

# LEGAL SERVICES

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## MEMORANDUM

March 28, 2013

**SUBJECT:** Definition of "subsistence fisheries" (Work Order No. 28-LS0681)

**TO:** Representative Tammie Wilson  
Attn: Brandon Breczynski

**FROM:** Alpheus Bullard *AB*  
Legislative Counsel

In reference to a definition of "subsistence fisheries" found in the 2012 Alaska Sport Fishing Survey prepared by the Department of Fish and Game (department),<sup>1</sup> Brandon asked (1) whether the *McDowell* and *Madison* decisions prohibit the state from establishing subsistence fisheries exclusively for rural residents, (2) whether the definition in the survey accurately reflects the state of the law, and (3) if "subsistence fisheries" are defined in Alaska law as "rural fisheries" for "community residents and their households only."<sup>2</sup>

Short answer: The Alaska Supreme Court has held that it is unconstitutional for the state to establish fisheries exclusively for rural residents and their households. The definition of "subsistence fisheries" as expressed in the survey is inconsistent with the Constitution of the State of Alaska as it has been interpreted by the courts, but it is consistent with the existing statutory definitions of "subsistence fishing" and "subsistence uses" that have been found unconstitutional.<sup>3</sup>

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<sup>1</sup> The definition reads "[s]ubsistence fisheries: [s]ubsistence fisheries are legally defined rural fisheries for community residents and their households only, and are based on customary and traditional use of the resource. Do not report subsistence harvest in this survey, as the Division of Sport Fish does not manage these fisheries."

<sup>2</sup> *Madison v. Alaska Department of Fish and Game*, 696 P.2d 168 (Alaska 1985); *McDowell v. State*, 785 P.2d 1 (Alaska 1988).

<sup>3</sup> AS 16.05.940(31) defines "subsistence fishing" as:

[T]he taking of, fishing for, or possession of fish, shellfish, or other fisheries resources by a resident domiciled in a rural area of the state for subsistence uses with gill net, seine, fish wheel, long line, or other means defined by the Board of Fisheries[.]

### **Court decisions relating to subsistence fisheries exclusively for rural residents<sup>4</sup>**

#### **Madison**

In *Madison*, the Alaska Supreme Court found that the Board of Fisheries could not restrict subsistence fishing to residents of rural areas, because the former state subsistence statute did not restrict subsistence to rural areas or authorize the board to impose such a restriction. The board could not interpret the term "customary and traditional" in the statute defining subsistence fishing to limit access by the urban subsistence fishing user group. The Court found that the terms "customary and traditional" in the state subsistence statute did not have the same meaning that the terms had under the applicable federal law and that the legislative intent was to protect, not limit, the subsistence fishing activities of residents of the state.

#### **McDowell**

A rural residency requirement for subsistence was struck down by the Alaska Supreme Court in *McDowell*. *McDowell* involved a requirement that excluded all urban residents from subsistence hunting and fishing without regard to their individual characteristics.<sup>5</sup> The Court held that the subsistence law's rural resident preference was unconstitutional because there were substantial numbers of Alaskans living in areas designated as urban who had legitimate claims as subsistence users, as well as substantial numbers of Alaskans living in areas designated as rural who had no legitimate claims. *Id.* at 10 - 11. The breadth of the over- and under-inclusiveness of the rural resident requirement was the primary reason it was struck down.

#### **Kenaitze Indian Tribe**

The Alaska Supreme Court held, in *State v. Kenaitze Indian Tribe*, 894 P.2d 632 (Alaska 1995), that a person's domicile cannot be used as the sole basis for determining the person's eligibility to participate in subsistence hunting and fishing. The Court, citing *McDowell*, held that where the necessity for the preservation of the wild game and fish exists in certain areas of the state, an area could be segregated for the purpose of regulating the right to take game and fish in that area, but the privilege of taking and

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<sup>4</sup> This is not a comprehensive list of all relevant judicial decisions.

