

Honorable Carl L. Rosier
Commissioner
Department of Fish and Game

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Application of defense of
life and property regula-
tion (5 AAC 92.410)

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In a memorandum dated March 1, 1990, your office requested our opinion regarding whether a person may lawfully kill a bear in the defense of (1) fish hanging on a drying rack, or (2) hunter-killed deer where there has been no actual destruction of other property such as camp equipment or dwelling structures. Specifically, you inquired whether lawfully taken fish or game constitutes "property" under 5 AAC 92.410(c).

This memorandum begins by providing a summary answer to the questions noted above. Discussion then turns to an analysis of 5 AAC 92.410 and focuses on whether legally taken fish and game constitute "property" within the ambit of the exculpatory provisions of the regulation. Attention is then directed to additional considerations presented by other provisions of 5 AAC 92.410 that may have an impact on the availability of the defense provided therein.

Summary Answer

Lawfully taken fish and game probably constitute "other property" under 5 AAC 92.410(c)(4) and are owned by the person who takes them subject to state regulation of the rights acquired. However, the critical question under 5 AAC 92.410(c)(4) is whether such fish and game constitute other property "necessary for the livelihood or survival" of the owner. This question presents a factual issue that is probably most easily resolved on a case-by-case basis. Still, to the extent lawfully taken fish hanging on a drying rack represent a legitimate means of support or subsistence upon which the owner relies, such fish are probably necessary for the owner's livelihood and survival. In contrast, it is doubtful that sport-caught fish or sport hunter-killed deer constitutes property that is necessary for the livelihood or survival of the owner because the owner probably does not rely on the fish or deer as a means of support or subsistence, and therefore the unlawful killing of a bear in defense of such property is probably not excused by 5 AAC 92.410.

Discussion

5 AAC 92.410 provides in pertinent part:

(a) Nothing in 5 AAC prohibits a person from taking game in defense of life or property if

(1) the necessity for the taking is not brought about by harassment or provocation of the animal, or by an unreasonable invasion of the animal's habitat;

(2) the necessity of the taking is not brought about by the improper disposal of garbage or a similar attractive nuisance; and

(3) all other practical means to protect life and property are exhausted before the game is taken.

. . .

(c) As used in this section "property" means

(1) a dwelling, permanent or temporary;

(2) an aircraft, boat, automobile, or other conveyance;

(3) a domesticated animal;

(4) other property of substantial value necessary for the livelihood or survival of the owner.

Since 5 AAC 92.410(c) defines the term "property" to mean the specific items set forth in that paragraph, the definition is exclusive and no other meanings should be implied. See 1A N. Singer, Sutherland Statutory Construction • 27.01 (4th ed. 1985); cf. State v. Debenham Electric Co., 612 P.2d 1001, 1002 (Alaska 1980). Paragraph (c) of the regulation does not specifically state that harvested fish or game constitute "property" for purposes of the exculpatory provisions of

paragraph (a). The question, therefore, becomes whether lawfully taken fish or game constitute "other property of substantial value necessary for the livelihood or survival of the owner" under 5 AAC 92.410(c)(4). This question presents three separate issues: (1) whether fish and game are "other property" under the law in Alaska; (2) whether a person who lawfully takes fish or game is the owner of such fish or game; and, if so, (3) whether such fish or game is necessary for the livelihood or survival of the owner. 1/

1. "Other Property"

No applicable regulations specifically address the scope of the terms "other property" as used in 5 AAC 92.410(c)(4). However, AS 01.10.060(10) defines the term "property" as appearing in the "laws of the state" sufficiently broadly to include fish and game. 2/

In addition, "property" is defined by Webster's to mean "something owned or possessed." Webster's New Collegiate Dictionary 923 (1976). See also Black's Law Dictionary 1095 (5th ed. 1979) ("that which belongs exclusively to one"). As implied by the statutes, regulations, and decisions discussed below, the question of fish and game ownership presumes a priori that fish and game are in fact something that can be owned by someone. Accordingly, fish and game probably constitute "other property" under 5 AAC 92.420(c)(4).

1/ We note that 5 AAC 92.410(c)(4) also states that "other property" must be "of substantial value" to come within the purview of the regulation. The policy evinced by the face of 5 AAC 92.410 is that the otherwise unlawful taking of valuable game should not be excused where the property being defended is of little consequence. However, the question of substantial value is probably subsumed by the requirement that the property be "necessary for the livelihood or survival of the owner." In short, if the property being defended is "necessary for the livelihood or survival of the owner" it is our view that such property should also be viewed to be of substantial value. See discussion infra, p. 8.

