the sport fishery. Mr. Rutter, as a commercial troll fisher, submitted a proposal to reduce the sport fishery allocation to a level consistent with the ten year average during the years 1980 to 1990.

A review of the partial transcript of the Board's discussion that led to the adoption of the 3% reallocation regulation⁵ indicates that many of the Board members believed that the 17% allocation to the sport fishery needed to be adjusted, as they had predicted, because it had proven to be too restrictive on the public's access to the resource.⁶ For example, Board member Edfelt noted that some of the goals of the 1992 regulation were to allow uninterrupted sport fishing, to minimize regulatory restrictions on sport fishers not fishing from charter vessels, and to im-

plement; it has not imposed such an obligation on the Board. See *Tungass Sport Fishing Ass'n*, 866 P.2d at 1319. A transcript of the meeting at which a particular regulation is discussed and adopted is sufficient. See *id.* Further, even in cases that involve a decisional document, judicial review is not limited to that document; a court may consider other evidence of the Board's decision making process, including a transcript of the Board's meeting. See *Stepovak-Shumagin*, 886 P.2d at 644-47.

6. The vote to adopt the 3% reallocation regulation was four in favor, two against, and one absent. The two board members who voted against adopting the regulation did so primarily because they believed reallocation thwarted the goal of stability of the fisheries, which was the main reason for the Board adopting the 1992 allocation scheme.

3. Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use.

Alaska Const. art. VIII, § 3.

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

Alaska Const. art. VIII, § 15.

5. The Supreme Court has stressed that it is important for the Board to make an adequate record so that its regulations can be subject to judicial review. See *Alaska Fish Spotters Ass'n v. State, Dep't of Fish & Game*, 838 P.2d 798, 801 (Alaska 1992). While the Court has recommended that the Board prepare a decisional doc-

APPENDIX A—Continued

pose the fewest restrictions on residents harvesting for personal use. He concluded that these goals had not been achieved by the 17% allocation because immediately after the regulation went into effect in 1992, the opportunity for residents to harvest king salmon was restricted, and was more severely restricted in 1993 when, in addition to bag limitations, the use of downriggers was temporarily prohibited.⁷ He also noted that although the commercial troll fishers had stability in that they knew what quantity of fish they could harvest, the sport fishers—the largest group of users—did not have stability because of the impossibility of forecasting when the in-season restrictions would be put into place.⁸

Ultimately, the Board decided that to allow uninterrupted sport fishing with limited restrictions, at least until the next Board cycle, a 3% increase in the sport fishery allocation was needed. As required by AS 16.05.251(e) and 5 AAC 75.017, the Board considered the statutory allocation criteria in deciding to reallocate the 3%.⁹ Board member Carlisle specifically listed each criteria, discussed how he applied the information presented to the Board to those criteria, and concluded that the criteria favored an increased sport fishing allocation because, under his analysis,

7. In both 1992 and 1993, ADF & G imposed regulatory restrictions to limit sport harvests as specified in the [king] management plan. These restrictions included a one [king] salmon bag limit, a ban on take by charter operators and crew, and, in 1993, a ban on the use of downriggers.

Paul Suchanek, Alaska Dep't of Fish & Game, *Overview of the Sport Fishery for Chinook Salmon in Southeast Alaska*, 1994 Report to the Alaska Bd. of Fisheries 1.

8. Board member Carlisle also noted that the goals of uninterrupted access and limited restrictions for recreational fishers had not been achieved as evidenced by the fact that restrictions had been imposed on sport fishers but not on commercial fishers. He indicated, however, that failure to satisfy these goals was not alone sufficient to indicate that an adjustment to the allocation was necessary. Instead, he analyzed the historical catches of the fisheries, considered the improved efficiency and methodology of taking fish, and noted that he believed the major problem was commercial prices which the Board could not control, rather than the increased

APPENDIX A—Continued

four of the factors favored the sport fishery, two were neutral, and one favored the commercial fishery. Board member Jacobson stated that he had gone through the allocation criteria along with Mr. Carlisle, but noted that he did not agree with all of Mr. Carlisle's conclusions. In contrast to Mr. Carlisle, he believed that commercial fishers do not always have other fishery resources available because of the restrictions placed on a person's ability to participate in the various commercial fisheries. The Chairperson agreed with most of Mr. Carlisle's conclusions, but noted that his two main concerns were the importance of each fishery to the economy of the state and the importance of each fishery to the economy of the region. He believed that both the commercial troll fishery and the sport fishery are of equal economic importance in different ways and in different areas.

Board member Edfelt adopted Mr. Carlisle's analysis of the allocation criteria. He also stated that his view of the criteria was the same as it was for the Board's deliberations for the 1992 decision to allocate 83% of the king treaty salmon to the commercial troll fishery and 17% to the sport fishery.¹⁰

Because the Supreme Court has already held that the initial 1992 allocative decision by the Board was valid, there is firm legal

charter industry. Ultimately, he concluded that all things considered, reallocation was appropriate.

9. In his complaint, Mr. Rutter alleges that "[t]he Board failed to consider all relevant criteria."

In making his argument in his cross motion for summary judgment, however, Mr. Rutter does not argue that the Board failed to consider the statutory criteria. Rather, he argues that the Board failed to consider certain information relevant to those criteria and that it failed to consider certain nonstatutory factors. While this may be true, the Board is not obligated to consider every possible factor. See *Gilbert v. State, Dep't of Fish & Game*, 803 P.2d 391, 398 (Alaska 1990) ("The fact that every possible factor may not have been debated does not vitiate the reasonableness of the regulation as a whole.")

10. This fact is particularly important because, as already noted, the Supreme Court has ruled that "[t]here is no evidence that the Board's [1992] allocation was unreasonable or arbitrary." *Tongass Sport Fishing Ass'n*, 866 P.2d at 1319.

APPENDIX A—Continued

APPENDIX A—Continued

standing for this second decision to adjust the percentages between the fisheries. This fact and the fact that the Board's deliberations on the reallocation issue included analysis of the statutory factors, provides ample support for the conclusion that the 3% reallocation regulation is reasonable and not arbitrary. The regulation is valid.

IV. EQUAL PROTECTION UNDER THE UNITED STATES AND ALASKA CONSTITUTIONS

Amendment XIV, section 1 of the United States Constitution¹¹ and Article I, section 1 of the Alaska Constitution¹² guarantee people equal protection under the law. These clauses, however, require "equal treatment only for those who are similarly situated." *Shepherd v. State, Dep't of Fish & Game*, 897 P.2d 33, 43, 44 (Alaska 1995); see also *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985) ("The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike."). Commercial fishers and sport fishers are not similarly situated. See *Tongass Sport Fishing Ass'n*, 866 P.2d at 1318.

Thus, treating Mr. Rutter, as a commercial fisherman, differently than sport fishers does not implicate equal protection concerns. The regulations impose the same gear limitations and allocation percentages on all commercial troll fishers. Further, there is nothing in either the 3% reallocation regulation or in the downrigger regulation, nor in any other statute or regulation, that prohibits Mr. Rutter from engaging in the sport fisheries. If Mr. Rutter chose to engage in the sport fisheries, the regulations would apply equally to him.

V. THE LIMITED ENTRY ACT (AS 16.43.140) and ARTICLE VIII, SECTION 16 OF THE ALASKA CONSTITUTION

A. The Limited Entry Act (AS 16.43.140)

Mr. Rutter's argument with regard to the Limited Entry Act is not clear. He demands the equal protection of AS 16.43.140, but does not indicate how this statute provides him with equal protection guarantees. It appears that Mr. Rutter's argument is that he is denied equal protection of the laws because charter vessel operators are not required to obtain an entry permit under AS 16.43.140 while he is required to have a permit to participate in the commercial troll fishery.

Alaska Statute 16.43.140 provides, in relevant part:

[A] person may not operate gear in the commercial taking of fishery resources without a valid entry permit or a valid interim-use permit. . . .

AS 16.43.140(a) (emphasis added). Thus, the plain language of AS 16.43.140 requires a person to obtain a limited entry permit only if that person is involved in the "commercial taking" of fishery resources. Mr. Rutter argues that the fact that sport fishers on charter vessels are allowed to use downriggers, the same type of gear used by commercial fishers, means the charter industry is engaged in the commercial use of the king salmon resource and therefore should be subject to the entry restrictions of AS 16.43.140.

The legislature has drawn a distinction between commercial users, sport users, and guided sport users of the fishery resources. See AS 16.05.251(a)(6) (granting the Board the authority to adopt regulations "classifying as commercial fish, sport fish, guided sport fish, personal use fish, subsistence fish, or predators or other categories essential for regulatory purposes"); AS 16.05.251(a)(12) (granting the Board the authority to adopt regulations "regulating commercial, sport, guided sport, subsistence, and personal use fishing as needed for the conservation, devel-

11. "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

12. "[A]ll persons are equal and entitled to equal rights, opportunities, and protection under the law." Alaska Const. art. I, § 1.

APPENDIX A—Continued

opment, and utilization of fisheries"). The legislature has also drawn a clear distinction between the commercial taking of fish and the sport taking of fish. Alaska Statute 16.05.940(5) defines commercial fishing as "the taking . . . of fish . . . with the intent of disposing of them for profit, or by sale, barter, trade, or in commercial channels." Alaska Statute 16.05.940(29) defines sport fishing as the "taking of or attempting to take for personal use, and not for sale or barter, any . . . fish by hook and line held in the hand, or by hook and line with the line attached to a pole or rod which is held in the hand or closely attended, or by other means defined by the Board of Fisheries."¹³

While charter vessel operators may be engaged in a commercial activity—that of guiding sport fishers—they are not involved in the "commercial taking" of fishery resources because they are not taking fish with the intent of disposing of them for profit. Instead, it is the customers of the charter vessel operators who are taking the fish and are doing so as sport fishers—taking fish for personal use, and not for sale or barter. As the law now stands, charter vessel operators acting as guides for sport fishers are involved in the sport taking of fish, not in the commercial taking of fish. Therefore, the provisions of AS 16.43.140 in specific, and the Limited Entry Act in general, are not implicated.¹⁴

B. Article VIII, Section 16 of the Alaska Constitution

Mr. Rutter argues that the 3% reallocation regulation violates Article VIII, section 16 of the Alaska Constitution, which provides:

13. The fact that the legislature specifically provided that the Board could define other means of engaging in sport fishing refutes Mr. Rutter's argument that use of downriggers somehow brings sport fishing under the auspices of the Limited Entry Act. As noted above, the key inquiry for the Limited Entry act is whether a person is involved in the "commercial taking" of fish, not what gear is being used in the taking.

14. To the extent that Mr. Rutter's argument deals with the differential requirements for sport fishers and commercial fishers, it has already been addressed above. Differential treatment of sport fishers and commercial fishers does not raise

APPENDIX A—Continued

No person shall be involuntarily divested of his right to the use of waters, his interests in lands, or improvements affecting either, except for a superior beneficial use or public purpose and then only with just compensation and by operation of law.

Mr. Rutter argues that by taking away 3% of the commercial troll fishery harvest of king salmon, he and other commercial troll fishers are being divested of their right to use the waters without compensation.

The Supreme Court has clarified that the phrase "use of water" in Article VIII, section 16 is coterminous with riparian rights. *Classen v. State, Dep't of Highways*, 621 P.2d 15, 17 n. 4 (Alaska 1980). "Riparian rights" are defined as

[t]he rights of the owners of land on the banks of watercourses, relating to the water, its use, ownership of soil under the stream, accretions, etc.

Black's Law Dictionary 1327 (6th ed.1990). Mr. Rutter's claim here is not based on his ownership of land adjacent to a watercourse. That is, Mr. Rutter's claim is not for divestment of his riparian rights. Therefore, the 3% reallocation regulation simply does not implicate Article VIII, section 16.¹⁵

VI. PACIFIC SALMON TREATY

Mr. Rutter argues that the 3% reallocation regulation violates Annex IV, chapter 7 of the Pacific Salmon Treaty. This section of the treaty provides:

[w]ith respect to intercepting fisheries not dealt with elsewhere in this Annex, unless otherwise agreed, neither Party shall initiate new intercepting fisheries, nor conduct or redirect fisheries in a manner that intentionally increases interceptions.

equal protection concerns because the groups are not similarly situated.

15. Even assuming the court should consider Mr. Rutter's argument that the regulation is a divestment of his water rights, his argument fails. Mr. Rutter has not been divested of his right to use the water; he may still use the water for the purpose of commercial fishing. See *Classen v. State, Dep't of Highways*, 621 P.2d 15, 17 (Alaska 1980) (holding that a person has not been divested of his riparian rights if he is still able to use the water for the purpose he intended).

Pacific Salmon Treaty, annex IV, ch. 7 (emphasis added). The intercepting of king salmon in Southeast Alaska is dealt with elsewhere in the Annex:

[I]n 1991, the all-gear catch in Southeast Alaska shall not exceed the base ceiling of 263,000 [king] salmon plus 10,000; in 1992, the all-gear catch in Southeast Alaska shall not exceed 263,000 [king] salmon; these catches exclude the Alaska hatchery add-on as described in the letter of transmittal; in 1991 and 1992 Alaska shall open its general summer troll fishery on July 1; the June fishery shall not exceed 40,000 [king] salmon (excluding the Alaska hatchery add-on) taken in a manner similar to 1989 and 1990; and areas of high [king] abundance shall be closed during [king] non-retention periods to reduce incidental mortalities.¹⁶

Pacific Salmon Treaty, annex IV, ch. 3(1)(c).

Because the Southeast Alaska king intercepting fishery is dealt with elsewhere in the treaty annex, the general provisions of chapter 7 do not apply. Therefore, Mr. Rutter's argument that the 3% allocation regulation violates this chapter must fail.

Further, if properly enforced, the 3% reallocation regulation would not violate the relevant provisions of chapter 3. The regulation reallocates a fixed number of salmon between the commercial troll fishery and the sport fishery of Southeast. While this regulation has increased the number of salmon the sport fishery may take, it has decreased proportionately the number of salmon the commercial troll fishery may take. Therefore, the total number of fish taken should not exceed the treaty limits.

VII. CONCLUSION

For all the above reasons, the court grants summary judgment in favor of the State on all of Mr. Rutter's claims.



Gretchen GANZ, Bruce Graham, Virginia L. Horn, Rita F. Neary, and Candida A. Szabo, individually and as class representatives, Appellants,

v.

ALASKA AIRLINES, INC., Appellee.

No. S-8050.

Supreme Court of Alaska.

Aug. 14, 1998.

Employees brought action against employer, alleging that pursuant to Alaska Wage and Hour Act's (AWHA's) overtime provision they were entitled to overtime payments for work in excess of forty hours a week or ten hours a day. The Superior Court, Third Judicial District, Reese, J., granted employer's summary judgment motion, and employees appealed. The Supreme Court, Fabe, J., held that employees' work schedule under collective bargaining agreement of 14 consecutive 12 hour days followed by 14 days off was exempt from AWHA's overtime provision.

Affirmed.

1. Labor Relations §1281.1

Employees' work schedule under collective bargaining agreement of 14 consecutive 12 hour days followed by 14 days off constituted "flexible work hour plan," within meaning of exemption from Alaska Wage and Hour Act's (AWHA's) overtime provision for work performed under flexible work hour plan included as part of collective bargaining agreement. AS 23.10.060(d)(13).

See publication Words and Phrases for other judicial constructions and definitions.

2. Labor Relations §1281.1

Exemption from Alaska Wage and Hour Act's (AWHA's) overtime provision for work performed by an employee under a flexible work hour plan if the plan is included as part

¹⁶ The treaty uses "chinook" instead of "king."

