their applications for aquatic farm operation permits pursuant to AS 16.40.100. Plaintiffs claim that these conditions make it impossible to successfully operate aquatic farms, and request that this Court order ADF&G to issue them the appropriate permits and enjoin ADF&G from attaching further conditions.

THE OBJECT

The geoduck (*panoplea generosa*) is a mollusk of the class *Lamellibranchia* (or *Pelecypoda*). It is a bivalve – literally "two door" in the Latin – a clam. But what a clam it is. This creature inhabits the Pacific Northwest coast of American at least into the waters of Southeast Alaska. It ranges from the intertidal zone into waters as deep as 250 feet, although in Southeastern Alaska they are most commonly found in 15 to 39 feet of water. The geoduck can reportedly live up to 150 years reaching a weight of 20 pounds. It should reach harvestable size in five or more years in Alaskan waters.

The geoduck reproduces in the standard mollusk fashion, broadcasting its seed into the ambient water column to mix with those of its breed. After a brief free floating period it settles into a sandy or muddy bottom and begins to burrow, using its "foot." The syphon, really intake and outlet tubes joined, extends above the substrate and processes seawater through the animal where edible bits are extracted and the waste expelled. The animal digs progressively lower as it grows to a maximum of three feet below the surface where the syphon emerges. To capture the creature one must duplicate

this effort to reach the main body. Thus the reputed origin of the name geoduck from the Nisqually Indian dialect "gwe – duk", meaning to "dig-deep."

Apparently little use was made historically of this food resource by the native peoples due to the technological problems of getting at them. The same difficulties and little interest kept them safe from human predation even as the problems of underwater harvesting were overcome, until it was realized that the geoducks close relative on the western coast of the Pacific was held to be a delicacy. Prices of seven or more dollars per pound piqued the interest of the fishing industry so that the Asian demand might be satisfied. By 1980, the commercial fishery had expanded into Southeastern Alaska. By 1999, the fishery had expanded enough to encourage the State to impose limited entry – to a maximum of 104 participants. (20 AAC 05.320(i)).

One other way of participating in and benefiting from the market for geoducks is by husbandry – growing them in tidy rows like so many turnips, and picking them en masse before seeding another crop with spat now available from hatchery operators. This technique had been successful with other shellfish including oysters, and most recently, littleneck clams. Plaintiff entrepreneurs hoped to accomplish exactly this with their applications.

Aquaculture, or "fish farming", in Alaska is very much a developing concept. While the utilization of hatcheries to promote wild stocks dates back many decades, some of the more modern techniques are scarcely more than science fiction to the uninitiated. In the proposed geoduck farms, sections of pipe are buried in the sea

floor, each charged with a juvenile geoduck; five or more years pass while the area is tended for predators, etc.; whereupon divers using hoses flush away the soil to expose and harvest the marketable clams. These same techniques are currently used to harvest the wild clams, although their distribution is anything but tidy.

THE STUMBLING BLOCK

In 1999, Plaintiffs submitted applications to the Alaska Department of Fish and Game (ADF&G) for aquatic farm operation permits. In a letter dated April 19, 2000, ADF&G Commissioner Frank Rue notified the Zaugg plaintiffs of ADF&G's intent to approve their permit applications, subject to two conditions:

> 1. For each proposed farm site, describe in writing to ADF&G a method for distinguishing (or segregating) wild, common property geoducks from cultivated, farmed geoducks. The method must allow practical access and commercial or personal use harvest of wild geoducks on each site that are not acquired through a stock acquisition permit. At the same sime, the method must prevent excessive disturbance of cultivated, farmed geoducks by commercial access and harvesting.
>
> 2. If ADF&G, in its discretion, determines that the method described ~~in~~ paragraph 1 will accomplish the requirements of that paragraph, you must agree, in a signed statement, to use that method on your farm site(s). Your signed statement and a detailed summary of approved method(s) will be attached and incorporated as conditions of your aquatic farm operation permit.

