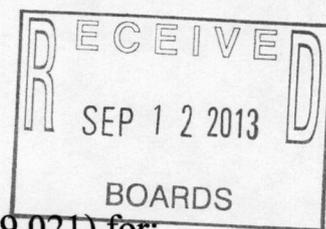




ATTN: Joint Board Comments
ADF&G
Boards Support Section

September 10, 2013



Dear Members of the AK Boards of Fisheries and Game,

Proposal #36, Support as Amended.

Amend proposal #36 to include definitions in regulation (5 AAC 99.021) for;

"subsistence fishing" means the taking of, fishing for, or possession of fish, shellfish, or other fisheries resources by residents of the state for subsistence uses with gill net, seine, fish wheel, long line, or other means defined by the Board of Fisheries;

"subsistence hunting" means the taking of, hunting for, or possession of game by residents of the state for subsistence uses by means defined by the Board of Game;

"subsistence uses" means the noncommercial, customary and traditional uses of wild, renewable resources by residents 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;

ISSUE: Under state law, all Alaskan residents are eligible for subsistence fishing and hunting. (Attachment #1- Subsistence in Alaska: A year 2010 Update) The current definitions for subsistence fishing, hunting, and use in statute have been unenforceable since 1989. The Alaska Supreme Court struck down the **"domiciled in a rural area"** requirement to participate in subsistence activities over two decades ago in the McDowell decision. Statutory provisions that are found unconstitutional by the courts may remain in statute until the legislature amends or repeals them. Judicial action does not repeal unconstitutional statutes, but nothing stands in the way of the Joint Boards correcting the definitions of subsistence fishing, hunting, or use in regulations.

WHAT WILL HAPPEN IF NOTHING IS DONE? Individuals in the Alaska Department of Fish & Game (Attachment #2- 2012 Alaska Sport Fishing Survey) will continue to rely on unconstitutional statutes to define subsistence activities. (Attachment #3- Legal Services work order No. 28-LS0681, Definition of "subsistence fisheries", March 28, 2013.)

Thank you for your consideration during board deliberations on proposal #36.

Rod Arno, AOC Executive Director

AOC
Attachment #1



Subsistence in Alaska: A Year 2010 Update

Division of Subsistence, Alaska Department of Fish and Game
333 Raspberry Road, Anchorage, Alaska 99518 (907) 267-2353

Introduction

Subsistence fishing and hunting are important for the economies and cultures of many families and communities in Alaska. Subsistence uses exist alongside other important uses of fish and game in Alaska, including commercial fishing, sport fishing, personal use fishing, and general hunting. This report provides an update on subsistence fishing and hunting in Alaska, including the dual state-federal management system.

What is Subsistence Hunting and Fishing?

State and federal laws define subsistence uses as the "customary and traditional uses" of wild resources for food, clothing, fuel, transportation, construction, art, crafts, sharing, and customary trade. Subsistence uses are central to the customs and traditions of many cultural groups in Alaska, including Aleut, Athabascan, Alutiiq, Euroamerican, Haida, Inupiat, Tlingit, Tsimshian, and Yup'ik. Subsistence fishing and hunting are important sources of employment and nutrition in almost all rural communities.

Commercial fishing differs from subsistence fishing because it is harvesting fish for sale in commercial markets. Subsistence fish and game cannot be commercially sold. Personal use fishing is similar to subsistence fishing, except that it is fishing with nets for food in areas generally closed to subsistence, particularly by residents of urbanized areas. Sport fishing and sport hunting differ from subsistence in that, although food is one product, they are conducted primarily for recreational values, following principles of "fair chase." While subsistence harvesting and processing are

