

**Supreme Court of Alaska.**

**COOK INLET FISHERMAN'S FUND, Appellant, v. STATE of Alaska, DEPARTMENT OF FISH & GAME, Appellee.**

**No. S–15595.**

**Decided: September 25, 2015**

**FOOTNOTES**

[1.](#) See 5 Alaska Administrative Code (AAC) 39.222(c)(2) (2015); see also *id.* (f)(10) (defining escapement as “the annual estimated size of the spawning salmon stock”). For example Kasilof River sockeye have an escapement range of 160,000–390,000, and the late-run Kenai River kings have an escapement range of 15,000–30,000. 5 AAC 21.365(b); 5 AAC 21.359(b). The management plans at issue have been amended since the 2013 commercial fishing season, but none of the amendments impact the provisions involved in our analysis. We therefore refer to the current management plans.

[2.](#) Sustained yield “denotes conscious application insofar as practicable of principles of management intended to sustain the yield of the resources being managed.” *West v. State, Bd. of Game*, 248 P.3d 689, 695 (Alaska 2010) (quoting Resources Committee, Alaska Constitutional Convention, Terms (1955)).

[3.](#) 5 AAC 21.320(a), (b).

[4.](#) 5 AAC 21.360(c)(2)(B). These waters include commercial fishing areas near the mouths of the Kasilof and Kenai Rivers.

[5.](#) 5 AAC 21.365(c)(2)(A).

[6.](#) 5 AAC 21.365(c)(2)(A), (3).

[7.](#) See 5 AAC 21.353(c)(2).

[8.](#) 5 AAC 21.363(e) (Upper Cook Inlet Salmon Management Plan), cited by 5 AAC 21.353(c) (am.6/12/2011) (Central District Drift Gillnet Fishery Management Plan), 5 AAC 21.359(h) (am.6/1/2013) (Kenai River Late–Run King Salmon Management Plan), 5 AAC 21.360(j) (am.5/21/2011) (Kenai River Late–Run Sockeye Salmon Management Plan), and 5 AAC 21.365(g) (am.5/21/2011) (Kasilof River Salmon Management Plan).

[9.](#) 5 AAC 21.360(c)(2)(B) (emphasis added).

[10.](#) See 5 AAC 21.365(c)(3) (providing that on July 8 fishing near the Kasilof River is subject to the 51–hour discretionary rule as outlined in 5AAC 21.360(c)).

[11.](#) See *State v. Kluti Kaah Native Vill. of Copper Ctr.*, 831 P.2d 1270, 1274 n. 9 (Alaska 1992) (“[A] mandatory injunction . . . should be granted only in extreme or exceptional cases [and] . . . with great caution.” (last two alterations in original) (quoting 42 AM. JUR. 2D. Injunctions § 21 (1969))). Unlike a prohibitory

injunction, which “forbids or restrains an act,” a mandatory injunction “orders an affirmative act or mandates a specified course of conduct.” Black’s Law Dictionary 904–05 (10th ed.2014).

[12.](#) Rule 56(f) provides: Should it appear from the affidavits of a party opposing [summary judgment] that the party cannot for reasons stated present by affidavit facts essential to justify the party’s opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

[13.](#) See Alaska R. Civ. P. 82(b)(2) (establishing 30% attorney’s fees award for cases without a money judgment that go to trial and 20% attorney’s fees award for cases without a money judgment “resolved without trial”); Alaska R. Civ. P. 82(b)(3)(A) (permitting superior court to vary attorney’s fees award due to “the complexity of the litigation”).

[14.](#) *RBG Bush Planes, LLC v. Kirk*, 340 P.3d 1056, 1060 (Alaska 2015).

