

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT 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

ORDER RE: TEMPORARY RESTRAINING ORDER

The Cook Inlet Fisherman's Fund ("CIFF") filed a *Complaint for Injunctive Relief and Damages* on June 19, 2022. CIFF also filed a *Motion for TRO & Preliminary Injunction* on July 19, 2022 ("*Motion*"). CIFF requested in its *Motion* that the court order a number of separate provisions related to commercial fishing against each of the above-named Defendants. Due to the limited time remaining in the commercial salmon fishing season, the court ordered an expedited briefing and oral argument schedule. Defendants filed a joint *Memorandum in Opposition* on July 27, 2022, and CIFF filed a *Reply* on July 28, 2022. The parties came before the court on July 29, 2022, for oral argument.

After reviewing CIFF's *Motion*, it became apparent to the court that an immediate decision was necessary only on some of its requests. Indeed, CIFF clarified this in its *Reply*, stating that its request for a Temporary Restraining Order ("TRO") related only to its request that the court order defendants to "withdraw [] EO 2S-18-22 and re-open the commercial fishing season."

I. FACTUAL BACKGROUND

CIFF is a nonprofit corporation that represents the interests of commercial fishermen who use both set and drift gillnets while fishing for salmon in Cook Inlet. The Board is a seven-member panel of individuals appointed by the Governor to serve three-year terms. The Board's purpose is to conserve and develop the fishery resources of the State through 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 fishers. The Board allocates the fishery resources among these groups for the five species of pacific salmon - king, coho, sockeye, chum, and pink salmon.

While various policy decisions go into setting the allocations, the Board is ultimately charged with maintaining a sustainable fishery. The Board holds a number of meetings throughout the year and takes testimony prior to establishing management plans. The Commissioner of ADF&G 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.¹

The issues presented here revolve around the Kenai River Late-Run King Salmon Management Plan ("Plan").² Under the terms of the Plan, ADF&G is tasked with managing the late run of king salmon to achieve an Optimal Escapement Goal ("OEG") of 15,000-30,000 "large" king salmon.³ ADF&G uses both preseason forecasts as well as in-

¹ The State of Alaska is currently managing the various salmon fisheries at issue. In *United Cook Inlet Drift Association v. National Marine Fisheries Services* ("UCIDA I"), 837 F.3d 1055 (9th Cir. 2016), the 9th Circuit Court of Appeals held that the National Marine Fisheries Service ("NMFS") was required to manage the Cook Inlet fisheries by way of a fisheries management plan ("FMP"). The process by which NMFS is to include the Cook Inlet salmon fishery into an FMP is ongoing, and was most recently before the federal district court in Anchorage. 2022 WL 2222879; 3:21-cv-00255-JMK. Until that process is complete, the NMFS and the State have agreed to allow the State to continue to manage the salmon fishery.

² 5 AAC 21.359(a) (requiring ADF&G to implement this plan June 20 to August 15).

³ Large king salmon are those that meet or exceed 75 cm mid eye to tail fork in length. 5 AAC 21.359(b).

season counts and updated in-season forecasts to manage the Plan. ADF&G uses paired restrictions when the forecast – both preseason forecasts, and in-season forecasts – suggests that the OEG will not be met. Paired restrictions are those restrictions which simultaneously go into effect against multiple user groups of the fishery. Under the terms of the Plan, for example, if the sport fishery is closed by emergency order to prohibit the use of bait and retention of king salmon, commercial fishing periods are simultaneously affected by limiting the number of hours those fisheries may operate and the type of gear that may be used.⁴

On January 26, 2022, the preseason forecast for large king salmon was 16,000 fish. Given the concerns that this forecast could not be met without some restrictions in place, ADF&G issued Emergency Order (“EO”) 2KN-1-09-22. Under that EO, king fishing on the Kenai River was restricted to using no bait, and catch and release, beginning July 1, 2022. This triggered limits on the times and methods for the commercial fishery as well. On July 15, 2022, the current in-season large king salmon count was 2,352 fish, and the projected escapement was adjusted to approximately 11,500. Given that the in-season projection for large king salmon was now well below the OEG of 15,000 fish, ADF&G issued a number of EOs that affected all user groups. Specific to this case, ADF&G issued EO 2S-18-22, closing “set gillnet fishing in the Kenai, Kasilof, and East Forelands Sections of the Upper Subdistrict until further notice.” This particular EO did not affect the drift fishery.