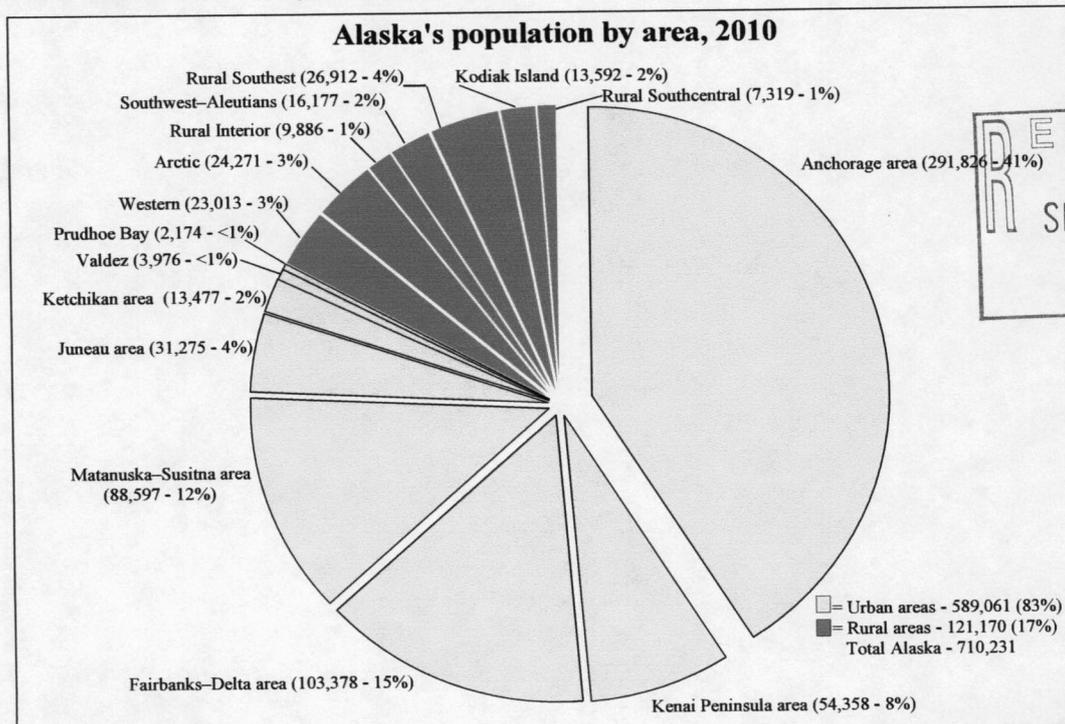
productive economic activities which are part of a normal routine of work in rural areas, sport fishing and sport hunting usually are scheduled as recreational breaks from a normal work routine.

Who Qualifies to Participate in Subsistence Harvesting?

Federal and state laws currently differ in who qualifies for participation in subsistence fisheries and hunts. Rural Alaska residents qualify for subsistence harvesting under federal law. About 17% of Alaska's population (121,170 people in 263 communities) lived in rural areas (outside nonsubsistence areas) in 2010 (Figure 1). Of the rural population, 67,024 (55%) were Alaska Native and 54,146 (45%) were not Alaska Native. Of Alaska's urban population (589,061 people), about 71,288 (12%) were Alaska Native and 517,773 (88%) were not Alaska Native. Under state law, rural residents qualified for subsistence harvesting from 1978-1989. Since 1989, all state residents have qualified under state law.

Who Participates in Subsistence Uses?

Most rural families in Alaska depend on subsistence fishing and hunting. A substantial proportion of rural households harvest and use wild foods (Figure 2). For surveyed communities in different rural areas, from 92%-100% of sampled households used fish, 79%-92% used wildlife, 75%-98% harvested fish, and 48%-70% harvested wildlife. Because subsistence foods are widely shared, most residents of rural communities use subsistence foods during the course of the year.



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Figure 1

Percent of households participating in subsistence activities in rural areas

Area	Harvesting game	Using game	Harvesting fish	Using fish
Arctic	63%	92%	78%	96%
Interior	69%	88%	75%	92%
Southcentral	55%	79%	80%	94%
Southeast	48%	79%	80%	95%
Southwest	65%	90%	86%	94%
Western	70%	90%	98%	100%
Total rural	60%	86%	83%	95%

Figure 2

What is the Rural Food Harvest?

Most of the wild food harvested by rural families is composed of fish (about 55% by weight), along with land mammals (22%), marine mammals (13%), birds (3%), shellfish (3%), and plants (4%) (Figure 3). Fish varieties include salmon, halibut, herring, and whitefish, among others. Seals, sea lions, walrus, and whales comprise the marine mammal harvest. Moose, caribou, deer, bears, Dall sheep, mountain goats, and beavers are commonly used land mammals, depending on the community and area. These rural subsistence (customary and traditional) harvests occur within a range of regulatory categories, including subsistence and general hunting, and subsistence, personal use, and rod and reel fishing.

How Large is the Subsistence Harvest?