Plaintiffs responded to this letter by asserting, among other things, that – although some of the sites (those proposed by Gary Zaugg, Ryan Morin, and Kurt Morin) have no standing stocks of wild geoducks, while others (such as Steve LaCroix's site)

have "no, very sporadic, or limited amounts" – these conditions make it impossible to successfully farm geoducks.[2] In a letter dated July 27, 2000, Rue notified Plaintiffs that their applications for aquatic farm operation permits were denied. Plaintiffs filed this appeal on August 25, 2000, and it was promptly consolidated with Alaska Trademark Shellfish's (ATS) action.

As amicus, the association of geoduck divers[3] has outlined their opposition to the appellants' design to stake, occupy, clear, and plant existing wild geoduck beds. Joining with them are the City of Craig, Alaska. In opposition, joined with appellants are the Pacific Coast Shellfish Growers Association and the Alaska Shellfish Growers Association, both eponymous entities naturally allied with shellfish farmers; the City of Seward, home to the hatchery most affected; and the Qutekcak Shellfish Hatchery, a business with the major stake in providing the seed for the proposed "farms."

STANDARD OF REVIEW

Issues of law arising from an agency proceeding are reviewed *de novo* when agency expertise is not involved. Tesoro Alaska Petroleum Co. v. Kenai Pipe Line

---

[2] Zaugg's affidavit (filed 12-08-00) does not explain how ADF&G's proposed conditions interfere with his ability to successfully farm geoducks, but merely states that he "disagreed with Mr. Rues [sic] statutory interpretations," and that "it appeared to me that the ADF&G 'general principle' was to change the rights that I would obtain under an operational permit." (those rights being, apparently, the right to harvest standing stock of wild geoducks – which, according to ADF&G's July 27, 2000 letter denying Zaugg's permit application, do not exist on his proposed site – or prevent others from doing so).

[3] Southeast Alaska Regional Dive Fisheries Association.

Co., 746 P.2d 896, 903 (Alaska 1987). The issues here deal with statutory construction, constitutional law, and whether ADF&G acted "unreasonably" and/or "arbitrarily."[4] None of these issues require agency expertise to resolve; this administrative decision is therefore reviewed *de novo*.

ANALYSIS

Plaintiffs contend that (1) ADF&G's proposed conditions are unreasonable and arbitrary, (2) ADF&G is estopped from prohibiting Plaintiffs from harvesting standing stock on their proposed sites for the purpose of funding their enterprise, (3) ADF&G violated Alaska law by not issuing Plaintiffs aquatic farm operation permits within five days, and (4) ADF&G violated Alaska law by placing "unlawful and unreasonable" conditions on Plaintiffs' operation permits.

ADF&G responds by asserting that Article VII of the Alaska Constitution bars it from granting Plaintiffs exclusive rights to harvest wild geoducks, and that its proposed conditions are neither unlawful nor unreasonable.

Constitutional Issues

The "No Exclusive Right of Fishery" Provision

Article VII, Section 15 of the Alaska Constitution provides:

---

[4] ADF&G asserts that its decision "involves complex matters or fundamental policy determinations" regarding the "management of fisheries and fish and wildlife resources" such that an abuse of discretion standard should be applied by the court rather than a substitution of judgment standard. While it is true that the issues in this case affect the management of wildlife resources, this court's decision will be based not

> No exclusive right or special privilege of fishery shall be created or authorized in the natural waters of the State. This section does not restrict the power of the State to limit entry into any fishery for purposes of resource conservation, to prevent economic distress among fishermen and those dependent upon them for a livelihood and to promote the efficient development of aquaculture in the State.

