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MEMORANDUM OPINION AND JUDGMENT, SUPREME COURT OF THE STATE OF ALASKA (OCTOBER 29, 2025)

THE SUPREME COURT OF THE STATE OF ALASKA

COOK INLET FISHERMAN'S FUND,

Appellant,

v.

ALASKA DEPARTMENT OF FISH & GAME, ALASKA BOARD OF FISHERIES, and COMMISSIONER DOUG VINCENT-LANG, in an official capacity,

Appellees.

Supreme Court No. S-19034

Superior Court No. 3KN-22-00515 CI

No. 2116 – October 29, 2025

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Kenai, Jason M. Gist, Judge.

Before: CARNEY, Chief Justice, and BORGHESAN, HENDERSON, PATE, and ORAVEC, Justices.

MEMORANDUM OPINION AND JUDGMENT*

I. Introduction

In the summer of 2022, the Alaska Department of Fish and Game (ADF&G) closed a portion of the commercial fishery in Cook Inlet in an effort to protect the weakening king salmon run, but kept the personal use fishery open. Challengers sued, arguing that this management decision violated the dormant Commerce Clause of the United States Constitution. The superior court granted summary judgment in favor of ADF&G, holding that the management decision did not violate the dormant Commerce Clause. Because the fish harvested in the personal use fishery will never enter a stream of commerce, and because the commercial closures apply equally to residents and non-resident fishing ventures, we hold that ADF&G's management decision does not impermissibly discriminate against interstate commerce and affirm the decision of the superior court.

II. Facts and Proceedings

A. Background

Cook Inlet Fisherman's Fund (CIFF) is a nonprofit corporation that represents commercial fishing interests in Cook Inlet. This is CIFF's third time before us challenging ADF&G's fishery management decisions.[1]

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* Entered under Alaska Appellate Rule 214.

[1] In *Cook Inlet Fisherman's Fund v. State, Dep't of Fish & Game* (*CIFF I*), 357 P.3d 789 (Alaska 2015), we rejected CIFF's arguments that ADF&G's closure of certain portions of the salmon fishery violated the State's own fishery management plans and the uniform application and sustained yield clauses of the Alaska

The Cook Inlet fishery accommodates commercial, sport, personal, and subsistence uses of all five Pacific salmon species — king, coho, sockeye, pink, and chum.[2] ADF&G is "charged with the duty to conserve and develop Alaska's salmon fisheries on the sustained yield principle."[3] The department fulfills this duty by establishing management plans for fisheries throughout the state.[4] Two of the department's management plans relating to Cook Inlet are at issue here.

The first is the Kenai River Late-Run King Salmon Management Plan.[5] That plan provides that "[t]he department shall manage the late-run Kenai River king salmon stocks primarily for sport and guided sport uses."[6] The plan also provides that ADF&G "shall" manage the late-run king salmon fishery to "achieve an optimal escapement goal of 15,000 – 30,000" king salmon of a certain size.[7] If the projected king escapement is less than 15,000 of a certain size,

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Constitution. Then in *Cook Inlet Fisherman's Fund v. State, Dep't of Fish & Game* (*CIFF II*), 514 P.3d 1250 (Alaska 2022), we rejected CIFF's argument that Alaska's fishery management was subject to federal standards in 2019 and 2020.

[2] *CIFF I*, 357 P.3d at 792 ("All five Pacific salmon species make their way through Cook Inlet and into its numerous river systems, including the Kasilof and Kenai Rivers.").

[3] 5 Alaska Administrative Code (AAC) 39.223(a).

[4] *See, e.g.*, 5 AAC 21.353-.377 (providing various salmon fishery management plans for regions throughout Alaska, including Cook Inlet).

[5] 5 AAC 21.359.

[6] 5 AAC 21.359(a).

[7] 5 AAC 21.359(b).

then ADF&G is required to close commercial set netting and heavily restrict commercial drift netting at and around the mouth of the Kenai River.[8]

The second plan at issue is the Upper Cook Inlet Personal Use Salmon Fishery Management Plan.[9] Fishing for personal use is defined as "the taking, fishing for, or possession of finfish . . . by Alaska residents for personal use and not for sale or barter."[10] In Cook Inlet, the personal use fishery is accessible only to persons with an Alaska resident sport fishing license.[11] The plan allows residents to dipnet for salmon on the Kenai, Kasilof, Beluga, and Susitna Rivers, and on Fish Creek.[12] Most kings may not be retained and any kings caught while fishing for other species (bycatch) must be released.[13]

B. The 2022 Commercial Closures

The king salmon population in the Kenai River has been suffering.[14] In January 2022, ADF&G projected that the late king run in the Kenai would

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[8] 5 AAC 21.359(d).

[9] 5 AAC 77.540.

[10] AS 16.05.940(27).

[11] 5 AAC 77.540(a)(1).

[12] 5 AAC 77.540(c)-(d), (g)-(h).

[13] *See id.*

[14] *See CIFF II*, 514 P.3d 1250, 1252-53 (Alaska 2022) (describing 2019 outlook for late king run as "well below average"); *see also CIFF I*, 357 P.3d 789, 792 (Alaska 2015) (describing 2013 early king run in Kenai River as "possibly the lowest on record" and late run as "the lowest on record").

consist of 16,004 fish — only 1,004 fish above the minimum escapement goal.[15] Because of this, the commissioner of ADF&G required sport fishers on the Kenai to use only "one unbaited, single-hook, artificial lure" and prohibited sport fishers from retaining "king salmon of any size while sport fishing through July 31, 2022."

Then in March 2022, the department published an advisory announcement entitled *Upper Cook Inlet 2022 Outlook For Commercial Salmon Fishing*. The announcement stated that ADF&G's sockeye escapement forecasts were well above its sustainable escapement goals for that species. And the announcement explained that from July 9 through July 15, portions of the commercial fishery would be closed on the weekends to "facilitate movement of fish into the rivers for the personal use fishery."

However, on June 3, 2022, ADF&G issued an emergency order restricting commercial set gillnet fishing near the mouth of the Kenai to "no more than 24 hours per week" to ensure that the king salmon run achieved its escapement goal of 15,000 – 30,000 kings.[16] Then effective July 17, 2022, the commissioner completely closed the Kenai River king sport fishery, prohibiting even catch-and-release of the fish, due to projections that the late king run would be far below

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[15] *See* 5 AAC 21.359(b) (setting optimal escapement goal for late-run kings in Kenai River at "15,000 – 30,000" fish).

[16] *See* 5 AAC 21.359(e)(3)(C) (providing that "if the use of bait retention of king salmon are prohibited in Kenai River sport fishery," then commercial set gillnet fishing in Upper Subdistrict shall be open "for no more than 24 hours per week").

the optimal escapement goal of 15,000.[17] This action also triggered the closing of "the commercial drift gillnet fishery in the Central District" and the "commercial set gillnet fishery in the Upper Subdistrict and the Central District"[18] near the mouth of the Kenai River pursuant to the Kenai River Late-Run King Salmon Plan.

C. The 2022 Complaint

In light of these closures, CIFF filed a complaint and a motion for a preliminary injunction in Kenai Superior Court, arguing that ADF&G's implementation of the Kenai River Late-Run King Salmon Plan violated the dormant Commerce Clause of the Constitution. CIFF argued that ADF&G's commissioner was using the plan "to severely and adversely disenfranchise commercial fishing interests" by closing "the East side set net fishery for the remainder of the season at or before the peak of the Sockeye run." It argued that this decision saved "a few hundred King salmon" while "allowing gross Sockeye and pink salmon over escapements of over a million salmon into the Kenai, Kasilof, and other Cook Inlet rivers that should have

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[17] *See* 5 AAC 21.359(d)(1) (requiring ADF&G to close Kenai sport fishery if escapement projection for late-run kings is less than 15,000 fish).

[18] *See* 5 AAC 21.359(d)(2)-(3) (requiring ADF&G to "close the commercial drift gillnet fishery in the Central District within one mile of the Kenai Peninsula shoreline north of the Kenai River and within one and one-half miles of the Kenai Peninsula shoreline south of the Kenai River" and also requiring ADF&G to completely "close the commercial set gillnet fishery in the Upper Subdistrict of the Central District" when escapement projection for late-run kings is less than 15,000 fish).

been harvested." CIFF maintained that this decision "caused great unnecessary harm to the fishermen, processors, local economies, national interest, salmon, salmon habitat, and national food supply." CIFF also argued that the Upper Cook Inlet Personal Use Salmon Fishery Management Plan was unconstitutional, contending that the fishery impermissibly discriminated against interstate commerce because a user must have an Alaska resident fishing license in order to access the fishery.

D. Superior Court Proceedings

In January 2023, CIFF filed a motion for partial summary judgment on its constitutional claim.[19] ADF&G opposed and filed its own cross-motion for summary judgment.

After hearing argument, the superior court granted ADF&G's cross-motion in February 2024. The court concluded that the personal use fishery did not

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[19] Before granting summary judgment to ADF&G on CIFF's dormant Commerce Clause claim, the superior court had dismissed the entirety of CIFF's case on grounds of issue and claim preclusion. After dismissing the case, though, the court granted CIFF's motion for reconsideration as to its dormant Commerce Clause claim, determining that CIFF did not have a "'full and fair opportunity' to previously litigate the constitutionality of the personal use fishery." The court denied reconsideration of all other claims that had been dismissed.

CIFF's only discernable argument on appeal is that the superior court erred by granting summary judgment to ADF&G on its dormant Commerce Clause claim. To the extent that CIFF intended to argue that it was error to grant ADF&G's motion to dismiss, that argument is waived due to inadequate briefing. *See Baseden v. State*, 174 P.3d 233, 243 (Alaska 2008) (explaining that "[b]ecause the issue is not adequately briefed, it is waived").

"facially discriminate" against interstate commerce, and any incidental effect that the Upper Cook Inlet commercial closures had on interstate commerce was insignificant. ADF&G subsequently moved for attorney's fees and entry of final judgment, which the court granted.

CIFF appeals.

III. Standard of Review

Whether a state action is constitutional is a question of law.[20] We review questions of law de novo, "adopting the rule of law that is most persuasive in light of precedent, reason, and policy."[21]

We also review orders granting summary judgment de novo, and will affirm such an order "if the record presents no genuine issue of material fact and if the movant is entitled to judgment as a matter of law."[22]

We review attorney's fee awards for abuse of discretion, and will only find such an abuse if "the award was arbitrary, capricious, manifestly unreasonable, or stemmed from an improper motive."[23]

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[20] *Pullen v. Ulmer*, 923 P.2d 54, 58 (Alaska 1996) (citing *Croft v. Pan Alaska Trucking, Inc.*, 820 P.2d 1064, 1066 (Alaska 1991)).

[21] *CIFF II*, 514 P.3d 1250, 1255 (Alaska 2022) (quoting *Smith v. State*, 282 P.3d 300, 303 (Alaska 2012)).

[22] *Id.* (quoting *Creekside Ltd. P'ship v. Alaska Hous. Fin. Corp.*, 482 P.3d 377, 382 (Alaska 2021)).

[23] *CIFF I*, 357 P.3d 789, 797 (Alaska 2015) (quoting *Bush v. Elkins*, 342 P.3d 1245, 1251 (Alaska 2015)).