CFEC ; MARY McDOWELL

HB281 - Issues to consider addressing in amendments

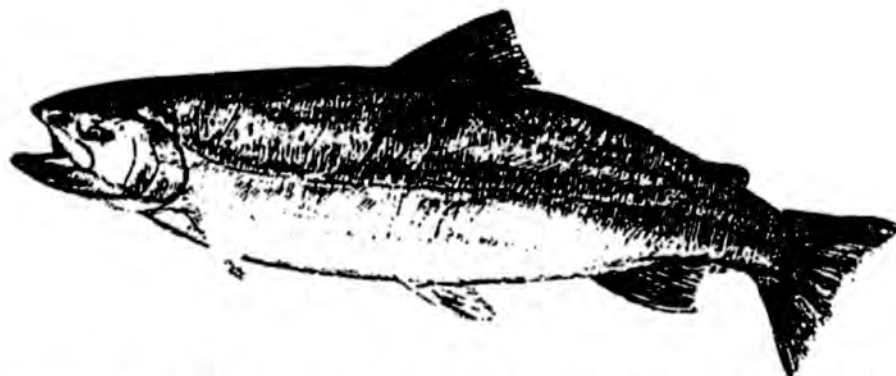
- Clarify (in title and text) that moratorium only pertains to participation in SALTWATER. Without tab eligibility, vessels can continue to license and be used in fresh water. Bill calls tabs "saltwater tabs" but says vessel may not be used for charter in SE without tab, and can only get tab if 2002 participation is documented in a log book. Freshwater charters weren't required to use logbooks, so won't qualify for tabs.
- Make clear that tabs are renewed annually rather than issued just once for whole moratorium (bill hints at that on p.2, line 13, relating to tabs for replacement vessels, but should say it in general provisions)
- Add provisions to spell out an appeals process
Some applicants will claim eligibility when state's records don't support the claim. Spell out right to request a hearing after initial denial by licensing staff, then appeal decision of hearing officer to commissioners, then judicial appeal?
- Issue "Interim Use Tabs" to applicants in adjudication process?
That is, provide that if an application for a charter tab is initially denied and is under appeal, the vessel may be issued an "interim use" tab so that it may continue participating in the fishery throughout the time the application is under appeal, until there is a final decision.
(Interim use tabs would need to be nontransferable because the application may ultimately be denied.)
- Make clear that tabs are to be issued only to actual OWNER of a vessel?
Bill says only owner of vessel can subsequently transfer tab to new vessel or sell vessel with charter rights - but says CFEC issues tab initially "to the vessel"
Currently many non-owners license vessels they are using or leasing - but now issuing a transferable use privilege with value - so seems it should go only to owner

Note this will be administratively cumbersome as CFEC has no info on owners. Will need process for verifying ownership
Will need to require proof of ownership such as copy of vessel registration, Coast Guard vessel documentation, bill of sale, etc
- Page 2, line 8 - after "affixed to" insert "the vessel in an easily visible location within 6 inches of" - so tab is near, but not stuck onto, the vessel license
ADF&G number and triangle vessel plate stays with a vessel forever. So if owner substitutes new vessel to use tab, don't want tab stuck onto it.
- Also, triangles are small so tab could only be about 3/4 inch wide if has to go onto triangle. Better to have bigger tab, more visible for enforcement purposes, and which does not ruin permanent vessel plate.

- Subsection (h) creates very difficult adjudications
 - Subjective words "substantial and continuing" and "substantial and nonrefundable"
 - Burden of establishing "intent."
 - Provides no timeframe for intended charter use (may have intended to use it for personal use for next 5 years and then to use it for chartering after retirement)
- No area of intended use specified--- must intent to have been to use it in the area covered by this moratorium?
- Could simplify by deleting (h) entirely. Otherwise, suggest:
 - Amending both (h)(1) and (h)(2) to specify exception is only if constructing or purchasing the vessel "with intent to use the vessel in charter service in Southeast Alaska in 2003 or 2004";
 - And, deleting p.3 lines 1 and 2 and 6 and 7 about applying for the tab by Dec. 31, 2003 -- confusing and seems unnecessary. (Don't want to imply that if person had fully purchased or completed the vessel, as opposed to not completing it until after effective date of the Act but not yet having used it for charter service, they couldn't qualify for tab.)
- Add to (i) so better duplicates the section in CFEC statutes providing that CFEC may "do all things necessary" to carry out these provisions -- rather just that we may adopt regs. May discover procedural or other issues that need to be addressed that are not anticipated going into program.
- Add specific authority to make clear that CFEC may charge fees for applications, transfers, duplicates, and annual fees for charter tabs
 - May be best to spell out specific fees in bill, rather than leave to CFEC regs.
 - In commercial fisheries, annual fees are determined according to gross earnings or permit value in the specific fishery -- but no data upon which to base parallel fee structure for charter.
- Bill creates moratorium on charters for "fish and shellfish" and requires that eligibility be established by logbooks, but logbooks don't seem to cover shellfish -- is this a problem needing clarification?
- Define "person" for purposes of this moratorium. General state law says unless another definition is provided, person means a person or entity (company, etc). Under limited entry law, a person is specifically defined as only a living human individual, and NOT an entity, partnership, etc. While HB281 is placed in uncodified law rather than under AS16.43 (CFEC statutes), it requires CFEC to run the program, issue the tabs, etc. Therefore, probably should add clarification that for the purpose of the moratorium established under HB281 (which calls for issuing tabs to entities), CFEC is to use the general definition that includes entities.

- Page2 line 4 "used in charter service" -- suggest clarifying by spelling out: "lawfully used."
(that is, qualifying participation had to have been in full compliance with state laws and regs,
logbooks filled out and timely submitted, etc)
(That is requirement in commercial fishery moratoria and limitations)

DIVISION OF SPORT FISH



**OVERVIEW OF THE SPORT FISHERY
FOR CHINOOK SALMON IN
SOUTHEAST ALASKA
THROUGH 2002**



REPORT TO THE ALASKA BOARD OF FISHERIES

*Ketchikan, Alaska
February 2003*

Information in this report was partially financed under the Federal Aid in Sport Fish Restoration Act (16 U.S.C 777-777K)

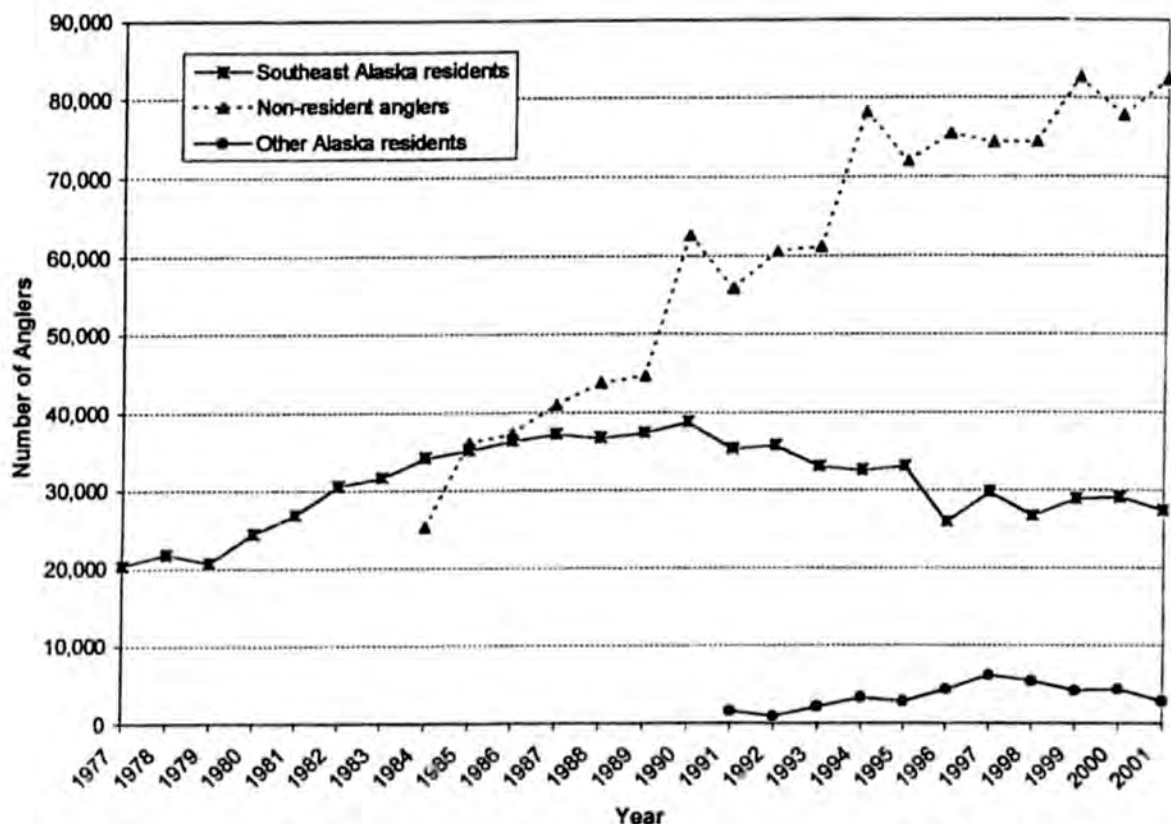


Figure 2. Number of Southeast Alaska resident, nonresident, and other Alaska resident anglers fishing within Southeast Alaska. Data are not available for some angler groups for some years.

(Table 6 and Figure 3). Resident tag purchases remained relatively constant averaging 16,200 with a peak of 17,000 occurring in 1997 when chinook returns to the region were outstanding. Nonresident tag purchases more than doubled during the same time period and averaged 33,100 over the 9-year period. Increased tag prices and the availability of more options could explain the slight drop in nonresident tag purchases between 1997 and 1998 (Table 7). Sales of annual nonresident tags declined dramatically in 1998 due to the large increase in cost (\$35 to \$100) and the availability of 7-day tags. In 2001, net revenue from king salmon tag sales in Southeast Alaska totaled \$918,000, with revenue from resident tags totaling \$150,000 and revenue from nonresident tags totaling \$768,000.

Resident and nonresident tag sales are not distributed evenly over the region (Table 8). About 45% of resident tags are sold in the Juneau area with 17% sold in the Ketchikan area and 15%

sold in the Sitka area. About 80% of regional sales of nonresident tags are split fairly evenly among the Ketchikan, Sitka, and Juneau areas. Sales of 1-day nonresident tags are concentrated in the Ketchikan (37%) and Juneau (33%) areas while nonresident tags of 3-day duration or more are sold in the highest numbers in the Sitka (36%) area with Ketchikan (20%) and Juneau (18%) also having relatively large sales.

Charter Vessel Registrations and Logbook Program

Since 1982, when charter vessel registration was first required by ADF&G, the number of registered charter vessels within Southeast Alaska has increased (Table 9 and Figure 4). In 1986, the number of charter vessel registrations decreased due to a regulation change that eliminated registration requirements for vessels that did not have an operator for hire (dry rentals) or were used in freshwater. From 1986 through 1997,

Table 9. Number of registered (or licensed) charter vessels in Southeast Alaska by port from 1983 to 2002 (2002 data are preliminary). Registration requirements were changed in 1998 to include vessels used in fresh water as well as those used only to transport anglers.

Area/port	1983	1984	1985	1986	1987	1988	1989	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002
Angoon	--	--	0	0	1	4	4	12	4	22	23	23	29	35	37	27	42	37	37	29
Elfin Cove	--	--	0	9	7	9	8	9	7	18	15	20	19	31	34	37	36	39	39	39
Gustavus	--	--	0	8	9	9	13	11	15	17	17	24	22	21	25	35	37	35	36	31
Haines	--	3	4	2	5	7	6	9	6	7	9	11	9	13	11	25	26	26	27	32
Hoonah	--	--	0	3	3	7	4	5	6	7	7	12	11	14	13	22	19	16	18	16
Juneau	22	60	43	47	47	47	40	54	52	80	71	115	112	147	154	207	191	199	181	160
Ketchikan	52	76	76	65	69	64	67	102	137	199	176	164	195	155	191	188	204	199	224	220
Pelican	--	--	--	1	5	7	5	4	5	7	3	5	6	9	12	19	22	25	24	21
Petersburg	69	97	72	5	4	8	11	13	22	28	40	35	45	59	49	62	62	64	64	59
PWI	--	--	--	32	34	34	40	44	45	67	73	94	101	143	167	210	221	226	216	199
Sitka	13	81	30	27	38	37	52	56	67	109	135	162	194	195	198	240	255	269	270	279
Wrangell	21	*	15	21	12	27	24	20	19	19	17	35	31	37	46	57	54	51	48	49
Yakutat	0	0	1	5	7	3	9	11	8	12	9	15	17	33	16	50	57	54	58	63
Other	20	0	31	0	0	1	2	1	8	8	10	12	12	11	26	61	50	59	60	54
TOTAL	197	317	272	225	241	264	285	351	401	600	605	727	803	903	979	1,240	1,276	1,299	1,302	1,251

* Wrangell included with Petersburg.

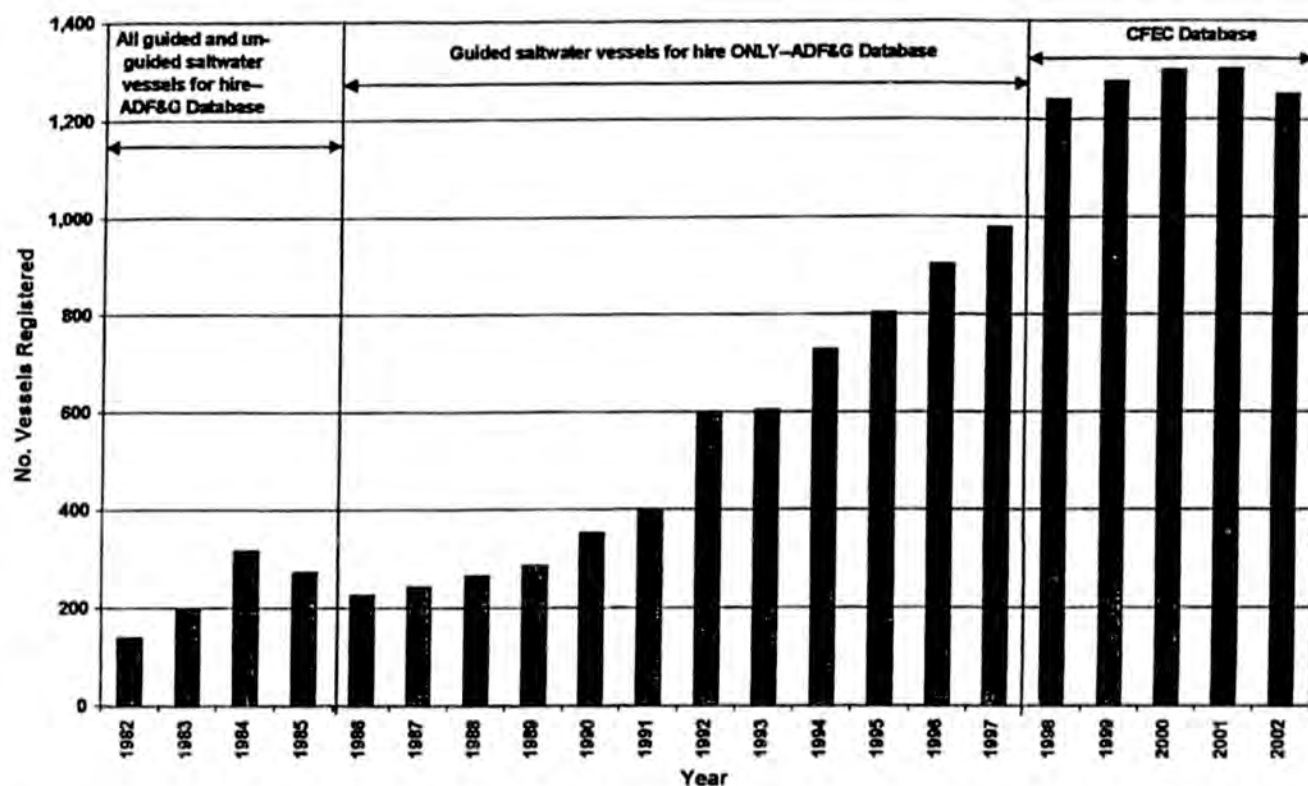


Figure 4. Number of charter vessels registered in Southeast Alaska, 1982–2002.

however, the number of charter vessels increased annually to a peak in 1997 of 979 charter vessels. It is unknown how many of these vessels were actually used in sport charter operations.

In 1998, the ADF&G vessel registration process was replaced with the licensing process conducted by the Commercial Fisheries Entry Commission (CFEC). Since CFEC also requires freshwater vessels for hire to be licensed as well as vessels used only for transporting guided anglers to shore, some of the increase in vessel registrations since 1998 is due to these changes. Another part of the increase during the last few years may be due to operators registering or licensing their vessel under the perception that charter vessels might be subject to a future limited entry program or moratorium.

Also in 1998, a saltwater charter vessel logbook program was implemented which required all

charter vessels operating in salt water with a guide to obtain and complete a logbook. Summary data from the logbook program show that slightly more than 50% of the licensed vessels reported taking clients on charter fishing trips (Table 10). Since 1999, the number of active permits has remained stable at about 670. On average, about 34% of the active vessels reported their port was in the Sitka area, 23% in the Prince of Wales Island (PWI) area, and 18% in the Juneau area (Table 10 and Figure 5).