Plaintiffs point to the "efficient development of aquaculture" exception in support of their claim that the legislature intended to allow ~~stock acquisition permit~~ (SAP) holders to harvest wild stock for the purpose of financing aquatic farming ventures.[5] They arrive at this conclusion by citing AS 16.40.120(f):

> Except as provided in (d) of this section or in a regulation adopted under (e) of this section, the commissioner shall issue a permit if
>
> (1) wild stock is necessary to meet the initial needs of farm or hatchery stock;
> (2) there are technological limitations on the propagation of culture stock for the species sought;
> (3) wild stock is not fully utilized by commercial, sport, personal use, or subsistence fisheries; or
> (4) wild stock is needed to maintain the gene pool of a hatchery or aquatic farm.

Plaintiffs go on to note that "stock" is defined as "live aquatic plants or shellfish acquired, collected, possessed, or intended for use by a hatchery or aquatic farm

---

on policy considerations but strictly upon principles of statutory construction, constitutional provisions, and legislative intent – areas in which ADF&G has no more expertise than does this court.

[5] Plaintiffs cite Ch. 145, SLA 1988, Sec. 1, in which the expressed legislative intent is to "encourage the establishment and responsible growth of an aquatic farming industry in the state." Plaintiffs contend that this clearly shows that the legislature "meant for the farmers to be able to systematically clear land suitable for geoducks for replanting, and to sell the harvested wild stock for money to improve the farms' viability."

for the purpose of further growth or propagation" under AS 16.40.199(8), and that AS 16.40.100(b) authorizes the holder of an aquatic farm operation permit to sell stock that is "used or reared at the hatchery or aquatic farm."

Plaintiffs then argue that "harvest of the wild stock 'is necessary' [pursuant to AS 16.40.120(f)(1)] to both clear the land for later planting and for money to make the farms more viable." It may be arguable that preparing the land for later planting "is necessary to meet the initial needs of farm...stock" (arguable because it is not obvious whether cultivated geoducks can grow alongside wild geoducks), but Plaintiffs' assertion fails to consider that the latter purpose, at least, is not satisfactory under AS 16.40.120(f)(1), which looks to "the initial needs of farm or hatchery *stock*," not the initial need for investors to raise capital.

Plaintiffs also argue that the wild geoducks they wish to harvest are "stock" under AS 16.40.199(8) because they will undergo "further growth" in the time between issuance of the SAP and harvest. Such a reading of the statute renders it essentially meaningless, however. If that is all the "further growth" required, then there need be nothing more to "aquatic farming" than acquiring a few permits and harvesting whatever happens to be growing on the designated site.

Finally, Plaintiffs assert that they are authorized to sell their harvested geoducks pursuant to AS 16.40.100(b), which permits the sale of stock that is "used or reared at the hatchery or aquatic farm." According to Plaintiffs, selling is a permissible "use" of stock. Taking this argument at face value, Plaintiffs are claiming that AS

16.40.100(b) authorizes them to sell stock that is "[sold] or reared at the hatchery or aquatic farm." It would be difficult to conceive of a more circular argument.

The real question, however, is not whether the legislature intended to allow SAP permit holders to harvest wild stock, but whether the legislature is *permitted* to do so. The Alaska Supreme Court has never interpreted the meaning of the "aquaculture" exception in Section 15, but it appears on its face that the exception applies only to the "no exclusive right of fishery" clause. There is also the "common use" clause of Section 3 (and the "sustained yield" clause of Section 4, as well) to consider.

Alaska's "Common Use" Clause

Article VIII, Section 3 of the Alaska Constitution provides: "Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people or common use." (emphasis added). This "common use" clause was intended to permit the broadest possible access to and use of state waters by the general public. It has been stated: "The common use clause necessarily contemplates that resources will remain in the public domain, and will not be ceded to private ownership. Since the right of common use is guaranteed expressly by the constitution, it must be viewed as a highly important interest running to each person within the state." State v. Ostrosky, 667 P.2d 1184, 1196 (Alaska 1983).

