2012 WL 3763718 (Alaska) (Appellate Brief)
Supreme Court of Alaska.

ALASKA FISH and Wildlife Conservation Fund (AFWCF), Appellant,
v.
STATE OF ALASKA and Ahtna Tene Nene', Appellees.

No. S-14516.
July 6, 2012.

Trial Court Case # 4FA-11-1474 CI
Appeal from the Superior Court Fourth Judicial District at Fairbanks

Brief of Appellee State of Alaska

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The Honorable Michael P. McConahy, Presiding

Filed in the Supreme Court of the State of Alaska, this 6th day of July, 2012.
Marilyn May, Clerk

By: <<Signature>>

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Alaska Constitution

Article VIII, Section 3 - Common Use.

Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use.

Article VIII, Section 15 - No Exclusive Right of Fishery.

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.

Article VIII, Section 17 - Uniform Application.

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.

Statutes

Sec. 16.05.258. Subsistence use and allocation of fish and game.

(a) Except in nonsubsistence areas, the Board of Fisheries and the Board of Game shall identify the fish stocks and game populations, or portions of stocks or populations, that are customarily and traditionally taken or used for subsistence. The commissioner shall provide recommendations to the boards concerning the stock and population identifications. The boards shall make identifications required under this subsection after receipt of the commissioner's recommendations.

(b) The appropriate board shall determine whether a portion of a fish stock or game population identified under (a) of this section can be harvested consistent with sustained yield. If a portion of a stock or population can be harvested consistent with sustained yield, the board shall determine the amount of the harvestable portion that is reasonably necessary for subsistence uses and

(1) if the harvestable portion of the stock or population is sufficient to provide for all consumptive uses, the appropriate board

(A) shall adopt regulations that provide a reasonable opportunity for subsistence uses of those stocks or populations;

(B) shall adopt regulations that provide for other uses of those stocks or populations, subject to preferences among beneficial uses; and

(C) may adopt regulations to differentiate among uses;

(2) if the harvestable portion of the stock or population is sufficient to provide for subsistence uses and some, but not all, other consumptive uses, the appropriate board

***viii** (A) shall adopt regulations that provide a reasonable opportunity for subsistence uses of those stocks or populations;

(B) may adopt regulations that provide for other consumptive uses of those stocks or populations; and

(C) shall adopt regulations to differentiate among consumptive uses that provide for a preference for the subsistence uses, if regulations are adopted under (B) of this paragraph;

(3) if the harvestable portion of the stock or population is sufficient to provide for subsistence uses, but no other consumptive uses, the appropriate board shall

(A) determine the portion of the stocks or populations that can be harvested consistent with sustained yield; and

(B) adopt regulations that eliminate other consumptive uses in order to provide a reasonable opportunity for subsistence uses; and

(4) if the harvestable portion of the stock or population is not sufficient to provide a reasonable opportunity for subsistence uses, the appropriate board shall

(A) adopt regulations eliminating consumptive uses, other than subsistence uses;

(B) distinguish among subsistence users, through limitations based on

(i) the customary and direct dependence on the fish stock or game population by the subsistence user for human consumption as a mainstay of livelihood;

(ii) the proximity of the domicile of the subsistence user to the stock or population; and

(iii) the ability of the subsistence user to obtain food if subsistence use is restricted or eliminated.

(c) 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 upon subsistence is not a principal characteristic of the economy, culture, and way of life of the area or community. In determining whether dependence upon subsistence is a principal characteristic of the economy, culture, and way of life of an area or community under this subsection, the boards shall jointly consider the relative importance of subsistence in the context of the totality of the following socio-economic characteristics of the area or community:

(1) the social and economic structure;

(2) the stability of the economy;

(3) the extent and the kinds of employment for wages, including full-time, part-time, temporary, and seasonal employment;

(4) the amount and distribution of cash income among those domiciled in the area or community;

(5) the cost and availability of goods and services to those domiciled in the area or community;

(6) the variety of fish and game species used by those domiciled in the area or community;

(7) the seasonal cycle of economic activity;

(8) the percentage of those domiciled in the area or community participating in hunting and fishing activities or using wild fish and game;

***ix** (9) the harvest levels of fish and game by those domiciled in the area or community;

(10) the cultural, social, and economic values associated with the taking and use of fish and game;

(11) the geographic locations where those domiciled in the area or community hunt and fish;

(12) the extent of sharing and exchange of fish and game by those domiciled in the area or community;

(13) additional similar factors the boards establish by regulation to be relevant to their determinations under this subsection.

(d) Fish stocks and game populations, or portions of fish stocks and game populations not identified under (a) of this section may be taken only under nonsubsistence regulations.

(e) Takings and uses of fish and game authorized under this section are subject to regulations regarding open and closed areas, seasons, methods and means, marking and identification requirements, quotas, bag limits, harvest levels, and sex, age, and size limitations. Takings and uses of resources authorized under this section are subject to AS 16.05.831 and AS 16.30.

(f) For purposes of this section, “reasonable opportunity” means an opportunity, as determined by the appropriate board, that allows a subsistence user to participate in a subsistence hunt or fishery that provides a normally diligent participant with a reasonable expectation of success of taking of fish or game.

Sec. 16.05.330. Licenses, tags, and subsistence permits.

(a) Except as otherwise permitted in this chapter, without having the appropriate license or tag in actual possession, a person may not engage in

(1) sport fishing, including the taking of razor clams;

(2) hunting, trapping, or fur dealing;

(3) the farming of fish, fur, or game;

(4) taxidermy; or

(5) control of nuisance wild birds and nuisance wild small mammals for compensation.

(b) When obtaining the appropriate license or tag in (a) of this section, an applicant who asserts residency in the state shall provide the license vendor with the proof of residence that the department requires by regulation.

(c) The Board of Fisheries and the Board of Game may adopt regulations providing for the issuance and expiration of subsistence permits for areas, villages, communities, groups, or individuals as needed for authorizing, regulating, and monitoring the subsistence harvest of fish and game. The boards shall adopt these regulations when the subsistence preference requires a reduction in the harvest of a fish stock or game population by nonsubsistence users.

(d) A person may not receive a sport fishing, hunting, or trapping license or other permit or tag issued under AS 16.05.330 - 16.05.430, if the person's right to obtain, or exercise the privileges granted by, a sport fishing, hunting, or trapping license is suspended or revoked in another state. A person who applies for a sport fishing, hunting, or trapping license or other permit or tag issued under AS 16.05.330 - 16.05.430 shall sign a ***x** statement that the person's right to obtain, or exercise the privileges granted by, a sport fishing, hunting, or trapping license is not suspended or revoked in another state. (e) [Repealed, Sec. 2 ch 39 SLA 2001].

Regulations

5 AAC 85.025. Hunting seasons and bag limits for caribou.

(a) In this section, the phrase “General hunt only” means that there is a general hunt for residents, but no subsistence hunt, during the relevant open season. For those units or portions of units within non-subsistence areas established by the Joint Boards of Fisheries and Game (5 AAC 99.015), there is a general hunt only. Hunting seasons and bag limits for caribou are as follows:

Units and Bag Limits	Resident Open Season “(Subsistence and General Hunts)	Nonresident Open Season
...		
Unit 13		
1 caribou per harvest report per regulatory year by community harvest permit only; up to 300 caribou may be taken; or	Aug. 10-Sept. 20 (Subsistence hunt only) Oct. 21-March 31 (Subsistence hunt only)	No open season
1 caribou every regulatory year by Tier I subsistence permit only; or	Aug. 10-Sept. 20 (Subsistence hunt only) Oct. 21-March 31 (Subsistence hunt only)	No open season
1 bull every regulatory year by drawing permit; up to 3,000 permits may be issued	Aug. 20-Sept. 20 Oct. 21-March 31	No open season

...

5 AAC 85.045. Hunting seasons and bag limits for moose.

(a) In this section, the phrase "General hunt only" means that there is a general hunt for residents, but no subsistence hunt, during the relevant open season. For those units or portions of units within non-subsistence areas established by the Joint Boards of Fisheries and Game (5 AAC 99.015), there is a general hunt only. Hunting seasons and bag limits for moose are as follows:

Units and Bag Limits	**Resident Open Season (Subsistence and General Hunts)**	**Nonresident Open Season**
...		
Unit 11		
1 bull per harvest report by community harvest permit only; however, no more than 70 bulls that do not meet antler restrictions for other resident hunts in the same area may be taken in the entire community harvest area; or	Aug. 10-Sept. 20 (Subsistence hunt only)	No open season
1 bull with spike-fork antlers or 50-inch antlers or antlers with 3 or more brow tines on one side	Aug. 20-Sept. 20	Aug. 20-Sept. 20
Unit 12, that portion including all drainages into the west bank of the Little Tok River, from its headwaters in Bear Valley at the intersection of the unit boundaries of Units 12 and 13 to its junction with the Tok River, and all drainages into the south bank of the Tok River from its junction with the Tok river to the Tok Glacier		
RESIDENT HUNTERS:		
1 bull per harvest report by community harvest permit only; however, no more than 70 bulls that do not meet antler restrictions for other resident hunts in the same area may be taken in the entire community harvest area; or	Aug. 24-Aug. 28 Sept. 8-Sept.l7 (Subsistence hunt only)	
1 bull with spike-fork antlers or 50-inch antlers or antlers with 4 or more brow tines on one side	Aug. 24-Aug. 28 Sept. 8-Sept. 17	

NONRESIDENT HUNTERS:		
1 bull with 50-inch antlers or antlers with 4 or more brow tines on one side		Sept. 8-Sept 17
Unit 12, remainder of that portion in the Tok River drainage upstream from the Tok Cutoff Bridge		
RESIDENT HUNTERS:		
1 bull with spike-fork antlers or 50-inch antlers or antlers with 4 or more brow tines on one side	Aug. 24-Aug. 28 Sept. 8-Sept. 17	
NONRESIDENT HUNTERS:		
1 bull with 50-inch antlers or antlers with 4 or more brow tines on one side		Sept. 8-Sept. 17
Unit 12, that portion lying east of the Nabesna River and south of the winter trail running southeast from Pickerel Lake to the Canadian border	Sept. 1-Sept. 30	Sept. 1-Sept. 30
1 bull with 50-inch antlers or antlers with 4 or more brow tines on one side		
Remainder of Unit 12		
RESIDENT HUNTERS:		
1 bull	Aug. 24-Aug. 28 Sept. 8-Sept. 17	
NONRESIDENT HUNTERS:		
1 bull with 50-inch antlers or antlers with 4 or more brow tines on one side		Sept. 8-Sept. 17
Unit 13		

1 moose per regulatory year, only as follows:		
RESIDENT HUNTERS:		
1 bull per harvest report by community harvest permit only; however, no more than 70 bulls that do not meet antler restrictions for other resident hunts in the same area may be taken in the entire community harvest area; or	Aug. 10-Sept. 20 (Subsistence hunt only)	
1 bull with spike-fort antlers or 50-inch antlers or antlers with 4 or more brow tines on one side; or	Sept. 1-Sept. 20 (Subsistence hunt only)	
1 bull, by drawing permit only; up to 1,000 permits may be issued; or	Sept. 1-Sept. 20 (General hunt only)	
1 antlerless moose by drawing permit only; up to 200 permits may be issued; a person may not take a calf or a cow accompanied by a calf	Sept. 1-Sept. 20 (General hunt only)	
NONRESIDENT HUNTERS:		
1 bull with 50-inch antlers or antlers with 4 or more brow tines on one side by drawing permit only; up to 150 permits may be issued		Sept. 1-Sept. 20

...