2/ AS 01.10.060(10) defines "property" to include "real and personal property." AS 01.10.060(9) defines "personal property" to include "money, goods, chattels, things in action and evidences of debt."

2. "Owner"

As a matter of elementary common law, wild animals are the property of the state in its sovereign capacity and are to be held in trust for the people of the state. Geer v. Connecticut, 161 U.S. 519, 526, 161 S. Ct. 600, 603 (1896), overruled on other grounds, Hughes v. Oklahoma, 441 U.S. 322, 99 S. Ct. 1727 (1979).

This principle is expressed in the Common Use Clause of the Alaska Constitution, article VIII, section 3, which provides: "Whenever occurring in their natural state, fish, wildlife and waters are reserved to the people for common use." Significantly, the Common Use Clause does not expressly state that fish and game are retained in trust by the state once they are legally taken and reduced to lawful possession, viz., no longer in their natural state.

The Court in Geer observed that animals belong to the people in their collective capacity and that such public resources are "not the subject of private ownership, except so far as the people may elect to make it so." 161 U.S. at 528, 16 S. Ct. at 604 (emphasis added). ^{3/} Significantly, the Alaska Supreme Court recognized in Owsichek v. State, Guide & Licensing Board, 763 P.2d 488, 493-95 (Alaska 1988) that the framers of the Alaska Constitution probably relied heavily on Geer and the common law announced therein in drafting the Common Use Clause. The Alaska Legislature has adopted at least part of this rule as embodied in AS 16 05.920, which states in pertinent part:

Unless permitted by AS 16.05 16.40 or by regulation under AS 16.05 -- 16.40, a person may not take, possess, transport sell, offer to sell, purchase, or offer to purchase, fish, game . . . or any part of fish [or] game. . . .

^{3/} The issue in Geer was whether a state's prohibition of the export of certain legally taken game offended the Commerce Clause of the U.S. Constitution. The discussion of the ownership of game was deemed relevant to a determination of whether such game became an article of interstate commerce and therefore subject to the proscriptive effects of the Commerce Clause. The relevance of a state's control of the ownership rights obtained in legally taken game to Commerce Clause analysis was later rejected in Hughes. See 441 U.S. at 336, 99 S. Ct. at 1736.

(Emphasis added.) As the court noted in State v. Eluska, 724 P.2d 514, 516 (Alaska 1986), AS 16.05.920 is phrased negatively, and, therefore, unless permitted by statute or regulation, a person does not have the right to (among other things) take or possess fish and game. Still, AS 16.05.920 does not expressly state that the ownership or title to fish and game rests with the state absent a statute or regulation granting such rights. However, it is our view that, taken together, the common law rule announced in Geer and AS 16.05.920 suggest strongly that title or ownership to the state's fish and game rests with the state unless otherwise provided by AS 16.05 or regulations promulgated thereunder. 4/

No statute or regulation expressly provides that title or ownership of lawfully taken fish or game is transferred from the state to the person taking the fish or game. In view of AS 16.05.920 it might, therefore, be argued that the state retains ownership of such animals even after they have been lawfully taken. However, several statutes and regulations imply very strongly that significant incidents of ownership devolve to a person who lawfully takes fish or game. For example, the terms "take" and "taken" as used throughout 5 AAC permitting the taking of fish and game in Alaska under certain conditions imply that ownership of such fish and game devolves to the taker. While the terms "take" or "taken" are not defined for purposes of 5 AAC, 5/

4/ Several statutes address the ownership of certain kinds of wildlife under particular circumstances. For example, under AS 16.40.010 - 16.05.30 the Department of Fish and Game may grant title to live surplus bison and musk oxen to private individuals.

Subject to conditions imposed by permit or regulation, a person receiving such a grant may acquire all of the incidents of ownership in such animals. See 1986 Inf. Op. Att'y Gen. (July 31; 661-86-0532). Similarly, under 16.05.930(f) the offspring of wild foxes collected to enhance the genetic stock of commercial fox farms may become the property of the fox farmer. See 1986 Inf. Op. Att'y Gen. (Nov. 14; 661-87-149). By contrast, the title to captive wild birds held under permit and their offspring remains with the state unless the permit expressly provides otherwise. 1987 Inf. Op. Att'y Gen. (Oct. 20; 661-88-0066). We note, however, that the foregoing statutes and opinions address primarily the ownership of live fish and game.