IV. Discussion

A. ADF&G's Closure Of Portions Of The Commercial Fishery In Cook Inlet While Keeping Open The Resident-Only Personal Use Fishery Does Not Violate The Dormant Commerce Clause.

CIFF contends that ADF&G violated the dormant Commerce Clause when it closed portions of the Cook Inlet commercial fishery pursuant to the Kenai River Late-Run King Salmon Management Plan but kept the personal use fishery on the Kenai open. But the fish harvested in the personal use fishery will never enter the stream of commerce, and the commercial closures in Cook Inlet apply to residents and non-residents alike. Therefore, the superior court properly granted summary judgment in ADF&G's favor.

1. ADF&G's management of the personal use fishery does not implicate the dormant Commerce Clause because the fish harvested in the fishery cannot be bartered or sold.

The Commerce Clause grants Congress the power to "regulate Commerce . . . among the several States."[24] The dormant Commerce Clause is a doctrine that "prevents the States from adopting protectionist measures" and is intended to "preserve[] a national market for goods and services."[25] This means that States may not

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[24] U.S. Const. art. I, § 8, cl. 3.

[25] *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 588 U.S. 504, 514 (2019) (citing *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273 (1988)). Dormant Commerce Clause doctrine was first set forth by Chief Justice John Marshall, *see Gibbons v. Ogden*,

"seek to 'build up . . . domestic commerce' through 'burdens upon the industry and business of other States.'"[26] In order to successfully mount a dormant Commerce Clause challenge, a party must first identify a commercial article or activity impacted by the state action challenged.[27]

Here, the Upper Cook Inlet Personal Use Fishery is restricted to Alaska residents.[28] But by definition, the fish caught for personal use cannot be bartered or sold.[29] The fish never enter the stream of commerce or otherwise become an article of commerce. CIFF attempts to circumvent this fact by pointing to "substantial monetary awards to commercial fishermen and others in the *Exxon Valdez* and *Glacier Bay* oil spill lawsuits." CIFF suggests that because commercial fishermen were financially compensated when wild salmon were destroyed in oil spill disasters, we should view the

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22 U.S. (9 Wheat.) 1 (1824), and remains good law today. *See Nat'l Pork Producers Council v. Ross*, 598 U.S. 356, 370-71 (2023).

[26] *Nat'l Pork Producers Council*, 598 U.S. at 369 (alteration in original) (quoting *Guy v. Baltimore*, 100 U.S. 434, 443 (1880)).

[27] *See United States v. Lopez*, 514 U.S. 549, 558-59 (1995) (stating Congress may regulate "three broad categories of activity" under the Commerce Clause: "the use of the channels of interstate commerce[,] . . . the instrumentalities of . . . , or persons or things in interstate commerce," and "those activities that substantially affect interstate commerce" (citations omitted)); *see also Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 550 (2012) ("The power to *regulate* commerce presupposes the existence of commercial activity to be regulated." (emphasis in original)).

[28] AS 16.05.940(27); *see also* 5 AAC 77.540(a)(1).

[29] AS 16.05.940(27).

suspension of certain commercial fishing activity in Cook Inlet as implicating "commerce."

But this argument is undermined by the reasoning of our decision in *Shepherd v. State, Department of Fish & Game*,[30] and by the United States District Court for the District of Alaska's decision in *Jensen v. Locke*.[31] In *Shepherd*, we held that a statute requiring the Board of Game to give preference in the taking of moose and other large game to Alaska residents for personal or family consumption did not implicate the dormant Commerce Clause.[32] Hunting guides whose clients were primarily nonresidents sued the State, arguing that the resident preference facially discriminated against interstate commerce.[33] The issue there was whether unharvested game is an article of commerce subject to Congress's constitutional commerce powers.[34] We first cited the United States Supreme Court's decision in *Toomer v. Witsell* in support of the proposition that "unharvested game is not an article of interstate commerce."[35] Then we considered sever-

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[30] 897 P.2d 33, 42 (Alaska 1995).

[31] No. 3:08-cv-00286-TMB, 2009 WL 10674336, at *12-14 (D. Alaska Nov. 9, 2009).

[32] *Shepherd*, 897 P.2d at 41-43.

[33] *Id.* at 35, 41.

[34] *Id.* at 41-43.

[35] *Id.* at 41-42 (citing *Toomer v. Witsell*, 334 U.S. 385, 394-95 (1948)). In *Toomer*, the Supreme Court held that a South Carolina law that imposed a one-eighth cent tax on each pound of shrimp harvested by commercial shrimpers in state waters did not "discriminate against interstate commerce in shrimp" because "the taxable event, the taking of shrimp, occurs before the

al federal district court decisions in which those courts "expressly found that unharvested game is not an article of commerce for Dormant Commerce Clause purposes."[36] After examining these authorities we reasoned that it was "particularly clear" that "unharvested game is not an article of commerce . . . where the game, after its taking, is still not destined for interstate commerce."[37] And we concluded that because Alaska law forbade the sale or purchase of moose, the resident moose-hunting preference did not touch a commercial article or activity subject to the dormant Commerce Clause.[38]

Then in *Jensen*, challengers argued that Alaska's personal use fishing regulations discriminated against interstate commerce.[39] The court rejected this argument, noting that by definition, fish caught for personal use could not be bartered or sold.[40] The court thus

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shrimp can be said to have entered the flow of interstate commerce." *Toomer*, 334 U.S. at 394-95.

[36] *Id.* at 42 (summarizing *Terk v. Ruch*, 655 F. Supp. 205, 215 (D. Colo. 1987), and *Tangier Sound Watermen's Ass'n v. Douglas*, 541 F. Supp. 1287, 1306 (E.D. Va. 1982)).

[37] *Id.* (citing *Hicklin v. Orbeck*, 437 U.S. 518, 533 (1978)).

[38] *Id.* (citing AS 16.05.920(a), which provides that unless otherwise permitted by law, "a person may not . . . transport, sell, offer to sell, purchase, or offer to purchase . . . game . . . or any part of . . . game").

[39] No. 3:08-cv-00286-TMB, 2009 WL 10674336, at *12-14 (D. Alaska Nov. 9, 2009).

[40] *Id.* at *12 (citing former AS 16.05.940(25) (2008), *currently renumbered as* 16.05.940(27) defining "personal use fishing" as "the taking, fishing for, or possession of finfish . . . by Alaska residents for personal use and not for sale or barter").

concluded that restricting access to the personal use fishery based on residency did not "affirmatively discriminate against interstate commerce."[41]

Like the game and fish at issue in those cases, the salmon caught in the personal use fishery are only ever destined for personal use; they may not be bartered or sold.[42] This is therefore one of those "particularly clear" situations in which interstate commerce is not implicated.[43] Because the wild salmon caught in the personal use fishery will never enter a stream of commerce, CIFF cannot successfully challenge ADF&G's management of the fishery under the dormant Commerce Clause.

2. ADF&G's closure of portions of the Cook Inlet commercial fishery pursuant to the Kenai River Late-Run King Salmon Management Plan also does not violate the dormant Commerce Clause.

CIFF also contends that ADF&G's closure of portions of the Cook Inlet commercial fishery pursuant to the Kenai River Late-Run King Salmon Management Plan is actually a subtle attempt to discriminate against out-of-state commercial fishing interests. CIFF cites *Hughes v. Oklahoma*[44] as supportive of its argument. There, the Supreme Court applied a

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[41] *Id.*

[42] AS 16.05.940(27).

[43] *Shepherd v. State, Dep't of Fish & Game*, 897 P.2d 33, 42 (Alaska 1995).

[44] 441 U.S. 322 (1979).

balancing test for determining whether a state action discriminated against interstate commerce.[45] That test required the court to consider:

> (1) whether the challenged statute regulates evenhandedly with only "incidental" effects on interstate commerce, or discriminates against interstate commerce either on its face or in practical effect; (2) whether the statute serves a legitimate local purpose; and, if so, (3) whether alternative means could promote this local purpose as well without discriminating against interstate commerce.[46]

In *Hughes*, the Court considered an Oklahoma law that prohibited natural minnows harvested within Oklahoma from being transported outside the state for sale.[47] Oklahoma argued that the law was intended to prevent the "depletion of minnows in Oklahoma's natural streams through commercial exportation."[48]

Applying the balancing test, the *Hughes* Court held that the Oklahoma law discriminated on its face against interstate commerce by forbidding the movement of natural minnows for sale out of the state.[49] The Court stated that Oklahoma's "interest in main-

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[45] *Id.* at 336 (citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)).

[46] *Id.* (citing *Pike*, 397 U.S. at 142).

[47] *Id.* at 336-37.

[48] *Id.* at 325 (quoting *Hughes v. State*, 572 P.2d 573, 575 (Okla. Crim. App. 1977)).

[49] *Id.* at 336-37.

taining the ecological balance in state waters by avoiding the removal of inordinate numbers of minnows may well qualify as a legitimate local purpose."[50] But it also held that Oklahoma had made no effort to show that the law was the "least discriminatory" means of conserving Oklahoma's minnows.[51] Therefore, the Court struck down the law as "repugnant to the Commerce Clause."[52]

Here, unlike the law at issue in *Hughes*, ADF&G's closure of portions of the Cook Inlet commercial fishery did not discriminate against interstate commerce.[53] Rather, the commercial closures applied equally to resident and nonresident commercial fishing ventures. Still, CIFF argues that the closures, paired with "the Alaska-resident-only PU [personal use] Fishery[,] . . . overtly discriminate[s] against interstate commerce." It characterizes ADF&G's commercial closures as an attempt to "to put more fish in the rivers for the PU fishery and thereby increase the harvest in the PU fishery."

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[50] *Id.* at 337.

[51] *Id.* at 337-38.

[52] *Id.* at 338.

[53] We observe that the test announced in *Pike* and applied in *Hughes* was the subject of a recent Supreme Court plurality opinion in *National Pork Producers Council v. Ross*, 598 U.S. 356 (2023). While the opinion was "fractured" over the state of the Court's dormant Commerce Clause analysis, at least six justices still agreed to "affirmatively retain the longstanding *Pike* balancing test for analyzing dormant Commerce Clause challenges to state economic regulations." *Id.* at 403 (Kavanaugh, J., concurring).

But CIFF's reasoning stretches the dormant Commerce Clause too far. ADF&G implemented commercial closures required by the Kenai River Late-Run King Salmon Management Plan in an effort to "ensure an adequate escapement of late-run king salmon into the Kenai River."[54] CIFF attempts to rebut ADF&G's stated purpose for the closures by latching onto one line in ADF&G's *Upper Cook Inlet 2022 Outlook For Commercial Salmon Fishing* advisory announcement. There, the department indicated that commercial fishing would be closed on weekends "to facilitate movement of fish into the rivers for the personal use fishery." But this was not ADF&G's explanation for shutting down portions of the commercial fishery mid-season; rather, this was ADF&G's explanation as to why, absent emergency orders, the commercial fishery would be closed on weekends in July.