From 1998 to 2001, an average of 601 vessels in Southeast Alaska reported harvesting or releasing one or more chinook salmon during their charter activities (Table 11). The number of vessels reporting chinook catches increased from 598 in 1998 to 631 in 2001. About 33% of the vessels reported chinook catches on 6–25 trips, while 29% reported chinook catches on 26–50 trips.

Table 10. Overall number of active charter vessels in Southeast Alaska by Statewide Harvest Survey area determined from logbook data collected in 1998–2002 (2002 data are preliminary). Active vessels are those that turned in logbook forms reporting at least 1 trip with clients.

SWHS area	Year					Average	Percent of total
	1998	1999	2000	2001	2002		
Ketchikan	102	110	118	136	130	119	18%
Prince of Wales Island	123	165	172	157	152	154	23%
Petersburg/Wrangell	52	72	80	79	58	68	10%
Sitka ^a	231	242	218	216	216	225	34%
Juneau	119	126	146	114	114	128	19%
Haines/Skagway	15	20	21	16	15	17	3%
Glacier Bay ^a	37	36	97	88	80	68	10%
Yakutat	17	12	14	15	13	14	2%
Total^b	618	653	699	676	651	667	
Percent of licensed vessels active	50%	52%	54%	52%	51%		

^a Beginning in 2000, the northern section of Chichagof Island (including Pelican, Elfin Cove, Hoonah, and the southern half of Icy Strait and Cross Sound) was re-assigned to SWHS Area G (Glacier Bay) and removed from SWHS Area D (Sitka). This was the primary reason for the dramatic increase in active vessels for Glacier Bay area and decrease in active vessels for the Sitka area between 1999 and 2000.

^b Total values for Southeast Alaska charter vessels are lower than the actual column total because a unique vessel may have operated or offloaded fish and/or clients in more than one SWHS area during a given year.

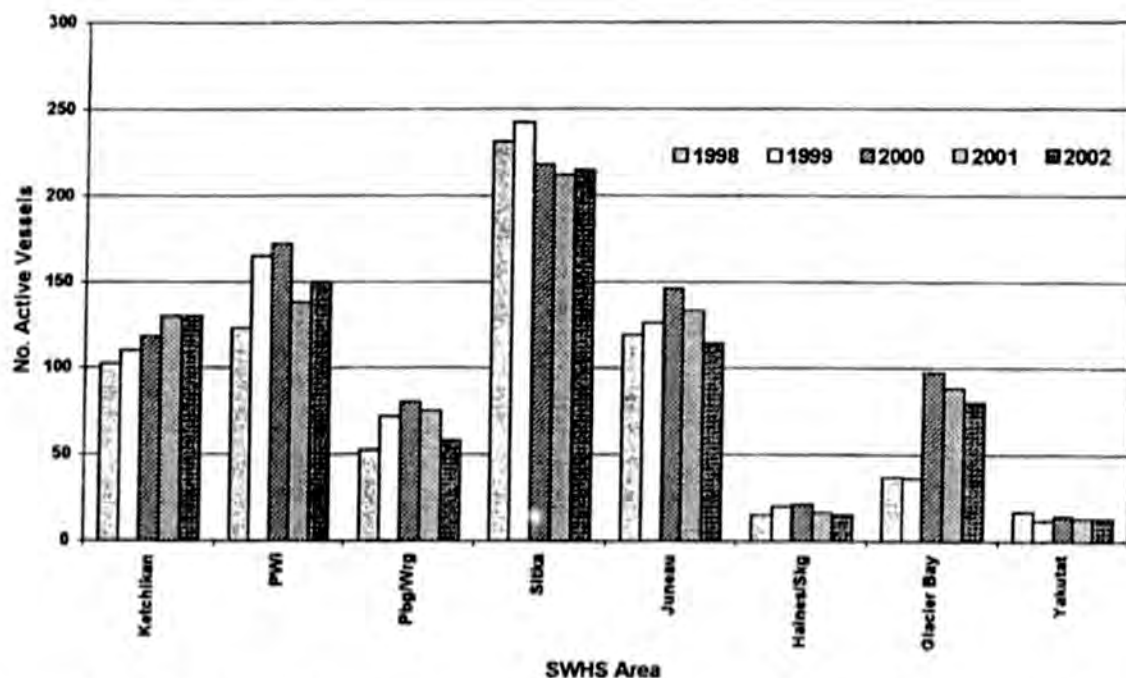


Figure 5. Number of active marine charter vessels in Southeast Alaska as reported from logbook data during 1998–2002. Data from 2002 should be considered preliminary. Active vessels are those that turned in logbook forms with at least 1 trip with clients reported.

Table 11. Number of charter vessels in Southeast Alaska classified by frequency of trips reporting either harvesting or releasing one or more chinook salmon as determined from logbook data, 1998–2002. Data for 2002 are preliminary and likely to change.

No. of vessels reporting catches of chinook salmon on:	Year				1998–2001 average	2002 ^a	Percent of total vessels ^b
	1998	1999	2000	2001			
1–5 trips	118	119	136	123	124	107	20%
6–25 trips	193	194	219	200	202	197	33%
26–50 trips	180	180	171	169	175	159	29%
51–100 trips	105	105	95	138	111	131	18%
100+ trips	2	2	1	1	2	0	0%
Total vessels	598	600	622	631	613	594	

^a Totals are as of October 28, 2002; final numbers will be larger.

^b 2002 data are not included.

HARVEST

Regionwide Harvest

Annual sport harvests of chinook salmon in Southeast Alaska from 1977 to 1987 were relatively stable, however, they began increasing rapidly in 1989 (Table 12). From 1977 to 1990, the average harvest was 24,500 while the 1991–1995 average was 48,900 and the 1996–2000 average was 63,900. The harvest in 2001 (72,300 chinook salmon) was the largest on record and the preliminary estimate for 2002 (85,200) is higher yet.

Distribution of chinook harvest by area in Southeast Alaska has changed substantially since the 1980s (Figure 6 and Table 12). Average harvests in the Ketchikan and Haines-Skagway remained stable from 1977–1990 to 1996–2000, while during the same time period, average harvests in the Prince of Wales Island, Sitka, Glacier Bay, and Yakutat areas increased 5 to 11 fold. During 1977–1990, 60% of the harvest was taken in Juneau (34%) and Ketchikan (26%), while a total of only 30% was taken in these two areas from 1996–2000. The Sitka fishery, on the other hand, increased from an average of 11% of harvest in 1977–1990 to 38% during 1996–2000.

Harvests by Residents and Nonresidents

Harvests of chinook salmon by both Alaska resident and nonresident anglers have been estimated since 1987 (Table 13 and Figure 7).

The proportion of fish taken by nonresident anglers increased from 28% in 1987 to 57% of the harvest in 2001 with a peak of 68% in 1994. Sport harvests of chinook salmon for resident anglers peaked in 1999 at 33,900 fish. The nonresident harvest of 41,400 fish taken in 2001 was the highest on record.

By dividing the total annual harvest for residents and nonresidents by the number of king salmon tags sold, the average harvest of chinook salmon per tag sold can be estimated (Table 13). On average, about 1.17 chinook salmon per year were taken per king salmon tag sold during 1993–2000, with harvest rates averaging higher for residents (1.53) than for nonresidents (0.99). Angler success per tag for nonresidents declined from an average of 1.15 during 1993–1996 to 0.95 during 1997–2000 after implementation of the annual bag limit of 4 chinook salmon in 1997. Since the number of nonresident 1-day tags has increased dramatically (10,200 in 1995 to 18,300 in 2000), it is not surprising that the average harvest per nonresident angler has declined. Angler success for residents was much more variable (range of 0.80 to 2.21 per year). The overall average of chinook harvested per king salmon tag sold in 2001 was about 9% above the previous 8-year average at 1.27. The increase was primarily in the resident fishery.

Distribution of harvests by resident and nonresident anglers by area was also compiled from 1987 to 2001 (Table 14). Average harvests

**ALASKA BOARD OF FISHERIES
RESOLUTION 2000-FB-202**

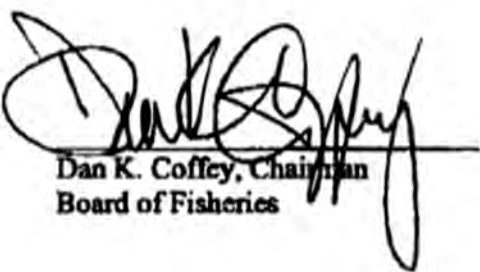
Supporting a Constitutional Amendment to allow the State of Alaska to Limit Entry in to the
Guided Sport Fishing Industry in Alaska

- WHEREAS, long term stability in the guided sport fishing industry in Alaska is a common goal of guides, resident sport anglers and commercial fishermen; and,
- WHEREAS, unmanaged growth in any user group sector on fully utilized fishery resources threatens stability of the resource, the users and local communities; and,
- WHEREAS, limited entry into the guided sport fishing industry in Alaska has been identified by all user groups as a necessary tool to accomplish predictable management and long-term stability for guided and commercial fishing interests; and,
- WHEREAS, effective management and conservation of Alaska fishery resources would be greatly facilitated by the ability to implement limited entry programs for guided sport fisheries around the state; and,
- WHEREAS, fishermen across the state have repeatedly testified before the Board of Fisheries regarding significant conflicts resulting from the currently unlimited growth of the guided sport fishing industry; and,
- WHEREAS, fishermen from all user groups, including the guided sport fishing industry, have requested that the Board of Fisheries take a proactive stance to secure limited entry as a tool to regulate the guided sport fishing industry;

NOW, THEREFORE, BE IT RESOLVED, that the Alaska State Board of Fisheries urges the Alaska Legislature to place a Constitutional Amendment on the ballot to allow implementation of limited entry programs for guided sport fisheries in Alaska

Dated on this 27th day of March, 2000
Anchorage, Alaska

Vote: 7/0/0


Dan K. Coffey, Chairman
Board of Fisheries

Recommending Amending HB 281

My name is Gordon Jackson. I am the Chairman of the Board, Kake Tribal Corporation. I am also the Director, Business and Economic Development, Central Council, Tlingit and Haida Indians of Alaska. We serve over 26,000 members throughout the Pacific Northwest.

One of our many activities over the past year with the Central Council was the hosting of Economic conferences in Hoonah, Angoon, Kake, and Prince of Wales Island. In each of these communities, the economy has been pretty tough the last several years. The Logging has come to an end and processors have been leaving while the prices have been falling like a rock over the last decade. The result is they are looking to a number of different economic activities to take its place. One of these activities is to get into the Charter business. Many of them have just now invested in this kind of business. Many are now in the process of taking six pack license tests.

All of these communities once had proud fishing fleets and was the envy of everyone throughout SE Alaska. Today, these fleets are a fraction of what they used to be. Let me give some instances. When Limited Entry was first introduced for purse seiner fishing, the Community of Angoon had 27 permits, today they have one active permit. In Hoonah, they once had over 50, they now have only 4 active permits. In Kake, they began with 27, they now have only 8 active permits. Add the loss of logging jobs you should not be surprised to find a very bad economy in these communities.

Many of us in the past remember cut-off dates or moratoriums before a major policy was adopted like Limited Entry. This one you are proposing goes to the extreme by not allowing the Commercial Fisheries Entry Commission to issue vessel licenses for recreational charter boats for 2004 unless the vessel was licensed in 2002 or before the bill was passed and also recorded charter operations in a state required logbook in SE waters in 2002 or 2003. I can tell you this provision will close the door on any smaller community entrepreneur who wanted to get into this business. Add on the log books, additional hoops to jump over, and loss of equal access and you are looking at no charter boats in rural SE Alaska. This concept of equal access is one you folks use to stop any Subsistence vote over the last decade. In this case, I think you should be consistent and do the same thing.

We at KTC just finished our final land selection under the ANCSA and selected a beautiful spot on the Keku Islands outside of Kake. It was our plan to build a fishing lodge there and diversify our holdings. With this moratorium, it will be impossible to build it without charter boat licenses. No bank will touch us. Our dream will have vanished.

I believe this bill needs work. I understand your concern. Too many boats taking too much fish and crowding us out. I have run through these fellas, cussed at them, and seen the boxes and boxes leaving the airports all over SE Alaska. There are a lot of them! However, the numbers only occur in the so called urban areas around Juneau, Sitka, and Ketchikan. You need to address the economics of how you will secure employment opportunities for rural SE. You need to address the semantics used in this bill. After I read the bill, I came to only one conclusion-it is a limited entry bill and no

group of word said after this would convince me otherwise. You need to address the equity question. As many of you say-it is in the state Constitution; it should not be ignored. If you don't address these items, I suggest you should do what the SE villagers would do for something like this-"take it down the beach and bury it!"

Thank you.



CENTRAL COUNCIL
tlingit and haida indian tribes of alaska
ANDREW P. HOPE BUILDING
320 West Willoughby Avenue • Suite 300
Juneau, Alaska 99801-9983

House Fisheries
Capitol 124, 8:30 a.m.

Special Committee Hearing on HB 281

Recommendations supporting No passage of HB 281

By Don Bremner, Staff
CCTHITA

Representative Seaton and Representative Wilson:

Members of the House Fisheries Special Committee thank you for the opportunity to present our views and analysis of HB 281.

There are a number of important reasons that we recommend not passing HB 281 or similar Bills into legislation;

1. This Bill will have negative impacts to rural residents similar to the 1973 Limited Entry Law that has caused serious socio-economic harm to the rural villages of Alaska.
2. Prior to even considering passage of such legislation the State should conduct professional socio-economic impact studies to help guide these type decisions.
3. HB 281 flies in the face of the Alaska State Constitution, Article VIII, Section 15. No Exclusive Right of Fishery, "No exclusive right or special privilege of fishery shall be created or authorized in the natural waters of the State. Does not restrict the power of the State to limit entry into any fishery for purposes of resource conservation, to prevent economic distress among fishermen and those dependent upon them for a livelihood and to promote the efficient development of aquaculture in the State." (<http://www.gov.state.ak.us/lrgov/akcon/art08.html>)
4. The State of Alaska has given the direct responsibility of managing fish & game in Alaska to the Department of Fish and Game. They have a tried and true Mission of managing our fish & game resources, with clear principles;

ADF&G Mission Statement

(<http://www.state.ak.us/adfg/geninfo/overview/mission.htm>)

The Alaska Department of Fish and Game's mission is to manage, protect, maintain, and improve the fish, game and aquatic plant resources of Alaska. The primary goals are to ensure that Alaska's renewable fish and wildlife resources and their habitats are conserved and managed on the sustained yield principle, and the use and development of these resources are in the best interest of the economy and well-being of the people of the State.

Guiding Principles

Seeking excellence in carrying out its responsibilities under state and federal law, the department will:

- Provide for the greatest long-term opportunities for people to use and enjoy Alaska's fish, wildlife and habitat resources.
- Improve public accessibility to, and encourage active involvement by the public in, the department's decision making processes.
- Build a working environment based on mutual trust and respect between the department and the public, and among department staff.
- Maintain the highest standards of scientific integrity and provide the most accurate and current information possible.
- Foster professionalism in department staff, promotes innovative and creative resource management, and provides ongoing training and education for career development.

We believe that the Department of Fish & Game has the knowledge and information to determine the need for such limited entry management schemes and should be allowed to carry out their Mission and Guiding Principles without legislative mandates, political pressure or influence.

5. If this Bill moves forward we would ask Governor Murkowski to adhere to his Oct 24, 2002 campaign commitment and belief that the Board of Fish and Department of Fish and Game be free of "political extensions" such as his office or legislative influence, and allow these two agencies to be independent decision-makers regarding the management and implementation of Article VIII, Section 15 of our State Constitution.
6. We have reviewed the Alaska Sport Fish Department information (<http://www.sf.adfg.state.ak.us/statewide/participationandharvest/html/index.cfm?frame=yes&r1=yes>) regarding sport fishing in S.E. Alaska and no-where is there information or evidence that any of the targeted species of salmon or halibut in the areas from Yakutat-Ketchikan is facing declining numbers. We have reviewed the numbers from 1987-2001.

7. We have reviewed the Alaska sport fishing up-dates (<http://www.state.ak.us/adfg/sportf/region1/geninfo/fishrpt/fishrpt.htm>) for Southeast Alaska and no-where in any of the reports from Yakutat-Ketchikan is there any indication of declining numbers in any of the targeted salmon or halibut species.
8. Sports fishing contributes money and jobs to Alaska. "The National Survey of fishing, hunting, and wildlife estimated that US residents spent \$537 million on fishing trips and equipment in Alaska in 2001. (<http://www.sf.adfg.state.ak.us/statewide/html/SFeconomics.stm>) That's a lot of money and jobs to turn over to private ownership without first accessing the socio-economic impacts to Alaska. Money and jobs to a yet undetermined amount of people who may not be year-round Alaska residents.
9. With this background we encourage you not to pass HB 281 or any similar legislation.

