Who Has the Legal Right to Fish?

Constitutional and Common Law in Alaska Fisheries Management

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Introduction

The purpose of this booklet is to condense the major constitutional and common law issues of fisheries management into a brief, clear summary. The information can help users of the fish resource understand their legal interests and responsibilities in relation to others.

Strategies available to fisheries managers and fisheries users are set by legal rules and standards. This publication focuses on the parameters established by state and federal constitutional law and state common law. Statutes and administrative regulations are not addressed, because (1) constitutional and common law create the context within which statutes and regulations are interpreted, and (2) statutes and regulations can be volatile and ephemeral since they are tied to political branches of government.

The booklet is organized into four parts. First, it discusses the processes of legal reasoning and the interplay among constitutional, common, and statutory law. Second, it identifies the sovereigns that have duties and authority for fish management. Third, it addresses the legal balancing that must occur to resolve competing uses of the fish resource, and in Part 4 it discusses specific Alaska case examples illustrating the principles.

Part 1: Understanding Constitutional Law, Common Law, and Statutory Interpretation

Succinctly stated, statutes are the province of the legislature; common law is created by the judiciary; regulations are the product of the executive branch; and the constitution establishes appropriate bounds for all three, with the judiciary serving as final arbiter for constitutional interpretation. All are distinct sources of substantive and procedural authority, yet each must interact with the others within a complex web of legal construction.

Understanding the Common Law

For many, common law is the most difficult legal concept to understand, yet it is this nation's most distinguishing legal characteristic. Common law is a consequence of America's founding as a British colony, for it is an English invention designed to bring stability and predictability to the arrangements among peoples by making custom and tradition into law. Nations with histories linked to continental Europe (such as France, Spain, and Germany) do not have common law in their legal institutions.

Common law is the product of courts resolving conflict among individuals by relying on local standards of reasonable conduct and expectations. Once a decision is made, the decision serves as precedent for purposes of analogy in subsequent controversies.

Much of the law that controls our behavior is common law, never enacted by a legislature. For example, property law, contract law, public and private nuisance, and tort law are all the domain of common law. When a statute is passed that intrudes on common law, the first rule of interpretation is to assume the intent by the legislature to preserve the common law. A statute replaces common law only when the legislation has explicit wording to do so. Even then, the statute is construed narrowly, thereby preserving as much of common law as possible, replacing only those aspects clearly specified by the statute.[1]

Common law is built on the case law tradition of legal reasoning by analogy.[2] When a court hears a controversy, it first categorizes the situation on the basis of its facts. The court then decides the outcome based on a "reasonable person" test, considering the appropriate local customs and traditions. Over time, the court designs sets of consistent rules that are appropriate for settling different types of controversies. The task of decision-making becomes one of determining which category of fact-patterns new controversies most closely resemble, in order to determine which rule to use. Each new case must be compared to a prior set of cases, which serve as precedent in determining which rule to use.

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[1] Plater, Zygmunt, R. Abrams, and W. Goldfarb. Environmental Law: Nature, Law, and Society. West Publishing Co., St. Paul, MN, 1992, pages 257 and 259.

[2] Levi, Edward. An Introduction to Legal Reasoning. University of Chicago Press, 1949.

It is important then to realize that each new application of an established rule slightly changes that rule because each controversy is slightly different from the cases before it.[3] In this way, the common law maintains currency without need for legislative intervention. Relying on precedent ensures that change within legal doctrines is evolutionary rather than revolutionary. Thus, case law is a check on the discretion of individual judges because a judge must explain his/her decision on the basis of its conformity with previous cases.[4] It is indeed the very rare occasion that an entire line of reasoning is changed by being overturned. The advantage of case law development is that it allows adaptability while preserving predictability.

Case law and legal reasoning approaches constrain not only common law development, but also constitutional and statutory interpretation.

Constitutional Interpretation

The Constitution has ambiguity in its text, plasticity in its terms, and indeterminacy in its history.[5] It is more a framework than a blueprint for balancing liberty and power.[6] U.S. Supreme Court justices have often commented that constitutional interpretation is difficult. The Constitution has developed in a direction that could not have been foreseen by its begetters.[7] This gives latitude to those who must later interpret it to make the language applicable to cases that the framers could not have imagined.[8] The U.S. Supreme Court believes that constitutional interpretation is not limited to the plain meaning of its text nor to the original intent of its framers,[9] but interpretation must be considered in light of our whole experience in what we have become as a nation.[10]

This is not a prescription for free constitutional interpretation for settling disputes by judges, legislators, or individuals. There are standard principles of reasoning that set the stage for legitimate "constitutional conversation" in decision-making.[11]

When interpreting the Constitution, courts must describe a general principle that can be applied to the issue at hand, which is also consistent with the written text of the Constitution, historical traditions of society, and precedent established in the case law of previous interpretations. These principles must not be so broad that they expand into fields for which they were not intended. While the consistency criterion does not seek positive pronouncement from the Constitution's text, it still serves as a constraint on judicial discretion.

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3 Ibid.