Aside from the above-described line taken out of context, CIFF fails to make any meaningful argument about how ADF&G's management of the Cook Inlet commercial fishery discriminates against interstate commerce. When a state law "regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed . . . is clearly excessive in relation to the putative local benefits."[55]

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[54] 5 AAC 21.359(a) (stating that purpose of Kenai River Late-Run King Salmon Management Plan is "to ensure an adequate escapement of late-run king salmon into the Kenai River system").

[55] *Hughes*, 441 U.S. at 331 (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)).

Here, the closure of the commercial fishery imposes no burden on interstate commerce that is not also imposed on intrastate commerce. And any incidental effect the closures have on interstate commerce is not "clearly excessive" in relation to the benefit of avoiding king salmon bycatch and protecting the weak king salmon run into the Kenai River. Where ADF&G was entitled to judgment as a matter of law, the superior court appropriately granted summary judgment.[56]

B. The Superior Court's Award of Attorney's Fees to ADF&G Was Within Its Discretion.

The superior court awarded attorney's fees to ADF&G under Alaska Civil Rule 82(b) for work done on matters unrelated to CIFF's dormant Commerce Clause challenge.[57] CIFF's argument regarding this award boils down to a brief assertion that allowing ADF&G to bill for two attorneys to prepare for and

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[56] CIFF also argues that the superior court erred by granting summary judgment to ADF&G "with no discovery." ADF&G asserts that CIFF did not make "a single discovery request" during the life of the case, and nothing in the record indicates any attempt by CIFF to seek a continuance to enable it to conduct discovery after the superior court agreed that it could litigate its constitutional challenge to the regulations. We review a claim not raised before the superior court for plain error, which requires a showing that "an obvious mistake has been made." *McCavit v. Lacher*, 447 P.3d 726, 731-32 (Alaska 2019) (quoting *Lindbo v. Colaska, Inc.*, 414 P.3d 646, 652 (Alaska 2018)). Here, CIFF never requested or argued for discovery while the case was pending before the superior court, and CIFF fails to identify particular discovery that would have been determinative of relevant issues. The superior court's dismissal of CIFF's claims on summary judgment without sua sponte ordering that further discovery be conducted was not obviously mistaken.

[57] *See supra* note 19.

travel to Kenai from Anchorage for a hearing in July 2022 was "excessive and exorbitant." But we see no abuse of discretion in the superior court's treatment of the involved attorney time.

Two attorneys billed time for ADF&G in this matter. The more senior attorney, who argued at the July hearing, billed 22.5 hours for work and travel in relation to the hearing, while the junior attorney billed 14.9 hours on the same matter. Given the nature of CIFF's claims and the superior court's "broad discretion in calculating awards of attorney's fees,"[58] we conclude that the court did not abuse its discretion by allowing ADF&G to bill for both attorneys' work related to the July 2022 hearing.

V. Conclusion

We AFFIRM the superior court's grant of summary judgment and award of attorney's fees to ADF&G.

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[58] *Valdez Fisheries Dev. Ass'n v. Froines*, 217 P.3d 830, 832 (Alaska 2009).

ORDER ON MOTIONS FOR SUMMARY JUDGMENT, SUPERIOR COURT OF THE STATE OF ALASKA, THIRD JUDICIAL DISTRICT, KENAI (FEBRUARY 23, 2024)

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

COOK INLET FISHERMAN'S FUND,

Plaintiff,

v.

ALASKA DEPARTMENT OF FISH & GAME, ALASKA BOARD OF FISHERIES, and COMMISSIONER DOUG VINCENT-LANG,

Defendants.

Case No. 3KN-22-00515CI

Before: Jason M. GIST, Superior Court Judge.

ORDER ON MOTIONS FOR SUMMARY JUDGMENT

The Cook Inlet Fisherman's Fund ("CIFF") filed a *Complaint for Injunctive Relief and Damages* on July 19, 2022, against the Alaska Department of Fish and Game, Alaska Board of Fisheries ("the Board"), and Commissioner Doug Vincent-Lang (collectively, "the State"). In Count I of the *Complaint,* CIFF sought temporary and permanent injunctive relief on a number

of claims, and sought damages in Count II. Following briefing by both parties, the court issued an *Order Granting Motion to Dismiss* on April 18, 2023.

On June 29, 2023, the court granted in part CIFF's *Motion for Reconsideration.* In that *Order,* the court found that CIFF should be allowed to pursue its claims that Alaska's Personal Use fishery ("PU fishery") is unconstitutional. The parties submitted additional briefing. CIFF filed a *Motion for Partial Summary Judgment,* and the State filed a *Cross-Motion for Summary Judgment* on the issue. The parties came before the court for oral argument on their respective motions. For the reasons explained below, CIFF's *Motion for Partial Summary Judgment* is denied, and the State's *Cross-Motion for Summary Judgment* is granted.

I. Factual Background.

CIFF is a nonprofit corporation that represents the interests of commercial fishermen who utilize both set net and drift gillnets while fishing for salmon in Cook Inlet. The Board is a seven-member panel of individuals appointed by the governor that serve three-year terms. The Board's purpose is to conserve and develop the fishery resources of the state through fishery management plans. In doing so, it sets the dates and times for fishing seasons, methods of take, and allocates the resources among the various competing user groups. In Cook Inlet, the Board allocates salmon resources among commercial set and drift gillnetters, sport fishers, guided sport fishers, subsistence users, and personal use fisheries. The Board allocates the fishery resources among these groups for the five species of Pacific salmon —king,

coho, sockeye, chum, and pink salmon. The fishery is complex and crowded.

While various policy decisions go into setting the allocations, the Board is ultimately charged with maintaining a sustainable fishery. The Board holds meetings throughout the year and takes testimony prior to establishing its management plans. These meetings are open to the public, and user groups such as CIFF may comment on proposed regulations. The Commissioner of Fish and Game, Doug Vincent-Lang, is then tasked with carrying out the management plans set by the Board. Given the ever-changing dynamics of fish returns, however, the Commissioner is given broad discretion in how those plans are carried out. The management plans seek to achieve sustainable escapement goals for each of the salmon species.[1]

Over the last several years, the late-run, large king salmon returns have been poor, and the sustainable escapement goals for king salmon have either not been achieved, or have been achieved at the very low end of the goals' range. Given the ongoing concern that late-run, large king salmon will not achieve the sustainable escapement goal set by the Board, the Commissioner has taken steps to mitigate these concerns. Some of these steps have included prohibiting personal use fisherman from retaining king salmon, instituting "no bait" restrictions on the Kenai River during king salmon season, and even shutting down the king salmon fishery altogether. The Commissioner also routinely implements emergency orders that close some, or all, of the commercial sockeye fisheries

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[1] *See e.g.,* 5AAC 21.359(b) (king salmon) and 5 AAC 21.365(b) (sockeye).

in Cook Inlet. These closures impact the setnet fishery more often than the drift gillnetters. However, the entire Cook Inlet commercial fishery has, without question, been significantly and detrimentally impacted over the last several years due to fishery closures. Because of this, CIFF has brought several suits against Defendants to enforce various regulations and to force the various fisheries to be managed in a way that opens the commercial fishery more often.

II. Prior Cases.

A. 3AN-13-08259CI.

In 2013, CIFF filed a *Complaint* against the Department of Fish and Game and the Kenai King Conservation Alliance in Anchorage.[2] Many of the claims raised by CIFF in that case were also raised before this court in 2019, and were again raised in this case. On June 2, 2014, the court granted summary judgment in favor of the Department on all claims. The Alaska Supreme Court affirmed that decision on September 25, 2015.[3] CIFF did not assert in that case that the PU fishery was unconstitutional.

B. 3KN-19-00641CI.

On July 26, 2019, CIFF filed a *Complaint for Injunctive Relief* against the Department of Fish and Game and the Board. In defending the action, the State primarily relied upon the Supreme Court's decision affirming the trial court's dismissal of CIFF's 2013 suit in Anchorage, asserting that the claims brought

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[2] 3AN-13-08259C1.

[3] 357 P.3d 789 (Alaska 2015).

forth in 2019 were nearly identical. On November 12, 2020, this court granted the State's *Motion for Summary Judgment* on all claims.

In finding in favor of the State, this court found that many of the claims raised were in fact similar to the claims upheld on appeal in 2015. This court also rejected CIFF's claims that the Upper Cook Inlet fishery must be managed in the "broad national interest." This court relied on a Ninth Circuit Court of Appeals decision in a matter brought by the United Cook Inlet Drift Association.[4] In that suit, the Ninth Circuit determined that the National Marine Fisheries Service ("NMFS") was required to manage the Upper Cook Inlet commercial fishery in a Fishery Management Plan ("FMP"). The Court stated that the NMFS could delegate management to the state, but it must do so expressly in an FMP, and remanded the case back to the district court for implementation. Noting that development of the FMP was still in progress in federal district court, this court rejected CIFF's claims that the fishery must be managed in the broad national interest. The court found that Defendants could not have been required to manage the fishery in 2019 and 2020 under federal guidelines because the NMFS had not yet developed the FMP. The court dismissed CIFF's claims.[5]

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[4] 837 F.3d 1055 (9th Cir. 2016).

[5] Order on Motion for Summary Judgment in 3KN-19-00641CI (Nov. 12, 2020). It is this court's understanding that negotiations regarding the State of Alaska's management of the fishery are still ongoing in federal court.

III. Current Complaint

In the current *Complaint,* CIFF reiterated many of the claims brought before this court in 2019. Many of the claims from 2019, in fact, were identical to the claims raised in the current litigation. The Department filed a *Motion to Dismiss* on August 11, 2022, arguing that CIFF's claims were barred by this court's 2019 decision. The following day, on August 12, 2022, the Alaska Supreme Court issued an opinion affirming this court's decision in 3KN-19-00641CI.[6] Given the similarities between this case and CIFF's prior case, this court dismissed CIFF's claims under the legal doctrines of *collateral estoppel* and *res judicata.*[7]

In its 2022 opinion, the Supreme Court briefly addressed CIFF's argument on appeal that the PU fishery is unconstitutional. The Court found that CIFF had forfeited the issue, stating that "the record reveals only one instance prior to the grant of summary judgment — at the May 2020 oral argument — when CIFF argued that the resident-only personal use fishery was unconstitutional under *Hughes."*[8] The Court found that the passing reference at oral argument was insufficient to preserve the issue for appeal, and declined to rule of CIFF's claim. For this reason, this court reversed itself in part, following CIFF's *Motion for Reconsideration,* finding that CIFF had not had a prior opportunity to fully litigate the issue.

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[6] 514 P.3d 1250 (Alaska 2022).

[7] Order Granting Motion to Dismiss (April 18, 2023).

[8] *Id.* at 1262.

For these reasons, the only remaining issue before the court is whether the PU Fishery is unconstitutional.

IV. Analysis

A. Legal Standard.

A party is entitled to summary judgment when there are "no genuine issues as to any material fact and [] the moving party is entitled to judgment as a matter of law."[9] Summary judgment may still be ruled upon only as to liability even where "there is a genuine issue as to the amount of damages."[10] The parties agree that, at least as to the constitutionality of the Upper Cook Inlet PU fishery, there are no genuine issues of material fact in dispute, although CIFF asserts that there is a genuine issue as to the amount of financial damages the unconstitutional fishery has caused its members.[11] Thus, both parties contend that they are entitled to judgment as a matter of law on the underlying issue, with CIFF asserting that potential damages should be held over for another day.