Thank You,

Don Bremner, Staff,
Central Council Tlingit & Haida Indian Tribes of Alaska
463-7341
dbremner@ccthita.org

cc/ Representative Heinze
Representative Ogg
Representative Samuels
Representative Berkowitz
Representative Guttenberg
Representative Kookesh

FISCAL NOTE

STATE OF ALASKA
2003 LEGISLATIVE SESSION

Fiscal Note Number: _____
 Bill Version: HB281
 () Publish Date: _____

Revision Date/Time (Note if correction): _____ Dept. Affected: Fish & Game
 Title Moratorium On Charter Vessel Licenses BRU Comm Fish Entry Commission
 Component Comm Fish Entry Commission
 Sponsor Rep. Weyhrauch
 Requester House Fisheries Component No. 471

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	104.2	53.3	14.6	14.6		
Travel	3.1	1.7				
Contractual	3.8	2.9	2.3	2.3		
Supplies	17.4	3.0	3.0	3.0		
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	128.5	60.9	19.9	19.9	0.0	0.0

CAPITAL EXPENDITURES						
-----------------------------	--	--	--	--	--	--

CHANGE IN REVENUES ()	*	*				
-------------------------------	---	---	--	--	--	--

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	128.5	60.9	19.9	19.9		
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	128.5	60.9	19.9	19.9	0.0	0.0

Estimate of any current year (FY2003) cost: 0.0

Check this box (X) if funding for this bill is included in the Governor's FY 2004 budget proposal: ☐

POSITIONS

Full-time	1					
Part-time	2	2	1	1		
Temporary						

ANALYSIS: (Attach a separate page if necessary)

See page two

Prepared by: Shirley Penrose Phone 790-6960
 Division Commercial Fisheries Entry Commission Date/Time 4/29/03 11:54 AM
 Approved by: Mary McDowell, Commissioner Date 4/29/2003
 Agency Commercial Fisheries Entry Commissioner

FISCAL NOTE

STATE OF ALASKA
2003 LEGISLATIVE SESSION

BILL NO. HB 281

ANALYSIS CONTINUATION

Operating Expenditures

HB281 creates a new program that differs in many ways from the other programs administered by CFEC, so many variables are unknown and estimating costs is difficult. This fiscal note assumes passage during the first session of the 23rd Legislature. Adoption of this fiscal note would provide funding for:

- ☐ A half-time seasonal licensing clerk (and associated office expenses), from November, 2003 through June of 2007 to handle the additional licensing and transfer responsibilities;
- ☐ A half-time hearing officer (and associated office expenses) for the last 8 months of FY04 and through FY05. After that time, remaining appeals would be handled by current hearing officer staffing level. This position will assist with adjudications of appeals by denied applicants for charter tabs and appeals of transfer cases;
- ☐ An Analyst-Programmer IV position for FY04 (and associated office expenses) to develop and implement computer programming necessary to handle new charter tab licensing system, renewals, and transfers. The programs will then be maintained by existing Data Processing staffing;
- ☐ Travel costs for public hearings on regulations package to implement program (one trip to Sitka, Ketchikan, Prince of Wales Island), and for the hearing officer to conduct appeals hearings (one trip to Sitka, Ketchikan, and Prince of Wales Island);
- ☐ Costs of tabs; application, renewal and transfer forms; and postage for mailings.

The bill is expected to significantly impact CFEC staff time and resources beyond what is reflected in this fiscal note because the work of drafting regulations, implementing the new program, designing new forms, establishing an appeals process, and adjudicating the more complex cases will have to be done by existing, experienced staff and the commissioners. While this additional load will be "absorbed" under the terms of the fiscal note, the added responsibilities created by the bill will likely impair or slow the commission's ability to perform its core duties (limitations of commercial fisheries, timely annual renewals of permits and licenses, adjudication of limited entry cases under appeal, etc).

Change in Revenues

* Explanation of "indeterminate" amount of change in revenue:

If the commission has authority to charge fees under the moratorium created by this legislation (as it does in commercial fisheries) for initial application, annual renewal, transfers, and duplicates of the tabs, some revenue will be generated by the bill.

Fiscal Note Analysis HB281

								Fiscal Year						
								2004	2005	2006	2007	2008	2009	
Personal Services								104.2	53.3	14.6	14.6	0.0	0.0	
		Type	Mos	Start	Thru	Yearly Cost								
HO II	22A	Half-Time	12	Nov-03	Jun-05	38.7		25.8	38.7	0.0	0.0	0.0	0.0	
Permit Clerk II	10A	Seas-PT	9	Nov-03	Jun-07	14.6		9.7	14.6	14.6	14.6	0.0	0	
AP IV	20A	Full-time	12	Jul-03	Jun-04	68.7		68.7	0.0	0.0	0.0	0.0	0.0	
Travel								3.1	1.7	0.0	0.0	0.0	0.0	
	# Staff	Days	Airfare	Per Diem	Hotel	Rental Car	Total							
Ketchikan Regulatory Hearing	2	2	1000	168	400	120	1688	1.7	0.0	0.0	0.0	0.0	0.0	
Sitka Regulatory Hearing	2	2		168	400	120	688	0.7	0.0	0.0	0.0	0.0	0.0	
Craig Regulatory Hearing	2	2		168	400	120	688	0.7	0.0	0.0	0.0	0.0	0.0	
Ketchikan HO	1	2	500	84	200	120	904		0.9	0.0	0.0	0.0	0.0	
Sitka HO	1	2		84	200	120	404		0.4	0.0	0.0	0.0	0.0	
Craig HO	1	2		84	200	120	404		0.4	0.0	0.0	0.0	0.0	
Contractual Services								3.8	2.9	2.3	2.3	0.0	0.0	
Postage		2.0						2.0	2.0	2.0	2.0	0.0	0.0	
Telephone	3	0.3						0.9	0.9	0.3	0.3	0.0	0.0	
Telephone Install	3	0.3						0.9	0.0	0.0	0.0	0.0	0.0	
Commodities								17.4	3.0	3.0	3.0	0.0	0.0	
	#	Cost	Total											
Computer setup	3	3.6	10.8					10.8		0.0	0.0	0.0	0.0	
Desk	3	1.2	3.6					3.6	0.0	0.0	0.0	0.0	0.0	
Tabs & Forms Supplies		3.0						3.0	3.0	3.0	3.0	0.0	0.0	
Total								128.5	60.9	19.9	19.9	0.0	0.0	

ALASKA STATE LEGISLATURE

REPRESENTATIVE BRUCE WEYHRAUCH
HOUSE DISTRICT 4



ALASKA
STATE CAPITOL
JUNEAU, ALASKA
99801-1182

(907) 465-3744
FAX (907) 465-2273

Sponsor Statement

HB 281

Moratorium on Charter Vessels in SE Alaska

HB 281 is introduced by the request of a broad-based group of fishers, including the guided sport fishing industry, who have long advocated for a proactive approach to achieve long-term stability in the industry. An expression of this desire was also articulated in 2000 when the Board of Fish passed a resolution supporting a limitation program on charter operations. The resolution came by request of the charter industry itself.

Two years later, 2002, a task force formed by the Board of Fish to look at the SE Alaska King Salmon Management Plan. This group was comprised of charter industry and sport fishing advocates, also recommended a moratorium on charter vessels in SE Alaska.

The 2003, ADF&G King Salmon report for SE Alaska shows that the number of licensed vessels and actual operators, as indicated by logbook activity, has stabilized over the last few years. This indicates that now is the time for a moratorium as the industry is relatively stable rather than in times of extreme growth or decline.

A vessel license moratorium for the sport fish charter fisher that does not limit entry into the fisheries by persons may be held to be constitutional and a valid exercise of legislative power under art. VIII, sec. 2 of the Constitution of the State of Alaska to provide for utilization, development, and conservation of natural resources belonging to the state.

Contact: Linda Sylvester
465-3744

Released: April 10, 2003

SPONSOR STATEMENT

ALASKA STATE LEGISLATURE

Representative Bruce Weyhrauch

HOUSE DISTRICT 4



ALASKA
STATE CAPITOL
JUNEAU, ALASKA
99801-1182

Sectional Analysis

(907) 465-3744
FAX (907) 465-2273

HB 281

Moratorium on Charter Vessels in SE Alaska

Section 1. The uncodified law of Alaska is amended by adding a new section:

Moratorium on Vessels Used in Charter Service for the Recreational Taking of Fish and Shellfish.

Paragraph 1 - Charter Vessel Tabs Issued

(a) After December 31, 2003 a person may not use a vessel in charter service for recreational fishing in SE Alaska east of Cape Suckling unless the vessel has been issued:

- a current vessel license under AS 16.05.490, and
- a current SE Alaska saltwater charter vessel tab under (b) of this section.

(b) For 2004 and subsequent years, the Alaska Commercial Fisheries Entry Commission shall issue an annual SE Alaska saltwater charter vessel tab for a vessel to be used in charter service if the vessel was:

- (1) issued a vessel license under AS 16.05.490 for 2002, or before the effective date of this Act was issued a vessel license for 2003; and
- (2) used in charter service for the recreational taking of fish and shellfish in SE Alaska in 2002 or 2003, as documented by ADF&G saltwater charter vessel logbooks.

(c) The SE Alaska saltwater charter vessel tab must be affixed to the number plate attached to the vessel under AS 16.05.520.

Paragraph 2 - Transferability

(d) A person who owns a vessel for which a tab has been issued may request CFEC to transfer the tab to another vessel if the other vessel is a temporary or permanent replacement of the original vessel issued a tab under (b) of this section.

SECTIONAL ANALYSIS

Representative_Bruce_Weyhrauch@legis.state.ak.us
www.akrepublicans.org/weyhrauch/

The transferred tab may be renewed annually and may be transferred again to another vessel. The replaced vessel is not eligible for a new tab unless it is subsequently used to replace another tabbed vessel.

(e) If the vessel for which the tab is issued is sold, the owner may request for CFEC to transfer the tab to the new owner of the vessel.

(f) The transfer of a tab under (d) or (e) of this subsection may not have the effect of increasing the total number of tabs issued for chartered vessels.

Paragraph 3 - Value

(g) A tab issued under this section may not be sold or otherwise transferred for value. A transfer for value doesn't include the enhanced value of a vessel that is attributable to the vessel ownership transfer that accompanied the transfer of the tab.

Paragraph 4 - Other Circumstances for CFEC Issuance

(h) CFEC may also issue a tab under (b) of this section if:

- (1) a substantial continuing effort toward the construction of the vessel for use in charter service was begun on or before the effective date of the Act but the vessel wasn't completed until after the effective date; and application for the tab has been made to CFEC by December 31, 2003.
- (2) Substantial and nonrefundable payment toward the purchase of the vessel for use in charter service was made on or before the effective date of the Act but the transfer of ownership did not occur until after the effective date, and the application for the tab has been made to CFEC by December 31, 2003.

Paragraph 5 - CFEC Regulations

(i) CFEC may adopt regulations to carry out the functions of this section.

(j) A person who violates this subsection is guilty of a class A misdemeanor.

ALASKA BOARD OF FISHERIES
RESOLUTION 2000-FB-202

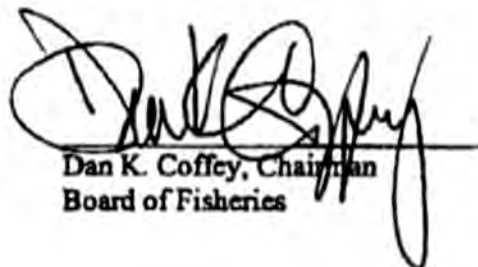
Supporting a Constitutional Amendment to allow the State of Alaska to Limit Entry in to the
Guided Sport Fishing Industry in Alaska

- WHEREAS, long term stability in the guided sport fishing industry in Alaska is a common goal of guides, resident sport anglers and commercial fishermen; and,
- WHEREAS, unmanaged growth in any user group sector on fully utilized fishery resources threatens stability of the resource, the users and local communities; and,
- WHEREAS, limited entry into the guided sport fishing industry in Alaska has been identified by all user groups as a necessary tool to accomplish predictable management and long-term stability for guided and commercial fishing interests; and,
- WHEREAS, effective management and conservation of Alaska fishery resources would be greatly facilitated by the ability to implement limited entry programs for guided sport fisheries around the state; and,
- WHEREAS, fishermen across the state have repeatedly testified before the Board of Fisheries regarding significant conflicts resulting from the currently unlimited growth of the guided sport fishing industry; and,
- WHEREAS, fishermen from all user groups, including the guided sport fishing industry, have requested that the Board of Fisheries take a proactive stance to secure limited entry as a tool to regulate the guided sport fishing industry;

NOW, THEREFORE, BE IT RESOLVED, that the Alaska State Board of Fisheries urges the Alaska Legislature to place a Constitutional Amendment on the ballot to allow implementation of limited entry programs for guided sport fisheries in Alaska

Dated on this 27th day of March, 2000
Anchorage, Alaska

Vote: 7/0/0


Dan K. Coffey, Chairman
Board of Fisheries

BOARD OF FISH RESOLUTION/SUPPORT

BIG JIM'S CHARTERS
PO Box 210328
Auke Bay, AK 99821
bigjim@acsalaska.net
www.bigjimscharters.com
1-866-BIGJIMS (Toll Free)
907 789-0088 (local)
907 789-2992 (FAX)

April 25, 2003

RE: HB 281

I am writing in support of HB 281, a moratorium on entry of vessels into the Southeast Alaska sport fish charter fishery.

Many charter operators have been trying for years to do something to regulate the charter industry in Southeast Alaska. One of the compelling reasons is the continual battle for allocation of king salmon. A legitimate argument from the commercial sector is that the charter sector is, basically, unregulated and, as such, can increase in size without bounds. This proposal would not limit the number of charter operators, but would, instead, limit the number of vessels allowed to operate in the saltwater fishery in Southeast Alaska.

In March 2000 the Board of Fish passed a resolution supporting a limitation program on charter operations. This resolution was a result of request from the charter industry.

In 2002 a task force was formed by the Board of Fish to look at the Southeast Alaska King Salmon Management Plan. This group was comprised of charter industry and sport fishing advocates. Among other findings, the Task Force recommended a moratorium on charter vessels in Southeast Alaska (p3, section 4e).

This legislation, as proposed, is limited to Southeast Alaska where there is overwhelming support from sport fishing and charter industry individuals and groups throughout the entire area, from Ketchikan to Juneau.

This legislation is limited to saltwater operations. It does not include any freshwater guiding operations, nor is it intended to include them.

The 2003 ADF&G King Salmon report for Southeast Alaska shows that the number of licensed vessels and actual operators, as indicated by logbook activity, has stabilized over the last few years. This indicates that now is the perfect time for a moratorium – when the industry is relatively stable rather than in times of extreme growth or decline.

I urge your support of HB 281 and request that you help move it on to final passage.

Jim Preston



LETTERS OF SUPPORT



The Whale's Eye Lodge

PO Box 210166

Auke Bay, Alaska

99821

(907)723-2920

E-mail whaleseye@starband.net

www.juneaualaskafishing.com

3/6/2003

Dear Representative Weyhrauch,

I own and operate a small family run sport fishing lodge on Shelter Island. We operate one boat and cater to only 4 to 6 guests. I have received a copy of your bill to put a moratorium on charter fishing boats in Southeast. I agree with your position in principle. I need a stable fishery to keep bread on the table. I think that your bill could help in stabilizing not only my industry but fishing allocation issues in general. A predictable number on vessels is good for management and business.

My concern is this; unlike most commercial fishing boats, which are heavily build and powered by large diesels, charter boats on the whole are lighter duty, faster, more hi performance, and much more subject to in-season failure. Outboard engines last only a season or two, inboard/outboards need constant maintenance as do high speed diesels. It has occurred in every season that I have fished that boats break down and charter operators and lodges need to borrow or lease a boat or keep one in reserve so we can keep our guests fishing while repairs are made.

A lengthy process of transferring a boat permit to a new boat and decommissioning an old one needs to be avoided in order for me to have stability in my business. If I have an breakdown I need to be able to make a phone call to Fish and Game, and take my paperwork to another boat and keep working in order to keep my clients happy. Now, if a part gets back ordered that puts my boat down I can get another boat that has numbers on it and keep going.



Where fishing is a way of life

Currently a breakdown is not a shutdown for a small operator. There are always extra boats to lease. *Without the ability to quickly make an emergency transfer I would be out of business not because of the breakdown but because of this bill.* Also Captains might be forced to run an unsafe vessel rather than find a suitable temporary replacement.