[15.](#) *Christensen v. Alaska Sales & Serv., Inc.*, 335 P.3d 514, 516 (Alaska 2014). “[A] party seeking summary judgment has the initial burden of proving, through admissible evidence, that there are no [genuine] disputed issues of material fact and that the moving party is entitled to judgment as a matter of law.” *Id.* at 517 (alterations in original) (quoting *Mitchell v. Teck Cominco Alaska Inc.*, 193 P.3d 751, 760 n. 25 (Alaska 2008)); see also Alaska R. Civ. P. 56(c). After the moving party satisfies that burden, “the burden shifts to the non-moving party ‘to set forth specific facts showing that he could produce evidence reasonably tending to dispute or contradict the movant’s evidence and thus demonstrate that a material issue of fact exists.’” *Christensen*, 335 P.3d at 517 (quoting *State, Dep’t of Highways v. Green*, 586 P.2d 595, 606 n. 32 (Alaska 1978)). “[A] non-moving party cannot create a genuine issue of material fact merely by offering admissible evidence—the offered evidence must not be too conclusory, too speculative, or too incredible to be believed, and it must directly contradict the moving party’s evidence.” *Id.* at 516. “After the court makes reasonable inferences from the evidence in favor of the non-moving party, summary judgment is appropriate only when no reasonable person could discern a genuine factual dispute on a material issue.” *Id.* at 520 (footnote omitted). Whether a genuine factual dispute exists is a question of law reviewed *de novo*. *Id.* at 519 & n. 40.

[16.](#) *Bush v. Elkins*, 342 P.3d 1245, 1251 (Alaska 2015) (quoting *ConocoPhillips Alaska, Inc. v. Williams Alaska Petroleum, Inc.*, 322 P.3d 114, 137 (Alaska 2014)).

[17.](#) Alaska R. Civ. P. 56(f).

[18.](#) See *Sengupta v. Univ. of Alaska*, 21 P.3d 1240, 1260 (Alaska 2001) (affirming denial of a second Rule 56(f) request in part because this court’s examination of an affidavit filed after the expiration of the first Rule 56(f) continuance revealed that the affidavit did “not raise a genuine issue of fact with respect to” the nonmovant’s claim); *Coulson v. Marsh & McLennan, Inc.*, 973 P.2d 1142, 1146–47 (Alaska 1999) (holding superior court did not err when it granted movant summary judgment without granting nonmovant a Rule 56(f) continuance because this court’s examination of document sought to be discovered revealed that it was “immaterial” and “irrelevant”); *Mount Juneau Enters. v. City & Borough of Juneau*, 923 P.2d 768, 777 (Alaska 1996) (affirming denial of Rule 56(f) continuance in part because “the superior court did not believe that a genuine issue of material fact would emerge from further discovery”).

[19.](#) See *Weed v. Bachner Co.*, 230 P.3d 697, 699–700 (Alaska 2010).

[20.](#) See *Aspen Exploration Corp. v. Sheffield*, 739 P.2d 150, 158 (Alaska 1987); see also *Weed*, 230 P.3d at 703 (stating that qualified official immunity is overcome when the official’s conduct is “outrageous or evidence[s] reckless indifference”); cf. *Bachner Co. v. Weed*, 315 P.3d 1184, 1190–94 (Alaska 2013) (affirming summary judgment ruling that state bid procurement evaluation committee members did not act with bad faith sufficient to defeat qualified immunity when they followed published bid guidelines, used “a

fair process” in evaluating the bids, and there was no “objective evidence . support[ing] an inference of malice” or one committee member’s “attempt to pursue his personal interests” in bad faith).

[21.](#) See 5 AAC 21.365(c)(1) (citing 5 AAC 21.310(b)).

[22.](#) See 5 AAC 21.310(b)(2)(C)(i) (“[I]f the department estimates that 50,000 sockeye salmon are in the Kasilof River before June 25, but on or after June 20, the commissioner may immediately, by emergency order, open the fishery . “ (emphasis added)).

