"Equal Access" to Alaska's Fish and Wildlife

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This article analyzes the Alaska Supreme Court's treatment of the equal access clauses of the Alaska Constitution in the context of fish and wildlife management. The article begins by tracing the history and application of each of the equal access clauses. Then, the article examines some of the common themes among the equal access clauses. The analysis next turns to the court's efforts to harmonize equal access jurisprudence with the "preference among beneficial uses" and equal protection provisions of the state constitution. Finally, this article concludes that the court must further clarify both its definition of "access," as well as the scope and limitations of the equal access clauses.

I. INTRODUCTION

Sections 3, 15 and 17 of Article VIII of the Alaska Constitution are collectively known as the equal access clauses. These uniquely Alaskan clauses guarantee equal access to the state's natural resources to all of Alaska's citizens. Over the past seven years, the Alaska Supreme Court has attempted to clarify the scope and meaning of these clauses in fish and wildlife contexts on no fewer than six occasions.[1] Additionally, the court has tried to reconcile the equal access clauses with a separate constitutional provision allowing the state to establish preferences among various

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1. The clauses also apply to other resources. *See, e.g.*, Wernberg v. State, 516 P.2d 1191 (Alaska 1973) (waters); CWC Fisheries, Inc., v. Bunker, 755 P.2d 1115 (Alaska 1988) (tidelands).

resource uses. The court is presently faced with these issues in another appeal involving access to fish and wildlife.[2] Thus, the court has an immediate opportunity to more clearly define the meaning of "access" to fish and wildlife, and to concretely establish the scope and limitations of the equal access clauses.

This article will analyze the court's treatment of equal access in the fish and wildlife context to date. First, part II considers the court's "common use clause"[3] jurisprudence. Part III then discusses decisions under the "no exclusive right of fishery" clause.[4] Part IV analyzes the law under the "uniform application clause."[5] Part V then examines some of the unifying principles and themes of the equal access clauses. Part VI discusses the relationship between the equal access clauses and other constitutional provisions, such as the "preferences among beneficial uses" clause and the equal protection clause. Finally, this note concludes that the court should take the next available opportunity to further clarify the meaning of "equal access."

II. THE "COMMON USE" CLAUSE

A. Public Trust Principles

Article VIII, section 3 of the Alaska Constitution, often referred to as the "common use" clause, provides that "[w]herever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use."[6] The Alaska Supreme Court has called the common use clause "a unique provision, not modeled on any other state constitution."[7] The clause embodies public trust principles that arise from a long history in this country of state managed wildlife resources.[8] The United States Supreme

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2. In *State v. Kenaitze Indian Tribe*, No. S-6162, the state is appealing a decision holding that the provision in Alaska Statutes section 16.05.258, authorizing the establishment of nonsubsistence use areas, violates the equal access clauses. The lower court decision was issued in *Kenaitze Indian Tribe v. State*, No. 3AN-91-4569 Civil (Alaska Super., Nov. 26, 1993) (final judgment).

3. ALASKA CONST. art. VIII, § 3.

4. ALASKA CONST. art. VIII, § 15.

5. ALASKA CONST. art. VIII, § 17.

6. ALASKA CONST. art. VIII, § 3.

7. Owsichek v. State, 763 P.2d 488, 493 (Alaska 1988).

8. The anti-monopoly purpose of the clause "was achieved by constitutionalizing common law principles imposing upon the state a public trust duty with regard to the management of fish, wildlife and waters. The constitutional framers'

Court has traced this history and concluded that the states have a trust responsibility to manage wildlife for the benefit of the public, not for the benefit of individuals or the government itself.[9]

Although the common use clause was intended to constitutionalize public trust principles,[10] the Alaska Supreme Court has not yet decided whether the clause grants greater protection over public access to natural resources than the public trust doctrine does toward tidelands and submerged lands.[11] To date, the court has held only that the "common law principles incorporated in the common use clause impose upon the state a trust duty to manage the fish, wildlife and water resources of the state for the benefit of all the people."[12]

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reliance on historic principles regarding state management of wildlife and water resources is evident from a written explanation in the committee materials for the term 'reserved to the people for common use.'" *Id.* The framers spoke of "[a]ncient traditions in property rights" which recognize that title to uncaptured wildlife "is reserved to the people or the state on behalf of the people." *Id.* (citing Alaska Constitutional Convention Papers, Folder 210, a paper prepared by Committee on Resources entitled "Terms").

9. Geer v. Connecticut, 161 U.S. 519 (1896). Specifically, the Court said that the state's power over wildlife "is to be exercised, like all other powers of government, as a trust for the benefit of the people, and not as a prerogative for the advantage of the government, as distinct from the people, or for the benefit of private individuals as distinguished from the public good." *Id.* at 529. The Alaska Supreme Court surmised that the framers of the constitution relied heavily on *Geer* when they drafted the common use clause. *Owsichek*, 763 P.2d at 495.

10. *Owsichek*, 763 P.2d at 496. Alaska's public trust responsibility to manage wildlife is comparable to its obligations under the "public trust doctrine," where the state has a trust duty to protect the public's right of access to certain lands and navigable waters for certain purposes. *See* Illinois Central Railroad Co. v. Illinois, 146 U.S. 387 (1892) (generally stating the public trust doctrine). In Alaska, the public has continuing access to privately held tidelands and submerged lands for navigation, commerce and fishing. *CWC Fisheries*, 755 P.2d at 1118.

11. In *CWC Fisheries*, the court examined whether a state tideland conveyance was subject to continuing public easements for navigation, commerce, and fisheries. Analyzing the conveyance under requirements of *Illinois Cent. R.R. Co.*, the court concluded that "[w]e need not decide at this time whether a fee simple tideland conveyance which satisfied the structures of *Illinois Central* would nonetheless run afoul of article VIII, section 3." *CWC Fisheries*, 755 P.2d at 1120 n.10.

12. *Owsichek*, 763 P.2d at 495.