Unlike commercial fishing, my industry involves another party besides me and the fish. My clients plan months and years in advance to visit. By the time they get here they have arranged their vacations, purchased airline tickets and sent me a large deposit. If I can't locate and lease a boat quickly in an emergence they (and I) loose it all. This is not good for them, Alaska tourism or me. A clause in your bill that allows me a quick emergence transfer to another vessel would bring stability to this issue. This will not increase the number of boats. It will only insure that those of us who are legally entitled to conduct the business of charter fishing can do so.

Please place a provision in your bill that will address this need. As it stands this bill would give my ability to make a living to my boat. My boat doesn't run my business I do. My boat is a tool. I need it to work. I need the flexibility as a business owner to meet the challenges of my business. I know it is not going to be easy to find the right words to do this but it needs to be done.

Thank you for your consideration in this matter.

Rick Bierman



Professional Sportfish Guiding

Silver King Marine

Mike Bethers
P.O. Box 210003
Auke Bay, Alaska 99821
(907) 789-0165 (Ph. & Fax)



Marine Wildlife Viewing

March 6, 2003

Linda S.

FAX TO:

Representative Bruce Weyhrauch
Linda Sylvester

Subject: Charter Boat Moratorium

Dear Representative Weyhrauch and Assistant

Sorry for this hurried response but I'm leaving town right away and wanted to make a comment on your draft charter boat limitation legislation.

First of all you need to know that I have been a life long sport fisherman and a fishing guide for about 12 years. I spend as much time sport fishing on my own as anyone I know in Juneau does and since 1995, I have operated a charter boat business in the summer in Juneau. I worked as a crew member on troll and crab boats on the Oregon coast as a kid and participated in troll and/or long line fisheries in Alaska for over 20 years. I am an independent operator, book my own trips, and don't work with any trip brokers in Juneau. I run from late May till the end of August and make both half and full day charters

I support your efforts to put a moratorium on charter vessels, (not only in Southeast, but also statewide), and move toward a limited permit system as soon as possible. I am writing on my own behalf and not for any other charter operators.

You should issue vessel permits to individuals rather than vessels. This way an operator that has three boats can continue to operate three boats if one of his regulars breaks down in season. If my one boat poops out in season and I don't have time or resources to fix it immediately, I would be able to lease an another boat which was legal to operate but inactive, from another operator and continue my season until my boat was repaired. Trust me, chartering is the ONLY fishery that most charter boats have and it is absolutely necessary to keep going during the short summer season. The profit margin in this fishery is thin and a down time of only a few days would drag most operators into the red for the season.

If you want 600 charter boats in SE or 1200 State wide, or what ever the number, just issue that many vessel permits to the currently active operators, ie, if a guy has one active boat he gets one permit and if he has 10 active boats, he gets 10 permits. That way, the number of boats in the industry would effectively be limited and vessel permits could be

transferred to some operator wanting to expand, or to someone wanting to get into the fishery (just like to commercial limited entry permit system). And if a guy's boat had a serious break down in season, he could quickly lease/rent a permitted, but available vessel to continue his season.

I would urge you to rewrite your draft of 2/24/03 to reflect the above comments. The decommissioning Etc, your legislation currently includes is not a feasible in season alternative for serious charter boat operators.

I could discuss the pros and cons of such legislation for a long time and would jump at the chance to do so with you. Once again, I support the basic concept of developing a moratorium and ultimate limitation of charter boat permits in Alaska, and would like to assist in any way that I can. It is very critical that you get real active charter operators involved in the process of such legislation, especially since they are the effected party. I would have rather received a copy of the draft from you for comment rather than being notified in a round about fashion a few minutes ago.

I would look forward to the opportunity to assist you on this project and will be available after March 16, 2003. Hope to hear from you.

Respectfully,



Mike Bethers



SITKA'S SECRETS

March 21, 2003

Representative Bruce Weyhrauch
State Capitol
Juneau, Alaska 99801-1182

Dear Representative Weyhrauch,

I understand you recently drafted a charter boat moratorium bill. I have operated a charter boat business in Sitka, since 1986, and would like to offer the following comments.

I reluctantly support the concept of a moratorium. My reluctance is because I feel sport anglers have not received a fair and reasonable allocation of the public fishery resources. The state Board of Fisheries and the North Pacific Fisheries Management Council (NPFMC) have always been skewed towards commercial fisheries, where historical use implies ownership. The current allocation for king salmon in southeast Alaska, is 80% commercial and 20% sport. Furthermore, the NPFMC is pursuing a 90% commercial and 10% sport allocation, under a GHL or IFQ program.

The most common reason cited for a moratorium or limited entry for charter boats, is *explosive growth*. Those of us who make our livelihoods from chartering know the numbers are misleading, primarily due to speculators.

Attachment 1 was prepared for the recent Board of Fisheries meeting, relating to southeast king salmon allocation. It shows the number of boats, since 1998, with logbook records of at least one charter where a king salmon was harvested or released. The number of vessels increased slightly from 1998 through 2001, then declined in 2002.

Attachment 2 further breaks down actual activity levels. It categorizes the number of vessels by how many trips were taken for king salmon. Almost half the vessels completed only one to 25 charters per year, a level considered insufficient to make a living off of. The number of vessels completing 50 or more charters per year, is relatively stable. These are considered full time operators making up the actual charter fleet.

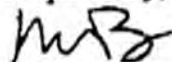
transferred to some operator wanting to expand, or to someone wanting to get into the fishery (just like to commercial limited entry permit system). And if a guy's boat had a serious break down in season, he could quickly lease/rent a permitted, but available vessel to continue his season.

I would urge you to rewrite your draft of 2/24/03 to reflect the above comments. The decommissioning Etc, your legislation currently includes is not a feasible in season alternative for serious charter boat operators.

I could discuss the pros and cons of such legislation for a long time and would jump at the chance to do so with you. Once again, I support the basic concept of developing a moratorium and ultimate limitation of charter boat permits in Alaska, and would like to assist in any way that I can. It is very critical that you get real active charter operators involved in the process of such legislation, especially since they are the effected party. I would have rather received a copy of the draft from you for comment rather than being notified in a round about fashion a few minutes ago.

I would look forward to the opportunity to assist you on this project and will be available after March 16, 2003. Hope to hear from you.

Respectfully,



Mike Bethers

These charts relate only to king salmon. However, because king salmon is the most sought after sport fish, I'm confident the numbers would change little if halibut or other salmon were counted.

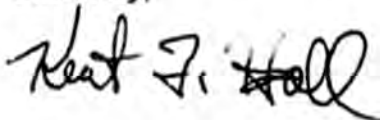
I am fascinated by the list of requests presented by the Salmon Industry Task Force, to deal with competition from farmed salmon. All of the items require grants, low interest loans or deregulation from the government. The charter/lodge industry has not asked for, nor received, nor been offered any government subsidies.

An economic comparison seems appropriate. According to ADF&G's fish tickets, the *total* ex-vessel value of *all* SE troll caught king salmon in 2002, was just over \$6 million. The total gross reported retail sales for charter/lodge operators in Sitka, alone, in 2002, was just over \$12 million! Why should businesses apparently thriving on their own be restricted at this time? This resource use is based more on political allocation (without fair and balanced representation) than on conservation concerns.

Should you still feel the need to pursue a moratorium, I hope your bill is as liberal as possible and requires recipients to have been *legal* operators in the past. I am comfortable with the 2002 and/or 2003 logbook requirement, or vessel construction proof. But the operators logbooks should document at least one charter conducted. More importantly, an operator should have proof of being in legal operation for the qualifying year(s). This should include 1) U.S. Coast Guard license, 2) Alaska State Business license, 3) ADF&G Business and Guide registration, 4) enrollment in a US Coast Guard random drug testing program, and 5) where applicable, payment of appropriate city sales tax, for any charters recorded in their logbook.

Thank you for your consideration.

Sincerely,

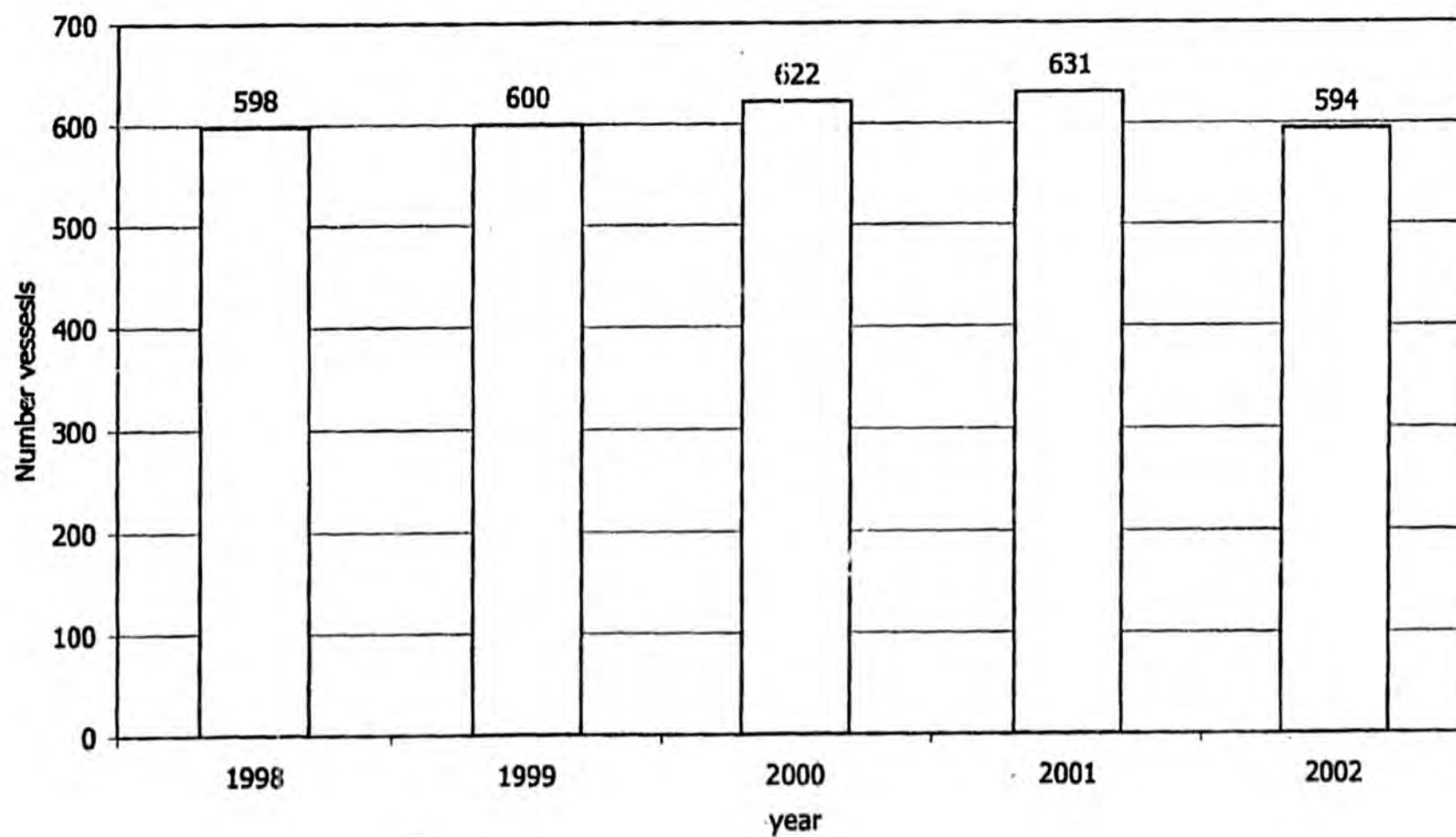


Kent F Hall

cc: Representative Peggy Wilson
Senator Robin Taylor

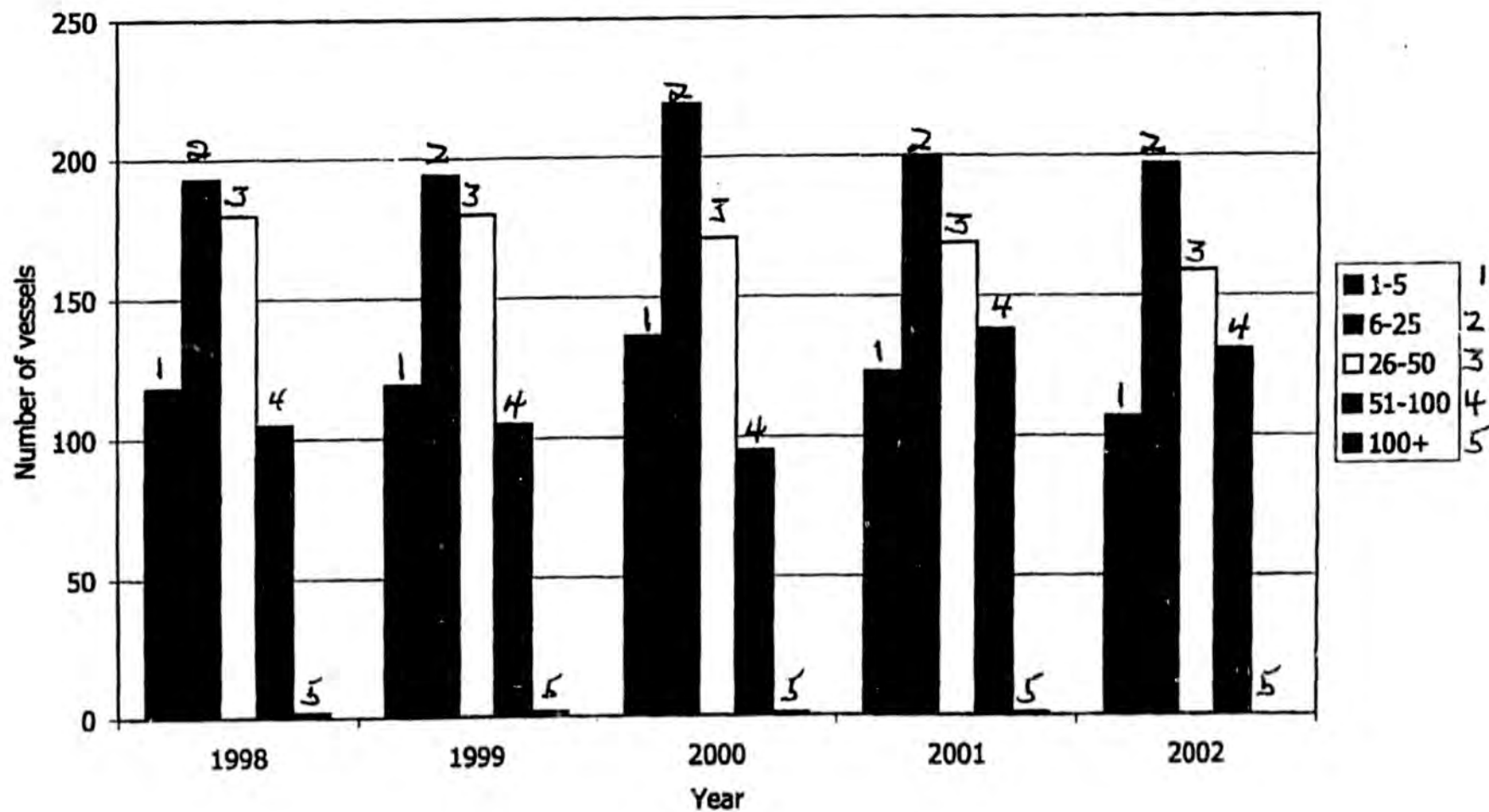
ATTACHMENT 1

Total number of active (reporting at least one trip) SE Alaska salmon charter vessels



ATTACHMENT 2

Number of charter vessels in SE Alaska, classified by frequency of king salmon trips



THE
FOLLOWING
DOCUMENT(S)
ARE
POOR
ORIGINAL
COPIES

4/65-6000

Tom Dawson

From: "Tom Dawson" <tommyjca@alaska.com>
To: <Rep.Bruce.Weyhrauch@legis.state.ak.us>
Sent: Monday, April 07, 2003 14:18
Subject: Moratorium on charter vessel License

I am a lifetime Juneau resident. I am a retired state employee (Dept of Corrections and Glacier Fire Dept).

I am currently self employed as an independent charter owner/operator of "Three Eagle Charters" since 1992.

I do not support your proposed bill for a moratorium on charter vessel licenses for the recreational taking of fish and shellfish in Southeast Alaska.

