Supreme Court rejects priority for subsistence

Law unconstitutional

by Warren Jarvis
for the Tundra Times

In the latest installment in the long and turbulent saga of the Alaska struggle with subsistence, the Alaska Supreme Court last month threw out as unconstitutional the state's current subsistence law.

The law, enacted in 1986, was a response to a previous legal challenge and a threat by the federal government to take over fish and game management of the 60 percent of Alaska that is federal land.

Key events

—Page Five

Steve Behnke, director of the Division of Subsistence for the Alaska Department of Fish and Game, said it was too early to tell what changes the court ruling might bring about.

He said, however, that the state subsistence regulations will remain in force, "until there is time to go back to court and get clarification."

continued on page five

• State official: Ruling means major changes

continued from page one

Behnke also said the decision means that eventually "some pretty major changes" will have to be made.

Justice Jay A. Rabinowitz cast the only dissenting vote in the 4-1 decision.

The decision overthrew a 1988 State Superior Court ruling upholding the state process of allocating subsistence use by "rural" and "urban" designations, saying in effect that the law discriminates unnecessarily against urban residents.

Under the state law, "rural" residents have priority in the taking of fish and game in times of shortage. The state law was enacted after Title VIII of the Alaska National Interest Lands Conservation Act was passed by Congress. ANILCA required a subsistence priority in times of shortage in fish and game resources.

"Exclusive or special privileges to take fish and wildlife are prohibited," the Alaska Supreme Court said in its opinion.

"The conclusion that we have reached does not mean that everyone can engage in subsistence hunting or fishing," the court added, stating, "We hold only that the residency criterion used in the 1986 act, which conclusively excludes all urban residents from subsistence hunting and fishing regardless of their individual characteristics, is unconstitutional."

The justices, in defining their decision, cited sections 3, 15 and 17 of article VIII of the Alaska Constitution — the "common use" provision — as well as section 1 of the White Act, a federal law under which Alaska fisheries were regulated before statehood.

Justice Daniel Moore, in his addendum to the majority opinion, said the decision does not mean all subsistence preference laws would be unconstitutional.

"There is only a modest correlation between the set of people who reside in areas designated as rural. . . and the set of people who are dependent upon subsistence hunting and fishing," Moore said.

State officials and Alaska Native leaders said they have not yet determined the effects of the decision.

"We're still trying to sort out the implications of the decision, but at first blush they appear enormous," Gov. Steve Cowper stated in a press release on the day of the decision. "Over the next few weeks we'll be exploring some options, although right now they look pretty limited."

The basic goal, Cowper said, will be "trying to protect fish and game resources while preserving the subsistence way of life for those who depend on it."

Cheri Jacobus, one of the attorneys representing the four men who filed the suit, said they were very pleased with the ruling.

"We do not see this as an anti-subsistence decision. We view this as a pro-subsistence decision," she said. She added that the decision was a step forward toward protecting the rights of the individual.

Jacobus said the decision will aid what she termed "real" subsistence users. She explained that she was referring to traditional users who live in areas currently classified as urban, as well as excluding those who do not normally live by subsistence yet live in areas currently classified as rural.

Julie Kitka, president of the Alaska Federation of Natives, does not agree.

"I'm at a loss to figure out any positive aspects to this," she said, saying that AFN has been arguing against the suit since the case's filing in 1983.

However, Kitka said, "People should not panic over the decision, because it was the state law that was ruled unconstitutional. Title VIII of ANILCA is still intact."

Calling the decision "extremely disappointing," Kitka said the Native community will now have to rely heavily on Title VIII of ANILCA and Congress.

"It appears to us now that the State of Alaska is unable to protect the subsistence users," she said.

Larri Spengler, assistant attorney general for the state, said that how the state reacts to the ruling depends on how the Superior Court, which was given back the ruling by the state Supreme Court for correction, interprets the higher court.

This procedure, she said, will probably take months, and will determine whether Alaska's entire subsistence preference law is unconstitutional, or just the rural-urban definitions in it.

Keith Bayha, the chief of the division of technical support for the U.S. Fish and Wildlife Service, said that while his agency is preparing options for the possibility of federal control, "the ball is not in our court at this time."

Bayha said that the state and the federal government must continue assuming the status quo until the Superior Court interpretation comes out. Until then, Bayha said, the Fish and Wildlife Service will continue preparing "what if" options to prepare for some of the many possible outcomes.