CIFF asks that the court issue a TRO that rescinds EO2S-18-22 because ADF&G has exceeded its authority in issuing the order, and because ADF&G is required to manage not only the king salmon fishery, but also the sockeye fishery, which has greatly exceeded the escapement goals set by the Board for that species.

⁴ 5 AAC 21.359(e).

II. ANALYSIS

In 2019, CIFF brought similar claims before the court.⁵ In that case, CIFF asked that the court issue several orders, including, but not limited to, extending the commercial fishing season beyond the August 15 deadline and require ADF&G to open commercial fishing for the historic regular periods on Mondays and Thursdays, with additional fishing time to remain within the sustainable escapement goal (“SEG”) for sockeye salmon.⁶ The primary argument then, as it is now, is that the sockeye escapement goals are significantly exceeded, which will ultimately harm all salmon stocks. In 2019, the court denied the TRO and Preliminary Injunction in August 2019, and ultimately granted summary judgment in favor of Defendants in November 2020. CIFF appealed the case to the Alaska Supreme Court, and that matter is still pending.⁷

In the matter now before the court, CIFF asserts that “[m]ost of the arguments in this case present straightforward legal questions,” and acknowledges that it “is raising similar issues [as the 2019 case] applied to the facts in 2022.”⁸ In determining whether a court should grant a TRO or a preliminary injunction, the Alaska Supreme Court has adopted two different standards for trial courts to employ – the “balance of hardships” standard, and the “probable success on the merits” standard.⁹ In 2019, this court found that a heightened standard applied, requiring CIFF to demonstrate a “probable success on the merits.” Relying on a 2013 *Order*¹⁰ in a similar case brought by CIFF, the court found that:

[T]he heightened standard applies to this case and that CIFF must demonstrate a probable success on the merits. Even if this court were to find that CIFF’s financial losses are not irreparable, the inquiry does not end there. The court must also find that the harm caused to the non-moving party can either be indemnified by a bond - which CIFF asks that this court not

⁵ 3KN-19-00641CI.

⁶ *Order Re: TRO and Preliminary Injunction*, 3KN-19-00641CI, p.3 (Aug. 5, 2019).

⁷ S-17955.

⁸ *Motion*, p.3.

⁹ *Alsworth v. Seybert*, 323 P.3d 47, 54 (Alaska 2014).

¹⁰ *CIFF v. Alaska Dept. of Fish and Game and Kenai King Conservation Alliance*, 3AN-13-08259CR.

require due to the “lack of financial harm to either ADF&G or the Board” - or where the injury to the non-moving party “is relatively slight in comparison to the injury which the person seeking the injunction will suffer if the injunction is not granted.”¹¹

The court now finds – as it did in 2019, and as another court found in 2013 under nearly identical circumstances – that a similar analysis applies to this case, and that CIFF would have to demonstrate probable success on the merits even after it applies a balance of hardships. The balance of hardships standard is as follows:

The balance of hardships standard requires balancing the harm the plaintiff will suffer without the injunction against the harm the injunction will impose on the defendant. A preliminary injunction is warranted under that standard when three factors are present: (1) the plaintiff must be faced with irreparable harm; (2) the opposing party must be adequately protected; and (3) the plaintiff must raise serious and substantial questions going to the merits of the case; that is, the issues raised cannot be frivolous or obviously without merit.¹²

Plaintiffs here face significant, financial harm if they are not allowed to continue with their fishing season. Defendants do not contest this. Defendants assert, however, that they are obligated to manage all of the fisheries, including sockeye and king salmon, and that the potential harm to the king fishery without such restrictions may result in a complete depletion of the fishery altogether. Defendants note that the court held in 2019 that it “[could] not find that the potential harm to the Kenai River late-run king salmon, as evidenced by ADF&G’s numbers presented, is ‘relatively slight in comparison’ to CIFF’s financial losses.”¹³ Defendants assert that the conditions in 2022 are even more dire than in 2019, stating that the 2019 forecast for large king salmon was 21,746, whereas

¹¹ *Order Re: TRO and Preliminary Injunction*, 3KN-19-00641CI, p.6 (citing, *Alsworth*, 323 P.3d at 56).

¹² *Alsworth v. Seybert*, 323 P.3d 47, 54 (Alaska 2014) (internal citations omitted).

