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Director, Division of Boards
Department of Fish and Game

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Nuchalawoyya Potlatch

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Our office has been asked for an informal opinion concerning the status of the Nuchalawoyya Potlatch regulation after the state supreme court's decision in McDowell v. State, 785 P.2d 1 (Alaska 1989), invalidated the rural limitation of the subsistence law. The regulation, 5 AAC 92.053, currently authorizes the taking of up to three moose per regulatory year for the limited purpose of use at the Nuchalawoyya Potlatch. 1/ Subsistence permits to take the moose are issued by the Department of Fish and Game to the Native Village of Tanana. 1/ The regulation was previously authorized by AS 16.05.255, AS 16.05.258 and AS 16.05.330.

We were asked two specific questions concerning the regulation after the invalidation of the rural limitation by the state supreme court in the McDowell decision:

(1) whether the Board has authority to adopt regulations which require the harvest to be used in a particular manner (in this instance, for the Nuchalawoyya Potlatch), and

(2) whether the Board has authority to promulgate a regulation which applies only to a certain geographic location or community, such as a village.

The summary answer to your inquiry is that we believe the Board of Game has the authority under the subsistence law to adopt regulations that require the harvest to be used in a particular manner so long as such regulations are reasonable and do not violate state and federal constitutional considerations. After McDowell, however, the Board of Game no longer has authority to promulgate regulations that apply only to residents in certain geographic locations or

1/ We understand that the Nuchalawoyya Potlatch is a traditional Athapaskan gathering of a secular nature. We are informed that the Potlatch is not restricted to certain communities or groups, but that anyone may participate.

2/ In its entirety, 5 AAC 92.053 reads as follows:

Permit To Take Moose for Nuchalawoyya Potlatch. The taking of up to 3 moose per regulatory year is allowed for the celebration known as the Nuchalawoyya Potlatch, under the terms of a subsistence permit issued by the department to the Native Village of Tanana.

The Native Village of Tanana shall report to the department, Division of Wildlife Conservation, Fairbanks, Alaska, within 5 days after the taking of each moose, the sex of the moose taken, and the location of taking.

communities. Furthermore, insofar as the existing Nuchalawoyya Potlatch regulation delegates to the Native Village of Tanana the authority to designate who receives the hunting permits, we believe it is inconsistent with the McDowell decision and also is an improper delegation of the discretionary functions of the commissioner.

Authority for the Nuchalawoyya Potlatch Regulation.

For purposes of conservation, development, and utilization, the Board has general authority to regulate seasons, areas, bag limits, and quotas for sport and subsistence hunting. AS 16.05.221; AS 16.05.255. The subsistence statute, AS 16.05.258, specifically authorizes the Board to provide for identified subsistence uses. This statute directs the Board to identify customary and traditional uses of game populations, or portions thereof, in order to provide for subsistence uses.

The Board is directed to determine whether portions of the identified game populations can be harvested consistent with sustained yield, and, if so, how much of the harvestable portion is needed to provide a reasonable opportunity to satisfy the identified subsistence uses of those game populations. The Board must then adopt subsistence hunting regulations for each identified game population for which a harvestable surplus exists.

Under this statutory authority, the Board has previously made a finding that there is customary and traditional use of moose for purposes of the Nuchalawoyya Potlatch. The Board also determined that there was a harvestable surplus of moose in Unit 20(F) and authorized the taking of up to three moose annually for the Nuchalawoyya Potlatch. 1/ See 5 AAC 92.053. The three-moose quota represents the Board's determination of what was required to provide a "reasonable opportunity" to satisfy the identified subsistence use.

Even after invalidation of the rural limitation by the McDowell decision, we believe the subsistence finding underlying permitting the harvest of moose for the identified subsistence use of the Nuchalawoyya Potlatch is still valid. There is no longer any authority, however, to limit the harvest to certain rural residents or communities. The subsistence permits would now have to be available to any Alaska resident who wished to engage in the subsistence use. Furthermore, we believe there is no longer authority under AS 16.05.330 to allow the Native Village of Tanana to dispense the permits. 1/

3/ This harvest has been authorized for two years, 1989 and 1990, with seasons the first two weeks of June, which is the customary time for the Nuchalawoyya Potlatch.

4/ After invalidation of the rural limitation the Board no longer has authority to determine eligibility for subsistence uses based upon the area or community where the user resides. We believe that issuing subsistence permits on a community or area basis under AS 16.05.330(c) would violate the common-use mandate of the Alaska Constitution, article VIII, in the same manner as did the rural limitation

Authority to Regulate Uses of Subsistence Taken Game.

Although the Board clearly has authority to regulate the taking of moose for subsistence, the question remains whether the Board has authority to require that the harvest be used for a certain purpose such as the Nuchalawoyya Potlatch. We believe the Board has such authority.

The state has ownership of wild animals and the authority of the state to regulate and control such wildlife is well established. Geer v. Connecticut, 161 U.S. 519, 526 (1896); See Alaska Const. art. VIII, • 3. Because of its ownership, and in the exercise of its police power, the state may regulate and control the taking, subsequent use, and property rights that may be acquired in such wildlife. Geer v. Connecticut; Lacoste v. Dep't of Conservation, 267 U.S. 545, 549 (1923) (citations omitted); State v. State Fish & Game Commission, 437 P.2d 373, 376 (Mont. 1968). The state's control over game extends even to restricting the use or right of property in the game after it is taken or killed. 38 C.J.S. Game • 7 (1943).