The subsistence and personal use food harvest by Alaska residents (about 39.4 million pounds) represents about 1% of the fish and game harvested annually in Alaska (Figure 4). This total represents all noncommercial harvests of wild food by residents of rural areas plus subsistence and personal use fish harvests by residents of nonsubsistence areas. Commercial fisheries harvest about 98% of the statewide harvest (about 3.5 billion pounds annually), while sport fishing and hunting (general hunting and sport fishing

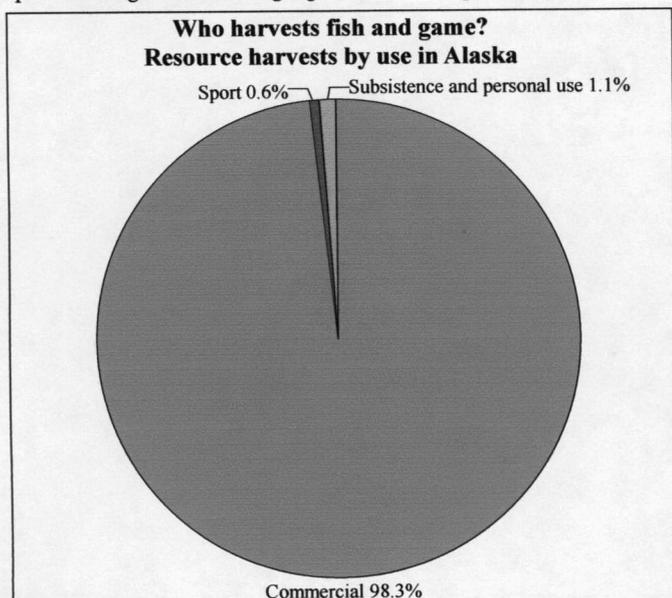


Figure 4

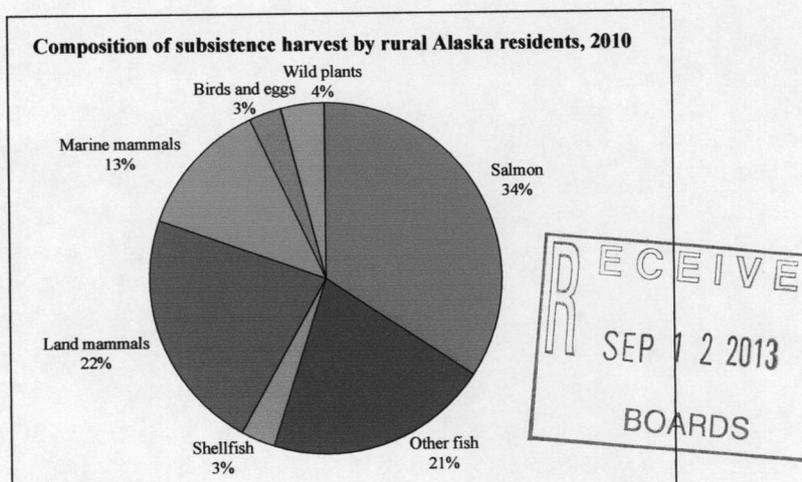


Figure 3

harvests by residents of Alaska nonsubsistence areas and all nonresident harvests) take 0.6% (21.3 million pounds).

Though relatively small in the statewide picture, subsistence fishing and hunting provide a major part of the food supply of rural Alaska (figures 5 and 6). Our best estimate is about 38.3 million pounds (usable weight) of wild foods are harvested annually by residents of rural areas of the state, and 13.8 million pounds by urban residents (Figure 6). On a per person basis, the annual wild food harvest is about 316 pounds per person per year for residents of rural areas (about 0.9 pounds a day per person), and 23 pounds per person per year for urban areas (Figure 5).

