

Examiner: State discriminated in closing fishery

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The Department of Fish and Game discriminated against a group of Yakutat surf fishermen when it closed surf fishing on the Alsek and East Rivers in 1980, according to a hearing examiner for the Alaska Commission on Human Rights.

In a proposed recommenda-

tion which could be sent to the Commission, hearing commissioner Joan Katz found that the Department of Fish and Game's decision to close surf fisheries in the Alsek and East Rivers placed unnecessary discriminatory hardship on the Natives who surf fished.

According to Commission procedure, attorneys for the DF&G and Walter Johnson

who filed the suit, have a time to comment. The DF&G already has filed a 10-page objection to the ruling. Johnson's attorney said she doesn't expect to have many objections to the decision.

After the two attorneys comment, another 20-day period goes by for the hearing examiner to amend her ruling or pass it unchanged to

the Commission.

The Human Rights Commission then either abides by the recommendation or may revise it. Some four volumes of testimony will accompany the recommendation. No time limit is placed on the Commission ruling and it is not known when any and if Commission action will be taken by the opening of the sockeye run

in the two rivers.

The case was filed by Walter Johnson, a Yakutat fisherman who regularly fished in the Alsek River. Johnson contended that the DF&G discriminated in favor of upriver fishermen who are mostly non-Native Seattle-based fishermen, and against himself and other surf fishermen who are mem-

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bers of the Alaska Native Community, when it closed the surf fisheries.

Johnson and a group of from 15 to 38 other surf fishermen were members of the Yakutat Tlingit Indian Community who have fished in the surf at one time or another from the 1930s to 1977.

The Alsek River is a 14-mile-long fishery which is fished in the surf almost exclusively by the Yakutat Tlingits, and upriver in set-net fisheries which are manned almost exclusively by the non-Native Seattle fishermen.

The surf fishing area was curtailed, then cut out entirely in 1980 by the DF&G and Board of Fisheries acting on the recommendation of a fisheries technician, Alex Brogle.

Johnson and the others contended that only Natives were affected by the cutoff of the surf fishery and the state therefore discriminated against them.

Included in the proposed recommendation's finding of fact and law, which could still be amended after the objection process is complete, were numerous comments written by Brogle in his weekly reports and seasonal summaries. The comments show a racial bias against Natives, according to Katz.

The comments included racial and sexual remarks about Native women and men, and numerous racist comments and references to Native and Black men.

Two comments referred to the "faltering Yakutat Co-op. . . give it the lethal blow this season, probably in the rear for that's where their head is."

Another comment stated,

"This is the year to teach them (Natives) the lesson of their life that this moving around is more than costly with a low price for fish, low production and high price for moving, it already has broken some guys' back who were so ardent to move 'the white man out of Drybay' (sic) they are all back in the Situk wishing they had never gone down there."

According to Katz, Brogle's supervisor, Don Ingledue, said he just took Brogle's comments "as a little humor."

Ingledue assessed Brogle as being "very dedicated in the rebuilding effort and he is very concerned about the Yakutat community, the Indian community here and their dependence upon this fishery resource."

Other references to Brogle include the allegation that in 1979 he made Native fisherman Eli Hanlon move his net from where it was set in the East River, then later that evening allowed non-Native Bellingham, Washington, fisherman Larry Harvey to set in the same spot.

The recommendation built a three-year history of the curtailment and ultimate closure of the Alsek surf fishery. Included in that three-year report was the fact that the Alsek and the East Rivers both had poor fish escapements in 1978 due to low water conditions, and expanded gear use. Brogle recommended curtailed fishing time in the Native-fished Alsek River but made no recommendation for the East River, according to the proposed recommendation.

During the years preceding the 1980 shutdown Native fishermen also were experiencing violent harassment with shots

fired at them and logs sent down the East River, apparently to damage nets.

In 1979 the Alsek escapement was very poor which Brogle said was due to a combination of the surf fishermen, the increased efforts of up-river fishermen who were putting more and more gear in the smallest back eddy and by a new Canadian gear regulation.

He recommended closing entirely the surf fishery, placing a two-day fishing week limitation and more surveys.

The Board of Fisheries in late 1980 voted to close the Alsek River to surf fishing because of the poor escapement but also allowed for an emergency order opening the Alsek and East surf fishing areas for three weeks.

During one three-week period, a massive storm hit the area and tore up numerous nets in the surf and in the mouth of the river.

Brogle testified that the storm resulted in "tremendous uncontrolled wastage" of fish from surf fishing during the storm when fishermen couldn't tend their nets.

His comments were not supported by any fishermen who said they saw no unusual numbers of dead salmon on the beach.

As a result of this alleged wastage, Brogle recommended closing the surf fishery.

In her proposed recommendation, Katz stated that in issuing an emergency closure order in May of 1980, the DF&G affected primarily Natives who used the surf fishery.

"Because the breaker fishermen were Natives and since they were affected adversely in

relation to the white upriver fishermen who were allowed to continue to fish in their customary sports, it seems evident that the emergency order had a disparate impact on the class of Alaska Natives."

Katz also stated that there were impediments to the Yakutat fishermen moving upriver because of threats of violence and actual violence.

Katz' recommendation also stated that DF&G ignored certain facts in closing the Alsek River, including the fact that the poor escapement of 1979 was due more to than just the surf fishermen. In fact, the major increases at the Alsek in 1979 and 1980 were in the numbers of in-river, not surf, fishermen.

She also was particularly critical of DF&G handling of Brogle.

"Brogle's contempt for the Natives is apparent. In addition to the racism exhibited by comments quoted . . . Brogle has actually described his view that the Natives have no business fishing in the Alsek and East Rivers

Katz said that the facts of the case don't allow Fish and Game to detach Brogle's personal racism from his professional observations and recommendations and from the state's official position.

"Mr. Brogle's biases permeate his work, as reflected in his weekly reports. His supervisors tacitly endorsed these biases, or at the minimum their expression in official documents, by failing to counsel Mr. Brogle or initiate other corrective action to insure the absence of such comments . . .

"The state cannot escape responsibility for Brogle's dis-

criminatory attitude. His recommendations form the basis for official actions, and his prejudices infected the entire process . . .

"Additionally . . . tacit endorsement of, and failure to investigate and correct, Brogle's racist remarks constitute independent grounds for holding the state accountable for the demonstrated biases of its field employee," said the recommendation.

The proposed recommendation would keep DF&G from issuing and/or enforcing any regulation order or other measure closing the surf at the Alsek or East Rivers at times when fishing within the rivers is allowed.

Fish and Game already has filed its objections to the proposed recommendations and objected on the following four points:

- * Fish and Game argued that the decision draws faulty conclusions when it stated that Natives were impacted differently than White people by the surf closure;

- * That the hearing examiner mischaracterized facts of the behavior of fish;

- * That the proposed decision treats the East and Alsek Rivers alike in considering research about fish in the rivers when they are different — the Alsek is silty glacial river and the East is clear;

- * And the decision doesn't give enough weight to the allocation decision by the fisheries board.

The hearing examiner has 20 days from Feb. 15 to amend her ruling or let it stand. There is no time limit for the commission to make its final ruling.