B. Parties' Arguments.

CIFF argues that the PU fishery, at least as to the PU fishery in Upper Cook Inlet is unconstitutional.[12] CIFF argues the PU fishery is unconstitutional

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[9] Alaska R. Civ. P. 56(c).

[10] *Id.* (stating that summary judgment may be decided as to the issue of liability even though there may be a disputed issue as to damages).

[11] Motion for Partial Summary Judgment, pg. 11.

[12] Because CIFF's claim is primarily directed at the Upper Cook

under the holding of *Hughes v. Oklahoma* in that it violates the Commerce Clause of the United States Constitution.[13] CIFF contends that, under *Hughes,* fishery regulations are to be analyzed under the same general rule used to analyze regulations of other natural resources. Under that analysis, the court must determine whether the challenged regulation applies "evenhandedly with only 'incidental' effects on interstate commerce, or discriminates against interstate commerce either on its face or in practical effect."[14] In determining whether the regulation discriminates against interstate commerce in practical effect, the court is to review whether the regulation serves a legitimate local purpose, and whether there are alternative means to promote the local purpose without discriminating against interstate commerce.

Under the test articulated in *Hughes,* CIFF argues that (1) "salmon for the PU fishery are being removed from capture by the commercial fishery (interstate commerce), and are being allocated to the Alaska-resident-only PU fishery without any conservation purpose since the PU limits are liberal."[15] 5 It further asserts that the effects on the commercial fishery are neither "incidental" nor evenhanded. Thus, CIFF argues, "[t]he PU fishery discriminates against inter-

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Inlet PU fishery, this court's order is intended to address the constitutionality of that fishery only. This court is not aware of what impact, if any, other PU fisheries around the state may have on various aspects of commerce.

[13] 441 U.S. 322 (1979).

[14] *Id.* at 336.

[15] Motion for Partial Summary Judgment, pg. 16.

state commerce on its face and in practical effect."[16] To support its argument that the PU fishery regulations facially discriminate against interstate commerce, CIFF points to a March 24, 2022, "Advisory Announcement" that commercial fishing would be closed in Upper Cook Inlet on weekends in favor of the PU fishery.

CIFF next argues that the PU fishery "does not serve a legitimate local purpose" because "it is managed by the [D]efendants to remove salmon from harvest by the commercial fishery."[17] It cites to AS 16.43.010's purpose in establishing the Commercial Fisheries Entry Commission "to promote the conservation and the sustained yield management of Alaska's fisheries resource and the economic health and stability of commercial fishing in Alaska by regulating and controlling entry of participants into the commercial fisheries in the public interest and without unjust discrimination."[18] It argues that re-allocating one-third of the annual sockeye run to the PU fishery "from an already fully allocated salmon fishery does not promote the economic health or stability of commercial fishing."[19]

Finally, CIFF argues that the State cannot justify excluding nonresidents from the PU fishery on conservation grounds, nor can it justify the "expansion of the PU fisheries to nearly half a million self-reported sockeye without any analysis of the effect on

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[16] *Id.*

[17] *Id.* at 16-17.

[18] *Id.* at 17.

[19] *Id.*

commercial fisherman."[20] CIFF contends that because "there are already adequate opportunities for Alaskans to harvest salmon by sport and sport-guided fishing," an "Alaska-resident-only PU fishery is the most discriminatory alternative against interstate commerce," and violates the holding in *Hughes*.[21]

The State's primary argument is that *Hughes v. Oklahoma* does not apply to the PU fishery in any manner because, "as a threshold matter, a personal use fishery is not *commerce,* does not *involve commerce,* and cannot run afoul of the Commerce Clause."[22] The State further contends that because the PU fishery "occur[s] at the mouths of rivers or inriver," the fish that enter the PU fishery have passed the commercial fishing grounds and are "no longer subject to commercial capture."[23] The State asserts that *Hughes* found a statute violated the Commerce Clause because it permitted *intrastate* commerce while simultaneously prohibiting *interstate* commerce of the same product. The State then argues that because the fish harvested from a PU fishery cannot be sold, PU fisheries involve neither *intrastate* nor *interstate* commerce, and thus, the Commerce Clause and the holding *of Hughes* are not implicated here. Finally, the State argues that this very issue has already been litigated in federal

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[20] *Id.* at 18.

[21] *Id.* at 19.

[22] Opp. to Motion for Partial Summary Judgment and Cross-Motion for Summary Judgment, pp. 1-2 (July 10, 2023) (emphasis in original).

[23] *Id.* at 2.

court, and that the federal court struck down the very arguments that CIFF asserts here.

C. Applicable Case Law.

1. *Hughes v. Oklahoma*.

CIFF's primary argument is that the PU fishery violates the Commerce Clause under *Hughes v. Oklahoma*. In *Hughes,* the state of Oklahoma passed a law that prohibited anyone from "transport[ing] or ship[ping] minnows for sale outside the state which were seined or procured within the waters of this state."[24] The purpose of the law was to "protect against the depletion of minnows in Oklahoma's natural streams through commercial exportation."[25] As such, Oklahoma law did not prohibit commercial minnow hatcheries from selling minnows to anyone, whether a state resident or non-resident; nor did the law prohibit the export of minnows outside the state. Rather, the law prohibited only the minnows' export if they were intended for sale outside of the state.[26]

William Hughes had a valid license to operate a commercial minnow business in the state of Texas.[27] He was arrested for violating the Oklahoma law after he purchased a load of natural minnows from a licensed dealer in Oklahoma and transported them to Wichita Falls, Texas to sell. Hughes argued that the prohibition on interstate transport of the minnows *for*

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[24] 441 U.S. at 323.

[25] *Id.* at 325.

[26] *Id.*

[27] *Id.* at 324.

sale violated the Commerce Clause.[28] The Oklahoma Court of Criminal Appeals upheld Hughes' conviction. Citing, among other cases, *Geer v. State of Connecticut,* the Court of Criminal Appeals stated that:

> The United States Supreme Court has held on numerous occasions that the wild animals and fish within a state's border are, so far as capable of ownership, owned by the state in its sovereign capacity for the common benefit of all its people. Because of such ownership, and in the exercise of its police power, the state may regulate and control the taking, subsequent use and property rights that may be acquired therein.[29]

The United States Supreme Court reversed Hughes' conviction, concluding that "challenges under the Commerce Clause to state regulations of wild animals should be considered according to the same general rule applied to state regulations of other natural resources."[30] The Court articulated the test for determining the validity of state regulations as to commerce, as follows:

> Under that general rule, we must inquire (1) whether the challenged statute regulates evenhandedly with only "incidental" effects on interstate commerce, or discriminates against interstate commerce either on its face or in practical effect; (2) whether the

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[28] *Id.*

[29] *Id.* at 324-25 (citing *Geer v. Connecticut,* 161 U.S. 519 (1896)).

[30] *Id. at* 335.

> statute serves a legitimate local purpose; and, if so, (3) whether alternative means could promote this local purpose as well without discriminating against interstate commerce.[31]

The Court noted that the burden to show discrimination falls to the challenging party, but once discrimination against commerce is shown, the State must justify it "both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake."[32] The Court found that the Oklahoma law "on its face discriminates against interstate commerce" because it "overtly blocks the flow of interstate commerce at the State's borders.'"[33] The Court further stated that a facially discriminatory regulation "by itself may be a fatal defect, regardless of the State's purpose. . . . "[34]

Although Oklahoma argued that its regulation was intended to conserve resources, the Court found that Oklahoma "ha[d] chosen to 'conserve' its minnows in the way that most overtly discriminates against interstate commerce" by placing no limit on the number of minnows that could be sold within the state, while simultaneously prohibiting their sale out

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[31] *Id.* at 336.

[32] *Id.* (quoting *Hunt v. Washington Apple Advertising Comm 'n,* 432 U.S. 333, 353 (1977)).

[33] *Id.* at 337 (quoting *Philadelphia v. New Jersey,* 437 U.S. 624, 628 (1978)).

[34] *Id.*

of state.[35] The *Hughes* Court was cautious to instruct that "the overruling of *Geer* does not leave the State powerless" to conserve its animal resources.[36] It further cautioned, however, that once a wild animal "becomes an article of commerce[,] its use cannot be limited to the citizens of one State to the exclusion of citizens of another."[37]

2. *Shepherd v. State, Dept. of Fish and Game.*

In *Shepherd v. State, Dept. of Fish and Game,* two hunting guides brought suit after the Alaska Board of Game restricted moose hunting by nonresidents in certain game management units.[38] The Board restricted these hunts in part because it concluded that the moose populations in these management units "could not sustain the demand for moose by both residents and nonresidents."[39] The guides argued, in part, that the restrictions violated the Commerce Clause because they prevented the guides from catering to nonresident hunters. The superior court dismissed the Commerce Clause claim, "finding that unharvested game is not an article of interstate commerce and that the statute's impact on the guides' interstate business was *de minimus."*[40]

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[35] *Id.* at 337-38.

[36] *Id.* at 338.

[37] *Id.* at 338-39 (internal citations omitted).

[38] 897 P.2d 33 (Alaska 1995).

[39] *Id.* at 35.

[40] *Id.* at 36.

On appeal, the Alaska supreme Court found that "under the federal and state constitutions the state has a special interest in the fish and wildlife within its boundaries and is entitled to grant allocation preferences to state resident recreational users."[41] As to Appellant's constitutional claims, the Court concluded:

> The State of Alaska devotes substantial resources to the protection and management of fish and wildlife. As the trustee of those resources for the people of the state, the state is required to maximize for state residents the benefits of state resources. In cases of scarcity, this can often reasonably be accomplished by excluding or limiting the participation of nonresidents. In such circumstances, the state may, and arguably is required to, prefer state residents to nonresidents, except when such preferences are in conflict with paramount federal interests.[42]

In other words, the State may create various fisheries (and hunts) that discriminate against nonresidents so long as those preferences do not conflict with "paramount federal interests." The Commerce Clause is one such "paramount federal interest." The Commerce Clause not only gives Congress the power to regulate commerce among the states, but also "restricts the power of the states to erect barriers to interstate commerce.[43] Although Shepherd couched his argument that the statutory scheme facially discriminated against

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[41] *Id.* at 39.

[42] *Id.* at 40-41.

[43] *Id.* at 41 (citing *Maine v. Taylor,* 477 U.S. 131, 137 (1986)).

interstate commerce because of its impact on his guiding business, the Court found that the statute and regulations did not regulate guiding, but rather regulated only the taking of game.[44]

The State asserted that the taking of game "[did] not involve articles of interstate commerce or any commodity or service destined to become so."[45] The Alaska Supreme Court agreed. While noting that several United States Supreme Court cases "have suggested that unharvested game is not an article of interstate commerce," the Alaska Supreme Court found this principle to be particularly true "where the game, after its taking, is still not destined for interstate commerce."[46] The Court also noted that selling or purchasing moose is prohibited by statute in Alaska, agreeing with the lower court that "unharvested game is not an article of commerce."[47]

The Court went on to analyze the regulations under the dormant Commerce Clause.[48] The Court

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[44] *Id.*

[45] *Id.*

[46] *Id.* at 41-42 (citing *Toomer v. Witsell, 334* U.S. 385, 394-95 (1948); *Hughes v. Oklahoma,* 441 U.S. at 329).