<sup>5</sup> The *McDowell* case did leave open the possibility that local residency may be used as a factor that is considered in resource allocation issues, provided that local residency does not become the basis for conclusively excluding persons from subsistence activities. See *McDowell v. Collinsworth*, Order of Clarification of Order Issued June 20, 1990, Superior Court, Third Judicial District, Anchorage, Case No. 3AN-83-1592 Civil, June 25, 1990. Accordingly, the *McDowell* decision does not prevent the state from establishing different bag or harvest limits for different people who hunt and fish in the same area, but it does prevent the assignment of different bag or harvest limits based on where the person resides in the state.

using fish and game must be extended to the people of the state outside of the area upon the same terms that are given to those who are residents of the area.

### **Constitutionality of the Sport Fishing Survey's characterization of "subsistence fisheries"**

"Subsistence fisheries" are defined in the survey as "*legally defined rural fisheries for community residents and their households only, and are based on customary and traditional use of the resource.*" While this definition is consistent with statutory definitions of "subsistence fishing" at AS 16.05.940(31) and "subsistence uses" at AS 16.05.940(33),<sup>6</sup> the definition of "subsistence fisheries" in the sport fishing survey and the statutory definitions of "subsistence fishing" and "subsistence uses" are not consistent with the Alaska Supreme Court's interpretation of art. VIII, secs. 3, 15, and 17. These sections are respectively, the natural resources article's "common use," "no exclusive fishery," and "uniform application" clauses of the Alaska constitution.<sup>7</sup>

Other sources confirm the state's recognition of the court decisions. There is an attorney general opinion from 1991 -- two years after the *McDowell* decision -- regarding a question about the Nuchalawoyya potlatch that notes the statutory definition of "subsistence uses" and brackets out the language requiring a rural area for subsistence, commenting that *McDowell* has made that requirement invalid. 1991 Op. Att'y Gen. 663-91-0309, April 12, 1991. Similarly, a regulation at issue in a recent case, *Alaska Fish & Wildlife Conservation Fund v. State*, 289 P.3d 903 (Alaska 2012) (relating to a negative "customary and traditional use" finding for the Chitna fishery), containing a definition of

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<sup>6</sup> AS 16.05.940(33) defines "subsistence uses" as:

[T]he 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[.]

<sup>7</sup> The erroneous definition in the survey may be the result of the survey drafter's reliance on the relevant statutory definitions. Subsistence preferences have been a volatile subject for the legislature, and these definitions have not been amended to conform to the Court's rulings. Development and drafting of the department's 2012 sport fishing survey was probably not subject to the level of scrutiny that the adoption of a regulation would have occasioned. Accordingly, it may be that the person developing the survey did so without legal guidance, and relied on the statutes as consistent with constitutional requirements.

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"subsistence way of life,"<sup>8</sup> does not contain a rural residency requirement. On the Department of Fish and Game's website, the department has posted the following definition, which does not make an urban/rural distinction:

The Alaska Department of Fish and Game recognizes the definition of subsistence fishing to mean the taking of, fishing for, or possession of fish, shellfish, or other fisheries resources by a resident of the state for subsistence uses with gillnet, seine, fish wheel, long line, or other means defined by the Board of Fisheries.<sup>(9)</sup>

Statutory provisions that are found unconstitutional by the courts remain in statute until the legislature amends or repeals the statute. As a practical matter, they may be unenforceable, but they are not repealed by judicial action.

If you have further questions, please do not hesitate to contact me.

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<sup>8</sup> In this case, in response to a direction from the superior court, the Board of Fisheries defined "subsistence way of life" as "a way of life that is based on consistent, long-term reliance upon fish and game resources for the basic necessities of life." 5 AAC 99.005 (effective June 10, 2010).

<sup>9</sup> Definition at <http://www.adfg.alaska.gov/index.cfm?adfg=subsistence.fishing> (accessed March 26, 2013).