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### Vanek v. State, Board of Fisheries

193 P.3d 283  
Alaska, 2008.  
September 19, 2008

Term 

193 P.3d 283

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Supreme Court of Alaska.

Stephen VANEK, Teague Vanek, David Martin, and Steve Tvenstrup, in a representative capacity on behalf of a class and for all others similarly situated; Tim Keener, Kenneth Coleman, Douglas Blossom, and Mark Ducker, in a representative capacity on behalf of a class and for all others similarly situated, Appellants,

v.

STATE of Alaska, BOARD OF FISHERIES, Appellee.

No. S-12579.  
Sept. 19, 2008.

Arthur S. Robinson, Robinson & Associates, Soldotna, for Appellants.

Steven A. Daugherty, Assistant Attorney General, Anchorage, and Talis J. Colberg, Attorney General, Juneau, for Appellee.

Before: FABE, Chief Justice, MATTHEWS, EASTAUGH, and CARPENETI, Justices.

#### OPINION

CARPENETI, Justice.

#### I. INTRODUCTION

Commercial salmon fishers holding Cook Inlet entry permits and shore fishery leases brought this class action requesting a declaratory judgment that regulations promulgated by the Alaska Board of Fisheries since 1996 have caused a taking or damaging of their property interests without just compensation. The superior court granted the state's motion to dismiss the case. The salmon fishers appeal the superior court's decision, arguing that their entry permits and shore fishery leases are constitutionally protected property and that the regulations at issue effect a taking or damaging of their property rights requiring just compensation. Because the entry permits are not property interests for purposes of takings analysis under the Federal or Alaska Constitutions, and because even if the permits or leases are property, the property interests have not been taken or damaged through the regulations, we affirm the superior court's decision to dismiss the case.

#### II. FACTS AND PROCEEDINGS

The plaintiffs in this case are commercial salmon fishers who have held Alaska Commercial Fishing Entry Commission (CFEC) Cook Inlet drift gillnet permits or set gillnet permits. They all harvest pacific salmon in Cook Inlet for sale into the international seafood market. The defendant, State of Alaska Board of Fisheries is the state agency authorized to promulgate commercial fishing regulations for Cook Inlet under [AS 16.05.251\(a\)](#).

This case arises out of changes to the Upper Cook Inlet Salmon

Management Plan. That plan, put into place by the board through [5 Alaska Administrative Code 21.363](#) in 1978, allocated Upper Cook Inlet salmon among Upper Cook Inlet commercial gillnet fishers and recreational in-river anglers in the Kenai, Kasilof, and Susitna rivers. Under the plan, salmon stocks were managed primarily for commercial users from July 1 to August 15 each year. After August 15, salmon stocks moving to the Kenai Peninsula drainage were managed for recreational uses, but salmon stocks other than those spawning on the Kenai Peninsula were still managed for commercial uses. As a result of the plan, the set net salmon season in the Kasilof, Kenai, and East Foreland sections of the Central District of Cook Inlet ran from June 25 to August 15 each year. From 1982 to 1996, the season for Upper Cook Inlet commercial drift gillnet salmon fishing ran from June 25 to December 31 each year.

In 1996 the board promulgated [5 AAC 21.358](#), the Northern District Salmon Management Plan, which closed the drift gillnet fishing season on August 9 in order to allocate silver salmon to in-river recreational fisheries in the Matanuska-Susitna drainage areas. The regulation also restricted commercial drift gillnet permit holders from operating gear in certain areas of Cook Inlet during what otherwise would be priority commercial fishing times.

In 1997 the board adopted [5 AAC 21.357](#), the Kenai River Coho Salmon Conservation Management Plan, which directed the Upper Subdistrict of Upper Cook Inlet to close following the first regularly scheduled set gillnet fishing period on or after August 10. That year, the period was closed before August 15 for the first time since 1978. The board also adopted [5 AAC 21.310](#), which changed the opening date for the set gillnet season in the Kenai and East Forelands sections of the Central District from June 25 to July 8 and changed the closing date for the set gillnet season from August 15 to August 10.

In 1999, 2000, and 2002, the board adopted numerous other regulations revising the Upper Cook Inlet Salmon Management Plan. These regulations limited the harvest of salmon and shortened the seasons for commercial drift gillnet fishing and set gillnet fishing.

These various regulations had the cumulative impact of reducing the amount of fish the drift gillnet and set gillnet fishers were able to catch and thus reducing the value of the commercial fishers' entry permits and the set gillnet fishers' shore fishery leases.

The salmon fishers filed a complaint on October 25, 2005, alleging that the regulations "constitute unlawful takings or damage to [their] property interest in violation of the United States and Alaska Constitutions." They sought "a declaration that these government actions are unconstitutional and unenforceable without just compensation paid to the plaintiffs for a taking or damage to their property."

On December 12, 2005, the state filed a motion to dismiss pursuant to [Alaska Rule of Civil Procedure 12\(b\)\(6\)](#), arguing that the salmon fishers' complaint fails to state a claim for which relief can be granted. On December 1, 2006, Superior Court Judge Sen K. Tan entered an order granting the motion to dismiss. Judge Tan entered final judgment dismissing the salmon fishers' claims on December 29, 2006.

The salmon fishers appeal.

### III. STANDARD OF REVIEW

We review *de novo* an order dismissing a complaint on the basis of [Rule 12\(b\)\(6\)](#) for failure to state a claim upon which relief can be granted.<sup>[FN1](#)</sup> Generally, motions to dismiss for failure to state a claim are disfavored and should be rarely granted.<sup>[FN2](#)</sup> To survive a motion to dismiss, the complaint must allege a set of facts consistent with and appropriate to some cause of action.<sup>[FN3](#)</sup> For purposes of reviewing an order on a motion to dismiss, we deem all facts in the complaint true and provable.<sup>[FN4](#)</sup> The complaint can be dismissed under [Rule 12\(b\)\(6\)](#) only where it appears beyond doubt that the plaintiffs can prove no set of facts in support of their claim that would entitle them to relief.<sup>[FN5](#)</sup>