[47] *Id.* at 43 (citing AS 16.05.920(a)'s prohibition on selling "any part or moose or other game).

[48] *See Carlson v. State, Commercial Fisheries Entry Comm'n,* 919 p.2d 1337, 1349, n.9 (describing the dormant, or negative, Commerce Clause as follows: "The grant of regulatory power to Congress implicit in the Commerce Clause has been interpreted to have a `negative' aspect `that denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce." (citing *Oregon Waste Systems, Inc.*

noted that the statutory scheme had "only an incidental effect" on Shepherd's guide business. Under that scenario, the statute only violated the Commerce Clause if "the burdens imposed on interstate commerce are 'clearly excessive in relation to the putative local benefits'" of the statute.[49]

In *Shepherd,* the State asserted that the resident preference for the taking of moose in the game management units was to preserve the scarce resource for Alaska residents, and presented evidence of increased demand on wildlife by both residents and nonresidents. The Court found this purpose to "unquestionably represent[] a legitimate state interest."[50] As a factual matter, the superior court found that the burden the statute and regulations placed on interstate commerce was *de minimis.* In agreeing with this conclusion, the Supreme Court affirmed the superior court's dismissal of Shepherd's Commerce Clause claim.

3. *Jensen v. Locke.*

As noted earlier, the State asserts that the very claim CIFF asserts here — that the PU fishery violates the Commerce Clause — was previously litigated in federal district court. In *Jensen v. Locke,* Plaintiff brought suit in federal court arguing, in part, that Alaska's resident-only salmon regulations violated both the Magnuson-Stevens Act and the Commerce Clause.[51] As to this latter point, Plaintiff argued that "Alaska's

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v. Dep't of Envtl. Quality, 511 U.S. 93, 98 (1994)).

[49] 897 P.2d at 42 (internal citations omitted).

[50] *Id.* at 43.

[51] 2009 WL 10674366 (Dist.Ct. Alaska 2009).

resident only subsistence fishing regulations impermissibly and unconstitutionally burden interstate commerce."[52] He asserted that "the subsistence or personal use priority 'results in actual economic harm to Plaintiff by reducing the number of salmon available to commercial harvest.'"[53]

The federal district court disagreed. It found that Plaintiff's claim that the fisheries violate the Commerce Clause was "contrary to established law."[54] Citing *Toomer v. Witsell* that "unharvested fish are not articles of interstate commerce," the court found that state regulations that discriminate based on residency status in the taking of fish and game do not violate the Commerce Clause.[55] The federal district court also noted — which is of particular relevance to CIFF's claims — that "Alaskan residents engaging in subsistence or personal use fishing are prohibited from selling or bartering any fish caught."[56] Thus, the court found, unharvested fish are not "article[s] of commerce," particularly "where the fish, after its taking, are still not destined for interstate commerce."[57] On these grounds, the court found the fishery regulations were not facially discriminatory against interstate commerce. The court went on to reject Jensen's arguments that the fisheries discriminated against interstate com-

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[52] *Id. at *1.*

[53] *Id.* at *6.

[54] *Id.* at *12.

[55] *Id.* (citing *Towner,* 334 U.S. at 394-395).

[56] *Id.* (citing AS 16.05.940(25)).

[57] *Id.* (quoting *Shepherd,* 897 P.2d at 42).

merce "in practical effect" by reducing the number of fish available for commercial harvest.[58]

D. The Upper Cook Inlet PU Fishery Does Not Violate the Commerce Clause.

The Commerce Clause provides that "The Congress shall have the Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[59] Although the Commerce Clause does not explicitly limit a state's power to regulate commerce, it has long been recognized as "a self-executing limitation on the power of the State to enact laws imposing substantial burdens on interstate and foreign commerce,"[60] and "directly limits the power of the States to discriminate against interstate commerce."[61] In turn, this prohibits "regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors."[62]

CIFF bears the burden of demonstrating that the PU fishery is unconstitutional. "A party raising a constitutional challenge to a statute bears the burden of demonstrating the constitutional violation. A presumption of constitutionality applies, and doubts are

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[58] *Id.* at *13.

[59] U.S. Const. art. 1, § 8, cl. 3.

[60] *Dep't of Revenue v. Nabors International Finance, Inc.,* 514 P.3d 893, 903 (Alaska 2022) (quoting *South-Central Timber Development, Inc. v. Wunnicke,* 467 U.S. 82, 87 (1984)).

[61] *New Energy Co. of Indiana v. Limbach,* 486 U.S. 269, 273 (1988) (citing *Hughes v Oklahoma,* 441 U.S. at 326).

[62] *Id.* at 273.

resolved in favor of constitutionality."[63] It is a "well-established rule of statutory construction that courts should if possible construe statutes so as to avoid the danger of unconstitutionality."[64] Where questions of constitutionality are in doubt, courts are to "employ a narrowing construction, if one is reasonably possible" in lieu of "strik[ing] a statute down."[65]

1. Personal Use Fishery Statutes and Regulations.

Alaska's PU fisheries are regulated both in statute and the administrative code. AS 16.05.940(27) defines "personal use fishing" as "the taking, fishing for, or possession of fin fish, shellfish, or other fishery resources, by Alaska residents for personal use and not for sale or barter . . . [by] means defined by the Board of Fisheries." PU fishery regulations are contained in the Alaska Administrative Code at 5 AAC 77.001-77.699. The purpose of such PU fisheries is defined in 5 ACC 77.001. That code section reads as follows:

(a) The Board of Fisheries finds that

(1) before the enactment of the state's subsistence priority law in ch. 151, SLA 1978, an individual could fulfill that

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[63] *State, Dept. of Revenue v. Andrade,* 23 P.3d 58, 71 (Alaska 2001) (quoting *Baxley v. State,* 958 P.2d 422, 428 (Alaska 1998)).

[64] *Kimoktoak v. State,* 584 P.2d 25, 31 (Alaska 1978).

[65] *State v. American Civil Liberties Unions of Alaska,* 204 P.3d 363, 373 (Alaska 2009).

individual's personal use needs for fish under subsistence fishing regulations;

(2) the state's subsistence priority law changed the definition of subsistence in a manner that now precludes some individuals from participating in customary and traditional subsistence fisheries and efficiently harvesting fish for their personal use;

(3) there presently are areas of the state with harvestable surpluses of fish in excess of both spawning escapement needs and present levels of subsistence, commercial and sport uses; and

(4) it is necessary to establish a fishery classified as "personal use" because

(A) since the sale of fish is not appropriate or permissible, this fishery cannot be classified as commercial;

(B) since the use is not a customary and traditional use, this fishery cannot be classified as subsistence; and

(C) since the gear for this fishery is often different from that historically associated with sport fishing, this fishery should not be classified as a sport fishery, to prevent confusion among the public.

(b) It is the intent of the board that the taking of fish under 5 AAC 77 will be allowed when that taking does not jeopardize the sustained yield of a resource

and either does not negatively impact an existing resource use or is in the broad public interest.

(c) Regulations in 5 AAC 77 apply to the taking of finfish, shellfish and aquatic plants for personal use. The regulations in 5 AAC 77.001-5 AAC 77.049 apply to the taking of finfish, shellfish and aquatic plants in all waters of Alaska.

(d) The regulations in 5 AAC 77 do not prohibit the personal use of finfish, shellfish or aquatic plants legally taken under the subsistence, commercial and sport fishing regulations in 5 AAC 01-5 AAC 75.

(e) The definitions of legal gear in 5 AAC 39.105(d), unlawful possession of fish in 5 AAC 39.197, definitions in 5 AAC 39.975, and abbreviations and symbols in 5 AAC 39.997 apply to the regulations in 5 AAC 77.

(f) In this chapter, "personal use fishing" has the meaning given in AS 16.05.940.

As can be seen in (a)(4)(A) above, PU fisheries are not classified as "commercial" fisheries because fish taken in the fishery cannot be sold. Moreover, under 5 AAC 77.010(b) "it is unlawful to buy, sell, trade or barter fish or their parts taken under the regulations in 5 AAC 77." As a means of identifying fish harvested in PU fisheries, salmon taken in these fisheries must have the tips of both tail fins "removed from the salmon before the salmon is concealed from plain view

or transported from the fishing site."[66] Although the court is primarily concerned with the Upper Cook Inlet PU fishery here, these regulations apply to all PU fisheries statewide.

The Upper Cook Inlet PU fishery — which CIFF particularly challenges here —is governed by 5 AAC 77.540. That regulation sets, among other things, the dates of the fisheries at each of the rivers, the type of gear that may be used, and the proximal location of each fishery to the rivers. The general, statewide regulations prohibiting the sale of fish harvested also apply in this fishery.

2. The Upper Cook Inlet PU Fishery Does Not Facially Discriminate Against Interstate Commerce.

CIFF's primary argument is that the Upper Cook Inlet PU fishery is unconstitutional under the holding of *Hughes v. Oklahoma.* The regulation at issue in that case permitted *the sale* of Oklahoma minnows *within* the state, but prohibited *the sale* of those same minnows *outside* the state. It did not, however, prohibit the transport of those minnows out of the state for personal use. The U.S. Supreme Court held that this prohibition on *the sale* of minnows only outside the state's borders involved commerce, was facially discriminatory against *interstate* commerce, and therefore violated the Commerce Clause.[67]

The statute and regulations that govern Alaska's PU fisheries, in contrast, do not directly involve com-

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[66] 5 AAC 77.010(f).

[67] 441 U.S. at 337-38.

merce at all. The regulations specifically prohibit the sale of fish taken in those fisheries, regardless of whether such a sale would take place in Alaska or outside the state. Under Alaska law, "unharvested [fish] is not an article of commerce."[68] This is particularly true where those unharvested fish are "still not destined for interstate commerce" after their taking.[69]

The United State Supreme Court, in analyzing the dormant Commerce Clause, has "emphasized that the Commerce Clause prohibits states from unjustifiably discriminating against or burdening the interstate flow of *articles of commerce."*[70] In *Carlson v. State,* the Alaska Supreme Court reviewed a challenge to commercial fishing license fees where nonresident fees cost three times the amount of resident license fees.[71] The Alaska Supreme Court found that the Commerce Clause was not implicated where "the fee differentials at issue in this case are not predicated upon the *movement of articles of commerce across state lines,* but rather upon the residence status of those applying for permits."[72]

Given the holding in *Shepherd* that unharvested wild animals in Alaska are not articles of commerce,

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[68] *Shepherd,* 897 P.2d at 42.

[69] *Id.*

[70] *Carlson v. State, Commercial Fisheries Entr Com'n,* 919 P.2d 1337, 1340 (Alaska 1996) (emphasis in original) (citing *Oregon Waste Systems, Inc. v. Dept. of Environmental Quality of State of Oregon,* 11 U.S. 93, 98 (1994).