4 Eisenberg, Melvin A. The Nature of the Common Law. Harvard University Press, Cambridge, MA, 1988, pages 9-10, 50-53.

5 Tribe, Lawrence and Michael Dorf. On Reading the Constitution. Harvard University Press, 1991.

6 Ibid.

7 Holmes, Justice Oliver Wendell. Missouri v. Holland 252 U.S. 416 (1920).

8 Rehnquist, Justice William. The Notion of a Living Constitution. 54 Texas Law Review 693 (1976).

9 White, Justice Byron. Thornburgh v. American College of Obstetricians 476 U.S. 747 (1986).

10 Holmes, Justice Oliver Wendell. Missouri v. Holland 252 U.S. 416 (1920).

11 Tribe. See note 3.

Statutory Interpretation

Once Congress enacts a statute, it is up to the judiciary to interpret the statute if disputes arise when it is implemented by administrative agencies. Applying meaning to a statute is difficult, given the general language and ambiguous terms most statutes have. Consequently, courts must look to text, legislative history, context, and policy considerations when reviewing statutes.[12]

Text is the starting point for the process of statutory interpretation because it is the most useful limitation on judicial discretion.[13] If the text is not written with clear, precise, and detailed language, then courts must try to determine the intent of the legislature or Congress when they enacted the statute. Determining intent, however, is problematic in that legislators vote for bills for many reasons, including political ideology, party or personal loyalty, matters of conscience, or constituent building.[14] Thus, it is usually extremely difficult to accurately describe the intent of a piece of legislation.[15]

As a result courts must often take into account the social and legal circumstances not anticipated or dealt with when a statute is passed. The courts usually consider current values, such as fairness and justice, in order to interpret the application of a statute to a particular case.[16]

Judicial discretion is limited. Just as in the development of common law and constitutional law, statutory interpretation is constrained by the role of precedent in case law. It is helpful to think of judicial discretion in statutory interpretation as a sliding scale. The more specific and detailed a statute, the less judicial discretion; the more vague and abstract the statute, the more judicial freedom to invoke policy considerations in interpretation. The final check is the legislative branch itself. Legislators can minimize judicial discretion in statutory interpretation by using precise language and definitions, frequent amendments to keep applications current to contemporary considerations, and "sunset" provisions.[17]

Balancing Rights and Responsibilities

To discuss rights as absolutes encourages simplistic reasoning, inconsistencies, and polarization.[18] There are no absolute rights; all rights carry responsibilities with them. For example, the "right" to own a stereo does not entail a "right" to play it as loud as one wishes, or whenever one wishes, if to do so injures another. This restriction on property rights, demanding responsibility in the exercise of ownership, is known as nuisance. Similarly, the "right" to free speech does not extend to falsely yelling fire in a crowded theater with deliberate intent.

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[12] Eskridge, William and Phillip Frickey. Statutory Interpretation as Practical Reasoning. 42 Stanford Law Review 321 (1990).

[13] Ibid.

[14] Ibid.

[15] Ibid.

[16] Ibid.

[17] Ibid.

[18] Glendon, Mary Ann. Rights Talk. Freedom Press, 1993.

Thus, with every "right" that an individual may assert, there are social responsibilities connected with exercising the right. This balancing takes place by considering common law, the Constitution, and the interpretation of statutes.

Part 2: Authority to Manage Fisheries

Four entities referred to in the Constitution have sovereign or quasi-sovereign interests in fisheries management. These entities, in somewhat of a hierarchy of authority are: (1) federal government, (2) compact organizations, (3) Native American tribes, and (4) states. Each bases an interest in the fishery on different legal grounds, and determining when a sovereign's interests trump another's is extremely fact specific.

Federal Government

Federal interests in fisheries are more important than other sovereign entities because of the Constitution's Supremacy Clause,[19] drafted to rectify the question of federal authority that plagued the Articles of Confederation. This supremacy only applies, however, when the federal activity is among those granted to the federal government in the Constitution. To a certain extent, the 10th Amendment serves as a weak limitation on federal authority and thereby safeguards state interests. The positive expressions of federal authority are (1) the Property Clause,[20] (2) the Commerce Clause,[21] and (3) the Treaty Clause.[22]

1. Property Clause

The property clause does not make fish the property of the United States but, rather, relates to the terrestrial lands, beds of navigable waters, reserved water bodies, and territorial seas which have federal ownership. Thus, federal management of fish is a result of federal ownership of lands and waters and the inextricable relationship among fish, federal land, and federal waters.

The property clause is very powerful. Federal authority to regulate natural resources and management on federal land is absolute and unlimited under the Constitution.[23] This power enables Congress to control the use of federal lands and the resources on them, to protect these resources from injury, and to set the conditions on which individuals may obtain rights.[24] In addition, the property clause grants the authority to Congress to regulate non-federal resources on federal lands.[25]

Under the property clause Congress also has the power to regulate private or state conduct on state or private lands, if the regulation is necessary to protect resources on federal land[26] or to prevent interference with federal resource management.[27]

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[19] U.S. Const. art. VI, cl. 2.

[20] U.S. Const. art. IV, sec. 3, cl. 2.

[21] U.S. Const. art. I, sec. 8 cl. 3.

[22] U.S. Const. art. II, sec. 2 cl. 2.

[23] Kleppe v. New Mexico 426 U.S. 529 (1976).

[24] U.S. v. Vogler 859 F. 2d. 638 (1988).

[25] U.S. v. Brown 552 F. 2d. 817 (1977).

[26] Alexander v. Block 660 F. 2d. 1240 (1981).

[27] U.S. v. Moore 640 F. Supp. 164 (1986).

2. Commerce Clause

Because the Commerce Clause has been interpreted very broadly, it has been the foundation for most federal regulatory activity since the Great Depression. Conduct by the Environmental Protection Agency, the Federal Communications Commission, Federal Trade Commission, Federal Deposit Insurance Corporation, and almost every other federal agency is validated through the federal regulation of interstate commerce.[28] Because the federal government has exclusive jurisdiction over interstate commerce, any activity of a state or tribe that may adversely affect interstate commerce is invalid unless consented to by Congress. Due in part to ubiquitous use of the Commerce Clause, its application to natural resources is weak in comparison to the property and treaty clause application.