To understand that thrust of Article VIII, Section 3, it is useful to review the history of fisheries management prior to statehood. After all, this section of the Constitution was, by all accounts, the ultimate answer to the fish trap controversy of the

1930's through statehood. These traps were highly efficient mechanisms designed for, and capable of, capturing practically an entire "run" of salmon destined for one or more spawning streams. They were, at least by the 1950's, owned or controlled by a handful of out-of-state interests and the subject of great controversy among the residents of the then Territory of Alaska.[6] Despite their abolition in British Columbia and regions southward these instruments continued to deplete salmon populations in a most unpopular way. In 1948 the people voted 19,712 to 2,624 to abolish the traps – to no avail.[7] By the time statehood was imminent the issue was hardly debatable and traps were in fact abolished by Ordinance No. 3 contemporaneously with the ratification of the State's Constitution.

The strong feelings of the people of Alaska with respect to its natural bounty; fish, wildlife, timber and other renewable resources were thus expressed in Article VIII, Section 3, prohibiting interference with common access; and Section 4, requiring management for sustained yield. Section 15, "No Exclusive Right of Fishery" added in 1972, tempered somewhat the more libertarian "common of piscary" view to permit limited entry and aquaculture. Nonetheless, ownership of wild fishery populations has remained in common. The ownership of farmed populations has been approved by the executive and the courts but not when the cultivated population was by design a substitute for a naturally occurring one. In other words, a salmon hatchery could not be constructed at the mouth of a producing anadromous stream, the wild run supplanted, and

[6] In 1944, 396 of 434 traps (91%), were owned by non-residents.

the introduced farmed run vested in the operator. This is essentially what Plaintiffs hope to accomplish.

Plaintiffs contend that their proposed farm sites are akin to set net leases for salmon fishing, and that a 1963 Attorney General's Opinion settles any question as to the constitutionality of such leases. In short, Plaintiffs claim that "the farm site lease is a property interest which, by its nature, leads to the farmer having sole access to the wild stocks."[8] There are several problems with this view.

First, the validity of the Attorney General's Opinion (J-66-538-82; 1982 Westlaw 43670) is called into question by CWD Fisheries, Inc. v. Bunker, 755 P.2d 1115 (Alaska 1988). That case involved a commercial set net fisherman who allegedly trespassed on tidelands that had been conveyed to a commercial fishing operation. In affirming the lower court's dismissal of CWS's claim, the Alaska Supreme Court said:

> While we have never had prior occasion to apply the public trust doctrine to tidelands in Alaska, those modern courts which have considered its application have generally held that any attempted conveyance of tidelands by the state which fails to meet the *Illinois Central* criteria[9] for passing title free of the public trust will pass only "naked title to the soil," subject to continuing public trust "easements" for purposes of navigation, commerce, and fishery. (cites omitted). The grantee may "assert a vested right to the servient estate (the right of use subject to the trust)," (cites

---

[7] See The State of Alaska, Gruening, Random House, 1954.

[8] Appellants' reply brief, page 21 (02-12-01).

[9] "The state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties, except in the instance of parcels mentioned for the improvement of the navigation and use of the waters, or when parcels can be disposed of without impairment of the public interest in what remains, than it can abdicate its police powers in the administration of government and the preservation of the peace." Illinois Central Railroad Co. v. Illinois, 146 U.S. 387, 453 (1892).

> omitted) but may not enjoin any member of the public from utilizing the property for public trust purposes. Id. at 1118.

Furthermore, the Court added in a footnote:

> We need not decide at this time whether a fee simple tideland conveyance which satisfied the strictures of *Illinois Central* would nonetheless run afoul of article VIII, section 3 [the "common use" clause]. Id. at 1120, fn. 10.