Alaska promotes tourism all over the world, "to come and see our great wilderness and beauty, our wildlife and fishing". Now we are about to shoot ourselves in the foot (again) by limiting their access to the very things we promote! (ADFG has been doing it for a few years now by constantly increasing the restrictions on fishing for non-residents). Many of my clients have gotten fed up with ADFG and simply vacation and fish (and spend their dollars) where it is more tourist friendly. Statistics show that for every King salmon caught by a non-resident charter fishermen has brought over \$900 into our local economy! Compare this to a commercially caught fish. Now you want to limit the non-residents ability to access this resource once we get them to come here! Why?

Because of ADFG regulations, which has reduced my number of clients over the years, (thus ... income), I now do all my outfitting and purchasing of big ticket items out of Seattle. The ripple effect costs our local economy not only the tourist dollars but my spending of my disposable income here as well.

I do not support this bill.

Charter operators are not a commercial fishing venture. We do not operate under commercial fishing regulations, we operate under sportfishing regulations. Our clients follow the sportfishing regulations. We provide for the client (resident and non-resident alike) the experience they want to enjoy. Sometimes fishing, sometimes not. Can you imagine how ludicrous it would be to have to explain to a client who had booked a charter vessel to enjoy a day or two cruise only to find out that when they wanted to put a fishing pole in the water to fish it wouldn't be allowed! Every client would have to know to ask every charter service if they were allowed to fish or not before they booked! First put yourself in the shoes of the frustrated client. What would you do? I would go elsewhere to where it is more tourist friendly to spend my dollars! Now imagine yourself as the "limited" charter operator. What kind of business do you think you could attract? This bill is definitely not small business friendly.

Tourism is on the rise in Juneau and Southeast and yet your bill, and the one proposed by the Governor (HB 163) are a definite slap in the face for small charter business operators! There are not enough "qualified" charter operators now to handle the tourist business. Many operators do not provide a qualified or safe experience and should not be operating. I would think it would be wiser to address these concerns first, to insure our visitors are safe. Enforcing the current regulations would have a much more positive outcome than what you propose. Let free enterprise take care of the rest. Competition is good. Level the playing field by enforcing the current regulations that apply to charter operators.

Why not address non-resident charter operators, or out-of-state vessels if there is a need for reductions?

What I really suspect is that the push behind this is from Commercial Fishing. Reducing the numbers of charter operators reduces their opposition. ADFG already has the sport/commercial allocation out of balance, and it becomes more so every year. Commercial fishermen have overfished for years and

4/7/2003

continue to do so with the help of ADI-G. ADI-G is not protecting the public resource. they are regulating the user groups to the favor of who has the loudest voice, biggest war chest and most lobbyists. This is what really needs to be changed. Tackle this and your on the right track.

*Respectfully,
Tom Dawson 789-9124
www,ThreeEagleCharters.com
e-mail: tommyjoe@alaska.com*

4/7/2003

SUMMARY REPORT

SOUTHEAST ALASKA KING SALMON MANAGEMENT PLAN TASK FORCE

The Board of Fisheries last modified the Southeast Alaska King Salmon Management Plan in February 2000. The plan has four objectives, one of which is to manage the sport fishery to attain its allocation of king salmon. The plan directs the department to establish specific regulations in step-down progression based on abundance level, forecasted prior to the summer season under the Pacific Salmon Commission process. The plan is currently structured into four sections that are each tied to a range of abundance indices. The plan has been in effect in its current form now for the past three seasons.

In December 2001, Sport Fish Division hosted a meeting among stakeholders in the SE king salmon fisheries. We sponsored that meeting after harvests of king salmon in the sport fishery exceeded the fishery allocation in 2000 and 2001. Those years were the first two under the newly revised plan and both were considered to be years of low king salmon abundance. The outcome of the December meeting was a request to the Board to establish a task force to reduce sport harvests to stay within the fishery's allocation and to reduce impacts to resident anglers.

In January 2002, the Board approved the Southeast Alaska King Salmon Management Plan Task Force and developed its charge. The purpose of the task force is to recommend changes to the Southeast Alaska King Salmon Management Plan to minimize regulatory impacts on resident anglers, and develop management options to reduce harvest by nonresidents and guided anglers in years of low abundance to stay within the sport allocation.

The task force is composed of 11 members. It includes Board member Larry Engel, three lodge owners, three charter operators including representatives for the Sitka and Petersburg Charter Associations, three anglers, one of whom also represents Territorial Sportsman's Association, and a representative for Sitka Tribe of Alaska. The group's membership follows the make-up established by the Board, and represents inside versus outer coast and northern and southern geographic areas of Southeast Alaska as well as each user group. Sport Fish Division staff supported the task force by coordinating meeting schedules and logistics, including meeting facilitators, and providing fishery data.

Task Force Activity

The task force accomplished much during the spring, 2002. At an in-person meeting held March 12-13 in Sitka, the group identified a number of issues involving the sport fishery for king salmon, developed a set of consensus items to incorporate into the existing management plan, and agreed to submit a regulatory proposal to the Board to modify the management plan. A second meeting was held by teleconference in early April to finalize the regulatory proposal. At that meeting, the group agreed that the specific plan modifications should be included in the proposal with the understanding that the

ADFFA REPORT: SEE 4.(E)

proposed plan may be modified and finalized by the task force at a meeting after the 2002 season. The primary product of the spring meetings was the development of proposal 323, which the Board will consider at its February meeting in Ketchikan.

The task force met twice again in fall 2002. During a meeting held November 12-13 in Ketchikan, the task force reviewed and modified the proposed management plan, and developed draft findings to present to the Board with the plan. On November 27, after modifications to the plan and findings were incorporated, the task force met by teleconference and finalized both the plan and findings.

Together, the final draft management plan and findings represent the product of the task force. Both will be considered during the February 2003 meeting of the Board of Fisheries.

The draft plan and findings can be found on this web site. Both documents have been distributed to stakeholder groups and Advisory Committees in Southeast Alaska, and hard copies are available at local (Southeast) ADF&G offices. Any questions or comments can be directed to ...

TASK FORCE FINDINGS

After several meetings the SE King Salmon Task Force has developed a consensus management plan that will accomplish the Board of Fisheries charge to minimize regulatory restrictions to resident anglers and reduce harvest by nonresident and guided anglers in years of low abundance to stay within the sport allocation. The Task Force plan is based on the best available scientific information and is measurable, easily implementable, will sustain the resource, minimize impacts to residents, and allow continuation of the charter/guide industry. The following findings describe how the charge has been met and identifies additional issues for consideration.

1. Minimizing Restrictions to Resident Anglers

The task force recognizes that king salmon are an important source of food as well as an integral component of the lifestyle of the people of Southeast Alaska. As such, the task force management plan suggests no new restrictions to resident anglers and in some cases eases restrictions. Specific changes include:

- a. Allow a two fish bag limit for residents at abundance indices above 1.35 when there is no cumulative overage for the sport fishery.
- b. Allow retention of king salmon during the Golden North Salmon Derby at low abundance indices.
- c. Allow residents fishing from charter vessels to retain king salmon at times when nonresident anglers are subject to more restrictive limits.

2. Increased Restrictions for Nonresident Anglers

The task force recognizes that the charter and lodge industries are an important component of the economy of Southeast Alaska and that these industries are primarily dependent upon nonresident anglers. It is also recognized that king salmon are the primary target species in May and June. To maintain these industries it is imperative that non-residents retain a bag limit of 1 and annual limit of 3 fish during May and June; the importance diminishes later in the year when other species are available. To achieve the Board charge of reducing harvest by nonresidents, the task force recommends several changes including:

- a. Limit nonresident anglers to a maximum bag limit of 1 fish at all abundance index levels.
- b. Limit nonresident anglers to a maximum annual limit of 3 fish (except at very high abundance levels combined with a cumulative underage of 10,000 fish or greater).
- c. At moderate and lower abundance levels (1.2 and below), annual limits in July and August are reduced to 2 or 1 fish depending on the allocation.

3. Allocation

The task force modifications to the King Salmon Management Plan were designed to meet the Board's charge of keeping within the sport allocation. The Task Force recognizes the Board's role in setting allocations, and takes no position on the appropriate allocation for the sport fishery.

Because of the need for stability in the sport fishery, and recognizing the limited ability of the department to manage for a specific sport allocation, the task force recommends that management actions be taken at the lower abundance ranges (1.2 and below) to accomplish a 23% allocation (approximately 15 percent above the current 20% sport allocation) while at higher abundance (above 1.5) the sport fishery be limited to a 17% allocation (approximately 15 percent below the current sport allocation). The task force felt that explicitly stating these targets in regulation clarifies the concept agreed to at the 2000 Board meeting that sport harvests may exceed the 20% allocation at low abundance levels but would fall short of allocations at high levels.

The task force intent is that, over a 6-year period, the sport fishery will harvest 20% of the combined sport/troll allocation. The task force recommends a 6-year tracking period to allow years of high, low and moderate abundance to equalize overages with underages. This will provide enough time to evaluate the effectiveness of the plan, while ensuring that the plan could be modified during the normal 3-year Board cycle if changes are needed.

The task force also recommends that tracking of sport overages and underages begin in 2000, when the most recent plan went into effect.

4. Additional Findings

- a. The task force recognizes that the charter and lodge industries are dependant upon the opportunity to harvest king salmon during May and June. Implementing non-retention during May and June would cause economic disaster. The task force recommends that, if May and June closures are necessary, a separate disaster plan be developed. This contingency may require efforts outside the scope of ADF&G or the Board of Fisheries.
- b. Stable and predictable regulations are desirable for all anglers. It was the goal of the task force to establish more restrictive regulations for non-resident anglers than are contained in the current plan to ensure that more stable regulations result.
- c. The task force recommends that a 48-inch minimum size limit be established, rather than periods of complete non-retention. A 48-inch king salmon weighs approximately 50 pounds and less than 0.25 percent of the fish harvested in Southeast Alaska reach this size. The task force concluded that this regulation would not promote catch and release fishing because of the low probability of catching a 48-inch fish. However, it would allow a person the opportunity to retain the "fish of a lifetime".
- d. The task force recommended allowing resident anglers to retain king salmon while fishing from charter vessels at times when nonresident anglers are subject to more restrictive limits. It was recognized that this would potentially result in a minor increase in harvest. However, the task force concluded that this was consistent with the charge of minimizing restrictions on residents and it was felt that the current regulation unfairly penalized resident anglers who choose to fish from a charter vessel.

- e. The task force fully supports immediate legislation to implement a moratorium or limited entry to the charter industry.
- f. The task force plan provides more specific regulatory direction to the department than the current plan. It is felt that by reducing discretionary action, the plan would be less prone to conflicting interpretation and less likely to be challenged in court.
- g. The task force recommends that harvest reductions at low abundance (less than 1.0) be accomplished by closing specific times to retention of king salmon. It is further recommended that 80% of the reduction should be by nonresidents and 20% by residents. Under the draft plan, non-retention periods for nonresidents will be established on a regular basis as needed during the period July 16-31 before establishing periods prior to July 16. In this way, for example, if eight days of non-retention were needed to reduce the nonresident harvest, retention by nonresidents would be prohibited every second day from July 16-31. If it becomes necessary to prohibit retention for more than the entire July 16-31 period, then additional non-retention periods for nonresidents will be established on a regular basis as needed during the period July 1-15.
- h. There was consensus that nonresidents should be responsible for 80% of the harvest reduction required during July closures and that the remaining 20% should come from residents. ADF&G will determine how many non-retention days will be required by each group to achieve the desired reduction. There was also general agreement that periods of non-retention for residents should be scheduled for days when retention is also prohibited for nonresidents; not on days when harvest by nonresidents is allowed.

KEN DOLE, HB 281

Water Fall Resort

21 Charter Boats

now have daily closures

\$700-\$1000/day/fish

OFFSETS

Dated: 30 April 2003

From: George Houck
Good Time Charters
40 South Point Higgins Rd.
Ketchikan, AK 99901
Phone: 907 247 2393
E Mail: amgo@ptialaska.net

To: Representative William Williams,
Senator Robin Taylor

Subj.: Public Response to House Bill No. 281

RE: "An Act relating to a moratorium on entry of vessels into the Southeast Alaska sport fishing charter fishery; and providing for an effective date."

1. This house bill is NOT in the best interest of Southeast Alaska, in regards to future growth and development in southeast Alaska.

Reasoning:

A. At present the city of Ketchikan is planning for additional berthing of Tour Ships, since the industry has indicated that in is one of our fastest growing industries. It is projected that we will almost double our tourist trade in the next 10 years or so.

B. If we put a moratorium on charter boats, we had in effect, limited the services that will be available in the future to accommodate this increase in tourist business off the cruise ships, i.e., four hour charters.

C. If this moratorium goes into effect, we have also hampered any

future development of other lodges, marinas, or bed and breakfast that would also include guided fishing tours as part of the package.

D. Think about it a minute, if we had 650,000 tourist passing through our town last year and we are expecting a doubling of this industry in the coming years, should we limit the number of people that can take these tourist out on a fishing experience? The present number of Charter Skippers will NOT allow for expansion in this industry, let alone allow for future enlargement of marinas or new lodges.

Dumb idea!

2. Suggestion:

A. If this moratorium is enacted, we should at the same time do away with only six pack licenses and make available for these qualifying, the options of taking more than six people on fishing tours, i.e., party boats, such as those available on the west coast that takes more than six people fishing at a time.

Reasoning:

A. We all know that our fishing industries as a whole is declining, do in large part to pen-raised salmon and other species such as halibuts and clams. We can stomp our feet, beat our chest and run around in circles as we are doing now or we can get real, realize the inevitable, and do some planning for the use of our fishing resources.

B. As more of our seine boats are tied to the docks because of the lack of a buyer for their product or the price is so low that they are not paying for the crew and fuel we need to give them an opportunity to do something else. One way to utilize these people and offer employment would be to allow them to convert the seine boat into a party fishing boat. This especially true if we put a moratorium on A

Southeast Alaska sport fish charter fisheries. The addition to allowing more people on one boat to fish, it will help alleviate the sure to come short fall of charter boat skippers available for hire.

Also this will make for more competition, if a skipper can take more than six people out at one time he can lower his cost per person, and offer a lower price to the tour ship. Presently we are only selling fishing charter trips to the high end people on boats, early in the season and for King salmon and the good fishing periods, for Coho/Pink Salmon in July, August and September are not being sold, in part do to the clientele that travel during this period on tour ships. But if we can lower the cost for these people we can enlarge this period in the business.

2. In a recap, this bill appears to me as a way for the present Charter Boats to eliminate any future competition. I have a charter boat license and a 100-ton Masters license and it sounds great if I want to insure that I don't have to worry about any more businesses competing against me to sell my charters, but for the overall good of Southeast Alaska and our economic development this is NOT a good bill. I'm not afraid of competition and me personnel feel competition is good for business and the future of Southeast Alaska.

Sincerely,

George Houck

P.S.: Robin and Bill, you may not recognize my name as George Houck and Good Time Charters, but you should remember me as the Sears Repairman and the owner/operator of George's Appliance Repair here in Ketchikan. I have done work for both of you . . . smiles. Always looking for ways to develop more jobs for our community, by the way I have other ideas that we should talk about . . . if you're open for suggestions.

Subject: Moratorium on Charter Vessel Licenses

Date: Wed, 30 Apr 2003 15:14:55 -0800

From: Don <ccpwow@gei.net>

To: representative_paul_seaton@legis.state.ak.us

House Fisheries Committee

Rep. Paul Seaton

Committee Members

I would like to address HB 281 Moratorium on Charter Vessel Licenses.

I believe placing limited entry or a moratorium to entry restriction on charter vessels may be well intentioned

but also carries the ability to cause much harm to Alaska's common use fisheries.

This harm would result from users attempting to access a resource which may be taken away from them if they have not accessed it in the past and then the restriction is removed for constitutional conflict reasons.

The reason I believe this is because I believe that only a vote of the people of Alaska may implicate a current Alaskan common user into becoming implicated within the Limited Entry Act.

I also believe that any past, present or future (moratorium to entry) to any common trust user is unconstitutional under Article VIII Section 3. Common Use and Article VIII, Section 17, Equal Access.

The Alaska Constitution does not allow a small amount of time for a common user to be subjected to limited entry / moratorium actions. The only exception Alaska's Constitution grants is that which is located within "**commercial fisheries**".

The Alaska State legislature tested its ability to implicate another common user with its creation of Exclusive Guide Area's, EGA's back in the 1980's. The State attempted to implicate the guided hunting industry into the Alaska's Limited Entry Act merely because the industry was natural resource related and also

commercial like the "**commercial fishing industry**". This was a critical legal error on the part of the State because the Limited Entry Act was specifically designed to apply only to the "**commercial fishing industry**".