3. Treaty Clause

The Treaty Clause, like the Property Clause, is extremely powerful in the balancing of competing interests. Like the Property Clause, the power of federal regulation in accordance with international treaties is absolute, so long as the activity is delegated to federal authority.[29]

Compact Organizations

The Constitution grants the ability of two or more states to create a quasi-sovereign entity with the consent of Congress.[30] The compact has the power surrendered by the individual member states and granted to it by federal consent. The purpose of the compact is to address issues of governance that exceed the scope of any one state's control, yet are sufficiently of regional concern that a national approach would be inappropriate. Compacts address such issues as marine fisheries management, water allocations in the semi-arid West, river pollution, forest fire protection, interstate transportation, and flood control.[31]

Interstate compacts are contract agreements with the force of law.[32] Once entered into, the compact agreement supersedes pre-existing and subsequent state statutes.[33] Individual state members of a compact cannot alter compacts or remove themselves from compacts except by procedures stated in the compact document.[34] Compacts differ from traditional interstate agreements in that compacts may potentially affect the balance of power in the federal system or affect powers delegated to the national government.[35] Consequently, congressional consent is required to protect the national government from destructive state alliances and to prevent unreasonable injury to the

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[28] Wickard v. Filburn 317 U.S. 111 (1942).

[29] Missouri v. Holland 252 U.S. 416 (1920).

[30] U.S. Const. art. I, sec. 10, cl. 3.

[31] Heron, Keven. The Interstate Compact in Transition. 60 St. John's Law Review 1 (1985).

[32] Zimmermann, F., and M. Wendell. The Law and Use of Interstate Compacts. (1976).

[33] Ibid.

[34] Dyer v. Sims 341 U.S. 22 (1951).

[35] Cuyler v. Adams 449 U.S. 433 (1981).

interests of non-compacting states.[36] Compacts may even be drafted at the federal level and submitted to the states.[37]

Compact organizations have power not available to an individual state. Compacts may enact and enforce provisions that would be found to impermissibly interfere with interstate commerce or to impermissibly engage in international activity were the actions taken by a state alone. Also, once congressional consent is granted, federal ability to interfere with compact internal affairs is significantly limited. However, states are often reluctant to form compacts because state sovereignty is relinquished over the issues submitted to compact authority. By entering into a compact, a state joins an entity that enhances the power of state interests at the expense of state autonomy.

It can be argued that the regional Fishery Councils established according to the Fishery Conservation and Management (Magnuson) Act[38] are variants of a compact—each a hybrid entity composed of a compact and a federal agency.

Native American Sovereigns

Tribal sovereignty of Native Americans derives from the inherent sovereignty originating under aboriginal occupation predating the existence of the United States.[39] The extent of sovereign powers retained, however, is reduced due to the consequence of United States conquest over the continent; thus tribes are considered "domestic dependent sovereigns."[40] Congress retains authority over the tribes and can, through statute or treaty, divest aspects of tribal sovereignty.[41]

This power over tribes held by Congress is constrained by the public trust duty owed by the federal government toward those in domestic dependent status.[42] Consequently, when interpreting a treaty or statute, courts must construe the language liberally in favor of the best interests of Native Americans.[43] One of the powers retained by the tribes is to regulate non-members on tribal lands, and under certain conditions to regulate non-member use of natural resources, such as fish, off tribal lands as well. A recent Supreme Court ruling on tribal sovereignty determined that tribal regulation of non-members was permissible when the regulation was directed at activities which threatened the tribe's political integrity, economic security, or cultural welfare.[44]

Because the relationship between the tribes and the federal government can best be described as a government-to-government relationship, the sovereign interests re-

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[36] Heron, Keven. The Interstate Compact in Transition. 60 St. John's Law Review 1 (1985).

[37] Seattle Master Builders Association v. Pacific Northwest Electric Power and Conservation Planning Council 786 F. 2d. 1359 (1986).

[38] 16 USC 1801 (1976).

[39] Worcester v. Georgia 31 U.S. 515 (1832).

[40] Johnson v. McIntosh 21 U.S. 543 (1823); Cherokee Nation v. Georgia 30 U.S. 1 (1831).

[41] Williams v. Lee 358 U.S. 217 (1959).

[42] Riley, Thomas. Federal Conservation Statutes and the Abrogation of Indian Hunting and Fishing Rights. 58 University of Colorado Law Review 699 (1988).

[43] Lone Wolf v. Hitchcock 187 U.S. 553 (1903); Rosebud Sioux Tribe v. Kneip 430 U.S. 534 (1977).

[44] Montana v. U.S. 450 U.S. 544 (1981).

tained by the tribes are superior to those of the states when conflict arises. In Alaska, this situation is somewhat more problematic because the effect of the Alaska Native Claims Settlement Act on territorial sovereignty and Indian Country recognition, in exchange for corporate status and a financial settlement, is in a state of flux.[45] However, it must be noted that Native jurisdictional sovereignty over tribal members is retained, and the federal government's public trust duty to Native Americans is retained. Fisheries in Alaska are also affected by sovereignty issues and treaty rights as they relate to Pacific Northwest tribes in Washington, Oregon, California, and Idaho. Subsistence interests in Alaska are demographically related and do not invoke tribal sovereign status.

States

One should not assume from the foregoing discussion that states are weak when balancing legal interests against those of the federal government or Native American tribes. State sovereignty encompasses two very important interests: (1) Public Trust Doctrine, and (2) Police Powers.

1. Public Trust Doctrine

Public trust doctrine is at once both ancient and contemporary. It is the foremost common law doctrine regarding the management of natural resources and is a state's most powerful legal interest in fisheries management.

The roots of public trust doctrine (PTD) extend back to the period of Roman conquest and domination in Europe. During that time, nearly 1,400 years ago, Emperor Justinian proclaimed that the air, water, and sea were common property, owned by no one, and available to all for the purposes of fishing, navigation, and commerce.[46] American courts, like their English forebears, adopted PTD into their own common law.[47] PTD in America was first imposed on the shores, rivers, bays, and the lands beneath them for the benefit of the whole community.[48] The power and the duty offered by PTD is imposed on the states, not the federal government. The doctrine holds that a state cannot deny public access to trust resources by conveying them to individuals for private use.[49] The fiduciary duty owed by a state to the public can be likened to the duty owed by the federal government to Native American tribes except that states cannot cancel their responsibility through statute.