¹³ *Order Re: TRO and Preliminary Injunction*, 3KN-19-00641CI, p.7.

the current forecast for 2022 is a mere 11,500. Given the current forecast, the court finds that applying the balance of hardships weighs in favor of denying a TRO.

Additionally, CIFF has not made a showing of probable success on the merits as it relates to this court's authority to usurp the Board's Plan, and ADF&G's implementation of that Plan. As in 2019, ADF&G is still tasked with managing the fisheries in accordance with the Board's Plan, and the Commissioner still retains considerable discretion in implementing and managing that Plan.¹⁴ CIFF argues that Defendants are required to manage the Plan "in the broad national interest," as required by *UCIDA I*, including managing the fishery in accordance with the 10 National Standards for fishery management under 16 U.S.C. § 1851(a). However, Defendants would not be required to manage the *setnet* fishery under the 10 National Standards, because the setnet fishery is not within the Exclusive Economic Zone ("EEZ").¹⁵ As stated by the federal district court just last month, "[a]lthough NMFS has 'exclusive fishery management authority' over all fish *within the EEZ*, and over all anadromous species throughout their migratory range beyond the EEZ," federal law "explicitly recognizes and reserves State jurisdiction over in-state fishery resources."¹⁶

The Board determined the Plan after extensive meetings, testimony and evidence taken. This court is not in a position to second-guess these decisions at this stage of proceedings absent some "extreme or exceptional case."¹⁷ While this *Order* is in no way intended to minimize the significant impact on the commercial fisherman affected by the July 16, 2022, EO, the Supreme Court previously decided the very issue presented here - whether ADF&G could prioritize the under escapement of late-run kings before the over

¹⁴ See e.g., 5 AAC 21.359-.360.

¹⁵ The court recognizes that although Defendants might not be *required* to manage the fishery in accordance with the 10 National Standards, those Standards may ultimately be included into an FMP that includes the setnet fishery. The court also recognizes that the Alaska Statehood Compact requires that fisheries be managed in the broad national interest. However, under 16 U.S.C. § 1801, Congress declared an intent to manage both commercial and recreational fisheries, in part, due to the decline of certain stocks of fish to the point that "their survival is threatened." At oral argument, Plaintiff acknowledged that survival of the Kenai king salmon stock may very well be implicated in the "broad national interest," and thus, should be considered in management decisions.

¹⁶ *UCIDA v. NMFS, et. al.*, 2022 WL 2222879, p.2.

¹⁷ *State v. Kluti Kaah Native Village of Copper Center*, 831 P.2d 1270, 1274, n.9 (Alaska 1972).

escapement of sockeye.¹⁸ The Supreme Court recognized that “[t]he Commissioner may...use the emergency order process to close down one type of fishery and not another in order to implement a policy establishing priorities of use,” and that limiting the harvest in one fishery to protect escapement levels in an adjoining fishery was “consistent with and reasonably necessary to the conservation and development of Alaska fishery resources.”¹⁹ The same analysis applies here to CIFF’s similar argument - that ADF&G is prioritizing the escapement goal of late-run kings arbitrarily and unnecessarily over sockeye escapement goals. These discretionary decisions are well within the Commissioner’s authority, and this court should refrain from substituting its judgment for that of the Commissioner “and other scientists hired to manage Alaska’s fisheries.”²⁰

III. CONCLUSION

The Board is given broad authority to implement resource allocations among the various user groups. As such, the court is to refrain from substituting its own judgment for that of the Commissioner and ADF&G’s biologists that manage the State’s fish resources. For the reasons stated herein, CIFF has failed to demonstrate a probable success on the merits of its claims. Accordingly, its *Motion for TRO* is **DENIED** insofar as CIFF requests that the court order rescission of EO 2S-18-22. The court will address CIFF’s requests for a preliminary injunction by way of separate order to address CIFF’s other arguments in the event that ADF&G reopens the commercial setnet fishery.

Dated at Kenai, Alaska, this 1st day of August, 2022.


JASON M. GIST
SUPERIOR COURT JUDGE

¹⁸ *Cook Inlet Fisherman's Fund v. State, Dept. of Fish and Game, et. al.*, 357 P.3d 789 (Alaska 2015).

¹⁹ 357 P.3d at 801.

²⁰ *Id.*

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