***xiii 5 AAC 92.050. Required permit hunt conditions and procedures**.

(a) The following conditions and procedures for permit issuance apply to each permit hunt:

(1) the applicant or the applicant's agent shall complete the application form; a permit application that is incomplete, or that does not include, if required, an Alaska hunting license number, or that contains a false statement, is void;

(2) except as provided in 5 AAC 92.061 and 5 AAC 92.069, a person may not apply for more than three different drawing permit hunts for the same species per regulatory year, submit more than one application for the same drawing permit hunt during a regulatory year, or apply for more than one moose drawing permit for a nonresident in Unit 23 per regulatory year; the commissioner shall void all duplicate applications, all applications by one person for more than three hunts for the same species, and all applications by one person for more than one moose hunt for a nonresident in Unit 23; a person may not hold more than one permit for the same species per regulatory year;

(3) the applicant must obtain or apply for an Alaska hunting license before the time of permit application;

(4) permit issuance:

(A) the department shall issue registration permits in the order applications are received, and drawing permits on a lottery basis;

(B) a successful applicant

(i) shall obtain the permit within the time specified by the department in a notification; and

(ii) who is a nonresident or a nonresident alien and who, under AS 16.05.407 or 16.05.408, must be accompanied by a licensed guide-outfitter, shall provide written verification, within the time specified by the department in the permit application form, that the required guide-outfitter has been hired; the requirement of this clause does not ***xiv** apply if the successful applicant is a nonresident and will be accompanied by a resident over 19 years of age who is a spouse or a relative within the second degree of kindred, as described in AS 16.05.407(a);

(C) repealed 7/1/2007;

(D) the department will issue Tier II subsistence hunting permits as provided in 5 AAC 92.062(b) and (c);

(E) the department may issue additional drawing hunt permits or Tier II subsistence hunting permits for specific hunts, in excess of the number established by other regulation, in order to correct administrative error in processing permit applications that has resulted in the denial of a permit to an applicant entitled to receive one;

(F) an individual who is a successful applicant for a specific drawing permit hunt is ineligible to apply for a permit for that specific hunt the following year;

(G) an individual who is a successful applicant for a Koyukuk Controlled Use Area moose drawing permit is ineligible to apply for a Koyukuk Controlled Use Area moose drawing permit the following year;

(H) a resident who is a successful applicant for a bison drawing permit hunt is ineligible to apply for another bison drawing permit for 10 years; a nonresident who is a successful applicant for a bison drawing permit hunt is ineligible to apply for another bison drawing permit;

(I) no more than one Unit 13 Tier I subsistence permit for caribou may be issued per household every regulatory year; the head of household, as defined in 5 AAC 92.071(b), and any member of the household obtaining a Unit 13 Tier I subsistence permit in a regulatory year for caribou may not hunt caribou or moose in any other location in the state during that regulatory year;

(5) except as provided in (6) of this subsection, a permit is nontransferable; however, the department may reissue an invalidated Tier II subsistence hunting permit to the highest-ranked applicant remaining in the original pool of eligible applicants;

(6) the commissioner may reissue or transfer a permit as follows:

(A) a permit may be transferred for scientific purposes;

(B) a resident that is on active duty in a branch of the military under United States Department of Defense deployment orders to a combat zone designated by an executive order issued by the President of the United States and that has been issued a (i) drawing permit, and is prevented from using the drawing permit due to being out of the state on active duty, may be reissued the same drawing permit when the person returns to this state from active duty under this subparagraph, under procedures set out in the applicable permit hunt supplement;

(ii) Tier II permit may transfer that Tier II permit only during the same regulatory year to a substitute resident hunter while the person is out of the state on active duty under this subparagraph, under procedures set out in the applicable permit hunt supplement;

(7) immediately after killing a big game animal for which a permit is required, the permittee, or his or her proxy under 5 AAC 92.011, shall cancel the permit by removing the permit day and month on which the kill was made, without obliterating or destroying any other day and month printed on the permit;

***xv** (8) a person who has been issued a permit, or that person's proxy under 5 AAC 92.011, shall return the permit harvest report to the department within the time period stated on the permit; in addition to other penalties provided by law for failure to report harvest, and except as provided in this paragraph and (c) of this section, if a permittee or the permittee's proxy fails to provide the required report for a drawing permit, registration permit, Tier I subsistence permit, or Tier II subsistence permit, the permittee will be ineligible to be issued a drawing, registration, Tier I subsistence, or Tier II subsistence permit during the following regulatory year; notwithstanding the provisions of this paragraph, the department may determine that, for specific hunts, it is administratively impracticable, to apply the penalty for failure to report;

(9) an applicant for a certified bowhunters only permit hunt must successfully complete a department-approved bowhunter education course before submitting a permit application;

(10) beginning July 1, 2007, an applicant for a certified muzzleloader hunter only permit hunt must have successfully completed a department approved muzzleloader certification course before submitting a permit application.

(b) The department may issue annually one bull bison permit for Unit 20(D) through a raffle or lottery conducted by a “qualified organization” as defined in AS 16.05.343. In addition to (a)(3) and (a)(5) - (a)(8) of this section, the following applies to the permittee:

(1) the permittee is not eligible for another bison drawing permit in the same regulatory year;

(2) if the permittee is a nonresident, the fee for the nonresident bison locking tag is to be paid from the proceeds of the raffle or lottery;

(3) a bison taken under a permit issued under this subsection does not count against the regular bag limit of one bison every five years; however, no person may take more than one bison, statewide, per regulatory year.

(c) A person aggrieved by a decision under (a)(8) of this section will be granted a hearing before the commissioner or the commissioner's designee, if the permittee makes a request for a hearing in writing to the commissioner within 60 days after the conclusion of the permit hunt for which the person failed to provide a report. The commissioner may determine that the penalty provided under (a)(8) of this section will not be applied if the permittee provides the information required on the report and if the commissioner determines that the failure to provide the report was the result of unavoidable circumstance, or that, in the case of subsistence permit, extreme hardship would result to the applicant.

(d) A permittee under this section must keep the permit in possession while hunting.

5 AAC 92.072. Community subsistence harvest hunt area and permit conditions.

(a) The commissioner or the commissioner's designee may, under this section and 5 AAC 92.052, issue community-based subsistence harvest permits and harvest reports for big game species where the Board of Game (board) has established a community harvest hunt area under (b) of this section and 5 AAC 92.074.

(b) The board will consider proposals to establish community harvest hunt areas during regularly scheduled meetings to consider seasons and bag limits for affected species in a ***xvi** hunt area. Information considered by the board in evaluating the proposed action will include

(1) a geographic description of the hunt area;

(2) the sustainable harvest and current subsistence regulations and findings for the big game population to be harvested;

(3) a custom of community-based harvest and sharing of the wildlife resources harvested in the hunt area by any group; and

(4) other characteristics of harvest practices in the hunt area, including characteristics of the customary and traditional pattern of use found under 5 AAC 99.010(b).

(c) If the board has established a community harvest hunt area for a big game population, residents of the community or members of a group may elect to participate in a community harvest permit hunt in accordance with the following conditions:

(1) a person representing a group of 25 or more residents or members may apply to the department for a community harvest permit by identifying the community harvest hunt area and the species-to be hunted, and by requesting that the department distribute community harvest reports to the individuals who subscribe to the community harvest permit; the community or group representative must

(A) provide to the department the names of residents or members subscribing to the community harvest permit and the residents' or members' hunting license numbers, permanent hunting identification card numbers, or customer service identification numbers, or for those residents or members under 16 years of age, the resident or member's birth date;

(B) ensure delivery to the department of validated harvest reports from hunters following the take of individual game animals, records of harvest information for individual animals taken, and collected biological samples or other information as required by the department for management;

(C) provide the department with harvest information, including federal subsistence harvest information, within a specified period of time when requested, and a final report of all game taken under the community harvest permit within 15 days of the close of the hunting season or as directed in the permit; and

(D) make efforts to ensure that the applicable customary and traditional use pattern described by the board and included by the department as a permit condition, if any, is observed by subscribers including meat sharing; the applicable board finding and conditions will be identified on the permit; this provision does not authorize the community or group administrator to deny subscription to any community resident or group member;

(2) a resident of the community or member of the group who elects to subscribe to a community harvest permit

(A) may not hold a harvest ticket or other state hunt permit for the same species where the bag limit is the same or for fewer animals during the same regulatory year; however, a person may hold harvest tickets or permits for same-species hunts in areas with a larger bag limit following the close of the season for the community harvest permit, except that in Unit 13, only one caribou may be retained per household;

***xvii** (B) may not subscribe to more than one community harvest permit for a species during a regulatory year;

(C) must have in possession when hunting and taking game a community harvest report issued by the hunt administrator for each animal taken;

(D) must validate a community harvest report immediately upon taking an animal; and

(E) must report harvest and surrender validated harvest reports within five days, or sooner as directed by the department, of taking an animal and transporting it to the place of final processing for preparation for human use and provide information and biological samples required under terms of the permit;

(F) must, if the community harvest hunt area is under a Tier II permit requirement for the species to be hunted, have received a Tier II permit for that area, species, and regulatory year.

(d) Seasons for community harvest permits will be the same as those established for other subsistence harvests for that species in the geographic area included in a community harvest hunt area, unless separate community harvest hunt seasons are established. The total bag limit for a community harvest permit will be equal to the sum of the individual participants' bag limits, established for other subsistence harvests for that species in the hunt area or otherwise by the board. Seasons and bag limits may vary within a hunt area according to established subsistence regulations for different game management units or other geographic delineations in a hunt area.

(e) Establishment of a community harvest hunt area will not constrain nonsubscribing residents of the community or members of the group from participating in subsistence harvest activities for a species in that hunt area using individual harvest tickets or other state permits authorized by regulation, nor will it require any resident of the community or member of the group eligible to hunt under existing subsistence regulations to subscribe to a community harvest permit.

(f) The department may disapprove an application for a community subsistence harvest permit from a community subsistence harvest permit from a community or group that has previously failed to comply with requirements in (c)(1) of this section.

(g) A person may not give or receive a fee for the taking of game or receipt of meat under a community subsistence harvest permit.

(h) Nothing in this section authorizes the department to delegate to a community or group representative determination of the lawful criteria for selecting who may hunt, for establishing any special restrictions for the hunt and for the handling of game, and for establishing the terms and conditions for a meaningful communal sharing of game taken under a community harvest permit.

(i) In this section, “fee”

(1) means a payment, wage, gift, or other remuneration for services provided while engaged in hunting under a community harvest permit;

(2) does not include reimbursement for actual expenses incurred during the hunting activity within the scope of the community harvest permit, or a non-cash exchange of subsistence-harvested resources.

***xviii 5 AAC 92.074. Community subsistence harvest hunt areas**.

(a) The commissioner may issue community subsistence harvest permits for designated big game species in the areas specified in this section.

(b) Chalkyitsik Community Harvest Area for moose: That portion of Unit 25(B), including the drainage of the Salmon Fork River and drainage of the Black River, downstream from Bear Mountain Creek, that portion of Unit 25(D), including the Black River drainage, upstream from Englishshoe Bar, the portion of the Porcupine River drainage from the lower mouth of Curtis Slough upstream to the upper mouth of Rock Slough, and the drainage of the Grass River north of the south bank of the Grass River east of 1440 15' W. longitude.