Today, modern PTD reflects the concept that certain natural resources are so essential to the well-being of society that they must be protected by distinctive legal principles.[50] This duty extends not only to maintaining access to such resources, but managing the resources to maintain sufficient quality and quantity that the resources re-

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[45] 43 USC 1601 (1971); see also Alaska v. Native Village of Venetie Tribal Government 101 F. 3d 1286 (1996).

[46] Stevens, Jan. The Public Trust: A Sovereign's Ancient Prerogative Becomes the Peoples Environmental Right. 14 U.C. Davis Law Rev. 195 (1980).

[47] Arnold v. Mundy 6 N.J.L. 1 (1821).

[48] Martin v. Waddell's Lessee 41 U.S. 367 (1842).

[49] Illinois Central Railroad v. Illinois 146 U.S. 387 (1892).

[50] Wilkinson, Charles. The Public Trust Doctrine in Public Land Law. 14 U.C. Davis Law Rev. 269 (1980).

main useful to the community.[51] Consequently, courts have extended PTD protection to resources and uses to include hunting, recreational fishing, wildlife habitat, scientific study, swimming, aesthetic beauty, and ecological integrity, in addition to the traditions of commercial fishing, navigation, and commerce over navigable waters.[52]

In Alaska, the common law of PTD has been formally incorporated within the state's Constitution.[53] Article VIII, sections 3 (known as the common use clause) and 15 (fishery clause) comprehensively incorporate the access concepts of PTD by stating "wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use,"[54] and that "No exclusive right or special privilege of fishery shall be created…in the natural waters of the state."[55] Article VIII, section 4 develops a variation on the "quantity and quality of the available resources" criteria of PTD by providing that the "fish, forest, wildlife and grasslands…shall be…maintained on the sustained yield principle, subject to preferences among beneficial uses." It should be noted, as a matter of interest, that the sustained yield management mandate in the Alaska Constitution extends beyond the PTD resources of fish, wildlife, and water to include forests and grasslands.

The common use clause is intended to guarantee public access to trust resources[56] and must be interpreted to offer the greatest opportunity for use of resources as is reasonably possible.[57] As fiduciary to the people in managing the fishery[58] the state must seek to equitably distribute the harvest of fish among users.[59] However, the common use clause does not prohibit regulations limiting use and access to trust resources if such limitations are related to conservation purposes.[60] In exercising its managerial role, the state may use only those limitations necessary to conserving the resource which pose minimum infringement to open access.[61] Different treatment of diverse user groups, such as allocations between sport and commercial fishermen, are acceptable if related to conservation.[62] Likewise, time, gear, and area restrictions are not a violation of public trust access obligations if designed to promote wise resource stewardship.[63]

2. Police Powers

Police powers are held by a state to promote the health, welfare, safety, and morals of its citizens.[64] These are the powers a state invokes when creating and enforcing crimi-

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[51] Bader, Harry R. Antaeus and the Public Trust Doctrine. 19 Boston College Env. Affairs Law Rev. 749 (1992).

[52] Orion Corp. v. State 747 P. 2d. 1062 (1987); Kootenai Env. Alliance v. Panhandle Yacht Club 671 P. 2d. 1085 (1983); Marks v. Whitney 491 P. 2d. 374 (1971); Montana Coalition for Stream Access v. Curran 682 P. 2d. 163 (1984).

[53] CWC Fisheries, Inc. v. Bunker 755 P. 2d. 1115 (1988).

[54] Alaska Const. art. VIII, sec. 3.

[55] Alaska Const. art. VIII, sec. 15.

[56] Owsichek v. State 763 P. 2d. 488 (1988).

[57] Wernberg v. State 516 P. 2d. 1191 (1973).

[58] Herscher v. State 568 P. 2d. 996 (1977).

[59] Metlakatla v. Egan 362 P. 2d. 901 (1961).

[60] Owsichek v. State 763 P. 2d. 488 (1988).

[61] McDowell v. State 785 P. 2d. 1 (1989); State v. Ostrosky 667 P. 2d. 1184 (1983).

[62] Kenai Peninsula Fisherman's Co-op. v. State 628 P. 2d. 897 (1981).

[63] State v. Hebert 803 P. 2d. 863 (1990).

[64] Euclid v. Ambler 272 U.S. 365 (1926).

nal laws, zoning statutes, liquor licensing, occupational safety regulations, and many environmental provisions.[65] To be found valid under the police powers doctrine, a statute need only demonstrate that the means chosen is related to the goals sought.[66] So broad are the police powers, as a basis for state action, that they may be seen as permitting an almost boundless host of regulation, just as the commerce clause authorizes a broad range of federal regulatory activity. Similarly, as the commerce clause power is relatively weak when balanced as an authority against other legal interests, so too are the police powers seen as a relatively weak foundation for laws when balanced against competing legal interests.

Individuals

In addition to sovereigns, individuals also possess interests in wildlife and fisheries. These interests fall principally under the federal Constitution's privileges and immunities clause and common law private property interests which are protected from government takings by the Constitution's Fifth Amendment.

1. Privileges and Immunities

Every citizen of the United States has the right to have their fundamental liberties respected by state governments. This protection, designed to promote interstate transactions and the free flow of goods, services, and ideas, is incorporated through the privileges and immunities clause of the U.S. Constitution.[67]

One of the first tests of this constitutional protection came in 1948, when a group of fishermen from Georgia challenged a South Carolina statute charging non-resident commercial shrimp fishermen a licensing fee 100 times greater that the fee charged South Carolina fishermen. In invalidating the South Carolina law, the U.S. Supreme Court noted that the state could not identify any attribute of non-resident commercial fishermen that would justify the fee disparity.[68] The U.S. Supreme Court did allow for differential license fees if the state could justify the disparity on the basis of compensating the state for added enforcement costs and conservation measures from state revenues to which only residents paid.[69] An attempt to apply the protection under the privileges and immunities clause to invalidate disparity between resident and non-resident recreational hunting license fees was rejected because, the courts argue, sport hunting, unlike commercial fishing activity, is an insufficient personal legal interest under the Constitution to trigger its protection. Thus certain interests rise to greater prominence because they contribute more significantly to the individual identity of a person. This concept, known as personhood theory, is a growing area in legal research. It is too early to determine the direction this theory, rooted in a right to privacy, may take as it relates to fisheries and other natural resources management law.

