RC044

IN THE SUPREME COURT OF THE STATE OF ALASKA

Alaska Fish and Wildlife Conservation Fund (AFWCF),	)	
Appellant,	)	
v.	)	
State of Alaska and Ahtna Tene Nene',	)	
Appellees.	)	S-14516
Trial Court Case# 4FA-11-1474 CI	)	

APPEAL FROM THE SUPERIOR COURT
FOURTH JUDICIAL DISTRICT AT FAIRBANKS
THE HONORABLE MICHAEL P. MCCONAHY, PRESIDING

BRIEF OF APPELLEE STATE OF ALASKA

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Marilyn May, Clerk

By: _____

Submitted by Teresa Sager Albaugh

Board to develop two or more alternative subsistence hunting options, among which Alaskans may be required to choose. The Fund is simply wrong on this point, and the trial court properly concluded that "[t]he presently disputed Board action distinguishes between uses, not users ...; the Board did not distinguish between users, as all Alaskans are eligible to participate in the CHP."[108]

D. The Trial Court Did Not Err in Refusing to Strike Other Pre-*McDowell* Statutes as Unconstitutional.

The Fund has no grounds for arguing that "at least six other pre-*McDowell* statutory and regulatory subsistence preferences must be struck."[109] Three of the statutes, AS 16.05.940(28), (32) and (33), include references to rural areas that are unenforceable following the *McDowell* ruling and have already effectively been stricken by judicial ruling. Even in *McDowell*, however, the trial court on remand found the "rural" references to be severable and retained the remainder of the definitions.[110] The State is well aware that these "rural" references have been declared unconstitutional, and the Alaska Supreme Court has recognized that the State no longer utilizes the urban-rural distinction.[111] The Executive Branch has repeatedly submitted bills that would bring these statutes into conformity with the *McDowell* ruling, but the Alaska Legislature has not amended them.[112] Another of the challenged statutes, AS 16.05.258(b)(4)(B)(ii), retains language referencing local residency that this Court found to be unconstitutional in

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108 Exc. 446 (emphasis in original).
109 At. Br. 19-21, 24-27.
110 R. 242-53. The definitions are now found at AS 16.05.940(31), (32), and (33)
111 R. 242-53 and *Morry*, 836 P.2d at 366-67.
112 R. 243. As just one example, *see* HB 600, introduced in the 17th Legislature.

1992 Gov. HB 599 in 17th Leg.

BARNES - RESOURCES JUDICIARY

AS 16.05.940(

In sum, the Superior Court properly refused to rewrite the Alaska Fish and Game Code according to the Fund's desires.

E. The Change to 5 AAC 92.072(d) Was Properly Noticed.

The Fund asserts that the Board violated the Administrative Procedure Act (APA) by not giving adequate notice of an amendment to 5 AAC 92.072(d) that added the phrase "unless separate community harvest hunt seasons are established" to the existing provision that community harvest permit hunts will be the same as for other subsistence hunts for a species in an area.[118] The Fund's argument is baseless. It fails at the outset because, while the Fund recognizes that it "bears the burden of showing a substantial failure to comply with the [APA]" and that the APA only requires identification of "the subject matter of the regulation ... so as to assure that members of the public are reasonably notified," it wholly fails to try to meet that burden.[119] It does not even identify the relevant meeting notices for appellate review.

The Superior Court properly found that adequate notice was given in in January 2009 of the changes adopted at the Board's March 2009 meeting because it "contain[ed] notice of proposed changes to unit 13 seasons for caribou and moose, as well as proposed changes to community subsistence harvest areas and conditions."[120] The ruling is correct, and the Fund fails to show any error.

In addition, at its October 2010 meeting, the Board reconsidered all its

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118 At. Br. 21-27.

119 At. Br. 22.

120 Exc. 448. The notice can be found in the State of Alaska Online Public Notices by searching for "Board of Game Spring 2009 Meeting."

Kenaitze.[113] Following the *Kenaitze* decision, the Board eliminated local residency from its Tier II scoring criteria.[114] So while the language remains on the books, following this Court's ruling in *Kenaitze* it is not implemented.

Neither the Executive Branch nor the Judicial Branch has the authority to write or rewrite statutes, even if those statutes are patently defective.[115] Only the Legislature may make the changes necessary to conform the codified Fish and Game Code to this Court's rulings. The Fund is simply mistaken, and ignores the separation of powers doctrine, when it assumes that this Court can dictate the language set forth in Alaska's statutes.

The final provision the Fund urges this Court to strike, AS 16.05.258(c)(1-13), has nothing to do with eligibility for subsistence participation.[116] Rather, it sets out criteria the Boards of Fisheries and Game must consider "in determining whether dependence on subsistence is a principal characteristic of the economy, culture, and way of life of an area or community" in the context of identifying nonsubsistence areas.[117] No findings about nonsubsistence areas are at issue in this litigation, and the Fund has not showing how this statute is relevant to their claims, how it harms them, or why it is unconstitutional.

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113 894 P.2d 632 at 638 (Alaska 1995).

114 *See* 5 AAC 92.070, which only authorizes points for "customary and direct dependence on the game population" (following AS 16.05.258(b)(4)(B)(i)) and for the "ability of a subsistence user to obtain food" (following AS 16.05.258(b)(4)(B)(iii)).

115 *Alaskans for a Common Language, Inc. v. Kritz*, 170 P.3d 183, 196 n. 54 and 55 (Alaska 2007); *Williams v. State*, 151 P.3d 460, 470 (Alaska 2006); *Gottschalk v. State*, 575 P.2d 289, 296 (Alaska 1978).

116 At. Br. 25.

117 AS 16.05.258(c).