The cases which decided this issue were **Owsichuk v. State**, 763 P. 2d 488

[Alaska 1988], and **CWC Fisheries v. Bunker**, 755 P.2d 1115, 1121 n, 4 [Alaska 1998].

Alaska had assumed that its 1971 "**commercial fisheries**" constitutional amendment also applied to other economic activity within the State when in fact it specifically only applied to "the intent of disposing of fish for

profit, or by sale, barter, trade, or in commercial channels". This state error was defined by the result of **Owsichuk and CWC Fisheries**. **Owsichuk** is Alaska's Supreme Court ruling on the Alaska legislature applying limited entry anywhere

it saw a possible user resource or economic problem. **Owsichuk** was a hunting case but the same constitutional

principles apply with regard to fisheries. **Owsichuk** found that the State could not place limited entry on hunting

guides just because it saw some of the same problems within commercial hunting that it observed within commercial fisheries. The end result of **Owsichuk** was that the State cannot just (implicate at will) other industries into the Limited Entry Act.

Owsichuk is the Court's statement that Limited Entry may only be applied to "**commercial fisheries**". **Owsichuk** answers the question of the State just implicating other industries into limited entry but it really did not address what the legal definition of a "**commercial fishery**" is.

To define what a "**commercial fishery**" is we must refer to **Alaska Supreme Court Opinion - Rutter v. Alaska Board of Fisheries (8/7/98), 963 P 2d 1007**.

This is a very recent ruling by the Alaska Court and is simply stating that there is (a very large constitutional wall)

between exclusive entry users and non-exclusive common users. The reason for the constitutional wall is because the Alaska Constitution forbids the exclusive use of any public trust natural resource. The reason "**comercial fisheries**" can legally get around this constitutional provision is because in 1971 the people of Alaska

voted to amend their constitution and allow exclusive use by "**commercial fisheries**".

Article VIII, Sec. 15, amended the exclusive right of fisheries provision of the Constiution of the State of Alaska.

In **Owsichuk** the State of Alaska had attempted to assume that Alaska's limited entry constitutional amendment

generally applied to the term "**commercial**" as in "**general economic activity**", when it infact only applied to

"the intent of disposing of fish for profit, or by sale, barter, trade, or in commercial channels."

Once you have legally defined what "**commercial fishing**" is with regard to the Limited Entry Act, you have also defined a final answer as to who limited entry actions may (and may not) be applied to.

Within **Rutter** the Alaska Supreme Court defined the legal difference between "**commercial fishing**" and "**sport fishing**".

The Alaska Supreme Court stated the following within Rutter.

["**Alaska Statute 16.05.940(5) and 16.05.940(29)** help reveal this commercial limited entry intent and defines

sport fishing intent as the "taking of or attempting to take for personal use, and not for sale or barter, any . . . fish

by hook and line held in the hand, or by hook and line with the line attached to a pole or rod which is held in the hand

or closely attended, or by other means defined by the Board of Fisheries." While charter vessel operators may be

engaged in a commercial activity -- that of guiding sport fishers -- they **are not** involved in the "**commercial taking**"

of fishery resources because they are not taking fish with the intent of disposing of them for profit.

Instead, it is the customers of the charter vessel operators who are taking the fish and are doing so as sport fishers -- taking fish for

personal use, and not for sale or barter.

As the law now stands in Alaska, charter vessel operators acting as guides for sport fishers are involved in the sport taking of fish, not in the commercial taking of fish. Therefore, the provisions of AS 16.43.140 in specific,

and the Limited Entry Act in general, are not implicated."]

Alaska Supreme Court Opinion - Rutter v. Alaska Board of Fisheries (8/7/98), 963 P 2d 1007).

Rutter is stating that Alaska's Limited Entry Act specifically applies to a single industry and that industry must

be involved in the commercial taking of fisheries resources. The definition of "**commercial taking**" is found within **Alaska Statute 16.05.940(5)** and comes down to "the intent of disposing of fish for profit, or by sale, barter, trade, or in commercial channels".

SUMMARY

Owsichek has specifically defined that with regard to Alaska trust issues, the Alaska legislature may not just implicate other industries into limited entry / moratorium type limitations beyond "**commercial fisheries**".

Rutter has specifically defined that charter vessel operators acting as guides for sport fishers are involved in the sport taking of fish, not in the commercial taking of fish. Therefore, the "**commercial**" provisions of **AS 16.43.140** in specific, and the Limited Entry Act in general, are not implicated.

Rutter and **Owsichek** informs all attempting to create (types of non-equal treatment on common use), that such attempts will also be found to be unconstitutional.

It does not matter if such non-equal treatment lasts for 10 minutes or 10 years, the Courts historically have not tolerated the unequal treatment of similarly situated common users therefore such treatment will not withstand judicial scrutiny.

Article VIII Section 3, Common Use.

Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use.

Article VIII, Section 17, Equal Access

"Laws and regulations governing the use or disposal of natural resources shall apply equally to all persons similarly situated with reference to the subject matter and purpose to be served by the law or regulation."

Alaska Statute 16.05.940(5) "commercial fishing" means the taking, fishing for, or possession of fish, shellfish, or other fishery resources with the intent of disposing of them for profit, or by sale, barter, trade, or in commercial channels.

Don Johnson
P.O. Box 876
Soldotna, Alaska 99669
ccpwow@gci.net
907 262 7893

Subject: [Fwd: HB 281]

Date: Fri, 02 May 2003 17:08:05 -0800

From: Representative Paul Seaton <Representative_Paul_Seaton@Legis.state.ak.us>

Organization: Alaska State Legislature

To: Cameron Yourkowski <Cameron_Yourkowski@legis.state.ak.us>

Subject: HB 281

Date: Fri, 2 May 2003 15:32:36 -0800

From: "Myrna Gardner" <mgardner@ccthita.org>

To: "Representative Wilson" <Representative_Peggy_Wilson@legis.state.ak.us>,
"Representative Berkowitz" <Representative_Ethan_Berkowitz@legis.state.ak.us>,
"Representative Guttenberg" <Representative_David_Guttenberg@legis.state.ak.us>,
"Representative Heinze" <Representative_Cheryll_Heinze@legis.state.ak.us>,
"Representative Ogg" <Representative_Dan_Ogg@legis.state.ak.us>,
"Representative Samuels" <Representative_Ralph_Samuels@legis.state.ak.us>,
"Representative Seaton" <Representative_Paul_Seaton@legis.state.ak.us>

I am writing to voice my objection to HB 281 MORATORIUM ON CHARTER VESSEL LICENSES. This bill would create a disproportionate allocation of access and use of the Sports Fishing Charter industry. The proposed moratorium is based upon the vessels registered not operators (OUPV or other). There are no known economic or scientific studies identifying excess use of the catch related to this industry, nor that the participants in the industry cause an undue burden on the resource. There are no scientific reports identifying the need for implementation of laws to restrict access or protect the resource associated.

According the ADF&G, there are 449 registered fishing guides or guide businesses. 60 of these have non-resident permanent addresses. ADF&G does not require a guide business to have an operator license. Obviously with the enhanced value of the vessels with the proposed restriction and tag system many guide businesses have registered a substantial amount of vessels. The following are a list of examples of registered vessels in the S.E. Sport Fish Industry:

<u>Guide or Guide Business:</u>	<u>Vessels Registered:</u>
Waterfall resort	29
Salmon Bay Resort	29
Baranof Wilderness Lodge	22
Bristol Bay Lodge (Ellensburg, WA)	28
Dave Duncan & Sons (Ellensburg, WA)	23
Mission Lodge	29
Rainbow King Lodge, Inc. (Lake Oswego, OR)	17
Rapid Camp Lodge (Dallas, TX)	15
Sitka Super 8 Motel, Inc.	6
Captain Roger Charters (Craig Alaska/owner/operator)	1

Unlike the CFEC limited entry program, qualifying for restricted access and use is not based upon the fisher or the years involved in this industry it is based upon your ability to own and register as many boats as you can this year. In effect, this bill would create a substantially large inflated value for a boat.

Representative Bruce Weyhrauch identified in his statement that there appears to be a stabilization of active charter vessels over the last 5 years. But, he failed to mention that the moratorium is based upon vessels registered in 2003. In 2003, according to the CFEC, there are 1113 vessels registered. Thirteen new in the last week since this bill was introduced. According to the Division of Sport Fish Overview of the Sport Fishery for Chinook Salmon in S.E. Alaska through 2002 report dated February 2003 (Table 10) there were 667 active charter vessels. This year (since Weyhrauch's bill states this year is the qualifying year) there has been an increase of 67% or approximately 447 registered vessels.

This bill would restrict access and establishes an exclusive right of the fishery. These actions are in violation of Alaska Constitution.

I implore you to not allow this bill to be moved out of your committee. As it is presented it will create an unfair restricted access to the Sports Fishing Charter Industry. With the decline in the commercial salmon industry, I don't believe it is an appropriate time for the Legislative Body to impose restriction that would hurt Alaskans and future business development.

Myrna Gardner

PO Box 33391

Juneau, AK 99803



CENTRAL COUNCIL
tlingit and haida indian tribes of alaska
ANDREW P. HOPE BUILDING
320 West Willoughby Avenue • Suite 300
Juneau, Alaska 99801-9983

Memo To: Representative Paul Seaton, Representative Peggy Wilson
From: Don Bremner, Staff
Re: **HB 281 follow-up and recommendations**
Date: May 2, 2003

Dear Representative Seaton and Representative Wilson;

Thank you for your professional public hearings re/ HB 281. Your explanations for the public were very helpful to those in the audience. It is very helpful to hear and understand what to expect from our Legislators regarding the legislative process of addressing important pieces of legislation such as HB 281.

As follow-up to the hearings I wanted to share two attached articles with your offices that address fisheries issues published by the PEW Oceans Commission regarding "Managing Marine Fisheries in the United States." The first article, "Rights-Based Fishing is (5) pages, and the second article, The Economics of Fishery Management, is (5) pages. Both articles help define and describe issues we are facing in Alaska. After reading these type professional articles it only brings home the need to support a State Fisheries and Seafood Commission, and the adoption of a State Fisheries Business Plan before moving forward with proposals such as HB 281.

After reading these articles part of a future plan may be directing a \$15.00 head tax on each client taken out on these charter vessels, and charging a per pound fee or per fish fee when fish is kept by the client. There are many issues and options to consider as you are well aware and I mentioned these two as examples of much work to be done in sustaining our wild seafood resources of Alaska.

Our office would appreciate very much a seat at the work group table to help find acceptable solutions that can fit into any future State Fisheries Business Plan adopted by the State of Alaska. I can be reached at 463-7341 for further discussion or e-mail dbremner@ccthita.org

Thank you,

Don Bremner, Staff
Business & Economic Development



Rights-Based Fishing: The Wrong Concept and the Wrong Solution for the Wrong Problem

Daniel W. Bromley, Ph.D.

Anderson-Bascom Professor of Applied Economics
Department of Agricultural and Applied Economics
University of Wisconsin-Madison

Summary

Support for so-called rights-based fishing stems from the mistaken belief that such mechanisms will lead to sustainable fishing practices because individual private owners will want to protect resources they own. Such schemes ignore the fact that with the creation of the Exclusive Economic Zone (EEZ), all U.S. citizens became the owners of fishery resources. Under current U.S. fishery policy and management, the agencies charged with protecting the public's wealth of ocean fisheries have not fulfilled that mission and the economic incentives are defective. In order to correct these flaws, fishers should be required to pay for the opportunity to extract fish from this publicly owned resource, and to pay royalties on fish caught. Doing so would correct the economic incentives, reaffirm the reality of public ownership of the oceans and their bounty, and most assuredly lead to more sustainable use of fisheries.

The Setting

U.S. fishery policy suffers from a flawed diagnosis of the fishery "problem," which in turn leads to flawed solutions. A prime example of such a flawed solution is the misnamed concept of "rights-based" fishing associated with the introduction of individual fishing quotas (IFQs). The Magnuson-Stevens Fishery Conservation and

Management Act is abundantly clear that such transferable fishing permits fail to bestow an ownership interest in the oceans or the fish. Fisheries with IFQs are nothing but quota fisheries, and that is what they should be called. The second flawed solution is the fiction that IFQs will rectify other problems in the fishery—paramount among them being the critical issues of stewardship and good management. Quota fisheries provide no incentives for fishing firms to resist the temptation to press fishery management councils to adopt total allowable catch (TAC) levels that threaten sustainable stocks over time. Moreover, having the exclusive opportunity to pursue a share of a specific allowable catch does not provide a fishing firm the opportunity to influence or control the fishing behavior of others. Indeed, with each fisher under a limit of what can be landed (the quota share), there are incentives for fishers to discard, at sea, certain fish that may not bring the highest prices. Finally, IFQs, as currently administered, do nothing to produce income for U.S. citizens, who are the owners of the wealth of ocean fisheries. Indeed, the few IFQ programs now in operation have simply handed over many millions of dollars of income drawn from publicly owned ocean fisheries. Given the untold millions of dollars in government subsidies to expand fishing capacity over the past

"Unfortunately, much of the fisheries literature continues to invoke the language of property rights with little attention to the essential concepts of rights, property, and property rights."

several decades, the industry now benefits in three ways: (1) by subsidies that have expanded fishing capacity; (2) by the opportunity to gain income from a public asset without the inconvenience of paying for that opportunity; and (3) by paying nothing for the fish removed from the oceans. Small wonder U.S. fishery policy is so flawed.

Unfortunately, much of the fisheries literature continues to invoke the language of property rights with little attention to the essential concepts of rights, property, and property rights. The literature does so without benefit of other literature on property rights in general, and natural resource property regimes in particular (Becker, 1977; Bromley, 1991; Christman, 1994; Hohfeld, 1913; Hohfeld, 1917). This conceptual incoherence is the primary source of defective policy advice that prevents clear thought and action regarding innovative fishery management policies.

On Institutional Structure

There are two structural issues in fishery policy. The first pertains to behavioral incentives emanating from the working rules (institutions) that define and mediate the actions of individual fishing firms. The second concerns the property regimes within which firms seek to harvest fish. Contrary to the received wisdom, there is no causal relationship between the two.

Behavioral Incentives

The literature in fishery economics began with a story that linked property regimes and

incentives. Starting in 1954 with H. Scott Gordon's incorrect reference to the open-access fishery as a regime of "common property," and with additional writings in the late 1960s by Harold Demsetz (1967) and Garrett Hardin (1968), most fishery economists had acquired the necessary terminology to craft bogus stories about what came to be called the "fishery problem." The recent preoccupation with IFQs is the predictable result of Gordon's flawed structural diagnosis.

Gordon and those who followed wrote that flawed incentives caused the fishery problem because no one owned the fish until they were harvested. Because no one owned the fish (or rights to the fishery), these writers alleged that no one had an incentive to take care of the fishery. With this magical association between private ownership and proper incentives for stewardship, it became *de rigueur* to insist that a fisher who owned the right to the entire fishery would take good care of it. This is the "sole owner" of early fishery economics. This link between ownership and good stewardship is grounded on one part of economic theory that suggests individuals will always act in their own best interest and would thus be good to nature if only they could become the owner of it.

Interestingly, another part of economic theory points out that a single owner will not necessarily exercise wise and sustainable stewardship of a natural resource. This result follows from the possibility that the owner's desire for income might outstrip the rate at

which the natural resource is regenerated—the natural rate of growth of a forest or of a fish stock. If this occurs, then it is optimal for the individual owner to catch as many fish as possible as quickly as possible and invest those proceeds where they will grow faster than the underlying resource stock. This behavior arises from what is called the “iron law of the discount rate” (Clark, 1973; Page, 1977). Simply put, private ownership of nature provides no assurance that degradation and destruction will not occur. From this realization, the fervent claims for IFQs as private property, and therefore as the sufficient management tool to ensure safe harvests of the fish stock, are twice flawed. IFQs are not private property, and even if they were, that would not be sufficient to assure sustainable management.

Whose Resource Is It, Anyway?

It is curious to observe that when writers advocate privatizing the fishery under IFQs they overlook the obvious fact that all U.S. citizens already own the fishery resource and other economic assets in the EEZ. The advent of the EEZ brought fisheries out to the 200-mile limit under the ownership and jurisdiction of the U.S. The EEZ is a clear example of a state property regime (Bromley, 1991). In addition, the federal government has made unprecedented subsidies to the fishing industry to expand fishing capacity over the past 25 years.