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[65] Miller v. Schoen 276 U.S. 272 (1928); Corrigan v. Scottsdale 720 P. 2d. 528 (1985).

[66] Bobrowski, Mark. Scenic Landscape Protection Under the Police Power. 22 Boston College Env. Affairs Law Rev. 697 (1995).

[67] U.S. Const. art. IV, sec. 2.

[68] Toomer v. Witsell 334 U.S. 385 (1948).

[69] Ibid.

2. Private Property

Under the common law doctrine of naturae ferae, wildlife and fish (due to public trust doctrine) cannot be owned by anyone in their natural state until reduced to possession by capturing.[70] This Locke-based theory holds that human labor transforms the wild thing into an article of commerce by removing it from nature. At that point, the fish or game animal is vested with private property attributes. The state, through its police powers, establishes the legitimate means by which fish and wildlife become personal possession.[71]

The ownership of taken fish is seldom an issue in fisheries management. However, the issue of what constitutes an encroachment on other property interests in the management of fisheries does come to the fore quite frequently. For example, is a limited entry fishing permit private property? Can the state restrict the use of private forest or mining lands to protect spawning streams as a fisheries conservation measure?

An Alaska limited entry permit is a "use privilege."[72] As such, it is similar to a liquor license.[73] Consequently, it is not vested with the full rights of private property.[74] Yet it does possess certain property attributes which receive some legal protections and bear some responsibilities.[75] It is similar, for legal balancing purposes, to a federal grazing permit in that regulatory activity may diminish its net worth by reducing market potential without requiring compensation for the monetary loss. Therefore, it is the type of value that generally is not protected as property in the full measure of the legal term.[76]

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[70] Pierson v. Post 3 Cai. R. 175 (NY Sup. Ct. 1805).

[71] McCready v. Virginia 94 U.S. 391 (1876); Manchester v. Massachusetts 139 U.S. 240 (1891).

[72] Alaska Stat. sec. 16.43.150(c) (1992).

[73] State v. Ostrosky 667 P. 2d. 1184 (1983).

[74] Alaska Const. Conv. P. Folder 210 (1956).

[75] Loretzen v. U.S. No. A90-446 Civil (Alaska 1992).

[76] U.S. v. Fuller 409 U.S. 488 (1973).

Part 3: Legal Balancing

The legal interests previously described cannot be realized as absolutes. Instead, courts must engage in fact-specific balancing when the application of two or more interests compete with one another.

Federal-State Pre-emption

State law and fisheries management may be invalidated if pre-empted by existing federal law, or if the state action interferes with interstate commerce. There are four principal types of pre-emption, where federal law outweighs state law: (1) Express, (2) Field Occupancy, (3) Direct Conflict, and (4) Interference with Federal Purposes. Closely related to pre-emption is the fact that states are not allowed to affect interstate commerce. When balancing the federal government's interests in fisheries through its property clause, commerce clause, and treaty clause with the state's interests through the state's public trust responsibilities and police powers, the following pre-emption types are considered:

1. Express Pre-emption

This form of pre-emption is straightforward. Congress may declare that the subject being regulated is reserved solely to the federal government.[77] This excludes state interests, and no balancing is necessary. The only issue in express pre-emption is determining the parameters of the subject for which pre-emption applies.

2. Field Occupancy Pre-emption

Even if Congress does not expressly state the intent to pre-empt state regulation of a subject, pre-emption may still be inferred if the scope, detail, and comprehensiveness of federal regulation indicates that there is no room for further attention to the matter, thereby preventing additional state regulation.[78] The only issue in these types of cases is to determine what area of concern has been occupied by direct federal action.

3. Direct Conflict Pre-emption

State law can be pre-empted if the effect of the state regulation would make it impossible to realize the goals of federal law.[79] The only issue in these types of cases is determining whether the goals in the federal statute fall within those of the enumerated powers.

4. Interference with Federal Purposes and Interference with Interstate Commerce

While interference with federal purposes[80] and interference with interstate commerce[81] are two distinctly different legal tests when balancing between state and federal interests in natural resources management, they are sufficiently similar to be combined into a single topic here.

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[77] Pacific Gas and Electric Co. v. California 461 U.S. 190 (1983); Silkwood v. Kerr-McGee Corp. 464 US 238 (1984).

[78] Huron Portland Cement Co. v. Detroit 362 U.S. 440 (1960).

[79] Kleppe v. New Mexico 426 U.S. 529 (1976).

[80] Hines v. Davidowitz 312 U.S. 52 (1941).

[81] Gibbons v. Ogden 22 U.S. 1 (1824).

A state law or regulation in fisheries management will be allowed to stand, even if it interferes with federal statute or interstate commerce, if it can meet the following rigorous test: (a) the state has a compelling interest justifying the action; (b) the state interest being protected is one of a unique or local character; (c) there is no viable alternative available to the state that will accomplish the state's purposes; (d) impact to federal purposes or interstate commerce is not intentional; and (e) essential federal interests or interstate commerce are not significantly or irreparably impaired by the state's conduct.

In fisheries management, public trust interests form the most compelling interest on which a state can justify an action.[82] Police power interests are heightened if directly related to the preservation of life. Economic development concerns seldom, if ever, are compelling enough to justify state interference.[83]

The state must also justify its interest as a local issue, rather than one of national character. Thus a state must point out unique factors such as dangerous currents and channels, discrete critical habitat areas, endemic wildlife populations, etc., to justify its burden on federal interests.[84]

The state also must demonstrate that it has a means to achieve the desired result without impinging on federal interests. A state may not attack federal regulation under the guise of state necessity.

