

Hon. Don W. Collinsworth
Commissioner
Department of Fish and Game

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Board action in light of
McDowell

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You have asked for guidance on what action will be necessary by the Boards of Fisheries and Game under the decision by the supreme court in McDowell v. State, 785 P.2d 1 (Alaska 1989), and the further interpretations of the consequences of that decision by superior court Judge Cutler in McDowell v. Collinsworth, 3 AN-83-1592 Civil. This memorandum will describe what the courts have held in these cases with regard to the state's subsistence law, and then will summarize what that means for fisheries and for game.

The status of the law in light of the court decisions.

In McDowell, the supreme court held that the rural limitation in Alaska's subsistence law is inconsistent with art. VIII, secs. 3, 15, and 17, of the Alaska Constitution. The superior court decided on June 20, 1990, that the rural limitation is severable from the remaining portions of the 1986 law, and that thus the approach set out in AS 16.05.258, including the priority for subsistence uses over other uses, is still in place. In a July 12, 1990, clarification of the June decision, the superior court stated that initial eligibility for subsistence uses cannot be based on whether or not an individual has engaged in customary and traditional subsistence uses in the past.

Thus, the structure in AS 16.05.258 remains basically in place, absent the rural limitation. Under that statute, for a given fish stock or game population, if there is a harvestable surplus and if the relevant board has found a customary and traditional use of that stock, then subsistence uses must be authorized. Neither the supreme court nor the superior court found the eight criteria contained in 5 AAC 99 010(b) and used by the boards to identify whether a use is customary and traditional to be invalid. In fact in the July 12, 1990 superior court order of clarification, the court indicated that the boards should use criteria like those to determine which fish stocks and game populations were subject to subsistence uses.

Under the statute, then, if the harvestable surplus and customary and traditional use findings can be made, the boards must then provide a reasonable opportunity to engage in subsistence uses for any Alaskan resident who would be using the harvest for the purposes specified in the definition of subsistence uses:

the direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation, for the making and selling of handicraft articles out of nonedible by-products of fish and wildlife resources taken for personal or family consumption, and for the customary trade, barter, or sharing for personal or family consumption.

AS 16.05.940(30). If a reasonable opportunity can be provided for those Alaskans likely to engage in subsistence uses, then nonsubsistence uses can be authorized on the same fish stock or game population. The situation in which all Alaskans eligible for and desirous of engaging in subsistence uses of a particular fish stock or game population can be allowed a reasonable opportunity to do so has been termed "tier one".

If a conservation problem, or increasing competition, requires a reduction in harvest, the relevant board cannot modify the subsistence regulations in a way which would provide less than a reasonable opportunity unless other uses have first been eliminated. Under AS 16.05.258, if nonsubsistence uses have been eliminated, and the relevant board is still not able to provide a reasonable opportunity at tier one for all Alaskans, we must move to tier two to determine which Alaskans will be afforded that reasonable opportunity. In a tier two situation, the statute specifies that opportunity to engage in subsistence uses must be distributed among those eligible at tier one based on three criteria:

- (1) customary and direct dependence on the fish stock or game population as the mainstay of livelihood;
- (2) local residency;
- (3) availability of alternative resources.

AS 16.05.258(c).

Of course, under both the Alaska Constitution and the

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Alaska Statutes, if any harvest would jeopardize sustained yield, all hunting or fishing -- including subsistence -- must be closed.

What this means for fisheries.

For those fish stocks for which the Board of Fisheries has made an affirmative finding that no customary and traditional uses exist, no subsistence uses need be authorized on those fish stocks, whether in rural or nonrural areas.

For those fish stocks for which the board has not made a finding one way or another about the presence of customary and traditional uses, it is our assessment that under the superior court decision the board can await proposals which individuals or groups may submit, and act on those at the next board meeting. The superior court noted at page eight of the June 20, 1990 order, that the subsistence law now no longer limits the fish stocks to be considered to those in rural areas. However, for those in nonrural areas, the superior court stated that the boards must still make an affirmative finding that the stock or population "is customarily and traditionally used for subsistence before making it available for subsistence use." We believe this indicates that the court decision does not require instant action on those as yet unexamined stocks and populations, but rather allows the board to address them over time, as proposals come in.

With respect to those stocks for which the board has found a customary and traditional use and which are already subject to subsistence fishing, the board needs to eventually repeal the eligibility limitations on participation in those fisheries. Those regulatory provisions are currently ineffective, since the stay in the supreme court McDowell case expired on July 1, but it is going to be confusing to the public to leave them on the books over the long term.

We understand that your department, pursuant to our earlier advice, has already directed that any Alaskan who requests a subsistence permit for any open subsistence fisheries be given such a permit, since the eligibility limitations are ineffective. We further understand that your department does not anticipate any conservation problems or extreme competition to arise this year. Thus, it appears that this method will indeed comply with the requirements of AS 16.05.258, as interpreted by the supreme and superior courts.

What this means for hunting.