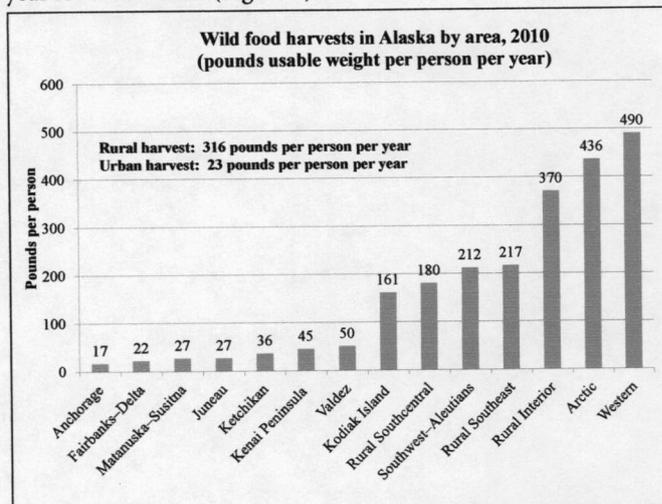


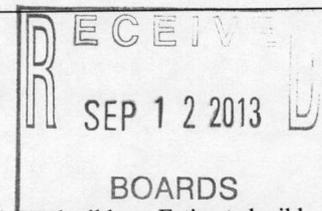
Figure 5

Nutritional Value of Subsistence Harvests

The subsistence food harvest provides a major part of the nutritional requirements of Alaska's rural population, and lesser percentages in urban areas. The annual rural harvest of 316 pounds per person contains 185% of the protein requirements of the rural population (that is, it contains about 94 grams of protein per person per day; about 51 grams is the mean daily requirement (Figure 6). The subsistence harvest contains 31% of the caloric requirements of the rural population (that is, it contains about 698 Kcal daily, assuming a 2,250 Kcal/day mean daily requirement). The urban wild food harvests contain 14% of the protein requirements and 2% of the caloric requirements of the urban population (Figure 6).



Wild food harvests in Alaska: Nutritional and replacement values



	Annual wild food harvest (pounds per person)	Annual wild food harvest (total pounds usable weight)	Percent of population's required:		Estimated wild food replacement value at \$3.50/pound	Estimated wild food replacement value at \$7/pound
			Protein (51 grams/day) (without plants)	Calories (2,250 calories/day) (without plants)		
Rural areas						
Southcentral	180	1,318,594	105%	18%	\$4,615,080	\$9,230,161
Kodiak Island	161	2,190,412	94%	16%	\$7,666,442	\$15,332,885
Southeast	217	5,828,786	125%	21%	\$20,400,751	\$40,801,503
Southwest–Aleutian	212	3,429,130	121%	21%	\$12,001,955	\$24,003,911
Interior	370	3,661,706	221%	36%	\$12,815,971	\$25,631,942
Arctic	436	10,592,409	257%	42%	\$37,073,432	\$74,146,863
Western	490	11,283,234	286%	48%	\$39,491,319	\$78,982,638
Total rural	316	38,304,272	185%	31%	\$134,064,951	\$268,129,902
Urban areas						
Ketchikan area	36	482,607	22%	3%	\$1,689,123	\$3,378,247
Juneau area	27	848,291	17%	3%	\$2,969,019	\$5,938,037
Matanuska–Susitna area	27	2,413,553	17%	3%	\$8,447,434	\$16,894,868
Fairbanks–Delta	22	2,247,598	13%	2%	\$7,866,595	\$15,733,189
Kenai Peninsula	45	2,435,992	27%	4%	\$8,525,972	\$17,051,943
Anchorage area	17	5,082,294	11%	2%	\$17,788,030	\$35,576,059
Valdez	50	200,247	31%	5%	\$700,864	\$1,401,728
Prudhoe Bay	23	50,788	14%	2%	\$177,758	\$355,516
Total urban	23	13,761,370	14%	2%	\$48,164,794	\$96,329,587
Alaska total	73	52,114,490	43%	7%	\$182,400,714	\$364,801,428

Figure 6

Traditional Harvest Areas

Studies show that subsistence hunters, fishers, and gatherers in rural Alaska tend to harvest in traditional use areas surrounding their communities. Subsistence harvest areas are accessible from the community, although seasonal camps are used to access some species. Subsistence harvest areas for communities are definable and relatively predictable (Figure 7).

The Monetary Value of Subsistence Harvests

Subsistence fishing and hunting are important to the rural Alaska economy. Attaching a dollar value to wild food harvests is difficult, since subsistence products do not circulate in markets. However, if families did not have subsistence foods, substitutes would have to be purchased. If one assumes a replacement expense of \$3.50–\$7.00 per pound, the simple “replacement value” of the wild food harvests in rural Alaska may be estimated at \$134–\$268 million dollars annually (Figure 6).

Subsistence and Money

Subsistence is part of a rural economic system, called a “mixed, subsistence-market” economy. Families invest money into small-scale, efficient technologies to harvest wild foods, such as fishwheels, gillnets, motorized skiffs, and snowmachines. Subsistence food

production is directed toward meeting the self-limited needs of families and small communities, not market sale or accumulated profit as in commercial market production. Families follow a prudent economic strategy of using a portion of the household monetary earnings to capitalize in subsistence technologies for producing food. This combination of money from paid employment and subsistence food production is what characterizes the mixed, subsistence-market economies of rural areas. Successful families in rural areas combine jobs with subsistence activities and share wild food harvests with cash-poor households who cannot fish or hunt, such as elders, the disabled, and single mothers with small children.