(c) Yukon Flats Community Harvest Area for black bears: Includes all of Unit 25(D).

(d) Gulkana, Cantwell, Chistochina, Gakona, Mentasta, Tazlina, Chitina, and Kluti Kaah Community Harvest Area for moose and caribou: Includes all of

(1) that area draining into the Copper River from the north side of Miles Glacier, and east of the easternmost bank of the Copper River from Miles Glacier north to the Slana River, then along the east bank of the Slana River to Suslota Creek, then south of the south bank of Suslota Creek to Noyes Mountain;

(2) that portion including all drainages into the west bank of the Little Tok River, from its headwaters in Bear Valley at the intersection of the unit boundaries of Units 12 and 13 to its junction with the Tok River, and all drainages into the south bank of the Tok River from its junction with the Little Tok River to the Tok Glacier, and that area westerly of the easternmost bank of the Copper River and drained by all tributaries into the west bank of the Copper River from Miles Glacier north to the confluence with the Slana River, then along the east bank of the Slana River to Suslota Creek, and that area of the Slana River drainage north of the south bank of Suslota Creek;

(3) the drainages into the Delta River upstream from Falls Creek and Black Rapids Glacier;

(4) the drainages into the Nenana River upstream from the southeast corner of Denali National Park at Windy;

(5) the drainages into the Susitna River upstream from its junction with the Chulitna River;

(6) the drainages into the east bank of the Chulitna River upstream to its confluence with Tokositna River;

(7) the drainages of the Chulitna River (south of Denali National Park) upstream from its confluence with the Tokositna River;

(8) the drainages into the north bank of the Tokositna River upstream to the base of the Tokositna Glacier;

(9) the drainages into the Tokositna Glacier;

(10) the drainages into the east bank of the Susitna River between its confluences with the Talkeetna and Chulitna Rivers;

(11) the drainages into the north and east bank of the Talkeetna River, including the Talkeetna River, to its confluence with Clear Creek, the eastside drainages of a line going up the south bank of Clear Creek to the first unnamed creek on the south, then up that ***xix** unnamed creek to lake 4408, along the northeast shore of lake 4408, then southeast in a straight line to the northernmost fork of the Chickaloon River;

(12) the drainages into the east bank of the Chickaloon River below the line from lake 4408; and

(13) the drainages of the Matanuska River above its confluence with the Chickaloon River.

*1 JURISDICTIONAL STATEMENT AND LIST OF PARTIES

This Court has jurisdiction to decide the issues raised below under AS 22.05.010 (a) and (b). Final judgment was entered on November 7, 2011.

The parties are:

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ISSUES PRESENTED FOR REVIEW

1. Does AS 16.05.330(c) violate Alaska constitutional equal access or equal application clauses on its face or as applied by the Alaska Board of Game (Board) in authorizing Community Subsistence Harvest hunts (CSH hunts, also referred to as Community Harvest Permit or CHP hunts)?

2. Do regulations adopted by the Board to provide a reasonable opportunity for Community Subsistence Harvest hunts of caribou and moose in the Copper River Basin violate Alaska's constitution or exceed the Board's statutory authority?

3. Did the Superior Court err in declining to strike Alaska statutes and regulations that include references to "rural" Alaskans following this Court's decision in ***2** *McDowell v. State* holding the rural preference unconstitutional?

4. Was adequate notice given under the Administrative Procedure Act of an amendment to 5 AAC 92.072(d) to provide that seasons for CSH hunts will be the same as for other subsistence harvests for a species in a geographic area "unless separate community harvest hunt seasons are established'_?

5. Was the Board's allocation of up to 70 "any bull" moose to the Copper Basin CSH hunt unconstitutional?

I. STATEMENT OF THE CASE

In 2010-11, the Alaska Board of Game (Board) substantially amended its regulations for subsistence harvest and use of caribou and moose in the Copper River Basin to address the issues identified in Judge Bauman's July 2010 decision invalidating the Ahtna Community Harvest Permit (CHP)hunt in Game Management Unit 13, [1] the appeal of which is pending before this Court. [2] In particular, the Board amended its regulations to specify that these hunts are not limited to residents of particular communities - that is, any group of 25 or more Alaskans, no matter where they live, can obtain a permit and participate in the hunt if they agree to follow specified permit conditions, including conditions for sharing the harvest. The Board also renamed the hunts Community Subsistence Harvest (CSH) hunts and amended the regulations for the ***3** individual Tier I subsistence hunts, which provide hunters with alternative subsistence opportunities to harvest Unit 13 caribou and moose that are more individual in nature than the CSH hunts are. Finally, the Board made additional findings explaining the two different patterns of subsistence use of caribou and moose that it found exist in the Copper River Basin and that form the basis for the two types of subsistence opportunities.

Appellant Alaska Fish and Wildlife Conservation Fund (Fund) filed suit challenging the constitutionality of the authorizing statute and regulations and moved for summary judgment. It argued that, even though all Alaskans are eligible to participate in the CSH hunts and the alternative individual Tier I hunts, AS 16.05.330(c) and the implementing regulations are unconstitutional. It argued the statute was enacted in the same 1986 legislation as the statute held unconstitutional in *McDowell* and contains an implicit rural preference, which, under the rationale of *McDowell*, would be unconstitutional. The State cross-moved for summary judgment, arguing that there is no rural preference and that *McDowell* and subsequent decisions held that only explicit rural preferences are unconstitutional. Fairbanks Superior Court Judge Michael McConahy rejected the Fund's arguments and ruled in favor of the State. Judge McConahy found it "evident that the Board did not distinguish between users, as all Alaskans are eligible to participate in the CSH." [3] For the reasons discussed below, Judge McConahy's ruling should be affirmed.

A. Statement of Facts

Subsistence caribou hunts in Unit 13 have generated more controversy than ***4** any other subsistence hunts in Alaska. [4] For some two decades starting in the mid-1980s, the Unit 13 caribou hunts were administered as Tier II subsistence hunts, open to

only a narrow set of long-time users. [5] During this period the Board of Game noticed troubling trends. Local residents dependent upon the caribou and moose in the area, especially younger residents and newcomers, increasingly were unable to participate in these hunts and meet their subsistence needs as permits shifted to older, less dependent urban dwellers. [6] Some local residents no longer even participated in the state hunts as they were unable to qualify for Tier II permits. [7] They were forced to depend on much more geographically restricted federal subsistence hunts on federal lands. [8] One consequence to these subsistence users was a loss of traditional knowledge and practices. [9]

To address these problems, the Board of Game held several special meetings, akin to special legislative sessions, devoted solely to attempting to resolve these issues. The Board also devoted large blocks of time to these issues during its regularly-scheduled meetings. [10]

***5** Beginning in 2006, the Board considered new regulations based on the premise that not all Alaskans who may want to hunt Unit 13 caribou necessarily are subsistence hunters, but instead might be recreational hunters. [11] The Board considered provisions for subsistence hunts that more closely reflect and accommodate the customary and traditional use patterns of caribou and moose in the area as distinguished from other, non-subsistence, uses. [12] Having previously made a customary and traditional use determination for caribou and moose in Unit 13, the Board determined that it would be appropriate to find out more specifically what the actual customary and traditional uses of those populations are. [13] After taking testimony and considering reports and other record materials, the Board adopted comprehensive written findings applying the eight regulatory criteria in 5 AAC 99.010 and identifying the customary and traditional uses of the Unit 13 caribou and moose populations. [14] The Board found the primary customary and traditional subsistence use pattern to be community-oriented or communal in nature, and also found a secondary use pattern that is more individual in nature and more ***6** common in Alaska's larger and road-system communities. [15]

Subsequently, in 2006-08, the Board made a few relatively minor adjustments to the Unit 13 regulations in accordance with these findings. In 2006 it adjusted the Tier II caribou hunt, amending the regulations to require the salvage of various organs and destruction of the trophy value of the antlers. It also established the Nelchina Community Harvest Area for moose and caribou. [16] In 2007 the Board made additional minor changes to the Tier II hunts. It made further changes at a 2008 emergency meeting called in response to a Superior Court ruling in the case of *Ahtna Tene Nene' vs. Alaska Board of Game*. [17]

The Board significantly changed the Unit 13 subsistence caribou and moose hunting regulations in 2009. It ended the Tier II hunts and amended the Tier 1 regulations to allow subsistence hunting of Unit 13 caribou and moose by Alaska residents who agreed to follow practices designed to ensure that the participant actually was engaging in a subsistence use. [18] The new regulations provided for two types of Tier I hunts in Unit 13. One type accommodates the community-based subsistence use pattern that the Board found to be the primary subsistence use of these game populations, and the other accommodates a more individual-oriented secondary subsistence use pattern. [19] The regulations were tailored to each pattern, and provided that any Alaskan could participate ***7** in either hunt subject to somewhat different conditions. [20] Essentially, the Board determined that subsistence hunters must follow the customary and traditional use practices that make the hunts subsistence hunts. [21]

In 2009, Kenneth Manning, a Tier II hunter, challenged these regulations in Kenai Superior Court, and the Fund intervened in the suit as a plaintiff. Judge Bauman ruled that the regulations were unconstitutional and failed to meet statutory requirements. He found the CHP hunt unconstitutionally limited participation to residents of Ahtna villages and enjoined the Board from proceeding with the Tier I hunt for caribou in 2010. [22] This Court's decision on the appeal of that case is pending. [23]

The Board held several meetings in response to Judge Bauman's decision, amending the regulations to address the perceived deficiencies. First, in the summer of 2010, the Board held an emergency meeting and, with the approval of the Superior Court, authorized (1) a Tier I caribou hunt in which those who would have participated in a CHP hunt could participate and (2) a winter Tier II hunt. [24] Then, at a regular Board meeting in October 2010, it adopted new regulations for Community Subsistence Harvest permit hunts that explicitly stated that the CSH hunts are open to all Alaskans. [25] The Board also ***8** amended its regulations to reduce the previous restrictions on Tier I hunts that differed from the community harvest permit hunt conditions. [26] In March 2011, the Board made supplemental findings regarding the two subsistence hunting patterns and the change from Tier II to Tier I hunts to include evidence found lacking in the record by Judge Bauman. [27]

As a result, under the current regulations the “preferences” that are the basis for the Fund's argument that the Board has unlawfully distinguished among subsistence users are few. [28]

***9 B. Statement of the Proceedings**

The Fund filed its complaint challenging these regulations in Fairbanks Superior Court and moved for summary judgment five days later. [29] Ahtna Tene Nene' moved for and was granted leave to intervene as a defendant. [30] The State and Ahtna Tene Nene' opposed the Fund's motion for summary judgment and cross-moved for summary judgment in their favor. [31] Judge McConahy granted summary judgment to the State and Ahtna Tene Nene' and dismissed all of the Fund's claims on August 5, 2011. [32] Final judgment was entered on November 27, 2011 and this appeal followed. [33]

II. STANDARD OF REVIEW

Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. [34] The challenged regulations are presumed to be valid and it is presumed that all legal requirements for their adoption have been complied with. [35] The Board's subsistence-related ***10** determinations and findings, even though not necessarily codified as regulations, are entitled to the same level of deference as are its regulations. [36] Because regulations are presumed to be valid, the Fund has the burden of demonstrating that the challenged regulations are invalid. [37]

Courts may not second-guess or substitute their judgment for the Board's determinations about the necessity for or appropriateness of the challenged regulations, which are policy choices that have been delegated to the Board by the legislature. [38] Likewise, courts may not overturn a resource management regulation simply because one group of users believes that the regulations should be different. [39] Judicial review of the Board's regulations “consists primarily of ensuring that the agency has taken a hard look at the salient problems and has genuinely engaged in reasoned decision making.” [40] Review is of process, not policy, [41] and is based on the record before the Board. [42]

For constitutional questions, this Court applies its independent judgment. [43] The Fund asserts that the challenged regulations should be subjected to strict scrutiny. [44] ***11** This standard does not apply to regulations that do not set eligibility standards for participation. [45] This Court specifically has “held that the ‘common use’ clause of article VIII, section 3 ... and the ‘uniform application’ clause of section 17 are not implicated unless limits are placed on the admission to resource user groups.” [46]

As for the Fund's statutory challenges, this Court has held that statutes, like regulations, are presumptively valid following codification, and challengers making a facial constitutional challenge to statutes have "the burden to negative every conceivable basis that might support" the statutes. [47]

III. ARGUMENT

A. Summary of Argument

The Board adopted subsistence hunting regulations that allow any and all Alaskans to participate on the same terms in community-based subsistence caribou and moose hunts in the Copper River Basin, in order to provide reasonable opportunity for the primary customary and traditional subsistence use of the caribou and moose populations there. The Board also adopted regulations that provided all Alaskans with an alternative, individual subsistence hunt opportunity, which it found be a secondary customary and traditional subsistence use of these caribou and moose.