5/ The term "take" is defined for purposes of AS 16.05 -- AS 16.40 at AS 16.05.940(31), which states: "take means taking, pursuing, hunting, fishing, trapping, or in any manner

they connote possession, obviously an important incident of ownership. See Webster's New Collegiate Dictionary, 1188 (1976).

5 AAC 75.010 provides that legally taken, sport-caught fish may be possessed, transported and exported outside of Alaska (subject to applicable possession limits). Similarly, legally taken game may be possessed. 5 AAC 92.140. The possession, transport and export of lawfully taken game is also implicitly permitted by regulation under certain conditions. See 5 AAC 85 (establishment of hunting bag limits implies game may be possessed); 5 AAC 92.140 (possession, transport of lawfully taken game is implied to be permitted); 5 AAC 92.025 (export of raw skin of game may be permitted).

Other statutes and regulations further suggest that the taker becomes the owner of legally taken fish and game. For example, fish taken for subsistence purposes may be bartered. AS 16.05.930(e). In addition, fish taken for personal use may be consumed or used as bait by the individual who takes the fish. 5 AAC 77.001(f). Finally, the sale of fish is permitted under certain conditions. See AS 16.10.267(1) (fishermen selling fish must possess required permits and other documentation) Like the right to possess, transport and export, the right to barter, consume and sell 6/ imply that substantial rights of ownership in lawfully taken fish and game are conveyed from the state to the taker.

In addition to the implied grant of ownership evinced by the above-noted statutes and regulations, the common law confirms the proposition that legally taken fish and game become the property of the taker subject to limitations imposed by the state. In Foster-Fountain Packing Co., Inc., 278 U.S. 1, 13, 49 S. Ct. 1, 4-5 (1928), 7/ the U.S. Supreme Court acknowledged

disturbing, capturing, or killing or attempting to take, pursue, hunt, trap, or in any manner capture or kill fish and game."

6/ The sale of sport-caught fish and certain game or game parts is prohibited. See 5 AAC 75.015 (sale of sport-caught fish prohibited); 5 AAC 92.200 (sale of the meat, antlers or prepared trophy of big game (including deer) prohibited). Thus, the right to sell as an incident of ownership would not obtain, for example, in the case of a hunter-killed deer or sport-caught fish.

7/ The issue in Foster-Fountain Packing was whether shrimp

that while a state may regulate the property rights acquired in lawfully harvested fish and game, where a state permits wild animals to be taken, sold, and exported, those taking the animal "necessarily become entitled to the rights of private ownership" in the animals and the trust upon which the state is deemed to own and control the animal is terminated. Other courts have reached similar conclusions. See, e.g., Tlingit and Haida Indians v. United States, 389 F.2d 778, 784 (Ct. Cl. 1968) (fish are ferae naturae capable of individual ownership only by possession and control); State v. State Fish and Game Commission, 437 P.2d 373, 375 (Mont. 1968) (hunter who lawfully reduces elk to possession by killing it gains ownership of it subject to state limitations).

In view of the foregoing discussion, we believe that for purposes of 5 AAC 92.410(c)(4) a person who lawfully takes and possesses fish or game acquires sufficient incidents of ownership in such fish or game to constitute an "owner" of it. Accordingly, lawfully taken and possessed fish hanging on a drying rack and lawfully taken and possessed hunter-killed deer constitute property of the taker under 5 AAC 92.410(c)(4).

3. "Necessary for the Livelihood or Survival"

Even though ownership of lawfully taken fish and game may devolve from the state to the taker for purposes of 5 AAC 92.410(c)(4), it does not follow that a person is necessarily excused from illegally killing a bear in defense of lawfully taken fish and game. In order for the exculpatory effect of 5 AAC 92.410 to apply, the defended fish or game must be "necessary for the survival or livelihood of the owner." 5 AAC 92.410(c)(4) (emphasis added).

harvested from Louisiana waters were sufficiently articles of interstate commerce to as to come within the protection of the Commerce Clause of the U.S. Constitution for purposes of evaluating state law prohibiting the export of unprocessed shrimp. The question in this opinion addresses the issue of ownership under state law and the rule observed in Foster-Fountain Packing is, therefore, not necessarily controlling. However, because the Alaska Legislature has adopted "so much of the common law not inconsistent with the Constitution of the State of Alaska or the Constitution of the United States," the rule announced in Foster is of high persuasive value. See AS 01.10.010.