B. Broad Public Access to Resources

The Alaska Supreme Court's principal interpretation of the common use clause regarding access to fish and wildlife can be found in *Owsichek v. State*.[13] There the court examined the state's system for assigning exclusive guiding areas to the big game guide industry. Under that system, the Alaska Guide Licensing and Control Board designated geographic areas in which only certain guides could lead hunts. Although persons could hunt recreationally in an "exclusive guide area" ("EGA"), only the Board-assigned guide could lead hunts professionally within the designated area.[14] The court concluded that the EGA system could not be justified as a wildlife management tool because the EGAs were endowed with many of the characteristics of private property.[15] Thus, the court reasoned that the EGAs "resemble[d] the types of royal grants the common use clause expressly intended to prohibit."[16] Although the court noted that the EGAs may have also violated the uniform application clause of the Alaska Constitution,[17] it struck down EGAs solely because they violated the common use clause.[18] In so doing, the court expressed a simple purpose for the common use clause, namely that it "was intended to guarantee broad public access to natural resources."[19]

The principle of broad access was reaffirmed and elaborated upon two years later. In *State v. Hebert*,[20] the court examined a regulation that established two "superexclusive" use fisheries. Under this type of fishery management, fishermen[21] must choose among several geographic areas where a fish species occurs. If a

13. 763 P.2d 488 (Alaska 1988).

14. *Id.* at 489. In practice, there were two types of EGA's: truly "exclusive guide areas," which had only one designated guide in each, and "joint use areas," which had several designated guides in each. *Id.* The court referred to both types as "EGA's." *Id.* n.1.

15. *Id.* at 498.

16. *Id.* at 497-98.

17. *Id.* at 498 n.17. The court did not consider this issue in full because the parties did not include it in their arguments and because the case could be decided upon other grounds. *Id.*

18. *Id.* at 498.

19. *Id.* at 493.

20. 803 P.2d 863 (Alaska 1990).

21. The term "fishermen" is used for the sake of convenience. The regulation applied equally to male and females engaged in fishing activities.

person registers to fish an area designated as "superexclusive," he or she may not harvest that type of fish in any other area. On the other hand, if the fisherman registers to fish in an area that is not "superexclusive," he or she may not fish for the same species in a "superexclusive" area.[22] The *Hebert* court cited evidence that the number of fishermen would probably increase under this type of registration-choice system, and thus, it would be possible for more rather than fewer persons to participate in the fishery. Therefore, the court upheld the superexclusive use regulation and noted that "if anything, [it] furthers the interests underlying section 3's common use mandate."[23] Thus, "broad public access" is a principle that favors maximizing the number of persons able to participate in a hunt or fishery rather than maximizing an individual's opportunities to catch as much fish or harvest as much game in as many areas as possible.[24]

C. Common Use Clause Prohibitions

The court held in *Owsichek* that the common use clause implicitly prohibits what another equal access clause, the "no exclusive right of fishery" clause,[25] prohibits on its face, namely "special privileges" and "exclusive grants" to fish and wildlife.[26] Although the other two article VIII clauses share these prohibitions, the purposes underlying the common use clause are "wholly apart from the limits imposed by other constitutional provisions."[27] Specifically, the common use clause was enacted with the intent to prevent monopolization of natural resources.[28]

The common use clause's prohibition against "special privileges" is best examined by its application in resolving the constitutionality of the EGA system. When an area was reassigned, the EGA

22. *Hebert,* 803 P.2d at 864.

23. *Id.* at 867.

24. This principle was followed by the state when it adopted a replacement for the EGA system struck down in *Owsichek.* The new system allows big game guides to select and register for up to three guiding areas in the state. ALASKA ADMIN. CODE tit. 12, § 38.820 (April 1994).

25. ALASKA CONST. art. VIII, § 15.

26. *See Owsichek,* 763 P.2d at 496. In an earlier decision, the court stated that the state's system for limiting entry into commercial fisheries is inconsistent with the common use clause because it grants an exclusive right to a select few. *State v. Ostrosky,* 667 P.2d 1184 (Alaska 1983).

27. *Owsichek,* 763 P.2d at 496.

28. *Id.*

system favored an applicant who had already used, occupied or invested in the area. Thus, this procedure worked like a seniority system that favored established guides over new entrants to the profession. The court found that such a system created a "special privilege" in violation of the common use clause.[29]

The EGA system was also found to be in violation of the "no exclusive grants" purpose of the common use clause. The prohibition against "exclusive grants" is another expression of the anti-monopoly principle against the granting of private rights in a public resource. Although the EGA system was unique in wildlife management, the court found it worthwhile to recognize features that gave it private property status. These features included their unlimited duration and the fact that guides could transfer them for profit without providing compensation to the state.[30]

The court found that the EGAs constituted an exclusive grant because they were unlimited in duration. The Alaska Supreme Court contrasted them with leases and concessions on state lands, which are limited in time, and therefore do not violate the common use clause.[31] The court noted that limiting entry into guide areas was inconsistent with the common use clause because it resulted in an exclusive right that could be exercised season after season.[32]

The *Owsichek* court also found that EGAs violated the public trust rationale underlying the common use clause because their sale generated no meaningful compensation to the public. The court again contrasted EGAs with leases and concessions, which do provide remuneration to the state.[33] Previously, the court had stated in dictum that the shore fisheries leasing program would not violate the public trust in part because shore fishery leases require compensation to the state for the use of public trust easements.[34] However, because profits realized from the sale of improvements constructed in an EGA went solely to the former EGA holder, and the Alaska Guide Licensing and Control Board routinely transferred the EGA to the buyer of those improvements, the public

29. *Id.*
30. *Id.* at 497.
31. *Id.* at 496-97.
32. *Id.* at 497.
33. *Id.*
34. *Id.* (citing *CWC Fisheries*, 755 P.2d at 1120-21).

trust doctrine was undermined by what was essentially an exclusive grant.[35]

D. Common Use: Its Scope and Limits

The Alaska courts have held that the "common use" of fish and wildlife is entitled to a high degree of constitutional protection. In a 1983 dissent, Justice Rabinowitz introduced this idea, stating that common use is a "highly important interest running to each person within the state."[36] In later court decisions a majority has supported this statement. For example, the court held in *Owsichek* that the interest is so vital that grants of exclusive rights are subject to "close scrutiny."[37] Furthermore, the clause itself makes no distinction in the level of scrutiny between personal and professional use,[38] and it protects both derivative and direct uses of fish and wildlife.[39] Whether direct or derivative, the right protected under the common use clause must be defined by the nature of the resource (that is, fish, wildlife or waters) and the nature of the use (that is, commercial, sport, subsistence or personal use), but not by a particular method or means of use.[40]

However, the common use clause does not govern all uses of fish and wildlife wherever they may be located. Constitutional history shows that the clause was not intended to govern the domestication of fur-bearing animals.[41] Furthermore, the common

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35. *Id.* at 496-98.