The Alaska Supreme Court elaborated on this concern in Owsichek v. State, 763 P.2d 488 (Alaska 1988), when it held that grants of exclusive rights to harvest natural resources listed in the common use clause (fish, wildlife and waters) should be subjected to close scrutiny. In holding that the state's assignment of exclusive guide areas in which only the designated guide could lead hunts was unconstitutional, the Court observed:

> In a discussion about fishing in lakes, the Constitutional Convention underscored its intent that the public retain broad access to fish, wildlife and water resources, and that these resources not be the subject of private grants...[t]he Convention made it clear that only fish in small private ponds may be owned free of the public's right of access. (cite omitted.) This confirms the view of the common use clause and the public trust expressed in *CWC Fisheries v. Bunker*, 755 P.2d 1115 (Alaska 1988), holding that a grant of a fee interest in tidelands remains impressed with a public trust easement. It also reinforces our conclusion that grants of exclusive rights to harvest natural resources listed in the common use clause should be subjected to close scrutiny. Id. at 494.

In light of these cases, Plaintiffs' reliance on a four-decades old Attorney General's Opinion may be misplaced. It seems clear that ADF&G's refusal to grant

Plaintiffs the exclusionary right to harvest all of the wild geoducks located on their proposed farm sites is not only permissible, but constitutionally mandated. Plaintiffs' permit to farm must remain "impressed with a public trust easement" allowing others, including commercial fishermen, access to any significant population of wild geoducks growing there.

The "Sustained Yield" Provision

Although ADF&G does not appear to base its arguments on it, the Southeast Alaska Regional Dive Fisheries Association (SARDFA) points out that Article VIII, Section 4 of the Alaska Constitution also poses a problem for Plaintiffs. That section reads:

> **Sustained Yield**. 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.

According to SARDFA, the maximum sustainable harvest for geoducks is only 2% per year, while 10% of the total known harvestable amount of geoducks are located within Plaintiffs' proposed farm cites. If SARDFA's numbers are correct, Plaintiffs' expressed intent to harvest this entire amount of stock in a short period of time is incompatible with the sustained yield clause.

The balance with Article VIII, Sections 3 and 4 intended by the people in enacting Section 15, must be struck in a way that will allow aquaculture's development to be efficiently promoted (to paraphrase the proviso). The regulations growing from this

controversy have now gone into effect. (5 AAC 41.200 – 400, effective June 19, 2001). These regulations resolve a number of Plaintiffs' concerns on their face: e.g. term of permits will be 10 years, rather than 5. The stock acquisition issue is however still unworkable, thwarting Section 15. 5 AAC 41.29(b) limits acquisition in a manner that would prohibit the former from making any profitable use of existing geoducks on the site no matter how few might live there; (e) meanwhile seems to protect only "established" (i.e. ongoing) uses by other fishers; (f) comes right to the point disallowing existing wild stock to be used to financially bootstrap the "farm". The Court, although anxious to avoid a trespass into the executive prerogative of policymaking, reads the potentially conflicting requirements of common use and promotion of aquaculture to protect only significant populations of wild geoducks. To hold otherwise would essentially prohibit the goal of aquaculture. Any site with no geoducks is likely so for a reason, even if not readily discernable by current science. On the other hand, a site with some geoduck population may promise, with good husbandry, the increase envisioned by Section 15. A site with many geoducks, such as might attract the existing divers industry must be protected for that potential "common" use. The regulations must permit farming on sites suitable for but not presently supporting significant populations. The meaning of "significant" and methods by which that status might be ascertained are best left to the expertise of the Department.

The current absence of this leeway in the regulations is unreasonable. The process of regulation is to take a 'hard look' at the problems confronting the regulator

and the regulated, and to reason a method by which both can conform themselves to fulfill the underlying laws, requirements and goals. During this process the Department failed to find the seemingly obvious answer to the site selection controversy, and arbitrarily crafted a policy and regulations sure to thwart the Plaintiffs and Section 15. See Interior of Alaska Airboat Association, Inc. v. State of Alaska, Board of Game, 18 P.3d 686 (Alaska 2001).