State-Tribal Balancing

Because the sovereignty of recognized tribes is in accordance with a treaty, tribal sovereignty is protected under the federal Treaty Clause as the supreme law of the land, and therefore outweighs state sovereign interests. Conflicts between states and tribes in the management of fisheries and wildlife have frequently been litigated in the past twenty-five years.

1. Management on Reservation Lands

Management of fish and wildlife by tribes on reservation lands has consistently been upheld as essential in tribal sovereignty. The laws of states have no force in reservations because reservations are distinct political entities, with territorial boundaries and exclusive authority.[85]

2. Management off Reservation Lands

Tribal members may take fish and game, consistent with state conservation laws, at all traditional places even on privately owned lands, if such interests are granted by treaty. This has been upheld even when it excludes all other people, including the

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[82] Maine v. Taylor 477 U.S. 131 (1986).

[83] Tribe, Laurence. American Constitutional Law. 2d. Ed. (1988).

[84] Ray v. Atlantic Richfield 435 U.S. 151 (1978).

[85] Worcester v. Georgia 31 U.S. 515 (1832).

land owner.[86] The right of tribal access to customary fishing grounds may extend beyond those areas actually ceded under treaty.[87]

The major issues in off-reservation fishing and hunting controversies stem from the debate between "reasonably necessary" state conservation laws and a "fair share" of the resource for tribal use. These issues were dealt with in a series of cases involving Pacific salmon, and have a continuing effect on Alaska fishermen.[88]

State regulation of off-reservation tribal fishing is limited to the state's duty to ensure the perpetuation of particular runs or species.[89] Conservation measures cannot extend to promoting administrative efficiency or to attaining maximum sustained yields. State conservation measures affecting off-reservation tribal fishing and hunting must allow a share of the resource to Native Americans to ensure the maintenance of tribal political, economic, and cultural integrity. Thus, Alaska fisheries management is constrained if ocean fishing threatens the ability of Alaskan and Pacific Northwest tribes in Washington, Oregon, and California to get their share of the fishery needed to sustain the tribe's political, economic, and cultural traditions.

Balancing Individual Interests

1. Public Trust Access Interests

Public Trust Doctrine holds that the state must ensure equal opportunity for its citizens to access trust resources for trust uses. Therefore, the state must identify (a) trust resources and (b) trust uses. Not all conceivable uses of a trust resource are trust uses. Nor must every citizen be guaranteed use of trust resources for trust uses. The state is only required to guarantee equal opportunity. As was discussed in Part Two, this means the state may restrict methods of harvest, time of harvest, and location of harvest. Also, the state may restrict the definition of public trust uses. For example, trap lines are not protected by the common use clause of Article VIII, section 3.[90] Nor is anyone empowered to capture wild animals and place them into domestic status.[91] The practical impact is that limited entry fishing does not violate equal opportunity to access the fishery, but a subsistence priority based on residence does. The operative principle is that while a state may allow differential treatment of diverse user groups and make different allocations among them, the state does not have the power to deny an individual admission into a user group.[92]

2. Private Property and the Takings Analysis

Private property is subject to the common law of nuisance and police powers, to regulate for public safety, health, and welfare. The ability of the state to control private

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[86] U.S. v. Winans 198 U.S. 371 (1905).

[87] Seufert Brothers v. U.S. 249 U.S. 194 (1919).

[88] Collectively, these cases are known as the Puyallup Cases: 391 U.S. 392 (1968); 414 U.S. 44 (1973); and 433 U.S. 165 (1977).

[89] U.S. v. Washington 384 F. Supp. 312 (1975).

[90] Owsichek v. State 763 P. 2d. 488 (1988).

[91] Proceedings of the Alaska Const. Conv. app. V (1956).

[92] McDowell v. State 785 P. 2d. 1 (1989).

lands to protect the public's welfare is well established.[93] Takings is involved when government regulation has so much control over the property that the government must compensate the land owner. The requirement for compensation for regulatory takings falls under protection of property through the U.S. Constitution's Fifth Amendment.

While takings issues are important under police powers, under a state's public trust doctrine the state is immune to the takings prohibition as long as the government does not take physical possession of the property.[94]

An issue of regulatory takings can arise in the context of fisheries management if state agencies impose restrictions on the use and development of private forest lands, mining claims, and residential construction to protect anadromous fish habitat. To determine if the regulation is impermissible without compensation, the court looks at several factors.

First, the court will want to know if the regulation was sufficiently related to a proper public purpose.[95] This requires that the chosen means will achieve the desired result, and that the desired result is justified by the police powers. Second, the court examines whether, after the regulation, the private property owner can still make the property economically viable. If the regulation eliminates most or all economically reasonable uses of the property, the regulation survives only if the use prohibited is one that would not have been expected under current common law property theory.[96] Finally, the regulation must be narrowly tailored to the public protection sought.[97]

Alaska's constitutional protections against regulatory takings[98] are similar, though the concept of "damage" to property interests in Alaska law offers broader protection for private property rights than the Fifth Amendment to the U.S. Constitution.[99] Even so, regulations preventing certain types of development in order to protect natural resources will not necessarily be found a taking. For example, when the municipality of Anchorage zoned an area for wetlands conservation, imposing restrictive permitting processes, the Alaska Supreme Court ruled that there is no regulatory taking of property as long as there is a potential for appreciation and some opportunity for development.[100]

In a fisheries management context, legal cases involving regulatory takings would have to determine if the state restrictions on private property use were effective toward producing a public benefit from the fishery, such as economic stability or conservation.

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[93] Miller v. Shoene 276 U.S. 272 (1928).

[94] Orion Corp. v. State 747 P. 2d. 1062 (1987).