36. State v. Ostrosky, 667 P.2d 1184, 1196 (Alaska 1983) (Rabinowitz, J., dissenting).

37. *Owsichek*, 763 P.2d at 494.

38. In *CWC Fisheries*, the court noted that the public trust doctrine guaranteed fishermen access to public resources for "private commercial purposes" as well as recreation. 755 P.2d at 1121 n.14. Later that year, the court stated, "[t]he same [*CWC Fisheries*] rationale applies to professional hunting guides under the common use clause." *Owsichek*, 763 P.2d at 497.

39. The derivative use, however, should be "closely tied" to the actual taking of the fish or wildlife. For example, although professional hunting guides do not actually take game themselves, the court said that "[t]he work of a guide is so closely tied to hunting and taking wildlife that there is no meaningful basis for distinguishing between the rights of a guide and the rights of a hunter under the common use clause." *Owsichek*, 763 P.2d at 497 n.15.

40. *See* Alaska Fish Spotters Ass'n v. State Dep't of Fish and Game, 838 P.2d 798 (Alaska 1992) (holding that the state may regulate the method of using natural resources without violating the common use clause).

41. 6 Proceedings of the Alaska Constitutional Convention app. V, at 98 (Dec. 16, 1955).

use clause does not govern fish in private ponds or legally registered trap lines.[42] And, although the common use clause protects the public's right to use fish in natural waterways, it does not authorize people to trespass over private property to reach the waters.[43]

III. THE "NO EXCLUSIVE RIGHT OF FISHERY" CLAUSE

A. History of the Clause

Article VIII, section 15 of the Alaska Constitution is often called the "no exclusive right of fishery" clause. It provides:

> No exclusive right or special privilege of fishery shall be created or authorized in the natural waters of the State. This section does not restrict the power of the State to limit entry into any fishery for purposes of resource conservation, to prevent economic distress among fishermen and those dependent upon them for a livelihood and to promote the efficient development of aquaculture in the state.[44]

Among the equal access clauses, section 15 is unique in two respects. First, because it applies only to fishery resources, this clause is narrower than both the common use clause,[45] which applies to wildlife, waters and fish, and the "uniform application" clause,[46] which applies to all natural resources. Second, unlike the other two clauses, the "no exclusive right of fishery" clause was not adopted in its entirety along with the original constitution. Only the first part, prohibiting exclusive rights and special privileges, was adopted originally. The second part, allowing the state to limit entry into fisheries, was added as an amendment sixteen years later.

The constitutional framers intended the first part to take the place of a pre-statehood federal law that regulated Alaska's fisheries.[47] That law, section 1 of the White Act, prohibited

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42. *Id.*

43. *Owsichek*, 763 P.2d at 494 (citing 4 Proceedings of the Alaska Constitutional Convention at 2460 (January 17, 1956)).

44. ALASKA CONST. art. VIII, § 15.

45. *Id.* § 3.

46. *Id.* § 17.

47. The Committee on Resources of the Constitutional Convention stated that "[t]his section is intended to serve as a substitute for the provision prohibiting the several right of fisheries in the White Act." 6 Proceedings of the Alaska Constitutional Convention 87 (Alaska Legislative Council); *see also* 1960 Op. Att'y Gen. No. 9, at 3 (Apr. 8, 1960).

federal regulations from granting an "exclusive or several right of fishery."[48]

The second part of the "no exclusive right of fishery" clause was submitted as a joint resolution to the Seventh Alaska Legislature in February 1971. It initially stated that "[t]he State may restrict entry to any fishery for purposes of conservation of the resource, to relieve economic distress among fishermen and those dependent upon them for a livelihood and to insure fair competition among those engaged in commercial fishing."[49] According to its sponsor, Governor William A. Egan, the purpose of the resolution was to make it "indisputably clear that the state may act to conserve and manage its fisheries in a manner which will benefit all Alaskans."[50] Further, the resolution was intended to remove all doubt that the first part of the clause, which prohibited exclusive rights of fisheries, did not necessarily prohibit "reasonable gear limitations or other restrictions on entry in our fisheries."[51] Thus, the original resolution was considered to be a clarification of the prohibition against exclusive rights and special privileges, not an exception to it.

Ultimately, the opening language evolved from "[t]he State may restrict entry to any fishery . . . ," to "[t]his section does not restrict the power of the State to limit entry into any fishery . . . ."[52] The legislature believed that the subtle change was needed to overcome ambiguity arising from the decision in *Bozanich v. Reetz*.[53] In *Bozanich*, the United States District Court for the District of Alaska held that laws limiting licenses to specific

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48. Section 1 of the White Act reads:

> Provided, that every such regulation made by the Secretary of the Commerce shall be of general application within the particular area to which it applies, and that no exclusive or several right of fishery shall be granted therein, nor shall any citizen of the United States be denied the right to take, prepare, cure, or preserve fish or shellfish in any area of the waters of Alaska where fishing is permitted by the Secretary of the Commerce.

White Act of 1924 ch. 272, § 1, 43 Stat. 464.

49. S.J. Res. 10, 7th Leg., 1971 SENATE J. 116.

50. Letter from Governor William A. Egan to Senator Terry Miller, Chairman, Senate Rules Committee (Feb. 3, 1971) in 1971 SENATE J. 116.