ADF&G's Permit Renewal Policy

ADF&G appears to take the position that AS 43.76.200(b) establishes a "traditional fishery" or "other existing use" of wildlife resources pursuant to AS 16.40.105(2), insofar as it permits bioassessment surveys to be conducted that may lead to subsequent commercial harvest of those wildlife resources. Therefore, according to ADF&G, if – at the time an aquatic farm operation permit is renewed – there is an aquatic farm in "an area that has been identified in an operating plan developed under AS 43.76.200(b), as an area for which a bioassessment survey and subsequent commercial harvest will be conducted...[the] aquatic farm would necessarily create a significant alteration of a traditional fishery or existing use and, therefore, would create a conflict under AS 16.40.105(2)."[10]

This seems to be a rather creative (and unfair) interpretation of the phrase "existing use." Plaintiffs more accurately describe it as "merely potential commercial fishing." ADF&G seems to be taking the position that because there is a regional dive

fishery development association already in existence, the association has "dibs" on all of the geoducks (or, more specifically, on all of the underwater real estate that *supports* geoducks – whether anyone has fished there in the past or not) in Southeast Alaska.[11]

ADF&G also claim that its interpretations of "significant alteration," "traditional fisheries," and "existing use" are not ripe for judicial review, because even if these interpretations are erroneous that fact would not further the Plaintiffs' cause. To the contrary, as this Court has found that ADF&G's interpretations are unreasonable, then Plaintiffs were well within their rights to reject ADF&G's "conditional approval" of their permit applications. While it is true that Plaintiffs have not yet suffered any actual harm as a result of ADF&G's claim that renewal of their aquatic farm operation permits will be subject to "significant alteration" analysis at some later time, they *have* been harmed to the extent that their rights to pursue a business opportunity have been "chilled."

This conundrum can be cured by the implementation of the aforementioned assessment or census of the proposed farms to issue that no significant population of wild geoducks, one that would now normally attract and support a dive

---

[10] Appellee's brief, page 13 (01-16-01).

[11] The department's primary concern with the farms that contained significant wild stocks of geoducks, was that they would preclude access to these large beds of wild geoducks by a *growing* diver fishery." (Appellee's brief, pages 21-22 [01-16-01, emphasis added]). "It would be inconsistent with the legislature's reluctance to displace existing users of wild resources if geoduck farming were allowed to thwart the *growth* or continuation of the diver fishery." (Id., page 24 [emphasis added]). It is clear from these statements and others that ADF&G believes it can choose to promote development of the commercial diver fishing industry over (indeed, at the expense of) aquatic farming. It should be obvious, however, that the "existing use" of a thing and reserving it for one's later "growth" are two entirely different concepts. (See also City of Craig's Brief as Amicus Curiae, page 8 [03-15-01]: "The geoduck fishery is a 'traditional fishery' in Southeast Alaska. Removing from the *future growth* of that fishery an enormous mass of the

fishery exists. Areas with only incidental populations could be so certified to the benefit of farmers and without real loss to the divers.

The "Five-Day Time Limit" Claim

Plaintiffs contend that ADF&G was required under 5 AAC 41.240(b) to act on Plaintiffs' aquatic farm operation permit applications within five days of the consistency determination by the Division of Governmental Coordination (DGC). ADF&G argues that the five-day time limit is directory rather than mandatory, and that no consequences should result from the Department's failure to comply.

ADF&G is correct. The five-day time limit is intended to serve primarily as a guideline for the orderly conduct of public business; minor deviations from the required timeframe will result in little, if any, prejudice to Plaintiffs. (In fact, Plaintiffs have failed to make any showing of prejudice resulting from the delay.) Therefore, it is directory rather than mandatory. City of Yakutat v. Ryman, 654 P.2d 785, 790 (Alaska 1982).

While strict compliance is required where an administrative regulation is mandatory, substantial compliance is sufficient – absent significant prejudice to the other party –where the regulation is merely directory. Copper River School District v. State, 702 P.2d 625, 627 (Alaska 1985). Here, ADF&G approved Plaintiffs' applications, subject to constitutionally required conditions (at least with respect to the common use issues, if not ADF&G's permit renewal policy), three days late. Given the particularly

---

wild stock in areas where the fishery will logically grow...constitutes a significant alteration of that

complicated nature of the issues involved, rigid adherence to the five-day time limit would be unreasonable.