[71] *Id.*

[72] *Id.* (emphasis added).

the court finds that the Commerce Clause is not implicated by the mere existence of the PU fishery. This is further supported by *Carlson's* finding that the Commerce Clause is not implicated where the issue is "not predicated upon the movement of articles of commerce across state lines."[73] Here, fish actually harvested in the PU fishery are strictly prohibited from becoming articles of commerce. They cannot be sold within Alaska's borders, or outside the state. This is significantly different than the regulation struck down in *Hughes*.

To support its argument that the Upper Cook Inlet PU fishery regulation is facially discriminatory, CIFF points to a March 24, 2022, "Advisory Announcement" issued by the Defendants that commercial fishing would be closed in Upper Cook Inlet on weekends "to facilitate movement of fish into the rivers for the personal use fishery." In response, the State notes that this "Advisory Announcement" was only a preseason announcement, and was never implemented.[74] The State notes that "the commercial fishery was open from July 16—July 31 (including six weekend days) — that is, commercial fishers fished on more weekend days in July 2022 than they did not. . . . "[75]

The court finds that the non-implementation of an "Advisory Announcement" that might have impacted

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[73] *Id.*

[74] Reply to Opposition to Cross-Motion for Summary Judgment, pg. 6 (citing the 2022 Upper Cook Inlet Salmon Fishery Season Summary, https://www.adfg.alaska.gov/static/applications/dcfnewsrelease/144706643.pdf; UCI Commercial Fishing Announcements Nos. 1-30 available at https://www.adfg.alaska.gov/index.cfm?adfg=commercialbyareauci.salmon.)

[75] *Id.*

commerce does not render the PU fishery unconstitutional. Where questions of constitutionality are in doubt, courts are to "employ a narrowing construction, if one is reasonably possible" in lieu of "strik[ing] a statute down."[76] While implementing this Advisory Announcement *might* have affected commerce — it is not clear whether the commercial fishery would simultaneously be closed for other reasons[77] — it seems that the court would have to look to "alternative means . . . without discriminating against interstate commerce" to ensure that the statutory and regulatory schemes remained constitutional.[78] Such a narrowing might include simply invalidating the "Advisory Announcement" rather than striking down the entire PU fishery altogether, as CIFF asserts should happen here. However, given that this particular "Advisory Announcement" was never implemented, this court need not reach that decision here today. Given that the PU fishery does not involve articles of commerce, the court finds that the PU fishery statute and regulations are not facially discriminatory against interstate commerce.

3. The Upper Cook Inlet PU Fishery's "Incidental Effect" on Commercial Fishing is *De Minimus at* Most.

Although the court finds that the PU fishery, standing alone, does not facially discriminate against interstate commerce, the court must also consider

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[76] *State v. American Civil Liberties Unions of Alaska,* 204 P.3d 363, 373 (Alaska 2009).

[77] As noted elsewhere in this Order, the commercial fishery has been routinely closed due to the low return of king salmon.

[78] *Hughes,* 441 U.S. at 322.

whether the fishery has an "incidental effect" on interstate commerce. Under this analysis, the court must inquire into:

> (1) whether the challenged statute regulates evenhandedly with only "incidental" effects on interstate commerce, or discriminates against interstate commerce either on its face or in practical effect; (2) whether the statute serves a legitimate local purpose; and, if so, (3) whether alternative means could promote this local purpose as well without discriminating against interstate commerce.[79]

CIFF argues that the PU fishery's effect on the commercial fishery is not merely "incidental" because "salmon for the PU fishery are being removed from capture by the commercial fishery (interstate commerce), and are being allocated to the Alaska-resident-only PU fishery without any conservation purpose since the PU limits are liberal.[80] The court disagrees. Other than the one, unimplemented "Advisory Announcement" noted above, CIFF does not point to any regulation or other instance in which the Upper Cook Inlet commercial fishery was closed in favor of the PU fishery. As the State points out, the Upper Cook Inlet fishery is conducted at the mouths of, and in, the rivers, well past the area where commercial fishers may harvest their catch. Any fish caught in the PU fishery are therefore, by proximate location of the

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[79] *Id.*

[80] Motion for Summary Judgment, pg. 16.

fisheries themselves, no longer harvestable in the commercial fishery.

In *Shepherd,* the court noted that the regulation at issue was intended to regulate the taking of game, not the guiding business. Yet the *Shepherd* court found only a *de minimis* effect on the guiding business even where all parties acknowledged that the guides *could have* serviced non-resident customers in those game units if the regulations allowed. Here, the incidental effect of the PU fishery on the commercial fishery is even less — perhaps nonexistent — where the unharvested fish have lost the potential for commercial harvest once they pass by the commercial fishing area.

Additionally, the regulation describes the purpose of PU fisheries as providing for the "personal use needs for fish" for Alaskan residents by allowing such fisheries to exist where there are "harvestable surpluses of fish."[81] This serves a legitimate local purpose. Additionally, because these fish are caught at the mouths of the rivers and in-river, there is no "alternative means to promote this local purpose" that would discriminate less against interstate commerce.[82] Because the fish have already passed by the area for

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[81] 5 AAC 77.010(a)(3). CIFF appears to argue that the PU fishery does not serve a legitimate local purpose because it conflicts with AS 16.43.010's establishment of the CFEC. However, the analysis of whether a regulation has a "legitimate local purpose" does not require that the court ensure that the regulation's purpose not conflict with the purpose of any other statute or regulation. In any event, the court does not find the purpose of establishing the CFEC and the purpose of the Upper Cook Inlet PU fishery to be in substantial conflict.

[82] *Hughes,* 441 U.S. at 336.

commercial fishing, CIFF's argument regarding the PU fishery's effect on interstate commerce are not well-founded.

The court is also not persuaded by CIFF's argument that the PU fishery is unconstitutional because it excludes non-residents. As the Court noted in *Shepherd,* states may "exclude or limit[] the participation of nonresidents," and at times are "arguably [] required to [] prefer state residents to nonresidents" in regulating the taking of fish and wildlife.[83]

In summary, the court does not find that the PU fishery violates the Commerce Clause. Although the findings in *Jensen v. Locke* are not binding on this court, they are highly persuasive and are on par with the court's findings here. This court finds that the unharvested fish that enter the PU fishery are not articles of commerce, nor are they available any longer for harvest by the commercial fishery once they have passed by the area designated for commercial fishing and enter that area designated for the PU fishery. The court recognizes that the commercial fisherman in Upper Cook Inlet have suffered detrimental losses over the last several years due to the closing of their fishery. This order is in no way intended to minimize those losses. However, the PU fishery is not rendered unconstitutional merely because the commercial fishery has been limited for other reasons.

V. Conclusion

For the reasons provided herein, the court finds that the PU fishery does not violate the Commerce

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[83] 83 897 P.2d at 41.

Clause, and that there is no valid basis to render it unconstitutional under *Hughes*. Accordingly, CIFF's *Motion for Partial Summary Judgment* is DENIED. The Defendants' *Cross-Motion for Summary Judgment* is GRANTED.

Dated at Kenai, Alaska, this 23rd day of February, 2024.

/s/ Jason M. Gist
Superior Court Judge

UPPER COOK INLET COMMERCIAL FISHERIES ANNUAL MANAGEMENT REPORT, 2021, RELEVANT EXCERPTS (AUGUST 2022)

Fishery Management Report No. 22-16

Upper Cook Inlet Commercial Fisheries Annual Management Report, 2021

by

Brian Marston
and
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August 2022

Alaska Department of Fish and Game

Divisions of Sport Fish and Commercial Fisheries

[. . .]

. . . *Management Plan* (KRLKSMP). Management of the drift gillnet fishery of the CD is governed by 5 AAC 21.353, the *Central District Drift Gillnet Fishery Management Plan* (CDDGFMP). Since 2012, numerous changes have been made to these plans by the BOF to conserve late-run Kenai River Chinook salmon and all salmon in the Northern District. The changes which primarily restricted fishing time also limited the commercial fishery harvest of sockeye salmon (Appendix B2).

The ESSN fishery in the Kasilof Section may be opened as early as June 20 depending on sockeye salmon run strength in the Kasilof River. The drift gillnet fishery opens on the first Monday or Thursday on or after June 19. Similar to 2020, inseason management decisions in 2021 for both the ESSN and drift gillnet fisheries were tailored to reducing commercial fishing on weekends to foster higher run entry of sockeye salmon into the Kenai and Kasilof Rivers and to achieve higher harvests in the personal use fisheries of those rivers.

The sockeye salmon run forecast to the Kenai River in 2021 was 2.33 million fish, which meant management for the start of the drift gillnet and ESSN fisheries fell into the provisions of the middle run size tier (>2.3 but <4.6 million fish). In this run size tier, the ESSN fishery could have been open for the regulatory Monday and Thursday 12-hour fishing periods with up to 51 additional fishing hours per week (75 total hours/week). However, on Wednesday, June 16, the department issued EO No. 2-KS-1-24-21 restricting the Chinook salmon sport fishery in the Kenai River to the use of no bait beginning July 1, 2021. In

response, and as per the KRLKSMP, EO 2S-04-21 was issued on June 17 which modified weekly fishing periods with set gillnets in all waters of the Upper Subdistrict (5AAC 21.320(a)(2)(E)). At the start of the 2021 season in the ESSN fishery (Figure 1), salmon could be taken only during fishing periods established by EO with a maximum available time of 48 hours per week. In addition to all fishing time coming via EO only in the Upper Subdistrict set gillnet fishery, mandatory gear restrictions were implemented. The more stringent of the 2 available gear restriction options that limited set gillnet gear by $^{2}/_{3}$was implemented. These regulations took effect on June 22 with the beginning of the ESSN fishery in the Kasilof Section. The drift gillnet fishery is not directly affected by the KRLKSMP, but the regulations relevant to the forecast of the lower run tier for sockeye salmon also limited the number of drift gillnet openings.

During the management week of June 20 through June 26, both the drift gillnet fishery and the Kasilof Section of the Upper Subdistrict set gillnet fishery opened for the 2021 season. The drift gillnet fishery opened by regulation on Monday, June 21 (Figure 4, Appendix A11). The regulatory 12-hour fishing periods on June 21 and June 24 were opened districtwide, producing a total harvest of 2,781 sockeye salmon (Appendix A4). Two additional drift gillnet fishing openers were provided in the narrow Kasilof Section, also termed the "Kasilof corridor"[7], on June 22 and June 26, during which only 53 sockeye salmon were reportedly harvested. On June 21, sockeye salmon abundance in the Kasilof River exceeded 30,000 fish

[7] Corridor is a synonymous term for Section in this case.

(Appendix A2), opening the Kasilof Section of the Upper Subdistrict set gillnet fishery for the season on June 22. Fishing was open in the Kasilof Section on June 22, June 24, and June 26 using a total of 41 hours of the available 48 hours of EO time and harvesting 51,782 sockeye salmon for the week (Appendix A4). The sonar count into the Kasilof River was 53,842 fish by the end of the week (Appendix A2). On average, 18% of the Kasilof River sockeye salmon sonar passage is complete by the end of this management week.