Dual Subsistence Management

Subsistence fishing and hunting in Alaska are regulated by the State of Alaska and the federal government, depending upon where the harvests occur. This system is called a “dual management system” because there are overlapping state–federal jurisdictions in many areas. The federal government regulates federal subsistence fisheries and hunts on federal public lands and federally-reserved waters in Alaska. The State of Alaska regulates state subsistence fisheries and hunts on all Alaskan lands and waters. A harvester should consult both the federal subsistence regulation booklet and the state subsistence fishing and general hunting regulations

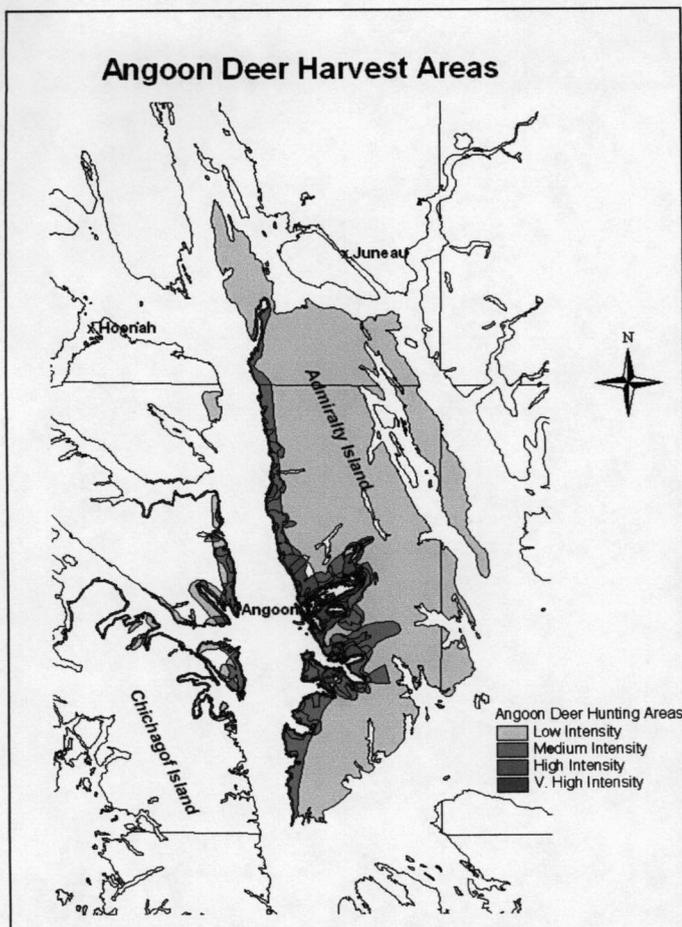


Figure 7

booklets, to be appraised of the complete set of hunting or fishing regulations in a particular area.

The Alaska Board of Fisheries and the Alaska Board of Game create regulations for state subsistence fisheries or hunts. The Federal Subsistence Board creates regulations for federal subsistence fisheries or hunts. In creating regulations, each board follows procedures for obtaining information and comments on proposed regulations from the public, agencies, and other interests.

Hunting of marine mammals is managed by the federal government through the National Marine Fisheries Service (seals, sea lions, and whales) or the U.S. Fish and Wildlife Service (polar bears, sea otters, and walrus). There is an exemption in the federal Marine Mammal Protection Act to allow for the traditional harvest and use of marine mammals by coastal Alaska Natives. Subsistence hunting of migratory waterfowl is managed by the U.S. Fish and Wildlife Service. Federal regulations limit participation to residents of designated rural areas. Subsistence fishing for Pacific halibut is managed by the National Marine Fisheries Service. Federal regulations limit participation to residents of designated rural areas and members of eligible tribes.

Subsistence hunting and fishing are restricted in non-rural areas of Alaska by the federal and state programs. Federal law allows subsistence harvests only by residents of rural areas. State law permits subsistence harvests by any Alaska resident in areas outside the boundaries of "nonsubsistence areas." The Alaska Joint Board of Fisheries and Game has determined that the areas around

Anchorage, the Matanuska–Susitna Valley, the Kenai Peninsula, Fairbanks, Juneau, Ketchikan, and Valdez are nonsubsistence areas, where fish and game harvests may be allowed under sport, personal use, or commercial regulations, but not under subsistence regulations. The Federal Subsistence Board has defined similar non-rural areas. Also, Prudhoe Bay is non-rural under federal rules.