51. *Id.*

52. House Committee Substitute for Committee Substitute for S.J. Res. 10, 7th Leg, 1st Sess. (1971).

53. 297 F. Supp. 300 (D. Alaska 1969), *vacated on other grounds and remanded*, 397 U.S. 82 (1970).

groups of fishermen violated both the common use and the "no exclusive right of fishery" clauses.[54] In response to this decision, the Alaska Legislature altered the opening line in order "to show that the state's power to limit entry is a specific *exception* to the 'exclusive right' prohibition."[55] Because the amendment was intended to create an "exception" to the prohibition against exclusive rights and special privileges, the prohibition is more compelling than if the amendment were only intended to provide clarification.

B. Application of the Clause

In *McDowell v. State*,[56] the Alaska Supreme Court relied largely on section 15 in interpreting the constitutionality of the state's criterion for participating in subsistence uses of fish, game and other wild, renewable resources. Under the 1986 version of the subsistence law, only persons who resided in rural areas of Alaska were eligible to enjoy the subsistence priority, while persons residing in urban areas were excluded from subsistence uses.[57] It was this rural residency criterion that was challenged under the equal access clauses.[58]

The *McDowell* court struck down the rural residency criterion, basing its decision on the "no exclusive right of fishery" clause and on its pre-statehood predecessor, the White Act. Noting that section 1 of the White Act guaranteed access to fisheries regardless of residence, the court reasoned that "section 15 likewise was

54. *Id.* at 304-07.

55. House Resources Committee, 1971 HOUSE J. 761 (emphasis added).

56. 785 P.2d 1 (Alaska 1989).

57. ALASKA STAT. § 16.05.258 (1987) (amended 1992). The subsistence law established two different systems, or "tiers," for distinguishing who was eligible to participate in subsistence uses. The tiers were determined by resource abundance. When there was enough harvestable resource to satisfy all subsistence uses, that is, at the "first tier" of abundance, the urban-rural criterion determined eligibility. When abundance diminished below the point where all subsistence uses could be satisfied, then rural residents, all of whom who had qualified under the "first tier," were further distinguished by their dependence, their local residency and their availability of alternative resources. *Id.* This is called the "second tier." The *McDowell* court examined the criterion for first-tier eligibility, namely, rural residency.

58. *McDowell*, 785 P.2d at 1.

meant to ensure an equal right to participate in fisheries, regardless of where one resides."[59]

Three years after *McDowell*, the court again construed the "no exclusive right of fishery" clause in *Alaska Fish Spotters Ass'n v. State Department of Fish and Game*.[60] That case involved a ban on aerial fish spotting, the practice of using aircraft to locate fish and direct the operations of commercial fishermen, in the Bristol Bay salmon fishery.[61] The court held that the ban did not violate the "no exclusive right of fishery" clause. The court found that the ban furthered equal access because all fishermen were equally excluded from aerial spotting, and that the pilots were not excluded from the numerous other uses of the resource.[62] This finding suggests that if a certain method or means is prohibited, and a group of individuals has no other way to use the resource, the remaining users may have been granted an unconstitutional "exclusive right" or "special privilege."[63]

Decisions construing the "limited entry" provision of article VIII, section 15 give further insight into the application of the "no exclusive right of fishery" clause. The Alaska Supreme Court has recognized the tension created by the clauses' simultaneous prohibition of exclusive rights in fisheries and the authorization of the state to limit entry.[64] The court has harmonized this apparent conflict by adopting a test of "least possible impingement."[65] This goal is achieved by the "optimum number" provision of Alaska Statutes section 16.43.290. Under this provision, the Commercial Fisheries Entry Commission establishes the optimum number of permits for each fishery. This number may be greater or less than

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59. *Id.* at 9.

60. 838 P.2d 798 (Alaska 1992).

61. *See* ALASKA ADMIN. CODE tit. 5, § 06.378 (June 1990).

62. *Id.* Other uses of the resource, as suggested by the court, were commercial fishing, participating in industries that support the fish harvest, using their planes to spot fish before an open harvest and transporting supplies and personnel for commercial fishing clients. *Id.* at 802.

63. The court made several other significant findings in upholding the fish spotter ban. First, it rejected the pilots' claim that they constituted a "user group" entitled to protection under the common use clause. *Id.* at 802. The court held that user groups are defined according to the nature of the resource (fish or wildlife) and the nature of the use (commercial, sport or subsistence), and not according to the particular tool used to take the resource. *Id.*

64. *See* State v. Ostrosky, 667 P.2d 1184 (Alaska 1983).

65. *Id.* at 1191.

the actual number of permits issued for the fishery. If greater, the state must issue additional permits until the optimum number is reached.[66] If lesser, the state must buy back permits until the optimum number is reached.[67] The Alaska Supreme Court has found that this system strikes an acceptable balance between fishermen's interest in access and the state's interest in conserving resources.[68]

Although limited entry is a unique situation, the "least impingement" principle may apply to other schemes that would create a special privilege for a subset of users.[69] In those instances, the inquiry should focus on whether another scheme, less intrusive upon equal access values, could achieve the same goals. For example, the Alaska Supreme Court suggested in *McDowell* that a system based on individual characteristics could be used to determine subsistence eligibility so long as it only minimally infringes upon the rights of those who are excluded.[70]

As previously discussed, the common use clause does not prohibit restrictive registration systems, such as "superexclusive" fisheries, if the system's restrictions on individuals result in greater public participation.[71] By the same rationale, these systems should also survive the exclusive use prohibitions of the "no exclusive right of fishery" clause. It is the element of choice that distinguishes a system where the state assigns areas (such as the EGA system)

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66. ALASKA STAT. § 16.43.330 (1992).

67. *Id.* §§ 16.43.310-320.

68. Johns v. Commercial Fisheries Entry Comm'n, 758 P.2d 1256 (Alaska 1988).

69. Analysis under the "no exclusive right of fishery" clause, as discussed earlier, applies only to situations where a portion of a user group is granted a privilege over the remaining members or potential members. The analysis is not applicable to differential treatment between resource uses, e.g., an advantage given to sport use over commercial use of a certain fish stock. These "preferences among beneficial uses" are the crux of fish and wildlife allocations, and they are specifically endorsed by the constitution. *See* ALASKA CONST. art. VIII, § 4; McDowell v. State, 785 P.2d 1 (Alaska 1989); Meier v. State 739 P.2d 172 (Alaska 1987); Kenai Peninsula v. State, 628 P.2d 897 (Alaska 1981).