[95] Nolan v. California Coastal Commission 483 U.S. 825 (1987).

[96] Lucas v. South Carolina Coastal Council 112 S. Ct. 2886 (1992).

[97] Dolan v. Tigard 114 S. Ct. 2309 (1994).

[98] Alaska Const. art. I, sec. 18.

[99] Homeward Bound, Inc. v. Anchorage School Dist. 791 P. 2d. 610 (1990).

[100] Zerbetz v. Anchorage 856 P. 2d. 777 (1993).

Part 4: Case Examples

This section includes six case studies drawn from Alaska and federal courts adjudicating an allocation issue involving Alaska fisheries. These cases involve conflicts between resident and nonresident fishermen, conflicts between commercial and sport fishermen, and conflicts among various commercial fishermen.

Case One

BROWN v. ANDERSON, 202 F. Supp. 96 (1962)

Allocation of fish between resident and nonresident commercial fishermen

This case involves a state fishing regulation in Alaska which, during times of low salmon numbers, closes areas to nonresident commercial fishermen while maintaining rights to fish for resident commercial fishermen. The state action is challenged by a group of nonresident commercial fishermen on the basis that regulation violates both the "privileges and immunities clause" and the "commerce clause" of the U.S. Constitution.

Salmon are a migrating and free-swimming fish that are caught in the marginal seas of Alaska. Both resident and nonresident fishermen catch and transport salmon to Alaska for processing and eventual export to domestic and foreign markets, an activity that is clearly interstate commerce.

Fishing seasons and methods are set by the state in order to provide sufficient escapement of salmon up freshwater streams to ensure sustained yields of salmon. Each fisherman must select a specific area to fish before the season starts. The fisherman may not thereafter transfer to another fishing area without permission from the state Department of Fish and Game; such permission is rarely granted.

Licensed fishermen are about one-third nonresidents and two-thirds residents of Alaska. They fish side-by-side in the same manner without residency distinctions. Yet, the state does make such a distinction when overall harvest must be limited. It maintains an open season for residents, while denying the same opportunity for nonresidents.

There is no exception in the U.S. Constitution's "privileges and immunities" clause providing for differentiation, on the basis of general welfare, between citizens of states, without first establishing a finding that nonresidents pose a unique harm different from that caused by residents. Such discrimination, to be valid, must be reasonable on the basis of the facts presented. Here, nothing appears that will in any way justify the application of the prohibition to nonresidents and not to residents. Therefore the law violates the U.S. Constitution and cannot be sustained.

The state also asserts that the actual taking of fish is a local activity, and therefore does not invoke interstate commerce considerations. But taking the fish is just one step in the whole process of the fishing industry. Fishing as a whole (taking, processing, transporting, and marketing) involves "interstate commerce." Therefore, the state regu-

lation places a burden on interstate economic activity and is void under the U.S. Constitution.

Case Two

CARLSON v. ALASKA, 798 P. 2d. 1269 (1990)

Different licensing fees among resident and nonresident commercial fishermen

The Alaska State Legislature revised the commercial fishing licensing scheme to create a 3:1 nonresident differential for entry permits. The state justified the skewed fees on the grounds that such a system reimbursed the state for costs of fisheries management, enforcement, and conservation attributable to nonresidents. Alaskan agencies compared the estimated expenditures for regulating residents and nonresidents against estimated revenues from each. Under the system used by the state, revenues from nonresidents fell considerably short of management expenditures. Nonresident commercial fishermen challenged the state fee structure, in part on the basis that the state calculation of revenues failed to consider such sources as fuel taxes, corporate taxes, federal funding, and cannery jobs. Plaintiffs also challenged the statute as a violation of the privileges and immunities clause of the U.S. Constitution.

The Alaska court invalidated the fee structure. Under the Privileges and Immunities Clause, less favorable treatment by a state toward nonresidents violates the U.S. Constitution if: (1) the activity is basic to the economic livelihood of the nation, and (2) the activity is not related to the advancement of a substantial state interest. Commercial fishing, according to the court, is certainly a sufficiently important economic activity to be protected through the Privileges and Immunities Clause, though sport fishing and hunting are not. Thus the differential fee structure invokes constitutional analysis.

Therefore, the state will be barred from implementing its differential permit fee structure unless it proves that nonresidents pose a unique problem which the fee structure prevents. The burden of persuasion rests with the state to demonstrate that the problems complained of cannot be accomplished by available, nondiscriminatory means.

The record put forward by the state is insufficient to demonstrate whether the fee structure properly equalizes the economic burden of fisheries management; therefore the court is unable to determine whether the fees charged nonresidents are too high for the purpose of distributing the costs of management, enforcement, and conservation. The court must invalidate the statute because the state failed to meet its burden of justification.

Case Three

KENAI PENINSULA FISHERMAN'S CO-OP v. ALASKA, 628 P. 2d. 897 (1981)

Allocation between sport and commercial salmon harvest

This case involves the State of Alaska's attempt to address competition between recreational and commercial salmon fisheries in the Cook Inlet area. State policy established priorities of use between commercial and sport fisheries based on target species

for salmon runs at different times of the year. In runs which had been identified as a sport priority, commercial catches would be closed if escapement was too low. A group of commercial fishermen challenged the authority of the Board of Fisheries for developing such regulations.

The Alaska constitution gives the Legislature the authority to provide for the utilization, development, and conservation of natural resources. Legislation in accordance with this authority established the Board of Fisheries for conservation and development of the fishery resource. As a general rule, fish and game legislation and regulation should be liberally construed to allow state authorities to achieve their intended purposes. In this case, "conservation" implies the *controlled* utilization of a resource to prevent its exploitation, destruction, or neglect. "Development" connotes management of a resource to make it available for public uses.