With respect to those game populations for which the Board of Game either has made a finding that no customary and traditional use exists or has not yet made a finding with respect to customary and traditional uses, the discussion in the above section on fisheries applies. Similarly, with respect to those game populations for which the board has made a customary and traditional finding, the board will need to repeal regulations limiting eligibility for participation, as discussed in the above section on fisheries.

The existing subsistence hunts will break down into two categories. For those in which the current subsistence regulations are identical to the nonsubsistence resident hunting regulations, there would appear to be no need for board action, since those regulations apparently accommodate use by all interested Alaskans in any event, without difficulty.

For those situations in which the regulations are not identical, however, further action probably will be required. The analysis for those hunts would be as follows:

1. The board should ask whether the existing subsistence hunt can be open to all Alaskans likely to desire to participate in that season for the purposes specified in the statute without jeopardizing either sustained yield or a reasonable opportunity for those participants. A discussion of the "reasonable opportunity" standard found in AS 16.05.258 follows this description of the four steps the board should take.
 - a. If yes, then no modifications would be required.
 - b. If no, proceed to step 2.
2. The board would close nonsubsistence hunting, and reevaluate the question posed in paragraph 1.
 - a. If the answer is now yes, no further action is necessary.
 - b. If the answer is still no, proceed to paragraph 3.
3. The board should consider whether the subsistence regulations can be restructured in such a way that

reasonable opportunity for all tier one participants can be provided.

- a. If yes, no further action beyond such restructuring is necessary.
 - b. If the answer is still no, proceed to paragraph 4.
4. The board should use the three "tier two" criteria to determine how to distribute the available opportunity among those Alaskans eligible at tier one to participate.

Whether a regulation provides reasonable opportunity for subsistence uses of that game population is in most cases a question for the board. However, we can provide some guidance. Attached are the only two pieces of state legislative history to address the term directly. Those, in combination with the McDowell decisions, and our experience with courts, leads to the following conclusions:

A. It is not a guaranteed take, but a real chance to harvest. Thus, any hunts in which not all those desiring to participate are able to participate do not provide reasonable opportunity, as a legal matter.

B. For those hunts where a customary and traditional use has been found, a court would accord a presumption that the existing regulations provide a reasonable opportunity. Thus, any reductions in season or bag limits, for example, must be accompanied by some evidence that will rebut the presumption for a court to accept a conclusion that the reduced opportunity is still reasonable.

C. Under AS 16.05.258, the board may not provide less than reasonable opportunity for subsistence uses unless non-subsistence uses are closed. However, assuming that guideline is met, the board may go to tier two (which is necessary if less than reasonable opportunity can be provided) in two cases: (1) to assure sustained yield, or (2) to continue subsistence uses. The latter situation may be presented when a population is being managed for overall growth, in order that eventually more opportunity can be provided.

D. Prohibitions on transportation methods could be consistent with reasonable opportunity for all Alaskans desiring to participate only if the board can conclude that they do not in

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reality affect a nonlocal person's ability to go hunt more than a local person's. For example, the board could find a prohibition on airplanes, other than regularly scheduled commercial flights, would still provide all Alaskans reasonable opportunity if any Alaska could take a commercial flight to a location where boats or other appropriate transportation methods are actually available through rental or other means in sufficient numbers for the anticipated use level.

E. If the board has provided a fall and winter subsistence hunt on a population, reasonable opportunity for each of those can be evaluated separately. Thus, it would be possible to have one hunt at tier one, and one at tier two.

Other questions will certainly arise during the board meeting on this issue, and we will be available to assist you and the board as those develop.

We are aware that the board may not be able to do everything necessary to fully comply with the McDowell decision in time for this fall's hunts. We would offer the following continuum to guide the board's priority of action.

At one end, there are those hunts in which the existing subsistence seasons are identical to the nonsubsistence resident seasons. Since the limitations on eligibility are currently ineffective these can be easily addressed, and should require no time from the board.

At the far end of the continuum are those hunts which cannot be restructured in any form to allow all Alaska residents desiring to participate to do so. Any hunt which must have eligibility limited to less than all those who wish to participate will be invalid and indefensible if the board does not use the three "tier two" criteria to decide which Alaskans are able to participate. Thus, these situations should be a priority for board action.

In the middle of the continuum are those situations in which the subsistence hunt must be restructured before everyone desiring to participate can, and it can be so restructured. The question then becomes whether the authorized season, bag limit, methods and means, etc., provide a "reasonable opportunity" or not. Each hunt in this category must be viewed as a matter of degree. Some situations will clearly constitute unreasonable opportunity -- for example, a two day season restructured from a 40 day season would probably fall into that category. We would recommend that the board put as high a priority as possible on

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addressing those situations which most clearly would not provide reasonable opportunity and convert those to tier two. Other situations will be arguably on the reasonable side of the dividing line between reasonable and unreasonable opportunity. If time does not allow all the hunts in this general category to be addressed thoroughly, we recommend that the board announce that those can be addressed again at the next meeting in response to public proposals, as can any of the boards' actions.

Conclusion

I am sure that many questions will arise as the department and the boards move along in the process of bringing the regulations into consistency with the McDowell decisions. If you have any questions, please do not hesitate to contact us.

GTK:BH:ml

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