In adopting these regulations, the Board carefully considered Judge ***12** Bauman's 2009 ruling holding certain aspects of the previous regulations unconstitutional (currently under appeal), and it substantially amended those regulations to address Judge Bauman's concerns. In particular, the Board made it clear that the community harvest permit hunts are open to any group of Alaskan residents, regardless of where they reside, who agree to follow the standards for communal subsistence harvesting and use of the caribou and moose. [48]

Judge McConahy properly denied the Fund's motion for summary judgment and granted the State's and Ahtna Tene Nene's cross-motion, concluding that since the same rules apply to all Alaskans and since any Alaskan may participate in either hunt, the regulations and authorizing statutes are constitutional. There is no legal basis for the Fund's argument on appeal that AS 16.05.330(c), other statutes, and the underlying regulations are unconstitutional because they contain an implicit rural preference. As this Court held in *State v. Hebert*, [49] the Board may enact regulations to meet local needs as long as they do not discriminate between local and nonlocal residents.

The Fund's other arguments likewise fail. The implementing regulations are statutorily authorized and do not purport to establish eligibility standards for Tier I hunts, which the Court found lacked statutory authorization in *State v. Morry*. [50] The Board gave ample notice to the public of the amendment to the community harvest regulation authorizing community hunt seasons different from those for other subsistence hunts. Finally, the allocation of 70 "any bull" moose to community harvest permit hunts ***13** is constitutional and statutorily authorized.

B. The Trial Court Did Not Err in Holding AS 16.05.330(c) and the Community Subsistence Harvest Hunt Regulations Are Constitutional.

The Fund begins by asserting that "[t]his Court should first determine whether any CHP is constitutionally legitimate post *McDowell* and *Morry*," [51] It argues that the authorizing statute, AS 16.05.330(c), and the implementing regulations are unconstitutional simply because the statute was passed as part of a comprehensive rural preference subsistence statute and the rural preference was stricken in *McDowell*." [52]

This argument has no merit. The Fund does not meet, or even attempt to meet, its burden of showing the statute is unconstitutional on its face, and its argument that the statute and the community harvest hunt regulations are unconstitutional either on their face or as applied flies in the face of *McDowell, Hebert*, and *Manning*.

1. AS 16.05.330(c) is constitutional, both facially and as applied.

On its face, AS 16.05.330(c) is neutral. It simply authorizes the issuance of subsistence permits for "areas, villages, communities, or groups" and does not classify Alaskans by residency or on any other basis. [53] It is presumptively constitutional, [54] and the Fund has "the burden to negative every conceivable basis" that might constitutionally ***14** support this grant of authority. [55]

Judge McConahy held "[i]t is ... possible that these provisions could be applied in a manner consistent with article VIII - as such, the facial challenge must fail." [56] The Fund does not show otherwise. It admits "*McDowell* only invalidated the overt rural preference," [57] but it summarily argues that subsection .330(c) is unconstitutional because it was enacted in the same 1986 legislation that included the explicit rural preference held unconstitutional in *McDowell*. [At. Br. 17-18].

The Fund's guilt-by-association argument has no validity whatsoever. The Fund provides no authority for the novel proposition that a statute is unconstitutional simply because it was enacted in the same legislation as another statute held unconstitutional, and its argument runs afoul of the principle that statutes are presumed to be constitutional.

Nothing in AS 16.05.330(c) explicitly and exclusively classifies based on residence, which is all that the constitution prohibits. This Court specifically held in *State v. Manning*, [58] that only criteria that are explicitly and exclusively based on residence are constitutionally prohibited. There, Manning argued that regulatory caps on the scoring for applicants for Tier II subsistence permits for the 2000-01 Nelchina caribou hunts based on community of residence as applied to the applicant's game ratio, food, and gas scores were unconstitutional residency-based criteria. The Court rejected this argument, stating: ***15** "*McDowell* must be read to prohibit only criteria that are explicitly and exclusively based on residence because such classifications are based on the arbitrary assumption that Alaskans in certain locations engage in subsistence activities while those in other communities do not." [59] Here, the statute does not contain any such criteria, nor do the Board's CSH regulations. Indeed, the record shows that ADF&G received applications and likely would grant community harvest permits to applicants from Fairbanks, Anchorage, Homer, and Glenallen in addition to the Ahtna communities. [60]

Further, the statute must be construed in a manner that avoids unconstitutionality, if possible. [61] The Fund itself suggests an interpretation that would be constitutional, stating: "At most, AS 16.05.330(c) gives the Boards discretion to consolidate and streamline the permitting process by issuing permits to areas, villages, communities, or groups." [62] In short, the Fund wholly fails to show that AS 16.05.330(c) is unconstitutional.

2. The CSH regulations are constitutional; they do not create a residency-based preference.

The Fund argues that even though the current CSH regulations do not explicitly limit eligibility based on residency, they are unconstitutional because they contain what it calls a "communal and local preference." [63] It claims that the regulations violate equal protection because they create classifications that result in disparate ***16** treatment of similarly situated Alaskans, that these classifications must be given "strict scrutiny," and that the regulations provide a very poor "fit" in preserving the customary and traditional subsistence uses of caribou and moose in Unit 13. [64]

Judge McConahy correctly explained why this argument fails:

The level of scrutiny a court applies to an equal access challenge under article VIII is unclear. However, regardless of the level of scrutiny applied, the threshold inquiry in a challenge brought under article VIII, sections 3, 15, and 17 - similar

to an equal protection challenge brought under article I, section I - is whether the law makes a classification or distinction between persons similarly situated. The current CHP makes no such distinction or classification between persons. The CHP does make a distinction between two equally available opportunities. Any Alaskan is eligible to participate in either opportunity by complying with the regulatory requirements for each. The distinction between individuals begins after the individual exercises their free will and decides to participate in a CHP, the Tier I hunt, or not at all. *Hebert* controls the outcome of this case - the creation of parallel allocation regimes, where participation is open to all yet mutually exclusive with respect to the two regimes - does not implicate the equal access and uniform application clauses of article VIII. [65]

Judge McConahy ruled correctly for several reasons.

First, because the regulations do not classify Alaskans, the equal treatment clauses are not implicated. Judge McConahy properly relied on *State v. Hebert*, in which this Court upheld the Board of Fisheries' establishment of "superexclusive" herring fishing areas because there was no classification or discrimination on the basis of residency. There, this Court stated:

[O]ne of the state's goals is, as it was in *Enserch*, to alleviate local economic distress. However, the critical difference between this case ***17** and *Enserch* is that there is no discrimination between residents and nonresidents: Superexclusive use has the same effect on local fishermen who wish to fish outside one of the superexclusive use districts as it does on outsiders with a similar desire. ...

Similarly, nonresidents are free to choose to fish in a superexclusive use district. [66]

Our constitution does not prohibit regulating to address local needs and concerns by providing for two fisheries, as *Hebert* instructs, or two subsistence hunts, as is the case here, so long as all fishermen and hunters are eligible to participate in either regardless of residency. Here, the CSH regulations comply with the command that there be no discrimination by making community harvest permits available to any group of 25 or more Alaskans. [67] *Hebert* also refutes the Fund's argument that the CSH regulations are unconstitutional because their purpose was to promote local subsistence use patterns started by the Ahtna people and subsequently adopted by others. *Hebert* shows there is no constitutional prohibition against laws that tend to be more attractive to, or that are intended to address the needs of, identifiable groups. [68]

The Fund does not distinguish *Hebert*, it and cites no authority for ***18** overturning that decision. The argument that the subsequent decision in *Grunert v. State* "squarely conflicted with *Heber*" plainly is incorrect for several reasons. [69] The Fund first mistakenly asserts that *Grunert I* addressed an "unconstitutional regulation" that gave special privileges to one group of fishermen over another. [70] *Grunert* expressly was not decided on constitutional grounds. This Court said in its conclusion: "Because 5 AAC 15.359 conflicts with both the Limited Entry Act's definition of 'fishery' and stated purposes, we need not reach Grunert's constitutional claims." [71]

Next, the Fund quotes a sentence from a footnote in *Grunert II* out of context and suggests that it means the Board of Game has no statutory authority to provide for different Tier I subsistence hunts. [72] *Grunert* and the quoted passage are concerned with the limits of the Board of Fisheries' statutory authority in AS 16.05.251(e) to allocate "among ... fisheries," which the Board interpreted by reference to the definition of fishery in the Limited Entry Act." [73] There is no analog to the Limited Entry Act or other statutory limitation on the Board's authority to regulate in the subsistence context. To the contrary, the Boards have abundant statutory authority to ***19** regulate in the subsistence context, as discussed in the next subsection; ffl.B.3, *infra*. These statutes provide ample authority for the Board of Game's regulations providing for community subsistence harvest hunts. [74]

The next consideration, assuming that the Fund had shown that the regulations classify Alaskans, which it has not, would be whether the regulations result in disparate treatment of "similarly situated" Alaskans. They do not. This Court has "held in various contexts that people using state land and resources for different purposes are not 'similarly situated' for purposes of constitutional analysis, including sport and commercial fishermen, residential and recreational purchasers of state land, and Alaska resident and non-resident hunters." [75] Here, hunters who choose to engage in the ***20** communal subsistence harvests under the CSH program are not similarly situated with those who choose to engage in the individual Tier I subsistence hunts.

The next step, if the Court were to agree with the Fund's unsupported contentions that the statute classifies and results in disparate treatment of similarly situated Alaskans, is whether the Fund the regulations sufficiently fit the governmental purposes. The Fund leaps to this stage of the analysis, arguing: "The question is whether the current CFIP bears a substantial relationship to protecting Ahtna's subsistence harvesting opportunities. ... The CHP offers a very poor fit to accomplish this purpose." [76] The Fund provides no support for this bald assertion.