The Subsistence Priority

Subsistence uses of fish and land mammals are given a priority over commercial fishing and recreational fishing and hunting in state and federal law. This means that when the harvestable portion of a fish stock or game population is not sufficient for all public uses, subsistence uses are restricted last, by regulation.

By and large, urban fishers and hunters have not experienced major changes in harvest opportunities due to the subsistence priority. General hunting and sport fishing regulations continue to provide opportunities for residents and nonresidents. Personal use net fisheries provide for established food fisheries of urban residents in areas closed to subsistence fishing.

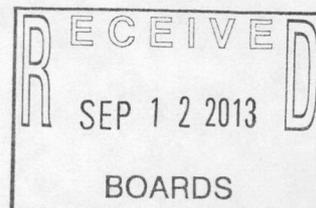
For example, during the eleven-year period when the rural priority was being implemented under state management (1978–1989), general resident hunting seasons for caribou increased by 36% (from 5,505 days to 7,500 days), moose hunting days decreased by 10% (from 2,961 days to 2,671 days), and Dall sheep hunting days increased by 2% (from 1,855 days to 1,900 days)—comparing the 1978–1979 resident season with the 1989–1990 resident season. That is, during this period, hunting days by urban hunters for caribou, moose, and sheep were not significantly changed by the rural subsistence priority.

The greatest effect of state and federal subsistence laws has been to legally recognize customary and traditional harvest practices and uses in rural areas. Because of the law, the Alaska Board of Fisheries and Board of Game and the Federal Subsistence Board have created subsistence regulations designed to provide opportunities for the continued harvest of the rural food supply. While impacts on urban residents have been relatively small, the benefits for rural areas have been great. Rural residents have a legally protected opportunity to fish and hunt to feed families following long-term customs and traditions.

Original: Robert J. Wolfe, Division of Subsistence, ADF&G, March 2000; revised by James A. Fall, Division of Subsistence, ADF&G, January 2012.

For a copy of the Alaska Department of Fish and Game OEO statement, see

<http://www.adfg.alaska.gov/index.cfm?adfg=home.oestatement>





ALASKA DEPARTMENT OF FISH AND GAME

2012 Alaska Sport Fishing Survey

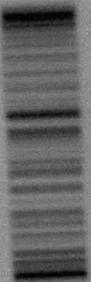
*AOC
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It is important that we know about your household's sport fishing activities in 2012, so that we can continue to manage our sport fisheries to the maximum benefit of both the angler and the resource. Please refer to the instructions for completing the survey, and return it in the enclosed envelope.

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Alaska Department of Fish and Game
Division of Sport Fish (DSTS)
111 Raspberry Road
Anchorage, AK 99518
(907) 261-2280



R4122-P107794



Subsistence Fisheries: Subsistence fisheries are legally defined rural fisheries for community residents and their household 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.

AOC
ATTACHMENT



LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

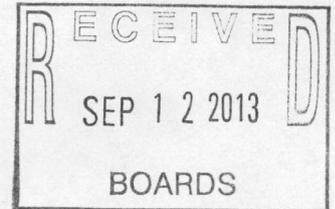
(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

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),¹ 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."²

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.³

¹ 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."

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

³ 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[.]



Representative Tammie Wilson
March 28, 2013
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Court decisions relating to subsistence fisheries exclusively for rural residents⁴

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.⁵ 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

⁴ This is not a comprehensive list of all relevant judicial decisions.

⁵ 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.**



Representative Tammie Wilson
March 28, 2013
Page 3

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),⁶ the definition of "subsistence fisheries" in the sport fishing survey and the statutory definitions of "subsistence fishing" and "subsistence uses" are not consistent 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.⁷

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

⁶ 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[.]

⁷ 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.

Well here
you go -
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TOO



Representative Tammie Wilson
March 28, 2013
Page 4

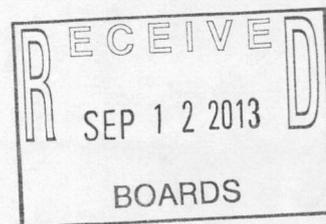
"subsistence way of life,"⁸ does not contain a rural residency requirement. On the Department of Fish and Game's website, the department has posted the following definition, which does not make an urban/rural distinction:

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.⁹

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.

TLAB:ljw
13-212.ljw



⁸ 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).

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