A regulatory scheme which establishes priorities among users of the fisheries resource is permissible if based on the need to bring about conservation and development. In this case, the Board of Fisheries has adequately described the link between the need for orderly utilization among a variety of users to properly ensure conservation and development. Therefore, these regulations do not exceed the constitutional authority of the Board of Fisheries as the proper delegate of the Legislature. [Note: The regulations were invalidated on unrelated administrative procedure grounds.]

Case Four

STATE v. HEBERT, 803 P. 2d. 863 (1990)

Authority of the Board of Fisheries to allocate among competing commercial fishermen

This case involves the criminal prosecution of fishermen violating the superexclusive zones established to regulate the herring roe fishery. Fishermen who operate in one superexclusive zone are prohibited from operating in another. Also, fishermen who operate outside a superexclusive zone may not operate within one. Here, fishermen were charged with fishing in the Norton Sound zone after fishing in another superexclusive zone. The defendants raised two issues: (1) that the Board of Fisheries lacked the authority to create superexclusive zones, and (2) that superexclusive zones violate the common use clause of the state constitution.

The first argument is without merit. The Board of Fisheries clearly has the authority delegated to it by the Legislature to bring about conservation and development of the state fishery. Superexclusive zones are within that authority.

The second issue is more complex. Article VIII, section 3 of the state constitution provides that "Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use." Also, Article VIII, section 15 provides that "No exclusive right or special privilege of fishery shall be created or authorized in the natural waters of the state."

The regulation involves allocation by dividing the herring resource between competing subgroups of commercial fishermen. Such decisions are necessary for conserva-

tion and development of the state fishery. The court also observes that this regulation does not limit admission to a user group; hence, it is clear that no exclusive privilege is vested in a class of people. The regulation does not limit one's ability to fish in a superexclusive zone except in the sense that one may not fish in more than one. This type of restriction has been found effective in sustaining the state's herring resource. By conserving the resource, the regulation promotes the development of the resource and ultimately will, therefore, build the fishery and permit more people to participate in the commercial herring fishery.

Case Five

UNITED FISHERMEN OF ALASKA v. FAIRNESS IN SALMON HARVEST, INC., Opinion of the State Supreme Court of Alaska No. 4394 (1996)

Status of fish as property of state under public trust doctrine

This case involves the application for initiative referendum establishing a sport fishery priority for salmon, by allocating no less than five percent of total salmon harvest statewide for recreational fishing. Certification of the initiative petition by the state is challenged by United Fishermen of Alaska, a commercial fishing group, on the basis that the initiative would violate the state constitutional prohibition on appropriation of state property by ballot initiative. The legal question is whether fish can be characterized as state property subject to the appropriation prohibition.

The U.S. Supreme Court has clearly declared that fish and wildlife cannot be considered property owned by the state. Rather, fish and wildlife are a public trust, managed and protected by the state for the benefit of its citizens. However, the rejection of a property theory in wildlife does not answer the question as to whether it has sufficient legal status to be included in the constitution's prohibition on initiative-led appropriations of state property.

The Supreme Court observed that if the state's salmon population precipitously declines, the fishing industry would be devastated, causing harm to Alaska's economy and revenue base. The state benefits from the harvest of salmon through the collection of taxes imposed on businesses engaged in the fishery and the license fees for sport and personal use. Consequently, the state constitution affirms the importance of fish to the state by including fish within the codification of common law public trust doctrine through Article VIII, section 3. These public trust responsibilities impose on the state an affirmative, mandatory obligation to manage and protect the fishery so that the fish are available to the people for common use. This is a special and unique duty that cannot be canceled by the state. Consequently, the Supreme Court holds that the interest the state has in migrating salmon is such that, while not described as "property," is an "asset" within the meaning contained by the constitutional prohibition of initiative-based prohibitions. Therefore, the state's certification of petitions for initiative is invalid.

Case Six

CWC FISHERIES, INC. v. BUNKER, 755 P. 2d. 1115 (1988)

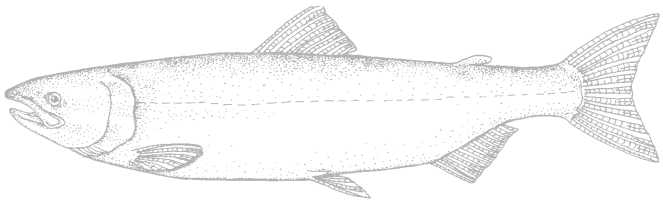
Fishing opportunity among commercial fishermen under public trust doctrine

Snug Harbor Packing Company received a patent to tideland fronting their cannery operation on Chisik Island from the Alaska Department of Natural Resources. Mr. Bunker, a commercial fisherman, operated a salmon setnet on tidelands covered, in part, by the Snug Harbor patent, starting his activity in 1964 and continuing until this controversy. The cannery's subsequent owner, CWC Fisheries, in 1985 granted setnet privileges on its tidelands patent to the facility supervisor. At that time, CWC Fisheries filed suit against Mr. Bunker for trespass. Bunker defended, arguing that the state patent to Snug Harbor was subject to the public trust doctrine. Under public trust doctrine, he alleged, the right of the general public to enter the tidelands for purposes of navigation, commerce, and fishing, is protected.

The court recognized that public trust doctrine is an affirmative duty that the state cannot ignore. The theory holds that the state must guarantee equality of opportunity to public trust resources for public trust uses. Tidelands and the beds of navigable waters are public trust resources in Alaska, protected for the public trust uses of fishing, navigation, and commerce.

A state may alienate a public trust resource to a private party through a patent only if: (1) to do so promotes public trust uses and conservation, and (2) the alienation is accomplished without a substantial impairment to the public interest in the lands and waters remaining. All transfers of public trust resources to private individuals are encumbered with an implied public trust easement, allowing the state to protect the public's retained interests.

Consequently, the court held that tidelands conveyed to private parties in accordance with state law are subject to the public's right to use the tidelands for navigation, fishing, and commerce. While patent holders are free to make use of their property in ways that do not interfere with public easements, they are prohibited from excluding the public from the property.



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