To the contrary, the record shows that the regulations and permit conditions "fit" very well the purpose of providing for and protecting both community-based subsistence uses, including Ahtna's uses, and also individual-based uses. This is apparent from the Board's extensive 2006 Findings and 2011 Findings, which explain the two patterns of subsistence uses upon which the regulations are based; [77] from the community subsistence hunt conditions found in 5 AAC 92. 072; and from the permit terms and conditions for customary and traditional uses and for the customary and traditional use pattern, which are expressly linked to the Findings. [78]

***21** A long line of cases in addition to *Hebert* have rejected constitutional challenges to Board of Fisheries and Board of Game regulations and allocations that may benefit or inconvenience one user group at the expense or to the advantage of another but that do not create eligibility standards. These decisions are noted below and are discussed in more detail in section III.F, *infra* at pp. 40-45, which addresses the Fund's claim that the Board's allocation of up to 70 "any bull" moose to CSH hunts was unconstitutional. [79] All these cases show that the CSH statute and regulations are constitutional on their face and as applied to the Copper River Basin hunts.

3. The Alaska Legislature and this Court have long recognized that the Board may adopt subsistence regulations that protect and continue local customs and traditions.

For some 35 years, this Court has recognized that Alaska's subsistence laws were designed and intended to protect uses of fish and game by all subsistence-dependent Alaskans and that the Board may regulate to protect those uses. The simple reality is that rural residents, and Alaska Natives, often are the most subsistence-dependent Alaskans. There is nothing unconstitutional about regulating to protect their subsistence uses.

As far back as 1978, this Court observed:

For hundreds of years, many of the Native people of Alaska depended on hunting to obtain the necessities of life. To this day, despite incursions by those of different cultures, many Alaska ***22** Eskimos, Indians and Aleuts eke out a livelihood by reliance on fish and game. ... Not only is the game of prime importance in furnishing the bare necessities of life, but subsistence hunting is at the core of the cultural tradition of many of these people. [80]

Then, in 1989 in *McDowell*, the Court recognized "the critical importance of subsistence hunting and fishing to residents of the numerous small and remote villages of our state." [81]

The legislature, in enacting the current subsistence law in 1992, found that "customary and traditional uses of Alaska's fish and game originated with Alaska Natives." [82] The communal and community-based nature of subsistence is reflected in AS 16.05.258(c), which requires that, in order for subsistence hunting or fishing to even be permitted, the Boards of Fisheries and Game jointly must first determine that the activities would occur outside of a nonsubsistence area. [83] In doing so, the Boards must determine "whether dependence on subsistence is a principal characteristic of the economy, culture, and way of life of an area or community." [84]

Again, in 2007 in *Manning*, the Court reaffirmed the validity of the underlying purpose of Alaska's subsistence laws to preserve such cultural traditions:

The statute and regulations may have other purposes, as well, such as preserving a traditional culture and way of life. Subsection (B)(i) of the enabling statute [AS 16.05.258(b)(4)(B)(i)] orders the Board to devise regulations that distinguish among subsistence users based on their "customary and direct dependence on the fish stock or game population." [85]

***23** Further, the Court acknowledged the community-based nature of many customary and traditional subsistence hunting and fishing activities, in recognizing that in many Native villages just a few hunters harvest game on behalf of the rest of the community. [86] Finally, indicating that community-based subsistence scoring criteria to determine an applicant's eligibility for a Tier II permit are constitutionally permissible so long as the scoring is based on accurate measurements, the Court went so far as to suggest that the State could adopt "a community cap based directly on the availability of other big game hunts reasonably accessible to a given community." [87]

There is no doubt that protection of the customary and traditional way of life of Alaska Natives and other subsistence-dependent residents of the remote villages of our state is a legitimate purpose of Alaska's subsistence laws. This further supports the conclusion that the Board may provide multiple forms of Tier I subsistence opportunities for customary and traditional uses of a game population.

C. The Superior Court Did Not Err in Holding that the Board has Statutory Authority to Establish More than One Type of Subsistence Opportunity for a Given Game Population.

1. The plain language and structure of AS 16.05.258 and AS 16.05.330(c) show that the Board has statutory authority.

The legislature has given the Boards of Fisheries and Game broad authority and responsibility to provide for and protect the customary and traditional subsistence uses of fish stocks and game populations. In particular, AS 16.05.258 authorizes and ***24** directs the Boards to identify those fish stocks and game populations customarily and traditionally used for subsistence, to provide reasonable opportunity for subsistence uses of those fish and game stocks, and to prioritize subsistence uses above other consumptive uses if the stocks or populations become depleted. It provides that all subsistence takings are subject to regulations regarding open and closed areas, seasons, methods and means, marking and identification requirements, quotas, bag limits, harvest levels, and sex, age and size limitations. [88] In addition, AS 16.05.330(c) authorizes the issuance of subsistence permits for areas, villages, communities, or groups.

The "community harvest" subsection, AS 16.05.330(c), gives particularly clear authority for the Board to adopt different subsistence hunting regimes. It says the Board may "adopt regulations providing for the issuance and expiration of subsistence permits for areas, villages, communities, groups or individuals as needed for authorizing, regulating and monitoring the subsistence harvest of fish and game." This gives broad authority to the Board to adopt regulations to allow hunting under area

permits, village permits, community permits, group permits, or individual permits, or any combination thereof, "as needed." The Board is free to choose which among those categories are most appropriate in each circumstance. [89]

The Board's actions fall squarely within its statutory authority. The Board ***25** has identified two customary and traditional subsistence uses of moose and caribou in Game Management Unit 13, one that is community-based and communal in nature and one that is individually-oriented, and has adopted regulations to provide a reasonable opportunity for each, pursuant to AS 16.05.250. It has adopted regulations providing for the issuance of permits to groups of individuals who want to participate in the community harvest hunts pursuant to this statute and AS 16.05.330(a). The legislature intended to protect subsistence uses, not limit them, [90] and these statutes provide clear authority for the Board to adopt the challenged regulations.

The Board's authority to provide for multiple Tier I uses also is apparent from the structure of AS 16.05.258, which repeatedly refers to "subsistence uses," using the plural form in each case to establish the authority or duty to identify and provide for those uses, [91] Every word in a statute is presumed to have been deliberately chosen and is to be read as having meaning. [92] Use of the plural shows that the legislature expected the Boards to regulate to provide opportunities for multiple subsistence uses whenever it determined it was appropriate to do so.

Finally, apart from its specific subsistence authority in AS 16.05.258 and ***26** AS 16.05.330, the Board of Game has broad statutory authority and discretion under its general authority statute, AS 16.05.221, to provide for multiple subsistence opportunities and to allocate game for each subsistence opportunity as it determines is appropriate. This Court has repeatedly held that the Board of Fisheries and Board of Game are authorized to allocate fish and game resources among competing subgroups of users, which includes the authority to require users to choose which use they will participate in each year and to prohibit them from participating in others. [93] The principle that the Board is authorized to establish alternative opportunities for various subgroups and allocate the resource among them applies to the case at bar.

This Court's decision in *State v. Morry* [94] supports the conclusion that the Board has authority to provide for multiple forms of subsistence opportunities at the Tier I level. In *Morry*, the Court was faced with the reverse of the argument made by the Fund in this case. There, it was argued that the Board was required to regulate so as to protect the customary and traditional character of subsistence hunting. Three pages of the Court's opinion are devoted to examining the Board's duty and authority to adopt regulations so as to benefit subsistence-dependent users. The Court concludes:

We agree with the State's analysis of this issue and with its position ***27** that "[c]learly the boards may adopt regulations that recognize the needs, customs, and traditions of Alaska residents." (Emphasis in original.) [Footnote omitted] ... Analysis of the applicable statutory provisions leads us to the conclusion that the boards have the discretion, but are not mandated, to take into consideration the traditional and customary methods of subsistence takings in their formulation of subsistence regulations. [95]

The conclusion that that Board has the authority is reinforced by the footnote to the passage quoted above, in which the Court quoted at more length from the State's brief, apparently in agreement:

In its opening brief the State elaborated in somewhat greater detail as follows

Although the subsistence law does not require the Boards of Fisheries and Game to protect the character of subsistence hunting and fishing, this does not mean they are prohibited from doing so. The boards have general authority to regulate the methods and means of pursuing, capturing, and transporting fish and game. AS 16.05.251(a)(4), AS 16.05.255(a)(6). They have used this authority, where it is appropriate, to allow traditional harvesting practices. ... While the boards have authority to provide for certain harvest methods, they are not compelled to do so. [96]

In short, the legislature has authorized the Board to identify and regulate to accommodate customary and traditional uses of fish and game, with express authority to issue permits to communities and groups as needed for authorizing and regulating the subsistence harvest of fish and game. Nothing in *Morry* or any other case cited by the Fund suggests the Board is required to pick a single customary and traditional practice and force all users to follow it. There is no basis for concluding that the legislature prohibited the Board from providing multible subsistence opportunities, at the Tier I ***28** level, in order to accommodate different customary and traditional practices.

2. *Morry* shows that the absence of statutory authority to "distinguish" among subsistence users by establishing eligibility criteria does not prohibit the Board from providing multiple, alternative Tier I subsistence hunts.

The Fund's primary argument that the Board exceeded its statutory authority revolves around the meaning of a single phrase - "distinguish among subsistence users." The Fund argues that the Board lacks express statutory authority to distinguish among subsistence users at the Tier I level, and that therefore it is prohibited from adopting two forms of Tier I hunts for caribou and moose in Unit 13.[97] This is an incorrect interpretation of AS 16.05.258(b)(4) and it runs contrary to the Board's statutory authority discussed above. It also is contrary to several of this Court's decisions, especially *Morry*, which hold that the Board only is precluded from adopting eligibility criteria that limit who is eligible to participate in Tier I hunts, not from providing for multiple subsistence hunting opportunities.

The phrase at issue is found in AS 16.05.258(b)(4)(B), which provides that the Board shall distinguish among users in a Tier II situation.

[I]f the harvestable portion of the stock or population is not sufficient to provide a reasonable opportunity for subsistence uses, the appropriate board shall

(A) adopt regulations eliminating consumptive uses, other than subsistence uses,

(B) distinguish among subsistence users, through limitations based on

(i) the customary and direct dependence on the fish stock or game populations by the subsistence user for human consumption as a mainstay of livelihood;

***29** (ii) the proximity of the domicile of the subsistence user to the stock or population; and[98]

(iii) the ability of the subsistence user to obtain food if subsistence use is restricted or eliminated. (Emphasis added.)

Numerous decisions of this Court, especially *Morry*, show clearly that the term "distinguish among subsistence users" means to establish eligibility criteria. The starting point is *Madison*, in which the Court rejected the State's argument that the legislature authorized the Board to limit all subsistence to rural residents. The Court held, based on the structure of the statute, that all Alaskans were eligible to participate in Tier I hunts.[99] The legislature then adopted new subsistence legislation that limited eligibility to rural residents, which was held unconstitutional in 1989 in *McDowell*.

