

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FIRST JUDICIAL DISTRICT AT KETCHIKAN

1 **ORGANIZED VILLAGE OF KASAAN, a**
2 Federally recognized tribe,

3 Plaintiff,

4 v.

5 **ALASKA BOARD OF FISHERIES,**

6 Defendant.

CASE NO.: 1KE-09-

CI

7
8
9 **MOTION AND MEMORANDUM FOR TEMPORARY RESTRAINING ORDER**
10 **AND FOR A PRELIMINARY INJUNCTION**

11 **I. INTRODUCTION**

12 The Organized Village of Kasaan has filed a Complaint for Injunctive Relief and
13 Declaratory Judgment seeking to preclude the Board of Fisheries from implementing
14 Proposal 149, which would open Area 2 to commercial crab fishing on June 15, 2009.
15 The Village moves for a temporary restraining order pursuant to Alaska Civil Rule 65 to
16 order the Board of Fisheries to issue an immediate directive that Area 2 shall not be open
17 for commercial fishing on June 15 through August 15, 2009, or whatever other
18 mechanism or procedure is the proper order to prohibit commercial crab fishing in Area 2
19 as of June 15, 2009.
20

21
22 **II. STATEMENT OF FACTS**

23 The Organized Village of Kasaan is a federally recognized tribe on Prince of Wales
24 Island, Alaska. The people of Kasaan are Haida people who continue to practice a
25 customary and traditional use lifestyle and rely heavily on the harvesting of Dungeness
26

1 crab in Area 2. The people in the Village of Kasaan are dependent upon subsistence crab
2 fishing in Kasaan Bay and have been historically dependent on the harvest of crab for the
3 community.

4 At least since the mid-1980s, the State, through the Department of Fish & Game and
5 the Board of Fisheries, has precluded commercial crab fishing in Area 2, which includes
6 Kasaan Bay, during the months of June 15 through August 15. The prohibition on the
7 commercial harvest of crab during those months has been based on many detailed and
8 historical scientific studies, which in general, established that the commercial harvest of
9 crab in those months could result in a devastating loss of over 50% of the males due to
10 handling while in the soft-shelled period of molting. We are not aware of any studies to
11 the contrary or which would establish that the commercial harvest of crab in Area 2 in
12 June through August will not result in a substantial adverse impact on the resource.

13
14 The people of Kasaan have been similarly protective of the resource, waiting until
15 mid to late June to harvest for subsistence, and they do so in small skiffs, which allow for
16 minimal, if any, handling of any soft-shelled crabs. The commercial fleet is not and
17 cannot be so discriminate, and as a result, the commercial catch will necessarily result in
18 the handling of large numbers of the soft-shelled males, which will then not complete the
19 molting process and not regenerate the resource. The Department of Fish & Game has,
20 without exception, opposed any proposal to open Area 2 for commercial crab harvest
21 during June 15-August 15. Any such proposal has been opposed, without exception, by
22 the advisory committees to the Board of Fisheries serving the Prince of Wales
23 communities and the Ketchikan area communities.
24
25
26

1 Before the Board of Fisheries meeting beginning January 21, 2009, an individual
2 submitted a proposal (hereafter Proposal 149) to allow commercial harvest of crab in
3 Area 2 from June 15 through August 15. The proposal indicated that it was submitted for
4 the purpose of benefiting the crab fleet. No new information about the fishery, or Area 2,
5 nor any data contradicting the years of scientific studies, was presented to the Board with
6 the proposal.

7 The Department of Fish & Game submitted written comments opposing Proposal 149.
8 In particular, the Department noted that the “current summer season of June 15 through
9 August 15 in much of Southeast Alaska overlaps the primary male molt period from
10 March through July. As a result, handling soft-shelled crabs is high during the first half
11 of the summer season.” The Department noted that in Duncan Canal as much as 59% of
12 legal males were in soft shell condition in early June. The Department noted that the
13 mortality rate for handling soft-shelled crab can be as high as 50%. The Department
14 concluded that it “has long advocated a fall/winter season be adopted for the entire
15 Southeast Alaska Dungeness crab fishery, **as avoiding the soft-shell period would**
16 **increase yielded poundage.”** (emphasis added) (See Exhibit 2 to the Complaint). The
17 Department also testified explaining its continued opposition to any proposal to allow
18 commercial harvest of crab in Area 2 during those summer months.

19 Consistent with the uncontradicted scientific data, and its historical position, the
20 Board voted to reject the proposal. The Board then took up other matters. For unknown
21 reasons, and without any new basis, information or data, the Board “reconsidered”
22 Proposal 149. The Board then adopted Proposal 149, with a three year sunset clause.
23
24
25
26

1 The only apparent reasons were because other areas of the state were open for
commercial harvest of crab at that time and to allow for the gathering of information.