The fishing industry harvests what U.S. citizens already own and sells it back in a different form. This is no different from the har-

vesting of timber on public lands. However, for some reason, fishery policy is talked about in quite different terms. Specifically, the reality of public ownership is curiously missing from discussions of the fishery—a remnant of the original diagnosis that fisheries were common property and therefore “un-owned.”* Thus, it should not be a surprise that fishery policy is a far cry from policy toward petroleum leases on the Outer Continental Shelf or the sale of timber from public land. Only in fisheries are private firms allowed to capture and profit from publicly owned assets without paying anything beyond a nominal license fee. Nor does the industry pay a royalty for every unit of valuable resource taken from the ocean.

Ironically, constant talk of the quota fishery as an example of rights-based fishing has compounded the flaws in this wealth transfer. This artful use of language is evidently motivated by the desire to bolster political support for the idea that if only the U.S. would get on with privatizing its fisheries, the magnificent stewardship tendencies of the industry will burst forth to trump the iron law of the discount rate.

It is essential to understand that property is not an object but is, instead, an income (or benefit) stream that can be associated with a particular setting or circumstance (Bromley, 1991; Macpherson, 1973). It is also necessary to understand that a right is the capacity to compel the state to validate and protect a particular setting or circumstance. A property right, therefore, is the legal ability to com-

“Only in fisheries are private firms allowed to capture and profit from publicly owned assets without paying anything beyond a nominal license fee.”

* This association is itself flawed. Common property is not a regime of the absence of ownership; it is merely the absence of individual ownership (Bromley, 1991).

"Fishery policy would be much enhanced if those who wished to profit from fishing had to offer bids for the opportunity to fish...."

mand the state to protect one's interest in a particular stream of benefits arising from specific settings and circumstances (Becker, 1977; Bromley, 1991; Hohfeld, 1913; Hohfeld, 1917).

The state stands ready to be enlisted in the cause of those to whom it has granted rights. Rights expand the capacities of the individual by indicating what one can do with the aid of the collective power (Bromley, 1989; Macpherson, 1978; Commons, 1968). Sloppy reference to all manner of objects—driver's licenses, grazing, or fishing permits—as "rights" is responsible for much of the incoherence in fisheries policy. This is an example of what legal scholar Mary Ann Glendon calls "rights talk" (Glendon, 1991).

In practical terms, the empirical content of property rights is determined when conflicting rights claims are brought before the courts—especially the U.S. Supreme Court. As a result, property rights are the result of a process that must determine which of the conflicting rights claims before the court seems better, at the moment, to sanctify. Those settings and circumstances that gain protection from this process acquire, by virtue of that protection, property rights (Bromley, 1993; Bromley, 1997).

Whither Fishery Policy?

Clarity in the realm of property relations helps gain clarity in the realm of behavioral incentives. Specifically, language and concepts must become logical, honest, and consistent. Without talk of rights-based fishing or privatizing the fishery, it would be easier to make

the case that the wealth of ocean fisheries belongs not to the fishing industry but to all U.S. citizens. Once this is recognized, it

becomes more difficult to justify massive giveaways of income and wealth to the industry as part of establishing IFQ systems. Indeed, with the idea firmly established that the ocean fishes belong to the citizens, it is easier to sustain the case that firms wishing to earn revenue from a fishery in the U.S. EEZ must pay.

Fishery policy would be much enhanced if those who wished to profit from fishing had to offer bids for the opportunity to fish—the same method used to apportion public timber and fossil fuels. The bidding could be structured so that each firm agreed to pay a fixed permit fee scaled to the size of the vessel, and then offered to pay a royalty for each fish landed. Fishing opportunities could be awarded for multiyear periods to the highest bidders within each partition of vessels—small, medium, and large.

The royalty on each fish would reduce the firm's net price of a fish landed at the dock and this lower net price would induce each vessel to reduce fishing effort sooner than they would in the absence of the royalty. This auction scheme would reduce the artificial inducement for excessive capital and labor now in fishing (artificial because it is free, while land-based producers must own land and pay property taxes). It would also award fishing opportunities to those firms that were the most efficient and could therefore offer the highest royalty bids. Most profoundly, the scheme would finally produce income for the

owners of the ocean and its commercial wealth. In the early years of such an auction, most of the proceeds might be devoted to assisting in the exit of much redundant fishing capacity—both capital and labor—from the

fishery, and to economic transition programs for fishing communities. Over the longer run, the proceeds must go to the owners of the wealth of ocean fisheries. That is, the proceeds must go to the public treasury.

References

- Becker, L.C. 1977. *Property Rights: Philosophic Foundations*. London: Routledge and Kegan Paul.
- Bromley, D.W. 1989. *Economic Interests and Institutions: The Conceptual Foundations of Public Policy*. Oxford: Basil Blackwell.
- . 1991. *Environment and Economy: Property Rights and Public Policy*. Oxford: Basil Blackwell.
- . 1993. Regulatory takings: Coherent concept or logical contradiction? *Vermont Law Review* 17(3):647–82.
- . 1997. Constitutional political economy: Property claims in a dynamic world. *Contemporary Economic Policy* 15(4):43–54.
- Christman, J. 1994. *The Myth of Property*. Oxford: Oxford University Press.
- Clark, C.W. 1973. Profit maximization and the extinction of animal species. *Journal of Political Economy* 81:950–61.
- Commons, J.R. 1968. *Legal Foundations of Capitalism*. Madison: University of Wisconsin Press.
- Demsetz, H. 1967. Toward a theory of property rights. *American Economic Review* 57:347–59.
- Glendon, M.A. 1991. *Rights Talk: The Impoverishment of Political Discourse*. New York: The Free Press.
- Gordon, H.S. 1954. The economic theory of a common property resource: The fishery. *Journal of Political Economy* 62:124–42.
- Hardin, G. 1968. The tragedy of the commons. *Science* 162:1243–48.
- Hohfeld, W.N. 1913. Some fundamental legal conceptions as applied in judicial reasoning. *Yale Law Journal* 23:16–59.
- . 1917. Fundamental legal conceptions as applied in judicial reasoning. *Yale Law Journal* 26:710–70.
- Macpherson, C.B. 1973. *Democratic Theory*. Oxford: Clarendon Press.
- . 1978. *Property: Mainstream and Critical Positions*. Toronto: University of Toronto Press.
- Page, T. 1977. *Conservation and Economic Efficiency*. Baltimore: Johns Hopkins University Press.

"Over the longer run, the proceeds must go to the owners of the wealth of ocean fisheries."



The Economics of Fishery Management: Behavioral Incentives and Management Costs

Susan Hanna, Ph.D.
Professor of Marine Economics
Department of Agricultural and Resource Economics
Oregon State University



Summary

Economics teaches the behavioral lesson that people respond to the incentives they face and are, for the most part, rational in what they do. In this way, the economics of fisheries and their management are interrelated. The relationship stems from the signals management provides, the incentives those signals create, and the behavioral responses caused by those incentives. The incentives created by fishery management encourage managers and fishermen to take short-term perspectives and act against long-term ecological and economic interests. Their actions create costs for management that affect its performance. A precondition for improving fishery management is to contain these costs.

Management Structure

The present costs of fishery management have their origins in the management structures and incentives established 25 years ago. The 1976 Fishery Conservation and Management Act (the act) was the first legislation to provide comprehensive federal authority to manage fisheries within the United States Exclusive Economic Zone (EEZ). It removed most foreign fishing from U.S. waters and established a new domestic fishery governance structure that distributed authority among the federal gov-

ernment and the regions through a system of eight regional fishery management councils.

The councils are democratic decision-making bodies comprised of representatives of recreational and commercial user groups, states, tribes, the federal government, and the public. Council advisers include scientists, user groups, and environmental organizations. All contribute to the development of Fishery Management Plans (FMPs) and regulations.

The idea behind the councils is to develop regional approaches to fishery management. The regional approach is based on the premises that people with working knowledge of regional fisheries can make the most informed decisions about those fisheries and that management of fisheries within state waters (out to three miles from shore, in most cases) should be coordinated with management of fisheries in federal waters.

The councils recommend management plans and regulations to the U.S. secretary of commerce, who has final authority for their approval and responsibility for their consistency with federal law. In most cases, the secretary delegates approval authority to the National Marine Fisheries Service (NMFS). The eight councils take different approaches to decision-making and management, as anticipated and intended by the act.



In response to changing fishery conditions, Congress has made many amendments to the act. The most recent amendments in 1996 charges the councils with stricter stewardship responsibilities.

Management Incentives

Congress passed the original version of the act in a climate of foreign exclusion and domestic expansion. The act gave domestic fleets priority and incentives to expand, prohibiting foreign fishing in U.S. waters except in cases where domestic fishing capacity did not exist. However, the councils were given little direction and few tools to accomplish their most difficult task—the allocation of fish between competing and expanding domestic interests.

The council system has operated under mixed incentives. The act eliminated the problem of open access fishing by foreign fleets but did little to resolve the problem of open access fishing by domestic fleets. The law required councils to keep exploitation within conservation limits at the same time they were operating in an expansionary mode. Determined to provide fishing opportunities to all, some councils put the needs of development before conservation. In addition, federal programs designed to assist in fishing industry renovation and expansion—low-interest loans and tax-deferred vessel construction programs—remained in place.

American fishery management under the original act and its subsequent amendments has followed a predictable path. Open access

created a race for fish that led to an overinvestment in fishing capital. The race for fish had common-sense origins and destructive results. Because access to most fisheries remained open, ownership of fish could be achieved only by capture. Fishermen competed by investing in bigger and better fishing vessels. Seafood processors expanded their plants. Investments in fishing and processing capacity far exceeded levels that could be supported by the fishery resource over time (Hanna, 2002).

Concurrent with this overinvestment in fishing and processing capital was an underinvestment in the management capital needed to keep pace with changing conditions. Management capital includes decision-making skills, knowledge of management tools, and understanding of monitoring and evaluation systems (The Heinz Center, 2000).

The race for fish, fishing overcapacity, and management undercapacity combined to shorten the time frames of fishery managers and user groups. Short-term actions crowded out long-term strategies. Reactions to crisis overwhelmed planned management. Assurance about the future declined, and conflict among competing interests increased. From the perspective of rehabilitation and expansion of U.S. fisheries, the path led to limited short-term success. From the perspective of building an institutional structure for long-term ecosystem sustainability, the path led to a fishery management system plagued by dysfunction and high costs (Hanna, 1998).

"The race for fish had common-sense origins and destructive results."

"In responding to the incentives provided by the management system, fishery managers and user groups have contributed to the inflation of management costs."

By the 1990s, U.S. fishery management was under pressure to change. The 1996 SFA added several important strictures to federal fishery law. It required that management actions be taken to eliminate overfishing, rebuild overfished stocks, minimize bycatch, protect essential fish habitat, and account for the effects of fishery regulations on fishing communities.

Also during the 1990s, the U.S. signed several international ocean agreements to protect marine ecosystems by reducing overfishing, reducing bycatch and discards, reducing fishing capacity, and strengthening governance and the scientific basis for ecosystem management (FAO, 1997).

Despite these changes at national and international levels, the problem of incompatible incentives remains in U.S. fishery management. Additionally, expansionary pressures from overcapacity, lingering expectations for growth, and inadequate attention to the long-term economic productivity of fisheries create costs for management as it attempts to adapt to stricter conservation requirements.

Management Costs

Productivity losses have required more complicated regulations, expanded requirements for information, and created more conflicts among user groups. In turn, these factors have increased management costs while undermining management's legitimacy and decreasing its effectiveness.

Fishery management is conducted with reference to a set of objectives specified in a

FMP. Ideally, management will cost the minimum necessary to achieve its objectives, and will generate more benefits than costs. Though reality never reaches the ideal, management can contain costs through the structure of regulations and the process of making decisions.

The costs of fishery management are transactions costs (Matthews, 1986; Eggertsson, 1990). For the councils and NMFS, transactions costs result from coordinating requirements to collect and analyze data, assess the status of fish stocks, design and implement regulations, and communicate and resolve conflicts. For fishery user groups, transactions costs are related to participation in management, including the cost of lost work time and time spent in acquiring information, as well as direct monetary expenditures for information, travel, and communication. Some transactions costs remain fixed; others vary with structure and process (Hanna, 1995).

In responding to the incentives provided by the management system, fishery managers and user groups have contributed to the inflation of management costs. Management has focused on the short-term exploitation of individual species, functioning with poorly articulated objectives, shortened time horizons, and high levels of scientific uncertainty. Broad-scale monitoring and the evaluation of performance are absent. The increasing intensity of fishery use creates a large regulatory burden that strains the personnel resources of management and requires management to focus on short-term regulatory needs. The

short-term focus prevents the development of design experiments that would increase management's adaptability.

Attempts to improve the performance of fishery management through additional requirements such as those added by the SFA have further added to transactions costs. New regulatory requirements are increasingly prescriptive and limit the flexibility with which management can meet its objectives.

One example of the increasing transactions costs burden of fishery management is the large number (greater than 100) of lawsuits pending against the secretary of commerce and challenging specific aspects of fishery management. These suits represent both dissatisfaction with the present costs of fishery management and new transactions costs generated by the information requirements of litigation.

Some transactions costs are attributable to the lack of property rights to guide and control the use of fishery resources. Property rights define legitimate owners and the rules and responsibilities so that expectations are consistent and enforcement possible (Bromley, 1991). The failure to adequately specify property rights to fisheries is a large barrier to the cost-effective conduct of basic management tasks.

Cost Containment

The present management environment includes significant barriers to containing transactions costs, but also suggests the conditions necessary for cost containment. There

are several barriers to cost containment:

- *Fishing overcapacity*: the scarcity created by excess fishing capacity leads to crisis-driven fishery management that tends to be reactive rather than strategic.
- *Adversarial strategies*: overcapacity means that management decisions create winners and losers who are pitted against each other instead of working toward a common objective.
- *The search for no-impact options*: the desire to find management actions without distributional effects causes the expenditure of large amounts of time on analysis.
- *Vague management objectives*: fishery management plans contain long lists of competing and qualitative objectives that make it difficult to assess management performance.
- *Strained human capital*: increasingly complicated management is generating sophisticated information needs and increasing demands on human capital.
- *Micromanagement*: detailed national management requirements ignore regional contextual differences, focus on process, and divert attention from desired outcomes.
- *Inadequate understanding of incentives*: underinvestment in research on incentives and behavior precludes the development of incentive-compatible management approaches.
- *The shadow of history*: the path created by past actions limits the consideration of present alternatives.

"The failure to adequately specify property rights to fisheries is a large barrier to the cost-effective conduct of basic management tasks."

There are a number of conditions that could facilitate cost containment:

- *Increase the economic productivity of fisheries:* motives to conserve and to participate effectively in management depend on economic well-being.
- *Decrease fishing pressure:* reduce capacity to a level that is profitable at much lower yields.
- *Specify measurable objectives:* provide long-term performance targets that leave management less vulnerable to short-term pressures.
- *Specify property rights:* provide consistent expectations about rights and responsibilities of fishery participants.
- *Realign incentives:* define responsibilities associated with rights, introduce accountability, and reward desired behavior.
- *Monitor and evaluate management performance:* develop performance indicators that promote adaptation and improvements in management.
- *Experiment with alternate management approaches:* identify management alternatives that are flexible, less vulnerable to short-term interests, and more cost-effective.

References

- Bromley, D.W. 1991. *Environment and Economy: Property Rights and Public Policy*. Oxford: Basil Blackwell.
- Eggertsson, T. 1990. *Economic Behavior and Institutions*. Cambridge: Cambridge University Press.
- FAO. 1997. Food and Agriculture Organization of the United Nations. *The State of World Fisheries and Aquaculture 1996*. Rome: FAO.
- Hanna, S. 2002. Transition in the American fishing commons: Management problems and institutional design challenges. In *The Commons at the Millennium*, N. Dolsak and E. Ostrom, eds. Cambridge: MIT Press.
- . 1998. Parallel institutional pathologies in North Atlantic fisheries management. In *Northern Waters: Management Issues and Practice*. D. Symes, ed. London: Blackwell Science.
- . 1995. Efficiencies of user participation in natural resource management. In *Property Rights and the Environment: Social and Ecological Issues*. S. Hanna and M. Munasinghe, eds. Washington, D.C.: World Bank.
- Matthews, R.C.O. 1986. The economics of institutions and the sources of growth. *Economic Journal* 96:903–10.
- The Heinz Center. 2000. H. John Heinz III Center for Science, Economics and the Environment. *Fishing Grounds: Defining a New Era for American Fishery Management*. S. Hanna, H. Blough, R. Allen, S. Iudicello, G. Matlock, and B. McCay. Washington, D.C.: Island Press.