The Court decided *Morry* in 1992, holding that the limited authority in AS 16.05.251(b)(4) to "distinguish among subsistence users" is authority to determine ***30** which subsistence users are eligible to participate in subsistence when the fish or game resource is limited. Under the heading, "Did the Superior Court err in invalidating the State's interpretation, following *McDowell*, that AS 16.05.258 provides no statutory grounds for distinguishing between beneficial users at the first tier level?", this Court

addressed the state's position "that the state subsistence law does not authorize or give guidance to the boards of fish and game on how to determine which individuals may engage in 'first tier' subsistence hunting and fishing." [100] This Court then held that the Board had no statutory authority to adopt "eligibility criteria" to limit eligibility for Tier I subsistence:

[U]nder the holding of *Madison*, the board lacks the authority to adopt eligibility criteria for first tier subsistence users absent statutory authorization. As the subsistence statute presently stands (post *McDowell)* there are no legislatively enacted standards for eligibility for first tier subsistence users. Given this absence of specific authorization, we hold that the board lacks the authority to adopt eligibility criteria for first tier subsistence users. [101]

Thus, the limited authority to "distinguish among subsistence users" is only a limitation on authority to establish eligibility criteria. This is consistent with *McDowell*, in which the Court said that eligibility standards for subsistence hunters' and fishers' admission to subsistence are subject to strict scrutiny under the constitutional equal access clauses. [102] The Court interpreted the statutory limitation the same way in 1995 in *State v. Kenaitze Indian Tribe*, in which it stated: "Just as eligibility to participate in all ***31** subsistence hunting and fishing cannot be made dependent on whether one lives in an urban or rural area, eligibility to participate in Tier II subsistence hunting and fishing cannot be based on how close one lives to a given fish or game population. [103]

Finally and most recently, in *Manning* the Court explained again that the authority to "distinguish among subsistence users" in AS 16.05.258(b)(4) is authority to determine who is eligible for a permit in a Tier II situation:

The Board identifies those eligible for Tier II permits through limitations based on (1) "the customary and direct dependence on the game population by the subsistence user for human consumption as a mainstay of livelihood," and (2) "the ability of the subsistence user to obtain food if subsistence use is restricted or eliminated." [104]

Thus, for nearly 30 years this Court consistently has interpreted the limited statutory duty and authority to "distinguish among subsistence users" as authority to determine eligibility to participate in Tier II hunts. These cases refute the Fund's argument that the Board is "distinguishing among subsistence users at the Tier I level" without statutory authority to do so. [105]

3. The Fund's interpretation would jeopardize the Board's ability to provide reasonable opportunity for subsistence uses of other game and fish populations.

The Fund's position that the Board has no authority to provide for more than one Tier I subsistence hunt is untenable and would jeopardize the Board's ability to provide reasonable opportunity for subsistence uses of other game and fish populations. ***32** For example, the Western Arctic Caribou Herd, the largest in the state, is managed as a single population, and it is customarily and traditionally taken and used for subsistence uses over a vast area of Northern and Western Alaska. [106] Currently, due to geographic variations and local use issues, this herd has about sixteen separate hunting regimes. [107] The Fund's view that only a single, uniform subsistence opportunity may be allowed for any population would seem to lead to the result that the people of Unalakleet, Nome, and Point Lay all must hunt this migratory herd during the same time period, with the same bag limit, and under the same conditions, even though the herd might not be present in their area, or different conservation concerns may exist over different parts of the range (for example, on Nome's extensive road system). Similarly, the Fund's argument would seem to lead to the conclusion that the Boards of Game and Fisheries cannot provide for and regulate differently subsistence hunting and trapping on the same population or allow subsistence fishing with multiple gear types, some of which might be group-based (e.g. beach seines) while others might be oriented to the individual user (e.g. dip nets or rod and reel).

No statute or decision of this Court supports the proposition that only a single Tier I subsistence opportunity can be offered for each game population. To the contrary, the statutory mandates to provide reasonable opportunities for multiple subsistence uses, and the Board's authority to regulate seasons, bag limits, methods, and means so as to continue to accommodate customary and traditional practices, allow the ***33** Board to develop two or more alternative subsistence hunting options, among which Alaskans may be required to choose. The Fund is simply wrong on this point, and the trial court properly concluded that "[t]he presently disputed Board action distinguishes between uses, not users ...; the Board did not distinguish between users, as all Alaskans are eligible to participate in the CHP." [108]

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

The Fund has no grounds for arguing that "at least six other ptQ-*McDowell* statutory and regulatory subsistence preferences must be struck." [109] Three of the statutes, AS 16.05.940(28), (32) and (33), include references to rural areas that are unenforceable following the *McDowell* ruling and have already effectively been stricken by judicial ruling. Even in *McDowell*, however, the trial court on remand found the "rural" references to be severable and retained the remainder of the definitions. [110] The State is well aware that these "rural" references have been declared unconstitutional, and the Alaska Supreme Court has recognized that the State no longer utilizes the urban-rural distinction. [111] The Executive Branch has repeatedly submitted bills that would bring these statutes into conformity with the *McDowell* ruling, but the Alaska Legislature has not amended them. [112] Another of the challenged statutes, AS 16.05.258(b)(4)(B)(ii), retains language referencing local residency that this Court found to be unconstitutional in ***34** *Kenaitze*. [113] Following the *Kenaitze* decision, the Board eliminated local residency from its Tier II scoring criteria. [114] So while the language remains on the books, following this Court's ruling in *Kenaitze* it is not implemented.

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

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

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

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

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

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

In addition, at its October 2010 meeting, the Board reconsidered all its ***36** previous amendments to 5 AAC 92.072 and completely repealed and readopted the regulation. [121] The language in question was included within that repeal and readoption. [122] The notice for this meeting, which was given in September 2010, specifically stated:

The board will also address additional topics for other Game Management Units and statewide provisions as described below: ... C. LICENSES, HARVEST TICKETS, HARVEST REPORTS, TAGS, FEES, AND PERMITS statewide, including but not limited to: ... Tier I and Tier II subsistence permits and permit conditions for Nelchina caribou; ... community subsistence harvest hunt area and permit conditions; the Gulkana, Cantwell, Chistochina, Gakona, Mentasta, Tazlina, Chitina, and Kluti Kaah Community Harvest Area for moose and caribou. [123]

The regulation the Fund claims was not noticed, 5 AAC 92.072, is entitled "Community subsistence harvest hunt area and permit conditions." Since the notice quoted above specifically referred to this title, not only did the Board notify the public that the subject was being considered for changes, it identified by name the regulation being amended.

In addition to the language quoted above, the September 2010 notice also emphasized:

Anyone interested in or affected by subsistence and general hunting or trapping regulations is hereby informed that, by publishing this legal notice the Board of Game may consider any or all of the subject areas covered by this notice. THE BOARD IS NOT LIMITED BY THE SPECIFIC LANGUAGE OR CONFINES OF ACTUAL PROPOSALS SUBMITTED BY THE PUBLIC OR BY DEPARTMENT STAFF. Pursuant to AS 44.62.200, the board may review the full range of activities appropriate to any of the subjects listed in this notice. The board may make changes to the hunting and trapping regulations as may be required to ensure the subsistence priority in AS 16.05.258...

***37** After the public hearing, the Board of Game may adopt these or other provisions dealing with the same subject, without further notice, or amend, reject, supplement, or decide to take no action on them. The language of the final regulations may be different from the proposed regulations. You should comment during the time allowed if your interests could be affected. [124]

Thus, the September 2010 notice specifically notified the public that the Board was considering making regulatory changes to 5 AAC 92.072 and Copper Basin subsistence caribou hunts and also explained that the Board was not confined to proposals submitted by the public or Department and could consider and thereafter make whatever changes it deemed necessary to the identified subjects. There can be no legitimate dispute that this is ample notice.

Finally, notice was given in the spring of 2011 that the Unit 13 subsistence hunting regulations including the language at issue again would be considered at the Board's March 2011 meeting. Proposal 50 submitted by ADF&G, which included all of the recent changes to 5 AAC 92.072, including the phrase in question, was included in the Board's book, which was distributed prior to the Board meeting. [125] It is clear that the Fund received it as they included it in their filings. [126]

The Board's notices more than meet the APA's standard of substantial compliance with APA requirements, [127] which are set forth at AS 44.62.190 and .200. This Court repeatedly has held that the "informative summary" requirement of ***38** AS 44 62.200(a) must be liberally construed in the agency's favor. [128] In *Gilbert v. State*, the Court recognized that AS 44.62.200

was drafted specifically so that the Board of Fisheries and Board of Game would not be required to give overly detailed and specific notice of proposed actions so as to allow them to adopt regulations that varied from their notices. [129] This freedom is necessary because these are citizen boards, whose members typically have other jobs and are tasked with considering, collectively, hundreds of public and agency proposals for regulatory change during the few meetings they have each year. Based on information presented at those meetings, they must develop coherent management schemes for Alaska's vitally important commercial, subsistence, and sport fisheries, and hunting and trapping activities, in very short time periods and on an annual basis. [130] The "informative summary" provision in AS 44.62.200(b) allows them to do so by allowing an adopted regulation to vary from the informative summary in the notice so long as the subject matter remains the same and the original notice gave reasonable notice of the subject of agency action so members of the public could determine whether their interests might be affected.

In other cases, this Court has approved notices that simply list and solicit public comment on extremely general subject headings, such as "General Provisions" and "Filing Procedures." [131] It even has found an informative summary in a public notice ***39** sufficient when it could discern the general topic that the agency was implicitly addressing, even though that topic was never explicitly mentioned anywhere in the notice. [132] It has found an informative summary by the Board of Fisheries that followed the same format as the notice at issue here (listing the categories of regulations the Board was considering, such as "set fishing seasons") to be sufficient. [133]

In this case, the Board specifically informed the public that it was considering addressing the very subjects at issue. The notice cited the specific regulation by name, rather than just listing broader general categories such as "Game Management" and "Subsistence Hunting" as it. could have under the cases cited above. Further, as was the case in *Gilbert*, supra n. 128, the public was informed that the Board was not bound by the language of the proposals submitted. The notice was in boldfaced type and capital letters, and thus was more than in *Gilbert*. [134] The informative summary requirement was met, and the trial court committed no error in concluding that adequate notice was given of the change to 5 AAC 92.072(d).

F. The Allocation of Up to 70 "Any Bull" Moose to Community Harvest Permit Hunts is Constitutional.

The Fund also challenges the provision in 5 AAC 85.045 that Unit 13 community harvest hunters may take up to 70 bull moose that do not meet antler restrictions for other hunts in the same area (also referred to as "any bull" moose). It argues that this is a monopolistic grant or special privilege that is unconstitutional under ***40** the common use clause and public trust doctrine applied by this Court in *Owsichek v. State*. [135] This argument misconstrues *Owsichek* and ignores several decisions of this Court rejecting constitutional challenges to Boards of Fisheries and Game resource allocations.

Owsichek is readily distinguishable from this case. At issue there were statutes authorizing the Game Licensing and Control Board to grant hunting guides "exclusive guide areas" (EGAs). Unlike the community harvest permit hunt challenged here, the EGAs truly were exclusive - they were geographic areas in which only the designated guide could lead hunts and from which all other guides were excluded - and they also essentially were transferable property rights. [136] The Court held that exclusive guide areas and overlapping joint use areas were unconstitutional because these areas truly were exclusively for the personal use of designated guides and because they essentially were property rights - considerations that do not apply here. [137]

***41** Here, the CSH hunt is open to any and all Alaskans who agree to follow the permit conditions. Neither the CSH hunt regulations nor the Board's allocation of up to 70 "any bull" moose to CSH hunts denies anyone access. This was an allocation decision made by the Board after careful consideration of the limited number of "any bull" moose that could be harvested while maintaining the desired bulhcow ratio. [138] It was reasonable of the Board to allocate the limited number of moose to those who

agreed to share the resource. Numerous longstanding decisions of this Court show that such allocations are constitutional and are squarely within the Board's authority.