During the management week of June 27 to July 3, the drift gillnet fleet fished the 2 regulatory periods on Monday and Thursday and one period in the Narrow Kasilof Section by EO, and the set gillnet fishery fished 3 days including Monday, June 28; Thursday, July 1; and Saturday, July 3 (Appendix A11). On July 1 and 3, the North Kalifornsky Beach (NKB) statistical area (244-32) opened with additional restrictions specific to the NKB statistical area. A total of 47 of the available 48 EO hours were used for the Kasilof Section setnet fishery as provided in the KRLKSMP (Table 4, Appendices A10, A11, and A22). Sockeye salmon harvest by set gillnets in the Upper Subdistrict was 72,018 fish and averaged 24,000 fish per opening during the 3 openers (Appendix A4). The drift gillnet fleet caught 8,000 sockeye salmon on Monday and 23,000 fish on Thursday during the regular district wide openers, but only harvested 82 sockeye salmon combined for the additional period in the narrow Kasilof Section (Appendix A4). Total drift harvest for the week was 31,315 sockeye salmon. Cumulative sockeye salmon passage into the Kasilof River ended the week at 131,662 fish (Appendix A2) and average run timing was 27% complete. Based on

average run timing and the 2021 passage to date, the final sockeye salmon passage for 2021 was projected to be 489,000 fish, which was above both the biological escapement goal (BEG: 140,000–320,000 fish) and OEG (140,000–370,000 fish) for the Kasilof River. The Kenai River sockeye salmon sonar project began operation on July 1 and counted 20,000 sockeye salmon through July 3 (Appendix A2). The cumulative count of the Kenai River Chinook salmon sonar was 369 large fish through July 3.

During the management week of July 4 to July 10, the entirety of the ESSN fishery (Figure 3) was scheduled for the first full opening of the 2021 season (Appendix A11). On July 5 and 7, the Kasilof Section was opened within the normal regulatory area of 1.5 miles, and on July 6 it was open but restricted to within 600 feet of shore. The NKB statistical area was also open but restricted to within 600 feet of shore on July 5 and 7. All areas of the Upper Subdistrict were open for the first full opening of the ESSN fishery on July 8. The drift gillnet fishery was opened on Monday and Thursday, districtwide by regulation, and was also opened on Wednesday, July 7, by EO in the Kasilof Section. Both Monday and Thursday fishing periods were extended in time within the section, to coincide with the Upper Subdistrict set gillnet fishing periods (Appendix A11, Figure 4). The Kasilof Section and NKB setnet fisheries caught 41,279 sockeye salmon from July 5 to 7 (Appendix A4). On July 8, a total of 26,471 sockeye salmon were harvested during the 18-hour fishing period, the first full fishing period of the ESSN fishery. The drift gillnet fishery caught 9,229 fish on Monday and 19,878 fish on Thursday. No reported harvest occurred on July 7 for that drift fishery

opening (Appendix A4). During this week, commercial fishing periods were not allowed on Saturday to facilitate fish movement into the Kenai and Kasilof Rivers for harvest in the personal use fisheries. At week's end, the cumulative passage estimate at the Kasilof River sockeye salmon sonar site was 183,000 fish (Appendix A2), with average run timing at 37% complete. The season-end escapement projection for Kasilof River sockeye salmon based on July 10 passage was 490,000 fish, which was above the BEG and OEG. The Kenai River sockeye salmon sonar estimate was 89,000 (Appendix A2) fish through July 10, projecting 1.3 million fish for an on-time run. Kenai River sockeye salmon run timing was 7% complete through July 10. The Kenai River Chinook salmon assessment was at 1,303 large fish, with average run timing at 11% complete through July 10.

During the management week of July 11 to July 17, the department issued EO No. 2-KS-1-42-21 on July 12 restricting the Chinook salmon sport fishery in the Kenai River to catch-and-release fishing only, thus restricting the ESSN fishery to no more than 24 hours per week, with a 36-hour continuous closure per week beginning between 7:00 PM Thursday and 7:00 AM Friday. This 24-hour restriction allowed for only 2 ESSN fishery openers, on Monday, July 12, and Thursday, July 15, each for 12-hour fishing periods. For these periods, all waters of the subdistrict were open. The Kasilof Section and NKB statistical area were opened within 600 feet of mean high tide from 5:00 AM and 10:00 PM on July 13 and 14. For this management week in the ESSN fishery, there were 24 hours fished (Table 4, Appendix A22) of the available 24 hours because the hours restricted to within 600

feet of shore do not count toward the hourly limit. The drift gillnet fishery was open for both Monday and Thursday regulatory periods (July 12 and 15) in Area 1 and the Expanded Kenai and Expanded Kasilof sections (Figures 7 and 8), and 2 periods in the Expanded Kenai and Expanded Kasilof sections on July 13 and 14 (Appendix A22). During this week, commercial fishing periods were not allowed on Saturday or Sunday to facilitate fish movement into the Kenai and Kasilof Rivers for harvest in personal use fisheries. During the week, the ESSN fishery harvested 67,398 sockeye salmon and the drift gillnet fleet harvested 118,359 sockeye salmon. The Kasilof River sockeye salmon sonar estimate was 242,000 fish on July 17, projecting a final escapement of 450,000 (Appendix A2), which exceeded the BEG and OEG for this system. Kasilof River sockeye salmon run timing was 53% complete, on average, through July 17. The total sonar estimate in the Kenai River at the end of the management week was 192,739 fish (Appendix A2), which projected a year-end inriver passage estimate of 828,000 fish. Kenai River Chinook salmon abundance remained low during the week, producing a cumulative sonar passage estimate through July 18 of 2,581 large fish. Average run timing through this date was 29% complete and projected a total late-run escapement estimate of 10,000 large Chinook salmon, which was below the OEG range of 15,000–30,000.

During the management week of July 18 to July 24, ADF&G commercial fisheries staff finalized the inseason assessment of the sockeye salmon run size to UCI and to the Kenai River. The assessment predicted that the Kenai River sockeye salmon run would be 2 to 9 days late and would possibly result in a run less

than 2.3 million fish. This assessment meant that the management of the ESSN fishery would change and fall into the lowest run size tier with the inriver goal of 1.0 million to 1.2 million for Kenai River sockeye salmon. The Kasilof River Special harvest area was opened on Sunday, July 18, for 10 hours for both drift and set gillnets. The fishery was opened for this afternoon and evening time frame to lessen the impact on the dipnet personal use fishery of the Kasilof River. The entire ESSN fishery was opened on Monday for 12 hours and one additional fishing period was opened on Tuesday, July 20, for 12 hours in all areas of the ESSN fishery but was restricted to within 600 feet of shore. The Kenai River late-run Chinook salmon abundance remained low throughout this management week. On July 19, the department issued EO 2 2-KS-1-46-21 closing the Kenai River drainage to fishing for Chinook salmon effective 12:01 AM Wednesday, July 21, 2021. In compliance with the KRLKSMP, the Upper Subdistrict set gillnet fishery was also closed. The drift gillnet fishery was open in Area 1 and the Expanded Kenai and Expanded Kasilof sections (Figure 7) on Monday, July 19. Three additional drift gillnet fishing period were also provided on July 20, 21, and 22 in the Expanded Kenai, Expanded Kasilof and Anchor Point sections. During this week, commercial fishing periods were not allowed on Saturday and the open period on Sunday, July 18, was opened only in the afternoon to facilitate fish movement into the Kenai and Kasilof Rivers for harvest in the personal use fisheries. The ESSN fishery harvested 148,133 sockeye salmon whereas the drift fleet harvested 240,784 sockeye salmon for the week (Appendix A4). This regulatory week resulted in the highest weekly harvest for 2021 for the ESSN fishery, including the

opening of the Kasilof River Special Harvest Area (KRSHA) on July 18, that only resulted in harvest of 1,502 sockeye salmon for the ESSN fishery. By week's end, the Kasilof River sockeye salmon sonar count had reached 334,296 fish (Appendix A2). With average run timing for this stock being 71% complete, the escapement projection was for 468,000 fish which would exceed the upper end of the BEG and OEG. The Kenai River sockeye salmon sonar count at week's end was 492,000 fish (Appendix A2), which projected a year-end inriver abundance of 1 million fish and fell just within the inriver goal for lower tier run sizes. The Kenai River large Chinook salmon final escapement projection at the end of this management week was 10,400 fish on July 248 and average run timing was 44% complete. This projection indicated restrictions in both the sport and commercial fisheries were still necessary to meet the Kenai River large Chinook salmon OEG.

During the management week of July 25 to July 31, the Kenai River large Chinook salmon cumulative count remained low and was projecting an escapement less than the OEG of 15,000–30,000 large fish. Therefore, paired restrictions for the ESSN fishery remained in effect per provisions in the KRLKSMP through July resulting in the ESSN fishery remaining closed. The drift gillnet fishery was open Monday, July 26, in Area 1, and the Expanded Kenai, Expanded Kasilof and Anchor Point sections (Figure 4). Openings were also allowed on July 27, 28, and 29 in the Expanded Kenai, Expanded Kasilof, and Anchor Point sections. During this management week, commercial fishing periods were not allowed on Sunday or Saturday to facilitate fish movement into the Kenai and Kasilof Rivers for harvest in the personal use fisheries. Drift gillnet harvest for

this management week totaled 125,067 sockeye salmon (Appendix A4). The Kasilof River sockeye salmon sonar count reached 415,735 fish (Appendix A2), average run timing was 86% complete, and final season escapement was projected at 484,053 sockeye salmon. By week's end, the Kenai River sockeye salmon sonar count had reached 923,945 fish (Appendix A2), average run timing was 64% complete, and the final inriver projection was for 1.4 million fish, which was projected to exceed the inriver goal. The Kenai River Chinook salmon sonar count was 6,189 large fish,[8] average run timing was 63% complete, and the escapement projection had stayed constant at 10,235 large fish, remaining below the minimum OEG of 15,000 large fish.

During the August 1 to August 7 management week, the ESSN fishery remined closed due to low Kenai River Chinook salmon passage. The drift gillnet fleet was open Monday and Thursday in Area 1, the Expanded Kenai, Expanded Kasilof, and Anchor Point Sections (Figure 4). Additionally, on August 1, 3, 4, 6, and 7, the drift gillnet fishery was open in the Expanded Kenai, Expanded Kasilof, and Anchor Point Sections. Weekend openings of the drift gillnet fishery were allowed this week to slow the large influx of sockeye salmon into the Kenai and Kasilof Rivers. The drift gillnet fleet harvested 261,164 sockeye salmon (Appendix A4) and resulted in the highest weekly drift gillnet harvest of the year. The Kasilof River sockeye salmon sonar count had reached 486,055 fish (Appendix A2) at week's end and average run timing was at 95% complete, projecting a final escapement of 514,000

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[8] https://www.adfg.alaska.gov/sf/FishCounts/index.cfm?ADFG=main.kenaiChinook&RunSummaryID=278

fish. The Kenai River sockeye salmon sonar passage estimate rose sharply to 1.6 million fish (Appendix A2), average run timing was 80% complete, and the yearend inriver run projection exceeded 2 million sockeye salmon, exceeding the inriver goal. The Kenai River Chinook salmon sonar count was 8,872 large fish by week's end,[9] average run timing was 81% complete, and the year-end escapement projection was 11,388 large fish.