70. *McDowell*, 785 P.2d at 3.

71. For example, the court came to this conclusion when comparing the competitive bidding system for allocating leases and exclusive concessions on state lands with the seniority system for granting EGAs. *See* Owsichek v. State, 763 P.2d 488 (Alaska 1988). The court found that a bidding system is constitutional because it allows a wider field of applicants than does a system based on prior use, occupancy and investment in the area underlying the private rights. *Id.* at 497.

from one where users register for areas (such as the superexclusive registration system). Even though a user may not have access to all areas, he or she is not initially excluded from any particular area. Thus, the apparent meaning of "equal access" is that no citizen enjoys guaranteed and exclusive use of a fish stock or wildlife population.

IV. THE "UNIFORM APPLICATION" CLAUSE

The third equal access clause, section 17 of Article VIII, is often called the "uniform application clause." It states:

> Laws and regulations governing the use or disposal of natural resources shall apply equally to all persons similarly situated with reference to the subject matter and purpose to be served by the law or regulation.[72]

The legislative history of the "uniform application clause" is sparse. The commentaries to the constitutional convention refer to it only once: "This section is intended to exclude any especially privileged status for any person in the use of natural resources subject to the disposition of the state."[73]

The Alaska Supreme Court recently interpreted the "uniform application" clause in *Gilbert v. State*.[74] There the court examined regulations allocating salmon among "intercept" and "destination" fisheries.[75] The regulations restrict harvest by fishermen who are further from spawning grounds in favor of fishermen who are closer to the grounds.[76] Drawing on principles derived from earlier decisions, the court articulated a test for satisfying the "uniform application" clause. Because the individual interest in equal access to fish and game resources is a "highly important interest running to each person within the state," the state must have an important purpose to countervail that interest.[77] The state then has the burden of proving that the means used to further its important purpose are carefully drawn and designed for the "'least possible infringement on article VIII's open access values.'"[78]

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72. ALASKA CONST. art. VIII, § 17.
73. 6 Proceedings of the Alaska Constitutional Convention 84 (Dec. 16, 1955).
74. 803 P.2d 391 (Alaska 1990).
75. *Id.* at 393.
76. *See* ALASKA ADMIN. CODE tit. 5, § 18.260 (June 1988).
77. *Gilbert*, 803 P.2d at 399.
78. *Id.* (quoting McDowell v. State, 785 P.2d 1, 10 (Alaska 1989)).

A question left open by the *Gilbert* test concerns the meaning of "open access." One type of access not likely to be protected by this test involves access by one user group and a resulting denial of access to another user group. Inequality of access between user groups results from the need to allocate resources and derives support from the constitution's sanction of "preference among beneficial uses."[79] Due to the court's ability to distinguish user groups, it is unlikely that an allocation conflict would ever reach the potentially problematic final step of the *Gilbert* test. Competing groups will likely differ in meaningful ways and, thus, the issue would not qualify for analysis under the test. For example, the opposing fisheries in *Gilbert* differed in their biological spawning patterns, historic catch levels, and participation.[80] Thus, because the fisheries were not "similarly situated," there was not a "non-uniform classification," and the uniform application clause was not implicated.[81]

More likely, the *Gilbert* test applies to situations involving individual access to resource user groups. This inference derives from the court's distinction between allocation and limits on admission to these groups.[82] This interpretation of *Gilbert* is also consistent with the court's decisions in *McDowell* and the limited entry cases. All of these cases examined limits on admission to user groups, not inter-group allocations.

In *Kenaitze Indian Tribe v. State*,[83] however, which is presently pending before the Alaska Supreme Court, a superior court interpreted the *Gilbert* decision differently. *Kenaitze* arose from the prohibitions on subsistence fishing and hunting established by a 1992 statute.[84] That statute states:

> The boards may not permit subsistence hunting or fishing in a nonsubsistence area. The boards, acting jointly, shall identify by regulation the boundaries of nonsubsistence areas. A nonsubsistence area is an area or community where dependence

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79. ALASKA CONST. art. VIII, § 4.

80. *Gilbert*, 803 P.2d at 399.

81. Similarly, the *Gilbert* test also did not apply to the ban on fish spotting in Bristol Bay. Because the ban applied equally to all citizens, there was no "non-uniform classification" and, therefore, the uniform application clause was not implicated. Alaska Fish Spotters Ass'n v. State Dep't of Fish and Game, 838 P.2d 798, 804 (Alaska 1992).

82. *See McDowell*, 785 P.2d at 8.

83. No. 3AN-91-4569 (Alaska Super. Ct. Oct. 26, 1993).

84. ALASKA STAT. § 16.05.258(c) (1992).

> upon subsistence is not a principal characteristic of the economy, culture, and way of life of the area or community.[85]

Residents of nonsubsistence areas challenged this provision, claiming it violated the equal access clauses.[86] Despite finding that the legislature's purpose for authorizing nonsubsistence areas was to allocate resources, the superior court struck down the provision under the *Gilbert* test.[87]

In *Kenaitze*, the superior court added a new condition for allocating natural resources. It held that, under the "least possible infringement" standard, the state could not prohibit subsistence activities in a certain area without first considering whether resources there could support some kind of balance between all possible uses.[88] Generally, this decision means that the state may not allocate resources so that one use is excluded in an area while maintaining others unless there is a finding that resource abundance will not support all uses simultaneously.

V. UNIFYING THEMES AMONG THE EQUAL ACCESS CLAUSES

There are several common themes and principles unifying the equal access clauses. Among these common themes are the clauses' reference to territorial fish and wildlife management, their prohibition on exclusive or special privileges and their focus on individual admission to resources "user groups."

A. Reference to Territorial Fish and Wildlife Management

In several opinions construing the equal access clauses, the Alaska Supreme Court has referred to pre-statehood fish and wildlife management practices. The court has assumed that the framers of the constitution were aware of these practices, and has consistently concluded that they did not intend the clauses to prohibit contemporary practices that are equivalent to historic ones.

