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Limiting subsistence

users

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The following is a written summary regarding the constitutionality of excluding individuals or groups of Alaskans as subsistence users. It does not address the situation under any specific past, present or future statutory scheme.

The Alaska Constitution ensures "the public the broadest possible access to wildlife" 1/ and imposes upon the state "a trust duty to manage the fish, wildlife and water resources of the state for the benefit of *all* the people." 2/ Consequently, as regards subsistence, location of residency is not a valid criterion on which urban residents can be excluded. 3/ However, this "open access" holding "does not mean that everyone can engage in subsistence hunting or fishing." 4/ Thus, the supreme court has assured fish and game managers that "(w)e do not imply that the constitution bars all methods of exclusion where exclusion is for species protection reasons." 5/ (emphasis added).

In spite of the seemingly narrow "species protection" loophole, the second holding in McDowell discusses the possibility of a "least restrictive alternative" 6/ formula to

1/ McDowell v. State. 785 P.2d 1, 6 (Alaska 1989).

2/ Owsichek v. State, 763 P.2d 488, 495 (Alaska 1988).

3/ McDowell at 9.

4/ Ibid.

5/ Ibid.

6/ Ibid. at p. 10. With the judicial invalidation of the rural/urban distinction, under the existing statute, AS 16.05.258, there are no such exclusions. Only at the so-called "tier 2" situation, where three statutory criteria are

determine if some potential users will have to be excluded to achieve the purposes of a subsistence statute. As a result, the definition of subsistence, as an important beneficial use, could conceivably involve the exclusion of some groups of Alaskan residents from harvests. However, as noted in the superior court remand, "(t)he boards will not be able to limit eligibility to merely granting 'grandfather rights' to residents." 7/

In summary, depending on the definition of subsistence uses, all Alaskans or only a few Alaskans may apply or qualify to be subsistence users. If subsistence continues to be defined broadly as "customary and traditional uses," all Alaskans will be potential subsistence users, so long as they conduct themselves and use the harvest in accordance with the specified statutory purposes. If the current definition were amended, however, a narrower, more specific definition of subsistence could, by its terms, result in exclusion of many Alaskans from eligibility for subsistence harvests. 8/ However, any such exclusion would be invalid if the exclusions were crudely or only modestly related to the underlying statutory purpose of subsistence.

Incidentally, in spite of some criticism to the contrary, the Department of Law does not opine that the McDowell decision mandates that "all Alaskans are subsistence users." 9/ All Alaskans may be potential subsistence users but only Alaskans who satisfy whatever statutory criteria may be applicable to subsistence uses will be able to engage in subsistence harvests. 10/

used to select among subsistence users if non-subsistence uses have been eliminated on a particular stock or population, can individual users be excluded.

7/ McDowell v. Collinsworth and Alaska Federation of Natives, et al, 3AN-83-1592 Civ., "Order of Clarification Pursuant to State's Motion for Reconsideration," July 25, 1990.

8/ Eg. a "use-it-where-you-take-it" basis for subsistence harvests.

9/ Even legal opinions criticizing this conclusion agree that ". . . all Alaskans have the right to apply for each subsistence fishery. . . ." April 25, 1991 memorandum from Attorney Michael A.D. Stanley to Theo Mathews, Administrative Assistant, United Cook Inlet Drift Association at page 9.

10/ References in the following Department of Law opinions on subsistence clearly evidence the departments conclusion that not all Alaskans automatically qualify for subsistence uses (emphasis added):

a. Memorandum on "Board action in light of McDowell," dated July 20, 1990.

1. for any Alaskan resident who would be using the harvest for the purposes specified in the definition of subsistence uses. (page 2)

2. those Alaskans likely to engage in subsistence uses (page 2)

3. all Alaskans eligible for and desirous of engaging in subsistence uses (page 2)

4. reasonable opportunity at tier one for all Alaskans (page 2)

5. eligibility limitations on participation in those fisheries (page 3)

6. any Alaskan who requests a subsistence permit for any open subsistence fisheries (page 3)

7. accommodate use by all interested Alaskans (page 4)

8. open to all Alaskans likely to desire to participate in that season (page 4)

9. distribute the available opportunity among those Alaskans eligible at tier one to participate (page 5)

10. those desiring to participate (page 5)

11. all Alaskans desiring to participate only (page 5)

12. provide all Alaskans reasonable opportunity (page 5)

13. all Alaska residents desiring to participate (page 6)

14. all those who wish to participate (page 6)

15. everyone desiring to participate can (page 6)

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May 10, 1991
-4-

JGG:nml

b. Report to the Joint Boards of Fisheries & Game, dated October 26, 1990.

1. those Alaskans likely to engage in subsistence uses (page 2)

2. all Alaskans eligible for and desirous of engaging in subsistence uses (page 2)

3. all Alaskans now potentially qualifying for subsistence uses (page 4)

4. class of potential users has been substantially broadened (page 5)