2 Since that action, the Village as well as many other entities, such as the City of
3 Ketchikan, have sought relief through administrative channels such as requesting an
4 emergency closure by the Commissioner. All efforts to protect the resource have been
5 rebuked by the Commissioner and the Board.
6

7 The people of Kasaan have been left with no option but to seek the assistance of the
8 Court to insure the protection of their federal subsistence rights, traditional lifestyle, and
9 the continued vitality of Dungeness crab in Kasaan Bay. The people of Kasaan believe,
10 based on their historical experience, that the commercial fleet will wipe out the legally
11 viable crab within a matter of days beginning on June 15, 2009, leaving essentially no
12 crab for the Village and community, and ensuring that a significant percentage of the
13 resource will not regenerate by the winter months for next year.¹
14
15

16 **III. THE BALANCE OF HARDSHIPS FAVORS THE VILLAGE OF KASAAN**

17 The people of the Organized Village of Kasaan are faced with irreparable harm
18 and the Board can be is adequately protected, or actually does not need any protection.
19 The Village raises serious and substantial questions going to the merits of the Board
20 action, as demonstrated in the Complaint. The issues cannot be characterized as
21 frivolous or obviously without merit. Therefore, under the decisions of the Alaska
22 Supreme Court, the Village respectfully requests that the Court enter a temporary
23 restraining order and preliminary injunction. State Division of Elections, 110 P.3d 976,
24
25

26 ¹ See Exhibits 1-6 attached to the Complaint as supporting documents for the Statement of Facts.

1 978 (Alaska 2005); Kluti Kaah, 831 P.2d 1270, 1273 (Alaska 1992). This is called the
2 “balance of hardships” approach or three-part test. Id. The same test applies for a
3 temporary restraining order and preliminary injunction. *Alaska v. United Cook Inlet*
4 *Drift Association*, 815 P. 2d 378 (Alaska 1991). The Alaska Supreme Court has held
5 that where the injury to the movant is certain and irreparable and the harm to the non-
6 movant inconsiderable, injunctive relief should normally be granted. *Alaska Public*
7 *Utilities Commission v. Greater Anchorage Area Borough*, 534 P. 2d 549, 554 (Alaska
8 1975).

9 A. The people in the Organized Village of Kasaan will suffer irreparable harm
10 without injunctive relief.

12 Irreparable harm

13 includes an injury, whether great or small, which ought not to be
14 submitted to, on the one hand, or inflicted, on the other; and which, because
15 it is so large or so small, or is of such constant and frequent occurrence, or
16 because no certain pecuniary standard exists for the measurement of
17 damages, cannot receive reasonable redress in a court of law. Kluti Kaah,
18 831 P.2d at 1273 n.5 (quoting Black’s Law Dictionary).

19 It seems apparent that the people in Kasaan will suffer an injury that “ought not”
20 to be inflicted on them, and which will be constant and perpetual in occurrence. A
21 subsistence fisher in a small skiff cannot harvest crab in the same area with commercial
22 fishers with any hope of catching any meaningful viable crab. By its historical actions,
23 both the Department of Fish & Game and the Board of Fisheries have recognized this
24 irreparable harm, and have protected both the subsistence fishers and the resource from
25 the commercial harvest. Indeed, the Board made no findings at all that its reversal of
26

1 its nearly thirty year position will insure the viability of the people of Kasaan to be able
2 to continue to harvest the Dungeness crab in accordance with their customary use and
3 traditional lifestyle.

4 **B. The Board will not suffer any injury.**

5 An injunction will not place any administrative or financial burden on the
6 Board. The Board has no interest to be protected in having Area 2 be opened for
7 commercial harvest of crab on June 15, 2009. The absence of any potential injury to
8 the Board seems apparent by its historical actions and by its original action on this
9 proposal, that being, to not allow the commercial harvest of crab in Area 2 in these
10 months.

11
12 Even if the Board could identify some slight potential injury, no bond, or at most,
13 a nominal bond, should be required of the Village. Despite the seemingly mandatory
14 language in Alaska Civil Rule 65(c), the posting of security as a condition for entering
15 preliminary injunctive relief is in the discretion of this Court; the Court has the discretion
16 to set the amount of security at zero. Courts waive security requirements in a wide
17 variety of circumstances. They do so when requiring security would effectively deny
18 access to judicial review. *E.g., Muckelshoot Indian Tribe v. Hall*, 698 F.Supp. 1504,
19 1518 (W.D.Wash. 1988) (“The Court finds that the Tribes do not have the financial
20 ability or resources to post a substantial bond and that requiring one would effectively
21 deny them access to judicial review.”). They often do so for indigent plaintiffs. *E.g.,*
22 *Wayne Chemical, Inc. v. Columbus Agency Servs. Corp.*, 567 F.2d 692, 701 (7th Cir.
23 1977); *Bass v. Richardson*, 338 F. Supp. 478, 490 (S.D.N.Y. 1971).. Public interest
24
25
26