In *Owsichek v. State*,[89] for example, the court stated:

> We observe initially that, in guaranteeing people "common use" of fish, wildlife and water resources, the framers of the constitution clearly did not intend to prohibit all regulation of the use of these resources. Licensing requirements, bag limits, and seasonal restrictions, for example, are time-honored methods of conserv-

85. *Id.*
86. *Kenaitze*, No. 3AN-91-4569, slip op. at 4.
87. *Id.* at 12.
88. *Id.* at 10.
89. 763 P.2d 488 (Alaska 1988).

> ing the resources that were respected by delegates to the constitutional convention.[90]

Similarly, in *State v. Hebert*,[91] the court observed that gear size and "time and area" limitations are among "time honored brakes" imposed on fishermen to achieve conservation.[92] The court upheld superexclusive registration for herring fisheries because convention debates did not reveal an intent to prohibit a comparable, pre-statehood management tool, namely exclusive registration for salmon fisheries.[93] The court came to a similar conclusion regarding the ban on fish spotting in *Alaska Fish Spotters Ass'n v. State Department of Fish and Game*.[94] Because the framers of the constitution submitted the constitutional provision simultaneously with an ordinance prohibiting fish traps, the court concluded that the framers had found nothing inconsistent in adopting the common use clause while concurrently banning certain methods and means of harvest.[95]

Although the court has recognized historic conservation practices, it is not clear whether the existence of a general conservation purpose will excuse a violation of equal access principles. On the one hand, usefulness in wildlife conservation and management was not sufficient to save the EGA system from being declared unconstitutional.[96] On the other hand, the court implied in *McDowell* that an exclusionary system would be more acceptable if it served conservation purposes.[97]

B. Prohibition on Exclusive or Special Privileges

One principle that applies to all of the equal access clauses is reflected in the wording of the "no exclusive right of fishery" clause.[98] The court has interpreted this clause consistently, stating that "[a]lthough the ramifications of these clauses are varied, they

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90. *Id.* at 492.
91. 803 P.2d 863 (Alaska 1990).
92. *Id.* at 866-67.
93. *Id.* at 866.
94. 838 P.2d 798 (Alaska 1992).
95. *Id.* at 802.
96. *See* Owsichek v. State, 763 P.2d 488 (Alaska 1988).
97. *McDowell*, 785 P.2d at 9. "We do not imply that the constitution bars all methods of exclusion where exclusion is required for species protection reasons." *Id.*
98. ALASKA CONST. art. VIII, § 15.

share at least one meaning: exclusive or special privileges to take fish and wildlife are prohibited."[99]

The court has not limited its "no exclusive right or privilege" analysis to the "no exclusive right of fishery" clause. The court has similarly held that the common use and the uniform application clauses were also intended to prohibit exclusive or special privileges.[100]

C. Individual Admission to Resource "User Groups"

The equal access clauses also scrutinize limits on admission to user groups.[101] In fact, the EGA system and the rural residency criterion, the only state actions struck down under the clauses, have both involved such user group admission limits.[102] Thus, it is important to understand the meaning of "user group" in fish and wildlife management in order to fully comprehend the application of the equal access clauses.

In the context of the common use clause, the court has defined user group according to "the nature of the resource (*i.e.*, fish or wildlife) and the nature of the use (*i.e.*, commercial, sport or subsistence)."[103] User groups include recreational hunters,

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99. *McDowell*, 785 P.2d at 6.

100. *See, e.g.*, State v. Hebert, 803 P.2d 863 (Alaska 1990).

101. *See, e.g.*, Tongass Sport Fishing Ass'n v. State, 866 P.2d 1314 (Alaska 1994) ("[T]he 'common use' clause of article VIII, section 3, the 'no exclusive right of fishery' clause of section 15, and the 'uniform application' clause of section 17 are not implicated unless limits are placed on the admission to resource user groups.").

102. This principle was recognized in a recent superior court decision. In *Kodiak Seafood Processors Ass'n v. State*, No. 1JU-93-274 CI, slip op. (Alaska Sup. Ct. Sept. 14, 1993), seafood processors challenged an exploratory scallop fishing permit issued by the Department of Fish and Game to a commercial fisherman. The permit allowed the fisherman, under the control of department biologists, to operate a scallop dredge in an area closed to commercial scallop fishing. *Id.* at 2-3. Plaintiffs claimed, inter alia, that issuance of the permit violated the equal access clauses. *Id.* at 4-5.

The superior court found that the issuance of the permit did not constitute the opening of a "commercial fishery" because it occurred at an exploratory, test-fishing stage during which no user group had access to the resource. *Id.* at 20-21. "Until the resource is open to recognized user groups, and the plaintiffs are excluded from a particular user group, . . . there can be no violation of the 'equal access clauses.'" *Id.* at 22. This holding is presently being appealed to the Alaska Supreme Court. *Kodiak Seafood Processors Ass'n v. State*, No. S-5987.

103. Alaska Fish Spotters Ass'n v. State Dep't of Fish and Game, 838 P.2d 798, 803 (Alaska 1992).

subsistence hunters, sport fishermen, commercial fishermen, personal use fishermen, subsistence fishermen and even professional hunting guides.[104] However, the court has rejected a definition of "user group" that is based on a particular means or method of using the resource. For example, persons who operate aircraft for aerial fish spotting are not a user group for purposes of the common use clause.[105]

The court revisited the "user group" issue recently in *Tongass Sport Fishing Ass'n v. State*.[106] In 1991, the Board of Fisheries allocated chinook salmon in southeast Alaska between the commercial troll and sport fisheries by establishing a percentage of the harvestable stock which each group could catch. Several sport fishing groups filed a suit challenging the allocation scheme, claiming, *inter alia*, that the system violated both the common use and the no exclusive right of fishery clauses of Article VIII.[107]