Because ADF&G substantially complied with the requirements of 5 AAC 41.240(b), and since Plaintiffs have not suffered significant prejudice as a result of the delay, no consequences should result from ADF&G's failure to comply perfectly.

Is the Department of Fish and Game Estopped from Refusing to Issue Plaintiffs' Stock Acquisition Permits for Harvest of Wild Stock on Site for Sale?

No. Courts may apply the doctrine of equitable estoppel against the state, even when the state acts as the sovereign. The Alaska Supreme Court has rarely applied estoppel to bar the state's exercise of its sovereign police powers, however, reasoning that where "a [government] acts for the good of its citizens rather than a narrow proprietary interest" estoppel would be unjust to the public. But the public interest does not altogether bar the application of estoppel against the state when it acts as sovereign. Rather, as the Court held in *Municipality of Anchorage v. Schenider*,[12] the public interest is best protected through careful application of the estoppel test itself, which weighs the prejudice to the public interest in each case. State v. Schnell, 9 P.3d 351, 355-56 (Alaska 2000).

In this case, Plaintiffs have asserted a sort of "trickle down" public interest, theorizing that if they are allowed to harvest wild geoduck in order to finance

---

fishery." [emphasis added]).

[12] 685 P.2d 94 (Alaska 1984).

their aquatic farms, economic benefits will flow to others in the state as well. Even if this court accepts Plaintiffs' rationale, however, the Alaska Constitution (as discussed above) bars the kind of exclusive private harvesting Plaintiffs seek to engage in. No agency can be estopped from complying with the supreme law of the state.

Did the Department of Fish and Game Coerce Plaintiffs to Accept Unlawful Conditions?

As discussed above, it appears that ADF&G did attempt to coerce Plaintiffs into accepting an unlawful condition with regard to its permit renewal policy. However, Plaintiffs have suffered no harm as a result of this attempted coercion, because Plaintiffs also refused ADF&G's *lawful* condition with regard to harvest of wild stock on the proposed farm sites. Since no error attaches to this latter condition, and Plaintiffs' have clearly indicated that they would not have agreed to it even in the absence of the unlawful condition, Plaintiffs have suffered no injury as a result.

CONCLUSION

ADF&G's position is simple: Plaintiffs did not intend to engage (solely) in *bona fide* aquatic farming. Rather, "under the pretext of farming, [Plaintiffs] want to

commercially fish wild geoducks, and be given an exclusive right to do so."[13] This the Alaska Constitution is loath to permit.

Although Section 15 of Article VIII contains an exception to its ban on exclusive rights of fishery for the "efficient development of aquaculture," Section 3 (and probably Section 4) still present barriers to Plaintiffs' proposed course of action. Nothing prevents Plaintiffs from obtaining title to some proposed farm sites and cultivating geoducks, but they cannot lay private claim to millions of dollars worth of public property. They will have to confine their activities to less desirable sites, without significant populations of wild geoducks.

With regard to ADF&G's permit renewal policy, however, the future growth of an industry is not an "existing use," and that ADF&G's policy is invalid to far as it attempts to condition permit renewal upon such future growth.

Dated at Ketchikan, Alaska this 18th day of July, 2001.

Michael A. Thompson
Superior Court Judge

SEAL OF THE TRIAL COURTS OF THE STATE OF ALASKA FIRST JUDICIAL DISTRICT

CERTIFICATION
Copies Distributed
Date 07-19-01
To Mr. Wagner
Mr. Smith
Mr. Weyhrauch
Ms. Blasco
By

CERTIFICATION
Copies Distributed
Date 07-19-01
To Mr. Grant
Ms. O'Fallon
Mr. Wayne
Ms. Johnson
By

[13] Appellee's Brief, page 17 (01-16-01).