The final full management week of 2021 for the ESSN fishery and the drift gillnet fishery in the larger inlet areas was from August 8 to 14. Concerns for low escapement of Kenai River Chinook salmon kept the ESSN fishery closed. The drift gillnet fleet was open 2 days, August 9 and 12, in . . . .

[. . .]

[9] https://www.adfg.alaska.gov/sf/FishCounts/index.cfm?ADFG=main.kenaiChinook&RunSummaryID=278

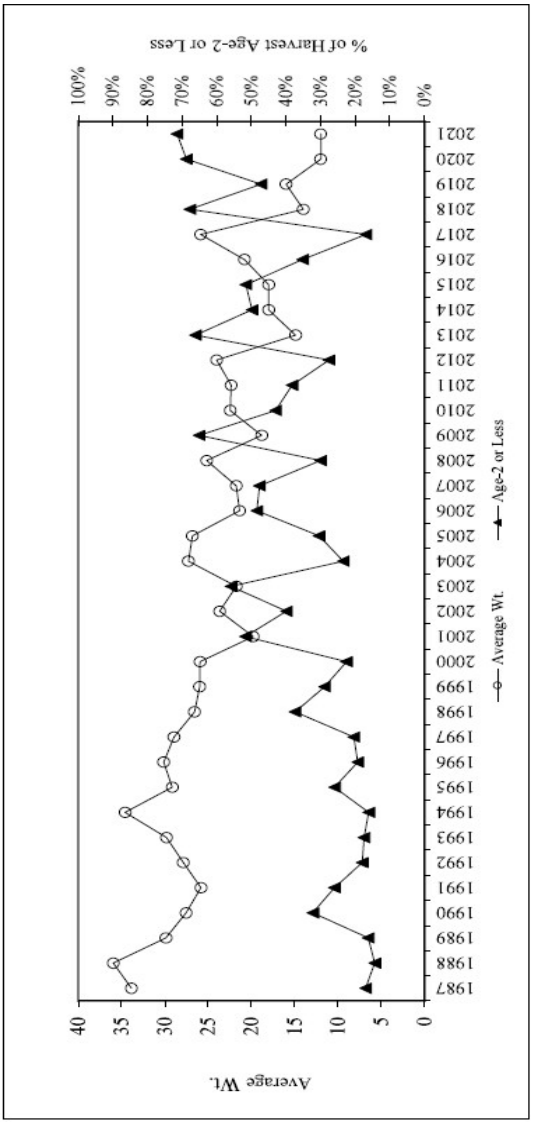

Figure 9.–Chinook salmon average weight (all fish) and percent of the harvest composed of fish ocean-age-2 or less in the Upper Subdistrict set gillnet commercial fishery, 1987–2021.

INTRODUCTION TO THE UPPER COOK INLET SUBSISTENCE AND PERSONAL USE FISHERIES, REPORT TO THE ALASKA BOARD OF FISHERIES, 1996, RELEVANT EXCERPTS (FEBRUARY 1996)

UPPER COOK INLET SUBSISTENCE AND PERSONAL USE FISHERIES, REPORT TO THE ALASKA BOARD OF FISHERIES, 1996

By Linda Brannian and Jeff Fox

Regional Information Report No. 2A96-03

Alaska Department of Fish and Game
Division of Commercial Fisheries
Management and Development
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February 1996

INTRODUCTION

In 1978, the State of Alaska passed its first subsistence statute (AS 16.05.258) which gave "priority" to subsistence uses of fish and game resources over other uses. In contrast, Federal passage of Title VIII of the Alaska National Interest Lands Conservation Act (ANILCA, 1980) gave a subsistence priority to rural residents only. In order to comply with ANILCA, the Board of Fisheries by regulation limited subsistence eligibility to rural Alaska residents. Since 1978 the Alaska subsistence statute has received numerous challenges and adjustments by the court system and the Alaska

State Legislature (Table 1). In 1985, as a result of the Madison et al. versus Alaska Board of Fisheries decision, all Alaska residents qualified as subsistence users. More liberal subsistence fisheries were established under emergency regulations for the 1985 fishing season. Prior to the 1986 fishing season the Alaska Legislature passed legislation which again limited subsistence to rural residents. As a result of the McDowell versus State of Alaska decision by the Alaska Supreme Court in 1989 the "rural" requirement was removed from state statute. This prompted the Joint Boards of Fish and Game to announce the "all Alaskan policy" in October of 1990 which stated that all Alaska residents are subsistence users under a Tier I classification.

In December of 1990, the Alaska Board of Fisheries (BOF) at a regularly scheduled meeting covering Upper Cook Inlet, adopted the Upper Cook Inlet Subsistence Salmon Management Plan. In addition to subsistence regulations, they also modified existing personal use fisheries in the Central District of Upper Cook Inlet to minimize the impacts of these newly expanded subsistence fisheries.

The Alaska State Legislature, during the 1992 session, passed legislation that required the Boards of Fish and Game to identify non-subsistence areas "where subsistence was not a principal part of the social or economic structure of the community". During the November 1992 meeting covering Upper Cook Inlet, Boards of Fish and Game established the Anchorage-Mat-Su-Kenai non-subsistence area which encompassed most of the Kenai Peninsula, all of the Municipality of Anchorage, and much of the Mat-Su Borough. Also the Board of Fisheries rescinded the Upper Cook Inlet

Subsistence Salmon Management Flan which: (1) ended all subsistence fisheries in Upper Cook Inlet except the Tyonek subsistence fishery, (2) reinstated personal use set gillnet fisheries at the mouth of the Kasilof River in late June and along the eastern shoreline north of Kasilof River during the last three weekends of September. In addition, dip net fisheries were reinstated in the mouth of Kenai and Kasilof rivers.

In October of 1993 the "non-subsistence areas" provision was ruled unconstitutional in Superior Court (Kenaitze v. Alaska). This ruling was appealed by the State of Alaska to the Alaska Supreme Court where a stay was granted on March 10, 1994. This stay was vacated by the full court on April 11, 1994. A special meeting of the Joint Boards was convened on April 28, 1994 by teleconference. As a result of these meetings the Upper Cook Inlet Subsistence Salmon Management Plan was readopted on April 28, 1994.

In early May of 1995 the Alaska Supreme Court overturned the October 1993 Superior Court decision. This ruling reestablished the Anchorage-Mat-Su-Kenai non-subsistence area where subsistence fisheries were scheduled to begin on May 20, 1995. The Board of Fisheries convened an emergency meeting by teleconference on May 24, 1995 to close subsistence fisheries in the non-subsistence area. At this emergency meeting the Board of Fisheries delegated the authority to the commissioner to readopt the Upper Cook Inlet Subsistence Salmon Management Plan as a personal use fishery. This was done by emergency regulation and later was made a permanent regulation due to the length of the fishing season. The result of this action was that 5 AAC 77.540 *Upper Cook Inlet Personal Use Salmon Fishery Management Plan* was established in

regulation. The Board of Fisheries also left standing; (1) 5 AAC 77.545 *Cook Inlet Personal Use Salmon Dip Net Management Plan,* (2) 5 AAC 77.547 *Central District Personal Use Sockeye Salmon Management Plan,* and (3) 5 AAC 77.548 *Central and Northern District Personal Use Cohn Salmon Management Plan.* The Board of Fisheries requested the department to provide the same opportunity under personal use in 1995 as there had been during the 1994 season when *The Upper Cook Inlet Subsistence Salmon Management Plan was in* effect. The Board of Fisheries also requested that the department submit a proposal for the next scheduled Upper Cook Inlet meeting which would blend these personal use fisheries to remove conflicting aspects of the various regulations and address any biological or social issues that the department observed.

UPPER COOK INLET MANAGEMENT AREAS

The Division of Commercial Fisheries Management and Development has defined the Upper Cook Inlet management area as that portion of Cook Inlet north of the latitude of Anchor Point. For commercial fisheries management purposes, it has been further divided into the Central and Northern Districts (Figure 1). This same area has been divided by Sport Fish Division into two sport fish management areas, (1) the upper Kenai Peninsula Management area which includes all fresh and saltwater fisheries between Anchor Point and a line connecting the West Forelands and Boulder Point and (2) the Northern Cook Inlet sport fish management area which includes all saltwater fisheries north of the forelands and all non-Kenai Peninsula freshwater *systems* draining into that portion of Cook Inlet.

HISTORY OF SUBSISTENCE FISHING IN UPPER COOK INLET

There is a long history of Alaskans harvesting fish and game for their personal consumptive needs in the Cook Inlet area (Braund 1982) under sport, subsistence, and commercial fishing . . . .

[. . .]

. . . *Cook Inlet Subsistence Salmon Management Plan.* This action ended all subsistence fisheries in Upper Cook Inlet except the Tyonek Subdistrict subsistence fishery. Personal use set gillnet fisheries at the mouth of the Kasilof River in late June (under 5 AAC 77.547) and along the eastern shoreline north of the Kasilof River during the last three weekends of September (under 5 AAC 77.548) did occur in 1993 harvesting 7,089 and 1,191 salmon respectively. In addition, dip net fisheries could open in the mouth of the Kenai and Kasilof rivers and in Fish Creek in the Northern District (under 5 AAC 77.545) if specified escapements were projected. In 1993, dip net fisheries were conducted only in Kenai River where 34,059 salmon were harvested (Nelson 1995) and Fish Creek where 40,768 salmon were harvested (Whitmore et al. 1995).

1994 SUBSISTENCE FISHERY.

In October of 1993 the "non-subsistence areas" provision was ruled unconstitutional in Superior Court and the *Upper Cook Inlet Subsistence Salmon Management Plan* was readopted. Fishing periods were again on select Wednesdays and Saturdays from late May to the end of September (Table 6). A total of 10,127 permits were issued for the 1994 season and

only 4,823 (48%) of these permits were returned as required. On 1,635 of the returned permits people indicated that they did not fish. On 1,312 returned permits, people indicated that they used dip nets in Kenai and Kasilof rivers for a total harvest of 20,995 salmon (Table 7). On a total of 1,875 returned permits people indicated that they used set gillnets for a total harvest of 50,724 salmon. The majority of the effort and harvest was from the east side of the Central District and from Knik Arm of the Northern District

1995 PERSONAL USE FISHERY

Just prior to the start of the 1995 fishing season the Alaska Supreme Court ruled in Kenaitze versus Alaska overturning the lower court ruling and reestablishing the Anchorage-Mat-Su-Kenai non-subsistence area. The Board of Fisheries convened an emergency meeting by teleconference to close subsistence fisheries in the non-subsistence area. At this emergency meeting the Board of Fisheries delegated authority to the commissioner to readopt the Upper Cook Inlet Subsistence Salmon Management Plan as a personal use fishery. The result of this action was that 5 AAC 77.540 *Upper Cook Inlet Personal Use Salmon Fishery Management Plan* was established in regulation. The fishing schedule was fixed in regulation on select Wednesdays and Saturdays from late May to the end of September (Table 8). Approximately 9,300 permits were issued for the 1995 season and 4,816 (52%) of these permits were returned as required. The majority of harvest was from the east side of the Central District and from Knik Arm of the Northern District. . . .