In rejecting the Article VIII claim, the Alaska Supreme Court restated principles announced in earlier opinions on the equal access clauses. The court affirmed that the equal access clauses are not implicated unless the state places limits to admission on resource user groups.[108] The court cited several opinions, including *Gilbert* and *Alaska Fish Spotters Ass'n*, in which the Board's authority to allocate among different fisheries had been recognized, and distinguished allocating resources from placing limits on admission to resource user groups.[109]

VI. THE EQUAL ACCESS CLAUSES' RELATION TO OTHER CONSTITUTIONAL PROVISIONS

The equal access clauses do not function in a vacuum. In fact, the clauses are significantly influenced by at least two other constitutional provisions. Specifically, the Alaska Supreme Court has had to square the equal access clauses with the "preferences among beneficial uses" clause of Article VIII, section 4. Addition-

104. The court recognized that "[t]he work of a guide is so closely tied to hunting and taking wildlife that there is no meaningful basis for distinguishing between the rights of a guide and the rights of a hunter under the common use clause." Owsichek v. State, 763 P.2d 488, 497 n.15 (Alaska 1988).

105. *Alaska Fish Spotters Ass'n*, 838 P.2d at 803.

106. 866 P.2d 1314 (Alaska 1994).

107. *Id.* at 1315.

108. *Id.*

109. *Id.* at 1318.

ally, because the equal access clauses have been called "a special type of equal protection guarantee," it is necessary to compare the standard of review used by the court to apply the equal access clauses with the equal protection test articulated by the court under Article I, section 1 of the state's constitution.

A. The "Preferences Among Beneficial Uses" Clause

Article VIII, section 4 of the Alaska Constitution provides:

> Fish, forests, wildlife, grasslands, and all other replenishable resources belonging to the State shall be utilized, developed, and maintained on the sustained yield principle, *subject to preferences among beneficial uses.*[110]

The Alaska Supreme Court has recognized the tension between the equal access clauses, which prohibit exclusive rights and special privileges, and the last phrase of section 4, which authorizes "preferences." In *McDowell v. State*,[111] Justice Moore rejected any implication in the majority opinion that all preferences, especially subsistence preferences, would violate the equal access clauses.[112] Justice Moore noted the apparent conflict between the clauses' prohibition against special privileges and section 4, which "clearly authorizes some preferences based upon uses."[113] Moreover, in his dissenting opinion, Justice Rabinowitz argued that the majority decision would conflict with the explicit language of section 4, which explicitly authorizes rural preferences.[114]

The court has attempted to clarify this apparent conflict by distinguishing between allocating resources among resource uses and limiting admission to resource user groups. In *Kenai Peninsula Fisherman's Cooperative Ass'n v. State*[115] the court stated:

> While section 15 [the "no exclusive rights" clause] does prohibit granting monopoly fishing rights, that section was not meant to prohibit differential treatment of such diverse user groups as commercial, sports, and subsistence fishermen. To conclude that, because a certain species is made available for sport fishing in a given area, commercial fishing of the same species must also be allowed, would be to go far beyond the purpose of the section.[116]

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110. ALASKA CONST. art. VIII, § 4 (emphasis added).
111. 785 P.2d 1 (Alaska 1989).
112. *Id.* at 13 (Moore, J., concurring).
113. *Id.* (Moore, J., concurring).
114. *Id.* at 17 (Rabinowitz, J., dissenting).
115. 628 P.2d 897 (Alaska 1981).
116. *Id.* at 904.

In *McDowell v. State*[117] the court stated that "[t]he state may, indeed must, make allocation decisions between sport, commercial, and subsistence users. That authority, however, does not imply a power to limit admission to a user group."[118] As an allocative system, such application is unauthorized under the "preferences" phrase of section 4.

B. Equal Access and Equal Protection

Because the uniform application clause requires that laws and regulations "apply equally to all persons similarly situated,"[119] it provides a clear equal protection guarantee for the use and disposal of natural resources. In *McDowell*, the court described the equal access clauses in general as "a special type of equal protection guarantee."[120] This raises the question of how analysis under Alaska's equal protection clause differs from analysis under the equal access clauses, and in particular, under the uniform application clause.

The equal protection clause in Article I, section 1 of the Alaska Constitution provides that "all persons are equal and entitled to equal rights, opportunities, and protection under the law . . . ."[121] When determining whether legislation comports with this clause, Alaska courts employ a "sliding" test that the Alaska Supreme Court has described as follows:

> We first determine the importance of the individual interest impaired by the challenged enactment. We then examine the importance of the state interest underlying the enactment, that is, the importance of the enactment. Depending on the importance of the individual interest, the equal protection clause requires that the state's interest fall somewhere on a continuum from mere legitimacy to a compelling interest. Finally, we examine the nexus between the state interest and the state's means of furthering that interest. Again depending upon the importance of the individual interest, the equal protection clause requires that the nexus fall somewhere on a continuum from substantial relationship to least restrictive means.[122]

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117. 785 P.2d 1 (Alaska 1989).

118. *Id.* at 8.

119. ALASKA CONST. art. VIII, § 17.

120. *McDowell*, 785 P.2d at 11.

121. ALASKA CONST. art. I, § 1.

122. State v. Enserch Constr., Inc., 787 P.2d 624, 631-32 (Alaska 1989) (footnote omitted).

Before *McDowell*, the court had said very little about the test for applying the "uniform application clause," nor had it discussed the equal access clauses in terms of equal protection. In one instance, the court opined that in cases involving natural resources the "uniform application clause" may require more stringent review of a statute than does the general equal protection clause.[123] However, the court did not articulate a specific standard to be applied to natural resource cases.