Applicable regulations or statutes do not define the terms "survival" or "livelihood" as appearing in 5 AAC 92.410(c)(4). Accordingly, they should be construed in accordance with common usage. See Debenham, 612 P.2d 1001, 1002. "Livelihood" is defined by Webster's to mean "means of support or subsistence." Webster's New Collegiate Dictionary 673 (1976). "Survival" is defined to mean "the continuation of life or existence." Id. at 1174.

Perhaps more importantly, the regulation offers limited guidance on the meaning of the term "necessary" as it appears in 5 AAC 92.410(c)(4). In common usage, the word may be understood to mean "compulsory," "absolutely needed," or "unavoidable." Webster's New Collegiate Dictionary 767 (1976). The term may also be understood, perhaps less commonly, to mean "reasonably useful" or "convenient." Black's Law Dictionary 928 (5th ed. 1979). In short, the word may imply "absolute necessity" or it may import that which is only "convenient, useful, appropriate, suitable, proper or conducive to the end sought." Id.

Despite the potentially broad construction of the term "necessary" revealed by the above definitions of the word, it is the Department of Law's conclusion that the Board of Game intended in promulgating this regulation a meaning closer to the more restrictive meaning of "necessary" discussed above to be attached to the word as it appears in 5 AAC 92.410(c)(4). First, had the Board of Game intended the broader, perhaps less common, meaning suggested above, it could have used a more appropriate term such as "convenient" or "suitable." Second, the policy expressed in the face of the regulation excusing the otherwise unlawful taking of game only in the defense of substantially valuable property suggests that the defense was intended to be limited to special circumstances. The specific items of property delineated in 5 AAC 92.410(c)(1)(3) (dwelling, aircraft, boat, automobile, etc.) are generally of considerable high value. Thus, the "substantial value" requirements of 5 AAC 92.410(c)(4) can be reasonably viewed to imply that "other property" covered by the regulation be of high similar value.

Furthermore, it is significant that 5 AAC 92.410(c) specifically delineates only dwellings, automobiles, aircraft, other conveyances and domesticated animals as property. It can reasonably be argued that these articles of property are types of property which, together with their typically high value, are characteristically "necessary," in the more strict sense, for a

person's livelihood or survival in Alaska. Thus, it follows that "other property" intended to be covered by 5 AAC 92.410(c)(4) must be of similar value and necessity to the owner. Moreover, if the Board of Game had intended to make the defense provided in 5 AAC 92.410(a) applicable to all valuable property regardless of the necessity of such property for a person's livelihood or survival, it simply could have stated it so rather than listing only a few "necessary" articles of property together with the more general language in 5 AAC 92.410(c)(4).

In view of the foregoing definitions of the terms "livelihood," "survival," and "necessary," the following conclusions can be drawn. To the extent lawfully taken fish game comprise a legitimate means of support or subsistence owner, such fish or game could be viewed to be necessary for the livelihood or survival of the owner. This conclusion presents a factual issue for a reviewing court that is probably best decided on a case-by-case basis. Nevertheless, we believe that a court deciding the issue could reasonably conclude that the Board of Game intended coverage by the regulation only where a harvester of fish and game relies on such items as important sources of food, shelter, or other maintenance. Only in such cases are fish and game necessary for that person's livelihood or survival, and therefore, "property" under 5 AAC 92.410(c).

We note, however, that it can be argued that so long as the hunter or fisherman, or any other person to whom the fish or game has been transferred, 8/ intends to consume or utilize the fish or game, such fish or game represents at least one "necessary" means of support or subsistence for the owner and, as a result, constitutes "property" under 5 AAC 92.410(c)(4). This interpretation of the regulation assumes the less restrictive definition of the term "necessary" discussed above. However, in such circumstances the owner probably does not rely sufficiently on the fish and game as a means of support or subsistence and, therefore, they are not necessary for the livelihood or survival of the owner. See 5 AAC 92.410(c)(4).