1 plaintiffs and environmental plaintiffs are often excused from the bond requirement,
2 e.g., *People ex rel Van de Kamp v. Tahoe regional Planning*, 766 F.2d 1319, 1325-26
3 (9th Cir. 1985), or required to post only nominal binds. E.g., *Friends of the Earth v.*
4 *Brinegar*, 518 F.2d 322, 323 (9th. Cir. 1975). Nominal security, or the waiver thereof, has
5 been allowed in cases where issues of overriding public concern or important federal
6 rights are involved. *Kalemba v. Turk*, 353 F.Supp. 1101 (N.D. Ohio 1973) (no bond
7 required in light of the importance of federal right of free expression coupled with lack of
8 monetary risk of loss to defendant).

9
10 Several of these considerations intersect in this case. The Village is a small tribe
11 dependent on a subsistence lifestyle that is protected by federal law. At the same time, the
12 villagers and the public at large have a substantial interest in the wise administration of
13 Alaska's natural resources. See, e.g., *Gilbert v. State, Dep't of Fish & Game*, 803 P.2d
14 391, 399 (Alaska 1990) (observing that "migrating schools of fish, while in inland waters,
15 are the property of the state, held in trust for the benefit of all the people of the state, and
16 the obligation and authority to equitably and wisely regulate the harvest is that of the
17 state"). These factors, in addition to the absence of any injury to the Board, are strong
18 reasons why no bonding requirement should be imposed on the Village.

19
20
21 If the Board opposes this motion by claiming the Village should post a bond, no
22 bond should be required. As there is no injury to the Board, and the Court has the
23 equitable discretion to excuse any bond requirement, the Court should not impose any
24 bond requirement.

25
26 C. The issues raised by the Organized Village of Kasaan are serious and substantial.

Under the third part of “balance of hardships” test,

1 it will ordinarily be enough that the plaintiff has raised questions going to
2 the merits so serious, substantial, difficult and doubtful, as to make them a
fair ground for litigation and thus for more deliberate investigation.

3 A.J. Industries, Inc. v. Alaska Public Service Comm’n, 470 P.2d 537, 541 (Alaska 1970).

4 This is not a heavy burden; as long as the questions a plaintiff raises are not “frivolous or
5 obviously without merit,” then this part of the test is satisfied. State, Divisions of
6 Elections, 110 P.3d at 978.

7
8 The Board must be held to at least the minimum standard of not acting in an
9 arbitrary and capricious manner. On its face, the Board cannot claim that its action
10 demonstrated a considered and thoughtful review of the options and issues and
11 consequences and harms. Indeed, the Board admitted that it simply thought this would be
12 a good idea to collect information about the crab in Area 2. The concept that the
13 subsistence rights of the people of Kasaan, which are federally protected, and which,
14 without dispute from the Board will be severely and irreparably harmed, have less
15 importance than providing an substantial benefit to the commercial fleet for experimental
16 purposes, we believe, can be ruled as arbitrary and capricious as a matter of law. The
17 Board did not even identify what information it wanted, why it wanted it, what it was
18 going to do with it, what alternatives there might be to obtain this information without the
19 devastating effect on the people in Kasaan and the resource.

20
21
22 The Board has a statutory obligation with respect to subsistence rights. The Board
23 “shall” identify fish stocks “customarily and traditionally taken or used for subsistence.” AS
24 16.05.258(a). The Board is obligated to insure and protect the “reasonable opportunity”
25
26

1 for subsistence fishers to participate in the fishery. AS 16.05.258(f). (See Exhibit 4 to
2 the Complaint). The Organized Village of Kasaan has raised serious and substantial
3 questions as to whether the Board complied with their statutory obligations.

4 We are comfortable that the decisions of the Alaska Supreme Court support that
5 the questions raised by the Village are not frivolous or obviously without merit.

6 **IV. CONCLUSION**

7 The Court occupies that place in our democratic process where people such as the
8 people of Kasaan can turn for equitable relief because the government has acted in a
9 arbitrary manner of disregard toward them, and others, that immediate relief is necessary.
10 There is no conceivable legal or factual reason why Area 2 should be opened for the
11 commercial harvest of crab on June 15, 2009, rather than maintain the protection of the
12 subsistence rights of the Plaintiffs and the protection of the resource, as the State has
13 done for more than twenty years, until the merits can be fully litigated. The Organized
14 Village of Kasaan respectfully requests that the Court enter a temporary restraining and
15 preliminary injunction ordering that Area 2 not be opened for commercial harvest of crab
16 from June 15 through August 15.

17
18
19 DATED this 11th day of June 2009.

20
21 HOFFMAN SILVER GILMAN & BLASCO, P.C.

22 By:  #7710098

23 Robert P. Blasco, ABA No. 7710098

24 Of Attorneys for the Organized Village of Kasaan