In *McDowell*, the court implicitly followed an equal protection analysis in striking down the rural residency preference in the subsistence law. Placing the *McDowell* analysis into the equal protection framework leads to the conclusion that the "individual interest" at issue was the interest of each person in the state in participating in subsistence uses of renewable resources. The court said that this was a "highly important" interest.[124]

As for the competing state interest, the court said that it must be at least "important" to sustain legislation that burdens the equal access clause.[125] The court noted that an "important" state interest embodied in the subsistence law was "to ensure that those Alaskans who need to engage in subsistence hunting and fishing in order to provide for their basic necessities are able to do so."[126]

In analyzing the "nexus" between the state's "important" interest and the legislation's "means" for accomplishing it, the court held that the government's approach must be the "least possible infringement on article VIII's open access values."[127] When the court applied this standard, it concluded that the "means used to accomplish this purpose [were] extremely crude."[128] Specifically, the court pointed to evidence showing that there were "substantial numbers of Alaskans living in areas designated as urban who have legitimate claims as subsistence users. Likewise, there are substantial numbers of Alaskans living in areas designated as rural who have no legitimate claims."[129] Thus, the court's ground for striking down the rural-urban classification scheme was that it was

123. Gilman v. Martin, 662 P.2d 120 (Alaska 1983).
124. *McDowell*, 785 P.2d at 10.
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.* at 10-11.

both under-inclusive and over-inclusive.[130] In his *McDowell* concurrence, Justice Moore stated that he would have followed an explicit equal protection analysis under article 1, section 1 of the Alaska constitution. He argued that the individual interest at stake, access to wildlife for subsistence purposes, was "a species of the important right to engage in economic endeavor."[131] The subsistence law, therefore, would be subjected to "close scrutiny," and it would have to at least be "closely related to an important state interest."[132] Justice Moore called the state's interest more than "important"; it was "compelling."[133] Therefore, Justice Moore would have found the subsistence law defective because its classification scheme established only a modest correlation, rather than a close relationship, between those who resided in rural areas and those who were dependent on subsistence hunting and fishing.[134]

In dissent, Justice Rabinowitz maintained that the individual interest at stake, the right to participate in subsistence hunting and fishing, was not a fundamental right. Thus, Justice Rabinowitz argued, the "strict scrutiny" and "least restrictive alternative" standards were not applicable.[135] Justice Rabinowitz therefore concluded that the means-end fit of the subsistence criterion was sufficiently close to satisfy equal protection under both the "uniform application clause" and under the general equal protection clause of the constitution.[136]

Recently, the Alaska Court of Appeals addressed the issue of whether the Alaska Supreme Court had created a constitutional analysis for the equal access clauses that was distinct from its analysis for the equal protection clause. The Court of Appeals stated that the Alaska Supreme Court appeared to use the same

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130. *McDowell*, 785 P.2d at 10-11. After striking down the "extremely crude" means for distinguishing persons who were eligible for subsistence uses, the court suggested a legislative solution: "A classification scheme employing individual characteristics would be less invasive of the article VIII open access values and much more apt to accomplish the purpose of the statute than the urban-rural criterion." *Id.* at 11.

131. *Id.* at 13 (Moore, J., concurring).

132. *Id.* (Moore, J., concurring).

133. *Id.* (Moore, J., concurring).

134. *Id.* (Moore, J., concurring).

135. *Id.* at 19 (Rabinowitz, J., dissenting).

136. *Id.* (Rabinowitz, J., dissenting).

approach for both, requiring the state to meet a rigorous test.[137] The state must demonstrate both an "important" legislative purpose and means narrowly tailored to accomplish that purpose.[138]

VII. CONCLUSION

The equal access clauses are unique to Alaska's constitution and, at the same time, based on established, historic principles arising under the public trust doctrine, pre-statehood fish and wildlife management policy and equal protection analysis. Although largely neglected in their first three decades, the clauses have recently been frequently scrutinized by the Alaska Supreme Court. In six opinions since 1987, the court has attempted to clarify the meaning of "equal access" as it applies to Alaska's fish and wildlife. While exclusive and special privileges to take subsistence resources are prohibited, these limitations are qualified by constitutional provisions that authorize limited entry to commercial fisheries and that enable the state to establish preferences among various uses. From among these provisions, one fundamental, consistently applied principle has emerged: Limitations on admission to fish and wildlife "user groups" are subject to strict judicial scrutiny under the equal access clauses.

Several other principles have evolved pertaining to the individual equal access clauses. The common use clause, for example, disallows the "privatization" of public fish and wildlife resources, especially if special privileges are long-term and do not compensate the public. The "no exclusive right of fishery" clause requires a "least possible infringement" inquiry when faced with a scheme that creates exclusive rights in fisheries, even if it is a form of limited entry. A similar test under the "uniform application" clause applies to nonuniform classifications among Alaskans who harvest these resources.

The pending Alaska Supreme Court decision in *Kenaitze Indian Tribe v. State*[139] affords the court an opportunity to clarify the nature of the "access" guaranteed by the constitution. *Owsichek v. State*[140] and *McDowell v. State*[141] hold that "access"

137. Baker v. State, 878 P.2d 642, 644-45 (Alaska Ct. App. 1994).
138. *Id.*
139. No. 3AN-91-4569 (Alaska Super. Ct. Oct. 26, 1993).
140. 763 P.2d 488 (Alaska 1988).
141. 785 P.2d 1 (Alaska 1989).

means access to membership in a user group. Other decisions hold that "access" does not mean equal opportunity among user groups to harvest fish and wildlife.[142] However, the issue of whether the state may limit access to fish and wildlife outside of the context of a user group has not been decided.[143] Another unanswered question is whether a restriction on a certain use of a resource may be justified by the availability of other uses of that resource.[144] With Alaska's finite resources and Alaskans' growing demand for fish and wildlife, the equal access provisions of the constitution will have a continuing, central role in providing answers.

142. *See, e.g.,* Kenai Peninsula v. State, 628 P.2d 897 (Alaska 1981).

143. There is some support for the idea that the court may limit access outside of this context. In interpreting the White Act, the territorial predecessor to the "no exclusive right of fishery clause," the United States Supreme Court stated that "'[e]xclusive,' as used in Section 1 of the White Act, forbids not only a grant to a *single person or corporation* but to any special group or number of people." Hynes v. Grimes Packing Co., 337 U.S. 86, 122 (1949) (emphasis added).

144. The answer to this question is probably yes. In *Alaska Fish Spotters Ass'n v. State Dep't of Fish and Game*, one reason the ban on fish spotting was found not to violate the common use clause is because there were alternative ways that aerial spotters could still use the fisheries resource. 838 P.2d at 802.