The legislature, through the state's subsistence law, has exercised its right to restrict the uses in game after it is taken. By statute, subsistence uses are defined as follows:

The noncommercial, customary and traditional uses of wild, renewable resources by a resident [domiciled in a rural area] of the state for 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; in this paragraph, "family" means persons related by blood, marriage, or adoption, and a person living in the household on a permanent basis.

AS 16.05.940(31). The uses of subsistence harvest are restricted in a number of ways by the definition of subsistence uses. It can only be noncommercial, must be for direct personal or family consumption, for only those uses enumerated.

In addition, the legislature has granted the Board general authority to regulate the uses of game after it has been legally reduced to possession by the hunter. AS 16.05.255. Subsection (3) of AS 16.05.255 authorizes the Board to establish the methods for the transportation of game after it is taken. Subsection (10) authorizes the Board to "regulate sport hunting and subsistence hunting as needed for the conservation, development and utilization of game" (emphasis added). Subsistence hunting is identified as "the taking of, hunting for, or possession of game by a resident domiciled in [a rural area of] the state for subsistence uses by means defined by the Board of Game." 1/ AS 16.05.940(30) (emphasis added). Read together, subsection (10) and the definition of subsistence hunting authorize the Board to regulate the possession of subsistence-taken game for purpose of conservation, development, and utilization of the resource. 1/

As evidenced by the above-referenced statutes and regulations, there is authority for the Board to regulate the use of subsistence game after it is taken. We believe that the Board's general authority in AS 16.05.255 to regulate subsistence hunting as needed for conservation, development, and utilization of game, together with the statutory definition of subsistence hunting to include both taking and possession, authorizes the Board to regulate post-taking uses. These statutes, when read together with the subsistence statutes, AS 16.05.258 and AS 16.05.940(31), which require the Board to provide for identified subsistence uses and defines what these uses may consist of, is sufficient authority for the Board to authorize as a subsistence use the taking of moose for use only at the Nuchalawoyya Potlatch. However, the Board should be cautious not to implement any such regulations in a manner that grants a special privilege to a limited group while denying the privilege to other groups similarly situated, so as not to conflict with the state's constitutional common-use mandates.

After McDowell There is No Authority For the Board To Restrict Subsistence Uses to Certain Areas or Communities.

5/ The bracketed terms were severed from the statute by the state superior court's decision in McDowell v. Collinsworth, Case No. 3AN-83-1592 Civ (Alaska Super., 20,19).

6/ This statutory authority is consistent with other statutes that also authorize certain restrictions on the use of wildlife after it is taken: For example, AS 16.05.370 authorizes the commissioner to require reports after the taking of fish and game resources; AS 16.05.920 prohibits certain post-taking uses, such as transporting, selling, or purchasing fish or game; AS 16.05.930 authorizes the commissioner to prohibit barter of subsistence-taken fish and game in certain circumstances; AS 16.40.010 regulates disposition of surplus musk oxen and bison and requires they be used for raising and breeding; and AS 16.10.240 regulates the shipping of live crab after taking.

There are also numerous regulations which regulate the use of wildlife after it is taken: 5 AAC 92 generally regulates the lawful possession or transportation of game or parts of game; 5 AAC 92.200 restricts the purchase, sale, or barter of game; 5 AAC 92.210 restricts the use of game as bait or dog food; 5 AAC 92.220 regulates the salvage of game meat, furs and hides; 5 AAC 77.001(f) regulates personal use fish bartered or used as bait after taking; and 5 AAC 75.010 regulates the transportation of sport fish out of state after taking.

Laird Jones, Director
Division of Boards
663-91-0309

April 12, 1991
Page 5

Since the McDowell decision invalidated the rural limitation of the subsistence law, the Board no longer has authority to promulgate regulations that provide for subsistence uses limited to Alaska residents who reside in certain areas or communities. After the McDowell decision, once the Board has identified a customary and traditional use of a game population, the opportunity to engage in that use must be made available to all Alaska residents who wish to participate as subsistence users.

Neither is there authority after McDowell for the Board to delegate to the Native Village of Tanana or any other group, community, or individual its discretionary function of determining who will be permitted to hunt for moose under a regulation. The Department of Law has previously advised state agencies that where the administrative agency (in this case the Department of Fish and Game) is charged by the legislature with the responsibility of determining who will be permitted to engage in the hunts, the agency cannot surrender the responsibilities that have been conferred upon it nor, as a general rule, can it delegate those functions that are discretionary in nature. See 1986 Inf. Op. Att'y Gen. (July 31; 663-86-0504). To grant to the Native Village of Tanana, or any other group or entity, the discretionary authority to allocate hunting resources by determining who is eligible to receive hunting permits under the Nuchalawoyya Potlatch regulation would be an improper delegation of the discretionary function accorded the Department of Fish and Game.

Conversely, however, delegations of governmental functions that are ministerial rather than discretionary in nature are much easier to sustain against a court challenge. We believe the department has proper statutory authority under AS 16.05.255(a) to delegate to the Village the ministerial functions of recording and reporting the harvest under the Nuchalawoyya Potlatch hunting permits, so long as the Village does not exercise discretion in carrying out the task.

Conclusion.

In summary, we believe the Board of Game has authority to adopt regulations that require the harvest of moose taken under subsistence permits to be used only for purposes of the Nuchalawoyya Potlatch so long as the regulation does not limit participation only to residents of certain areas. However, the existing and the proposed Nuchalawoyya Potlatch regulations improperly delegate to the Native Village of Tanana the authority to designate who is to receive the permits.

If you have any further questions, please do not hesitate to contact our office.

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