[23.](#) CIFF also argues that “[i]f the king salmon [escapement] goal was so important,” then “the sport fishery should have been limited or closed” before the set net fishery was closed. But the Kenai River Late–Run King Salmon Management Plan plainly states that “[t]he department shall manage the late-run Kenai River king salmon stocks primarily for sport and guided sport uses” and not for commercial uses. 5 AAC 21.359(a). And the argument is factually incorrect because beginning in June 2013 the Department continually limited Kenai River king sport fishing by emergency order. By contrast set netters were permitted to harvest kings until July 28.

[24.](#) 890 P.2d 567 (Alaska 1995).

[25.](#) Id. at 573.

[26.](#) Id. at 568–69.

[27.](#) Id. at 569.

[28.](#) Id.

[29.](#) Id. at 574.

[30.](#) 5 AAC 21.360(a).

[31.](#) 5 AAC 21.359(d)(3).

[32.](#) 5 AAC 21.359(b)(3)(C).

[33.](#) 5 AAC 21.365(a).

[34.](#) 5 AAC 21.363(a)(6).

[35.](#) See 5 AAC 39.222(f)(35) (defining “stock of concern” as “a stock of salmon for which there is a yield, management, or conservation concern”).

[36.](#) 5 AAC 21.363(e) (emphasis added); see also 5 AAC 21.353(h) (“The commissioner may depart from the provisions of the [Central District Drift Gillnet Fishery Management Plan] under this section as provided in 5 AAC 21.363(e).”); 5 AAC 21.359(j) (authorizing same departure from the Kenai River Late–Run King Salmon Management Plan); 5 AAC 21.360(j) (authorizing same departure from the Kenai River Late–Run Sockeye Salmon Management Plan); 5 AAC 21.365(g) (authorizing same departure from Kasilof River Salmon Management Plan).

[37.](#) See 5 AAC 39.222(c)(5).

[38.](#) 5 AAC 39.222(c)(5)(A)(iv); see also 5 AAC 39.222(b) (stating that one broad goal of the Board's statewide salmon management plan "is to ensure conservation of salmon").

[39.](#) See also 5 AAC 39.222(c)(2)(F) (establishing statewide salmon management policy and stating "salmon escapement and harvest management decisions should be made in a manner that protects nontarget salmon stocks or species"); 5 AAC 39.222(c)(4)(D) ("[A]n understanding of the proportion of mortality inflicted on each salmon stock by each user group, should be promoted, and the burden of conservation should be allocated across user groups. [T]he burden of conservation shall be shared among all fisheries in close proportion to each fisheries' respective use. "); 5 AAC 39.220(a) ("In applying this statewide mixed stock salmon policy for all users, conservation of wild salmon stocks consistent with sustained yield shall be accorded the highest priority.").

[40.](#) See, e.g., *Native Vill. of Elim v. State*, 990 P.2d 1, 8 (Alaska 1999) ("The Board must balance economic, ecological, cultural, international, and other policy concerns when it makes decisions about Alaska's fisheries. It must accommodate all of these legitimate interests in the face of substantial scientific uncertainty. Moreover, it is the Board's role to reach this accommodation. Courts are singularly ill-equipped to make natural resource management decisions. Consequently, we do not substitute our judgment for that of the Board." (citing *Stepovak–Shumagin Set Net Ass'n v. State, Bd. of Fisheries*, 886 P.2d 632, 637 (Alaska 1994); *Meier v. State, Bd. of Fisheries*, 739 P.2d 172, 174 (Alaska 1987))); see also *Metlakatla Indian Cmty., Annette Island Reserve v. Egan*, 362 P.2d 901, 915 (Alaska 1961), vacated on other grounds, 369 U.S. 45 (1962) ("Control of fishing, by enforcement officers advised by biologists experienced in the escapement requirements of each spawning area, is an absolute necessity if preservation and re-building of the depleted runs is to be accomplished.").

[41.](#) *Kenai Peninsula Fisherman's Coop. Ass'n v. State*, 628 P.2d 897, 907 (Alaska 1981).

