Court's ruling devastating to Natives

by John Shively

In what can only be termed a double-barreled blast from a culturally biased shotgun, the Alaska Supreme Court has sent a message to Alaska Natives which will reverberate for years.

OPINION

During the week before Christmas, in two separate but legally related cases, the Alaska Supreme Court has told Alaska Natives there is no room under the State Constitution to assist them either in preserving their own culture or in helping them participate in Western culture.

In a case involving the state's local hire law, the Supreme Court found it unconstitutional to attempt to help people in economically disadvantaged areas obtain jobs on state-funded projects.

Although this case has implications for non-Natives, there is no question that the most economically disadvantaged areas in the state are those areas primarily inhabited by Alaska's Native people.

In the second case, the Supreme Court threw out the state's subsistence law because the law favored rural residents over urban residents in subsistence use of fish and game. The state's subsistence law was an effort to resolve a very difficult and long-standing issue relating to the protection of hunting and fishing rights which are the basis of the Native culture.

There are several issues common to these cases. Both involved a split decision of the court. The local hire law saw three-two division in the court, and the subsistence law, a four-one division.

In both cases the Supreme Court was concerned with the concept of equal allocation and access. In the local hire law, the case was decided under the equal protection clause of the constitution. The subsistence decision was based on the concepts of equal access and common use found in the natural resources article of the constitution.

The Supreme Court in both cases seems to recognize that inequality is rampant in our society. The only question the court decides is who is going to be more unequal than whom.

In these cases the Supreme Court, in its very finite wisdom, decided that the primarily non-Native urban society should have the upper hand over the primarily Native rural society.

In the local hire case, the job preference was available only if the State Department of Labor determined an area to be economically depressed. In such areas, the preference applied to only 50 percent of the jobs for which there were qualified local residents.

Thus, there were plenty of opportunities for urban workers to participate in rural projects. However, the Supreme Court refused, even in this limited manner, to assist people in rural Alaska in participating in Alaska's economy.

Absent this kind of assistance, most of the jobs will go to urban residents who have direct access to union halls and to the headquarters offices of those construction companies which perform the work on most state-funded projects.

The decision on the state subsistence law is on the other end of the cultural scale. Rural Alaskans, particularly Native people, depend on fish and game resources for a great deal of their livelihood.

In order to protect this lifestyle the federal government passed a law requiring the state to adopt subsistence legislation that gave preference — not exclusive use — in hunting and fishing to rural Alaskans. Sport hunting and fishing and commercial fishing would still take place while this preference was exercised. The court has now dismembered this subsistence law.

It should be of some concern to citizens who believe judicial decisions should be free of personal bias that three of the four justices who decided to overturn the subsistence law have recently held sport hunting and/or sport fishing licenses.

At the very least, this gives the appearance of a conflict of interest, as their decision gives themselves and other urban sportsmen a potentially bigger piece of the Alaska fish and game pie.

Remember, this is the same Supreme Court which oversees a criminal justice system which incarcerates Natives at a rate which is more than twice their percentage of the population.

It is also worthy of note that major portions of the subsistence decision are based on the court's belief that the intent of a piece of federal legislation was directly incorporated into the Alaska constitution.

Native leaders might note with some irony that the title of that act was, appropriately, the White Act, and that its major purpose was to eliminate fishing rights for certain Natives.

In both the local hire and subsistence cases, Chief Justice Warren Matthews, Justice Edmond Burke and Justice Daniel Moore found for urban non-Natives. Also in both cases, Justice Jay Rabinowitz found on the side of rural Alaskans.

The fact that Rabinowitz is generally considered to be the most judicially distinguished justice of the five members of the Supreme Court should cause some people to think twice about what the Supreme Court has done.

Justice Allen Compton dissented from the opinion in the local hire case, but joined with the majority in the subsistence case.

The key point here is to look at the message the Supreme Court has delivered to Alaska Natives. The message would seem to be that, "We refuse to use the State Constitution to preserve your subsistence culture or help you get jobs in the Western culture."

It is a devastating and tremendously significant message to those Natives who for years have been told that if they just work within the system, the system will recognize the importance of them as a distinct and important part of our Alaskan society.

The message is a sobering one. It would seem to give a great deal of credence to those leaders of the Native community who promote a sovereign relationship with the federal government as the only logical method for solving the many difficult social, legal and economic problems facing Alaska Natives. Indeed, the U.S. Supreme Court has an almost 200-year tradition of protecting the rights of indigenous people.

The message delivered by the Alaska Supreme Court is every bit as explicit and blatant as those messages delivered by white judges during the declining days of racial segregation in the South, as well as the message delivered by George Armstrong Custer and his compatriots as they herded American Indians across the Western frontier.

The court seems to be saying, "There are more of us white guys than you Natives, and the more of us there are, the less we will leave for you."

Even though these Supreme Court decisions will be challenging to Alaska Natives, these people have survived hardship for thousands of year. They were here long before institutions such as the Alaska Supreme Court were envisioned by mankind and will be here long after the justices of the Supreme Court have cashed out their state retirement and fled to some exotic southern climate.

Even though the Supreme Court found a unique way to say, "Merry Chritmas" to Alaska Natives, I believe the new challenges presented to the Native leadership will be met, just as other challenges have been met in the past.

Alaska Native are survivors, and they will ultimately prevail. However, I am ashamed and saddened that the Alaska Supreme court will not allow the state to participate in the resolution of these problems.

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This column is reprinted courtesy of the Anchorage Times. John Shively is a vice president of NANA Regional Corp. He is a former chairman of the Board of Game and was chief of staff to Gov. Bill Sheffield.