8/ It is possible, of course, that in some circumstances the original taker may no longer be the owner of the fish or game being defended. For example, to the extent a subsistence fisher owns the fish he has caught under the above analysis, his property rights in the fish may be transferred to another person by lawful barter. See AS 16.05.930(e). To the extent that the fish are necessary for the survival or livelihood of the subsequent owner, 5 AAC 92.410(c) still applies.

We note also that the amount of fish or game threatened by a bear may also be dispositive of how necessary the fish or game is to the hunter's or fisherman's livelihood or survival. For example, where only a few fish are being threatened by a bear and the loss of such fish would not jeopardize the owner's ability to maintain a livelihood or means of support, it could be reasonably argued that the fish are not necessary for the owner's livelihood or survival. 9/

It appears, therefore, that where a substantial amount of fish or game, lawfully taken for subsistence purposes, is threatened by a bear or other game, the lawfully taken fish or game would be covered by 5 AAC 92.410(c)(4). 10/ Similarly, where a substantial amount of commercially caught fish is threatened, such fish would also be necessary for the livelihood of the owner, and therefore, covered by 5 AAC 92.410(c)(4). Thus a substantial amount of fish (legally taken for commercial or subsistence purposes) hanging on a fish rack or deer lawfully taken for subsistence purposes probably constitute "property" under 5 AAC 92.410(c)(4).

On the other hand, we conclude that where sport-caught fish or sport hunter-killed deer does not comprise a significant portion of the diet or other maintenance of the owner, or where the amount of the threatened fish or deer is insignificant, the person does not rely on the fish or deer for his support or subsistence and, therefore, the fish or deer are not necessary for the owner's livelihood or survival. In such a case, the fish or deer would not constitute "property" under 5 AAC 92.410(c).

4. Other Requirements

The availability of the defense provided in 5 AAC 92.410 is conditioned on the following three requirements:

9/ This interpretation is also consistent with the requirement that the property being protected is of "substantial value."

10/ See AS 16.05.258; AS 16.05.940(30). This interpretation assumes that, by definition, fish or game taken under subsistence laws and regulations constitute a necessary means of support or subsistence to the taker.

(3) the necessity of the taking is not brought about by the harassment or provocation of the animal, or by an unreasonable invasion of the animal's habitat;

(2) the necessity of the taking is not brought about by the improper disposal of garbage or a similar attractive nuisance; and

(3) all other practical means to protect life and property are exhausted before the game is taken.

5 AAC 92.410(a).

In view of the foregoing provisions, in some circumstances the killing of a bear in the defense of lawfully taken fish and game may not be justified even if the fish or game might otherwise be necessary for the owner's livelihood or survival. For example, where a deer is killed in close proximity to a known concentration of bears and the deer is hung or stored unreasonably close to the deer's entrails, such conduct may constitute an unreasonable invasion of the bear's habitat under 5 AAC 92.410(a)(1) or the improper disposal of garbage or an attractive nuisance under 5 AAC 92.410(a)(2).

Finally, the defense provided by 5 AAC 92.410 is available only if "all other practical means to protect life and property are exhausted before the game is taken." 5 AAC 92.410(a)(3) (emphasis added). Accordingly, when an owner stores fish or game in an unprotected manner that provides easy access to bears, he may not have taken "all practical means" to protect the property. Similarly, a summary dispatch of a bear without reasonable attempts to dissuade the bear from destroying fish and game is not justified. C.f. Nordan v. State, 681 P.2d 346 (Alaska Ct. App. 1984).

5. Conclusion

In sum, lawfully taken fish and game are probably "property" under 5 AAC 92.410(c) to the extent such fish and game are necessary for the livelihood or survival of the owner. Without additional regulatory guidelines, the question of whether particular lawfully taken fish and game are necessary for the livelihood or survival of the owner in a particular case is a

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question of fact which the courts would probably address on a case-by-case basis. Still, it is our view that a reasonable interpretation of 5 AAC 92.410(c)(4) strongly suggests that where a hunter or fishermen does not rely to a significant degree on the fish and game as means of support or subsistence, as in the case of the casual sport hunter or fishermen, or where an insignificant amount of fish or game is threatened by a bear, the fish or game is not necessary for the livelihood or survival of the owner. In such a case the fish or game probably does not constitute property under 5 AAC 92.410(c) and the exculpatory provisions of 5 AAC 92.410(a) do not apply.

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