For example, in 1981, in *Kenai Peninsula Fisherman's Cooperative Ass'n v. State*, [139] the Court rejected a commercial fishing group's constitutional challenge to a policy of the Board of Fisheries allocating Cook Inlet between commercial and sports fishermen.

Again, the Association's contention is without merit. While [article VIII,] section 15 does prohibit granting monopoly fishing rights, that section was not meant to prohibit ***42** 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 in the same area must also be allowed, would be to go far beyond the purpose of the section. [140]

In 1990, in *Gilbert v. State*, [141] the Court rejected an equal access constitutional challenge to a regulation providing for allocation of salmon among commercial fishermen in southwest Alaska and limiting the total harvest of Chignik-bound sockeye salmon in the fishery in the Stepovak Bay area. Stepovak fishermen contended that the regulation conferred a special privilege on Chignik and Igvak fishermen and that under article VIII they should have the same right of access to the salmon as other fishermen. The Court rejected this argument:

[T]he Stepovak fishery is not similarly situated to the Chignik fishery as a matter of biological spawning patterns, and it is not similarly situated with the Igvak fishery in terms of historical catch levels and participation. Since article VIII, section 17 only applies to those who are "similarly situated," it does not apply to this case.

The regulation in question reflects an allocation decision authorized under article VIII, section 4 of the state constitution which the Board must necessarily make between users involved in different fisheries. *McDowell*, 785 P.2d at 8; *Meier*, 739 P.2d at 174 ("The Board's power to control fishery resource utilization allows it to allocate the salmon harvest between these two competing subgroups of commercial users."). Such decisions are within the power of the Board, so long as they are not arbitrary and unreasonable and are "consistent with and reasonably necessary to the conservation ***43** and development of Alaska fishery resources." [142]

In 1994, in *Tongass Sport Fishing Ass'n v. State*, [143] the Court rejected an Article VIII challenge to a sports fishing group's challenge to a regulation allocating the chinook salmon harvested by commercial and sport fishers in the southeast portion of state, stating that the Article VIII clauses are not implicated where the regulation does not limit admission to resource user groups.

We have held that the "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. *McDowell v. State*, 785 P.2d 1, 8 & n. 14 (Alaska 1989); *see also Owsichek v. State, Guide Licensing & Control Bd.*, 763 P. 2d 488_492 (Alaska 1988). Article VIII limitations on the state's power to restrict access to natural resource user groups do not apply to the state's authority to allocate fishery resources among sport, commercial, and subsistence users. [144]

To the extent the Fund is arguing that Article VIII requires that individual subsistence hunters must be allowed an opportunity to harvest and use these "all bull" moose by their preferred means or in the manner most convenient to them, this Court repeatedly has rejected such arguments. In 1991, in *Alaska Fish Spotters Ass'n v. State*, [145] the Court rejected an article VIII challenge to a regulation banning the use of aircraft for ***44** locating salmon. It stated: "[W]e do not agree with Fish Spotters' fundamental premise that the common use clause obligates the state to guarantee access to a natural resource by a person's preferred means

or method." [146] In 1995, in *State v. Kenaitzte Indian Tribe*, [147] the Court rejected an argument that banning the subsistence priority in non-subsistence areas was unconstitutional because residents in those areas were denied convenient local access to subsistence fish and game resources. The Court said that "[i]nconvenience is in no sense the equivalent of a bar to eligibility for participation in subsistence hunting and fishing and does not suffice to trigger an analysis under the equal access clauses." [148] Finally, in 2001, in *Interior Airboat Ass'n v. State*, [149] the Court rejected an Article VIII challenge to the Board of Game's designation of the Noatak and Nenana Critical Use Areas where the use of aircraft and airboats was restricted. In rejecting the argument that the CUAs create monopolistic privileges for local hunters, the Court noted that the CUAs were open to any Alaskan who wanted to use them, and that the equipment limitations apply equally to all users. [150]

Here, as in the cases cited above, CSH hunts are open to any Alaskan who wants to participate and who agrees to the hunt limitations. The allocation of up to 70 all bull moose to the CSH hunt does not violate Alaska's constitution.

***45 G. The Fund's Other Arguments Do Not Pertain to the Final Adopted Regulations, or They Address Actions That Are Well Within the Board's Authority**.

The Fund briefly argues that the Board has imposed religious or cultural practices on Alaskans who might otherwise wish to participate in a community harvest subsistence hunt; conversely, it also complains that the Board and/or Department of Law have "constitutionally sanitized" the final regulations as compared to various earlier proposals by making them more generic. [151] As the trial court properly found, these arguments are at least partly based on discussion points and earlier draft versions of the proposed regulations that were not adopted. [152] The only remaining "practices" that community harvest permittees must agree to are sharing and greater salvage of edible parts. [153] Sharing meat and other edible parts is the whole point of a community harvest permit. It is inherent in the concept of "community" and is a part of the very definition of "subsistence uses." [154] The Board is explicitly directed by AS 16.05.258 to provide for and regulate such subsistence uses of game. [155] The Fund has provided no basis for invalidating the sharing and salvage requirements for participation in a community-based subsistence hunt.

Allegations that the Board and/or Department of Law wrongfully "sanitized" the regulations as compared to various proposals considered during board ***46** meetings likewise have no merit. An important purpose of public comment, oversight and advice from the Department of Law, and board deliberations is to ensure that the final adopted regulations are appropriate and lawful. In essence, the Fund's complaint amounts to a charge that state officials were doing what they were supposed to be doing.

IV. CONCLUSION

The community harvest permit hunts for caribou and moose that the Fund has challenged in this case are constitutional, authorized by statute, and were properly noticed. For the reasons discussed above, this Court should affirm the grant of summary judgment to the State.

DATED at Anchorage, Alaska this 21st day of July, 2012.
MICHAEL C. GERAGHTY

ATTORNEY GENERAL

By: <<Signature>>

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Footnotes

1 Game Management Unit 13 is shown at Exc. 977 and is the area generally south of the crest of the Alaska Range and north of the crest of the Chugach Range, from Denali National Park to the Copper River. 5 AAC 92.450(13). The Copper Basin caribou and moose community subsistence harvest permit area encompasses all of Units 11 and 13 and portions of Unit 12, but only Unit 13 is open to caribou hunting. Exc. 976.

2 *Ahtna Tene Nene' v. Alaska Fish and Wildlife Conservation Fund*, et al., Case No. S-13968.

3 Exc. 446.

4 Exc. 361.

5 The standards for Tier II hunts are found in AS 16.05.258(b)(4) and 5 AAC 92.070. In the early 1990s, the Board determined that so many Alaskans wanted to hunt Nelchina caribou that 100% of the available harvest (which varied widely between 1,000 and 5,000 caribou in those years due to wide fluctuations in the population) would be needed for subsistence, so the hunts were administered as Tier II hunts. Exc. 844-45, 850. The Board subsequently looked more closely at what the actual customary and traditional uses of the caribou and moose in the area were and set the amount necessary for subsistence at a range of 600-1000 caribou and 300-600 moose. Exc. 972-73.

6 Exc. 361, 846.

7 *Id.*

8 *Id.*

9 *Id.*

10 Exc. 796-97.

11 *Id.* If all sport hunters are also subsistence hunters, the priority for subsistence uses over other consumptive uses in AS 16.05.258(b)(2)-(4) would be meaningless.

12 Exc. 362.

13 Exc. 847.

14 Exc. 361-68. The Board found:

When the Board originally determined there were customary and traditional uses of the Nelchina Caribou Herd and moose in GMU 13, it recognized these subsistence uses were established by Ahtna Athabascan communities within the Copper River basin, and were later adopted by other Alaska residents. Due to the importance of, and high level of competition for subsistence permits in this area, the Board has undertaken, as precisely as possible, the task to identify the particular characteristics of these customary and traditional use patterns. (Exc. 362.)

15 Exc. 361-68; *see also* Exc. 848-49.

16 Exc. 797.

17 *Id.* (citing *Ahtna Tene Nene' Subsistence Committee v. State of Alaska, Board of Game*, Case No. 3An-07-8072 CI).

18 Exc. 797-99.

19 *Id.*

20 5 AAC 85.025(8) and .045(11), Register 190.

21 Exc. 847.

22 Exc. 52.

23 S-13968.

24 Exc. 799.

25 Exc. 279-83 and 434-35. Judge Bauman issued his decision on July 9, 2010. The Board adopted emergency regulations shortly thereafter, and because the emergency regulations would expire in 120 days, it met again in October 2010 to address the remainder of the subsistence caribou season. Exc. 250. In addition to making it clear that the CHP hunts were not residency-based, the Board eliminated a provision delegating community hunt administration responsibilities to the community.

26 Exc. 59, 136, 255, 279-83, 325.

27 Exc. 43,970-73.

28 Judge McConahy summarized the post-amendment differences as follows:

The caribou CHP hunt and the caribou Tier I hunt differ in two ways. First, under the Tier I caribou hunt, a hunter and his or her entire household may only hunt caribou and moose in unit 13; under the CHP caribou hunt, a hunter and his or her household may only hunt caribou in unit 13 [and] a hunter may only hunt moose in unit 13, but the hunter's other household members may hunt moose elsewhere. Second, the CHP hunt imposes salvage requirements beyond the salvage requirements for the Tier I hunt, including salvage of heart, liver, kidneys, and fat. The moose CHP hunt differs from the general moose hunt in three ways. First, the moose CHP hunt is for any bull, while the general harvest ticket moose hunt is limited to bull moose having spike-fork antlers or 50 inch or greater antlers. Second the moose CHP hunt opens 10 August, while the general hunt opens 1 September. Third, similar to the caribou CHP, the moose CHP imposes additional salvage requirements beyond the salvage requirements of the general moose hunt. Exc. 435. The differences and “preferences” are even fewer than this indicates. Other application restrictions are that individual Tier I hunters cannot apply for any other caribou hunt permits (and while not restricted as to what they can apply for with moose, though with hunting restrictions they could get a permit they cannot use); caribou CHP hunters cannot apply for any other caribou hunts but can apply for moose drawing hunts within Unit 13; and moose CHP hunters cannot apply for other moose hunts but can apply for caribou drawing hunts within Unit 13 and can apply for the individual Tier I caribou hunt in Unit 13. Other hunting restrictions are that individual Tier I hunters can only hunt moose within Unit 1; caribou CHP hunters and their households can only hunt caribou within Unit 13 and moose within the CHP hunt area (Unit 11, 13, and a portion of 12); and moose CHP hunters and their households can only hunt caribou within Unit 13, and moose within the CHP hunt area (Unit 11, 13, and a portion of 12). *See* Exc. 975, 986, 989, 5 AAC 92.050(a)(4)(I), 5 AAC 85.045(a)(11), 5 AAC 92.220(d), 5 AAC 92.990(a)(17).

29 R. 741-47, Exc. 1-14.

30 R. 287-90.

31 Exc. 91-329 and 330-368.

32 Exc. 433-439.

33 Exc. 757.

34 Alaska R. Civ. P.56.

35 *Grunert v. State*, 109 P.3d 924, 937 (Alaska 2005) (Carpeneti, J., dissenting); *Interior Alaska Airboat Ass'n v. State*, 18 P.3d 686, 689 (Alaska 2001); AS 44.62.100.