[42.](#) *Gilbert v. State, Dep't of Fish & Game, Bd. of Fisheries*, 803 P.2d 391, 399 (Alaska 1990) (quoting *Meier*, 739 P.2d at 175); see also *Interior Alaska Airboat Ass'n v. State, Bd. of Game*, 18 P.3d 686, 693–94 (Alaska 2001) (stating that "[t]his court is not empowered to resolve" policy disputes over the management of Alaska's natural resources so long as the agency did not act unreasonably or arbitrarily).

[43.](#) As noted earlier, at the preliminary injunction hearing CIFF stated that in part it was seeking to have the court direct the Commissioner how to exercise her discretion in managing the sockeye set net fishery. We reiterate that each and every claim in CIFF's amended complaint was predicated on the allegation that the Commissioner's actions were not authorized by the Board's management plans. As a matter of law, the Commissioner's decisions were authorized by the Board's management plans. To the extent the fishery mismanagement claim alleged in CIFF's amended complaint is a putative tort claim directed to how the Commissioner exercised her lawful discretion, as opposed to the Commissioner's discretionary actions being lawful, we note two considerations. First, CIFF's claim would be barred by sovereign immunity. See AS 09.50.250(1) (barring tort actions "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a state agency or an employee of the state, whether or not the discretion is abused"). Second, in *Mesiar v. Heckman* we declined to recognize a cause of action for "negligent resource-management," holding that the Department does not owe a fisheries resource user an actionable duty of care because fisheries management decisions inevitably benefit some user groups while harming others, and if subjected to these types of lawsuits, the Department might abandon "sound principles of resource management" in favor of placating competing user groups. 964 P.2d 445, 448–52 (Alaska 1998). CIFF articulates no sound basis why a claim for "willful fisheries mismanagement" would not be barred by *Mesiar*.

[44.](#) "[W]e exercise our independent judgment in reviewing whether an agency action is consistent with the Alaska Constitution." *Manning v. State, Dep't of Fish & Game*, — P.3d —, Op. No. 7036, at 8, 2015 WL 5061353, at \*3 (Alaska August 28, 2015). Although CIFF's constitutional claim was predicated on the infirm allegation that the Commissioner's actions were outside her authority under the Board's management plans, we will address CIFF's article VIII uniform application claim as it relates to the

Commissioner's lawful actions. And although CUFF also cites the general equal protection provision of article I, § 1, it fails to provide any legal analysis under that constitutional provision; the general equal protection argument is therefore waived for inadequate briefing. *Kingery v. Barrett*, 249 P.3d 275, 285 (Alaska 2011) (stating party waives legal arguments by “inadequately briefing them”); *Adamson v. Univ. of Alaska*, 819 P.2d 886, 889 n. 3 (Alaska 1991) (“[W]here a point is given only a cursory statement in the argument portion of a brief, the point will not be considered on appeal.”).

[45.](#) Alaska Const. art. VIII, § 17.

[46.](#) *Gilbert v. State, Dep't of Fish & Game, Bd. of Fisheries*, 803 P.2d 391, 399 (Alaska 1990) (quoting *McDowell v. State*, 785 P.2d 1, 10 (Alaska 1989)).

[47.](#) Alaska Const. art. VIII, § 2.

[48.](#) See AS 16.05.221(a) (“For purposes of the conservation and development of the fishery resources of the state, there is created the Board of Fisheries. ”); AS 16.05.251(a)(12) (“The Board of Fisheries may adopt regulations it considers advisable . for . regulating commercial . fishing as needed for the conservation, development, and utilization of fisheries. ”).

[49.](#) 5 AAC 21.363(e) (“[N]o provision within a specific management plan is intended to limit the commissioner's use of emergency order authority . to achieve established escapement goals for the managements plans as the primary management objective.”).

