

April 30, 2007

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Dear Ron,

Below is the summary of research of the Sea Grant Law Center regarding the question you posed to us on April 23, 2007. The following information is intended as advisory research only and does not constitute legal representation of Michigan Sea Grant by the Sea Grant Law Center. It represents our interpretations of the relevant laws and cases.

In your fax, you related the experience of Cameron McMurray, a licensed Michigan wholesale fish dealer, who received a citation for operating as a wholesale fish dealer without a license in Wisconsin. In view of his experience, you asked whether other Michigan wholesale fish dealers must purchase a Wisconsin license to pick up processed fish in Wisconsin. Although the wholesalers may only pick up processed fish, given the broad language of the statute and Wisconsin's interest in protecting its natural resources, it is my opinion that they would be subject to the license requirement.

As you mentioned in your email, WIS. STAT. ANN. § 29.503 defines "wholesale fish dealer" as "any person who buys, barter, obtains, sells, solicits, or processes fish in any manner for himself or herself or any other person for sale to anyone other than a consumer ..." I believe that "picking up" would qualify as "obtaining" the fish. Additionally, the statute does not expressly exempt nonresident wholesale fish dealers from the requirements.

The Michigan wholesale dealers also specified that they were picking up *processed* fish; however, Wis. STAT. ANN. § 29.503 defines fish as “processed or unprocessed fish of those species which are found in the waters of the state . . .” Therefore, I believe that the product that the Michigan wholesale dealers are picking up would qualify as “fish” under the statute.

Wis. STAT. ANN. § 29.503 (2) (a) specifies that “No person may engage in business as a wholesale fish dealer unless he or she is issued a wholesale fish dealer license by the department.” Additionally, Wis. Adm. Code NR 21.05 provides that “a wholesale fish dealer’s license is required if the fish are sold to any person other than the final consumer.” A final consumer is defined as “the last or ultimate person who obtains a fish for its final use for eating or otherwise.” §25.02 (10). So unless the Michigan wholesale dealers are selling directly to consumers, I believe that the statute would apply to nonresident wholesale dealers.

Although the Wisconsin statutes may apply to Michigan wholesale fish dealers, if the Wisconsin statutes unduly burden interstate commerce, it could be a violation of the Commerce Clause of the U.S. Constitution. The Commerce Clause invests Congress with the power to regulate commerce “among the several States.” The negative aspect of the Commerce Clause restricts the state’s power to enact laws and regulations. A state law that facially discriminates against residents of another state is unconstitutional unless it serves an important, non-economic state interest and there are no reasonable non-discriminatory alternatives. If the statute does not discriminate but burdens interstate commerce, it will be invalid if the burden on commerce outweighs the state’s interest.

In this instance, a court probably would not consider the licensing requirement to be discriminatory, since it applies to both resident and non-resident wholesale fish dealers. Since the statute is not discriminatory, a court would balance the state’s interest with the burden of requiring out-of-state wholesale fish dealers to acquire a license from Wisconsin DNR. The state’s interest in regulating the state’s natural resources may be found in Wis. STAT. ANN. § 29.11, which states, “The legal title to, and the custody and protection of, all wild animals within this state is vested in the state for the purposes of regulating the enjoyment, use, disposition, and conservation of these wild animals.”¹

In a Wisconsin Court of Appeals case, *LeClair v. Natural Resources Board*, commercial fishermen objected to new regulations promulgated by the Department of Natural Resources. The court held that the state was within its right to regulate the natural resources of the state:

“It is not only the right, but the duty, of the State to preserve for the benefit of the general public, the fish in its waters from destruction or undue reduction in numbers . . . As trustee for the people, in the exercise of this right and duty, the State may conserve fish and wild life by regulating or prohibiting the taking of same . . . It is well established . . . that by virtue of residual sovereignty, a State, as the representative of its people and for the common benefit of all of its citizens,

may control the fish and game within its borders, and may regulate or prohibit such fishing . . .”²

A court examining Wisconsin’s licensing requirement would probably find that the state’s interest in protecting its natural resources would include the regulation of wholesale fish dealers. Although not binding in a Wisconsin court, the Louisiana Supreme Court has held that:

“The right of persons to purchase commercial fish for resale is not an absolute right, but a mere privilege which the state may grant or withhold at its pleasure. When the privilege is granted, however, the state may for its exercise exact such charges and impose such conditions as it may deem necessary to secure the preservation and conservation of its property.”³

Many other states require wholesale fish dealers to obtain licenses and specify a higher fee for non-residents. In fact, Michigan has a wholesale fish dealer license requirement, which states “Every person who deals in fish by operating a wholesale fish market or fish house, or who solicits the purchase of or buys fish for wholesale distribution, shall secure a license from the department.” MCLS § 324.47333(1).

The state’s substantial interest in protecting its natural resources would probably outweigh the burden imposed, which would be the cost of the license (\$100) and the effort required to apply for the license. In conclusion, I feel that the Wisconsin licensing requirements apply to Michigan wholesale fish dealers who pick up processed fish in Wisconsin.

Please contact us if you have additional questions regarding the above information. Thank you for approaching us with your question.

Sincerely,

Terra Bowling
Research Counsel

¹ Wild animal is defined in § 29.001 (90) to include “fish.”

² *LeClair v. Natural Resources Bd.*, 168 Wis. 2d 227, 239 (Wis. Ct. App. 1992).

³ *State v. Monteleone*, 171 La. 437 (La. 1930).