[50.](#) AS 16.05.060(c); see also *Kenai Peninsula Fisherman's Coop. Ass'n v. State*, 628 P.2d 897, 907 (Alaska 1981) (“The extent of the Commissioner's power under AS 16.05.060 should . be interpreted in light of the overall purpose of the constitutional and legislative scheme of management of state resources prescribed by other provisions of the law. Thus, if the Board properly adopted a plan for the management of state fishery resources, the Commissioner could enforce that policy through the emergency order process.”).

[51.](#) This clause provides: “Fish, forests, wildlife, grasslands, and all other replenishable resources belonging to the State shall be utilized, developed, and maintained on the sustained yield principle, subject to preferences among beneficial uses.” Alaska Const. art. VIII, § 4.

[52.](#) *West v. State, Bd. of Game*, 248 P.3d 689, 696 (Alaska 2010) (alteration in original) (emphasis added) (quoting *The Alaska Constitutional Convention, Proposed Constitution for the State of Alaska: A Report to the People of Alaska* (1956)).

[53.](#) 5 AAC 39.222(b).

[54.](#) See Alaska Const. art. VIII, § 2; AS 16.05.251(a)(12); 5 AAC 39.222.

[55.](#) *Kenai Peninsula*, 628 P.2d at 903 (footnote omitted) (internal quotation marks omitted).

[56.](#) *Id.* at 392–93, 398–400.

[57.](#) *Id.* at 399 (quoting *McDowell v. State*, 785 P.2d 1, 10 (Alaska 1989)).

[58.](#) *Id.*

[59](#). Alaska R. Civ. P. 65(d) provides in part: “Every order granting an injunction . shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained. ”

[60](#). See *Schmidt v. Lessard*, 414 U.S. 473, 476 (1974) (“[T]he specificity provisions of [the analogous federal rule] are no mere technical requirements. The Rule was designed to prevent uncertainty and confusion on the part of those faced with injunctive orders, and to avoid the possible founding of a contempt citation on a decree too vague to be understood.”).

[61](#). See *Kenai Peninsula*, 628 P.2d at 899 (noting “[a]ll five species of salmon enter Cook Inlet, with considerable overlap in timing and migration routes” and both commercial and recreational users harvest these salmon).

[62](#). See *Interior Alaska Airboat Ass'n v. State, Bd. of Game*, 18 P.3d 686, 691 (Alaska 2001) (stating when Board of Game acts consistently with its overarching statutory purposes, we will not inquire “whether a regulation is necessary as a means to a legislative end” because such inquiry “would mire this court in questions of public policy and the advisability of possible alternatives” and is in any event “beyond our authority and expertise” (emphasis in original) (quoting *State, Dep't of Revenue, Permanent Fund Div. v. Cosio*, 858 P.2d 621, 624 n. 1 (Alaska 1993))); *Gilbert v. State, Dep't of Fish & Game, Bd. of Fisheries*, 803 P.2d 391, 397 (Alaska 1990) (“We have no authority to substitute our own judgment for the Board of Fisheries' particularly since highly specialized agency expertise is involved.” (quoting *Meier v. State, Bd. of Fisheries*, 739 P.2d 172, 174 (Alaska 1987))).

[63](#). See Alaska R. Civ. P. 82(b)(2) (setting base standard of 30% for matters that go to trial and 20% for matters resolved without trial).

[64](#). See Alaska R. Civ. P. 82(b)(3) (allowing variation from base standard for various reasons, including “complexity of the litigation”).

[65](#). See *BP Pipelines (Alaska) Inc. v. State, Dep't of Revenue*, 327 P.3d 185, 197 (Alaska 2014) (“While we have occasionally expressed concern about the use of factor (A)—complexity of the litigation—to enhance fees . we have repeatedly upheld its use.” (alteration in original) (quoting *Ware v. Ware*, 161 P.3d 1188, 1199 (Alaska 2007))); *Hiller v. Kawasaki Motors Corp., U.S.A .*, 671 P.2d 369, 375 (Alaska 1983) (affirming award of about 23% of actual fees because “[t]he litigation was complex and lengthy”).

WINFREE, Justice.

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