36 *See Koyukuk River Basin Moose Co-Management Team v. Bd. of Game*, 76 P.3d 383, 390-91 (Alaska 2003).

37 *Id.* at 389.

38 *Grunert*, 109 P.3d at 941 (Carpeneti, J., dissenting); *Interior Alaska Airboat*, 18 P.3d at 691.

39 *Koyukuk River Basin*, 76 P.3d at 386-87.

40 *Interior Alaska Airboat*, 18 P.3 d at 690.

41 *Id.* at 693.

42 *See id.* at 693-94 (referring to the record); *see also Ellis v. State Dept. of Natural Resources*, 944 P.2d 491, 493-94 (Alaska 1997) and *Stepovak-Shumagin Set Net Ass'n v. State, Board of Fisheries*, 886 P.2d 632, 647 (Alaska 1994) and cases cited therein.

43 *Alyeska Pipeline Service Co. v. State, Dep't. of Envt'l Conservation*, 145 P.3d 561, 564 (Alaska 2006).

44 Appellant's Opening Brief (At. Br.) at 29.

45 *See McDowell* 785 P.2d at 5-9 and especially footnote 14 ("We have consistently taken the position that limits on admission to user groups are subject to scrutiny under the Article VIII equal access clauses"); *State v. Manning*, 161 P.3d 1215, 1220-22 (Alaska 2007).

46 *Tongass Sport Fishing Ass'n v. State*, 866 P.2d 1314, 1318 (Alaska 1994) and *Interior Alaska Airboat Ass'n, Inc. v. State*, 18 P.3d 686, 695 (Alaska 2001).

47 *State, Dep't of Revenue v. Andrade*, 23 P.3d 58, 71 (Alaska 2001).

48 *See* 5 AAC 92.072; 5 AAC 92.074(d).

49 803 P.2d 863 (Alaska 1990). Exc. 130-31.

50 836 P.2d 358 (Alaska 1992).

51 At. Br. 15 (emphasis in original).

52 At. Br. 16-19.

53 AS 16.05.330 implements AS 16.05.258, which authorizes the Board of Game to adopt regulations that provide a reasonable opportunity for subsistence uses of game populations that it finds are customarily and traditionally used for subsistence.

54 *Alaska Civil Liberties Union v. State*, 122 P.2d 781, 785 (Alaska 2005); *Interior Alaska Airboat Ass'n v. State*, 18 P.3d 686, 689 (Alaska 2001).

55 *State, Dept of Revenue v. Andrade*, 23 P.3d 58, 71 (Alaska 2001).

56 Exc. 444.

57 At. Br. 17.

58 161 P.3d 1213 (Alaska 2007).

59 *Id.* (emphasis added).

60 Exc. 130-31.

61 *State v. Arnariak*, 941 P.2d 154, 157 (Alaska 1997).

62 At. Br. 45.

63 At. Br. 19. The Fund also calls it "preferences for community hunters" (At. Br. 27-30) and a "community preference" (At. Br. 36).

64 At Br. 29-30.

65 Exc.445.

66 *State v. Hebert*, 803 P.2d 863, 865 (Alaska 1990) (emphasis added).

67 Exc. 124. In fact, several groups besides the local villages participated in the community harvest hunt, including groups from Homer, Glenallen, Fairbanks, Anchorage, and Juneau. Exc. 130-31; *see also* At. Br. 28.

68 *See also State v. Kenaitze Indian Tribe*, 894 P.2d 632, 640 (Alaska 1995) ("Inconvenience [in access to subsistence resources] is in no sense the equivalent of a bar to eligibility for participation in subsistence hunting and fishing and does not suffice to trigger an analysis under the equal access clauses. ... 'We have held that the '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 user groups.") (quoting *Tongass Sport Fishing Ass'n v. State*, 866 P.2d 1314, 1318 (Alaska 1994)).

69 At. Br. 40-41 (citing *Grunert v. State*, 109 P.3d 924 (Alaska 2005)). The Fund argues that the trial court ignored *Grunert*. However, the State twice cited *Grunert I* in its summary judgment memorandum, so presumably the trial court read and was familiar with it. Exc. 101.

70 At. Br. 40.

71 109 P.3d at 936.

72 The Fund asserts: "The Court agreed that in Hebert, it had allowed the Board to distinguish among resident and non-resident herring fishers; 'But we have never stated that the Board may divide what has historically been a single commercial fishery and allocate fish between fishers who have traditionally been treated as a single user group."' At. Br. 41 (citing *State v. Grunert*, 139 P.3d 1226, 1239 n. 66 (Alaska 2006)).

73 *See Grunert II*, 139 P.3d at 1236.

74 The Fund's reliance on this footnote in *Grunert II* and on the *Grunert* cases in general is misplaced for other reasons as well. First, when one reads the entire footnote, it becomes clear that the *Hebert* is cited for an ongoing, valid proposition - that the board may continue to make the distinctions at issue in that case and the others listed. Moreover, in *Grunert II the* Court addressed concerns that its ruling might affect other cooperative fisheries in the state and took pains to say: "We express no opinions about those fisheries. We have been given no specific information about those fisheries and at oral argument it appeared there were disputes about how each of those fisheries should be defined, such as whether any of them involve a single 'fishery."' 139 P.3d at 1235, n. 45. In other

words, even if the *Hebert* cases had dealt with cooperative fisheries (which they did not, *see* 743 P.2d 392 and 803 P.2d 863), the Court was expressing no opinion about their ongoing validity, and it certainly wasn't purporting to state a rule that would affect the validity of community-based hunting efforts.

75 *State, DNR v. Alaska Riverways, Inc.*, 232 P.3d 1203, 1219 (Alaska 2010) (citing *Tongass Sport Fishing Ass'n v. State*, 866 P.2d 1314, 1318 (Alaska 1994), *Reichmann v. State, DNR*, 917 P.2d 1197, 1200 (Alaska 1996), and *Shepherd v. State*, 897 P.2d 33, 43-44 (Alaska 1995)). In *Alaska Riverways*, the Court also observed that "[c]oncluding that two classes are not similarly situated necessarily implies that the different legal treatment of the two classes is justified by the differences between the two classes." *Id.* (quoting *Shepherd*, 897 P.2d at 44 n. 12).

76 At. Br. 29, 30.

77 Exc. 361-68, 970-73.

78 Thus, for example, each community or group must prepare a written report that "contain[s] a complete description (date, location, number of participants, amount of met shared, and so forth) of at least one communal sharing event featuring caribou [or moose] harvested under the terms of a Copper Basin CSH hunt." Exc. 978, 989. This is consistent with the 2006 and 2011 findings that the community-based pattern of use is characterized by such sharing. Exc. 970-72, 978, 989. Each participant must certify that they have read, understood, and will attempt to participate in and establish the pattern of subsistence use described in the 2006 Findings, key aspects of which are summarized in the permit terms and conditions. Exc. 978, 989.

79 *See Kenai Peninsula Fisherman's Cooperative Ass'n v. State*, 628 P.2d 897 (Alaska 1981); *Gilbert v. State*, 803 P.2d 391 (Alaska 1990); *Alaska Fish Spotters Ass'n v. State*, 838 P.2d 798 (Alaska 1992); *Tongass Sport Fishing Ass'n v. State*, 866 P. 2d 1314 (Alaska 1994); *Interior Airboat Ass'n v. State*, 18 P.3d 686 (2001).

80 *State v. Tanana Valley Sportsman's Ass'n*, 583 P.2d 854, 859 n.18 (Alaska 1978).

81 *McDowell*, 785 P.2d at 5.

82 Sec. 1 ch 1 SSSLA 1992.

83 AS 16.05.258(c).

84 *Id.* (emphasis added); *see also* AS 16.05.258(c)(5), (6), (8), (9), (11), and (12) (discussing subsistence-related characteristics "in the area or community").

85 *Manning, supra*, 161 P.3d at 1223, n. 38 (emphasis in original).

86 *Id.* at 1224.

87 *Id.* (emphasis added).

88 AS 16.05.258(e).

89 *See State v. Greenpeace, Inc.*, 187 P.3d 499, 510 n. 26 (Alaska 2008) ("Generally, courts presume that 'or' is used in a statute disjunctively unless there is clear legislative intent to the contrary."); *Employment Security Commission v. Wilson*, 461 P.2d 425, 428-29, especially n. 6 (Alaska 1969) (ordinary rules of grammar apply in construing statutes, "or" is to be interpreted disjunctively).

90 *See Madison v. State*, 696 P.2d 118, 176 (Alaska 1985) (interpreting 1978 statute).

91 *See* AS 16.05.258(b) ("the board shall determine the amount of the harvestable portion that is reasonably necessary for subsistence uses"); (b)(l)-(3) ("if the harvestable portion of the stock or population is sufficient to provide for subsistence uses... ") (b)(1) and (b)(2) ("the appropriate board shall ... adopt regulations that provide a reasonable opportunity for subsistence uses of those stocks or populations"); (b)(3) ("the appropriate board shall ... adopt regulations that eliminate other consumptive uses in order to provide a reasonable opportunity for subsistence uses"); (b)(4) ("the appropriate board shall ... adopt regulations eliminating consumptive uses, other than subsistence uses").

92 *Rubey v. Alaska Com'n on Postsecondary Educ*, 217 P.3d 413, 416 n.9 (Alaska 2009); *Homer Elec. Ass'n v. Towsley*, 841 P.2d 1042, 1045 (Alaska 1992).

93 *Kenai Peninsula Fishermen's Co-op Ass'n v. State*, 628 P.2d 897, 903 (Alaska 1981) (Board of Fisheries' authority in AS 16.05.221(a) to regulate for purposes of conservation and development, identical to Board of Game's authority in AS 16.05.221(b), authorizes allocating among competing users); *Meier v. State, Bd. of Fisheries*, 739 P. 2d 172, 174 (Alaska 1987) (Board of Fisheries has authority to allocate between competing subgroups of commercial users); *State v. Hebert*, 743 P.2d 392, 394 (Alaska App. 1987) and *State v. Hebert*, 803 P.2d 863 (Alaska 1990) (Board of Fisheries has authority to establish "superexclusive" herring fisheries).

94 *State v. Morry*, 836 P.2d 358 (Alaska 1992).

95 *Id.* at 370 (footnote omitted, emphasis in original).

96 *Id.* at 370 n. 14 (emphasis added).

97 At. Br. 41-47.

98 AS 06.05.258(b)(4)(B)(ii) was declared unconstitutional in *State v. Kenaitze Indian Tribe*, 894 P2d 632 (Alaska 1995). The court found that the remainder of this statue was severable and remained enforceable. R. 242-53.

99 In *Madison*, the court said:

> The board's argument reveals a fundamental misconception about the structure of the 1978 law. There are potentially two tiers of subsistence users under AS 16.05.251(b). The first tier includes all subsistence users. Under the statute, all subsistence uses have priority over sport and commercial uses .... If the statutory priority given all subsistence users over commercial and sport users still results in too few fish for all subsistence uses, then the board is authorized to establish a second tier of preferred subsistence users based on the legislative criteria expressed in AS 16.05.251(b), namely customary and direct dependence on the resource, local residency, and availability of alternative resources.

696 P.2d at 174 (emphasis in original). *Madison* addressed the 1978 version of Alaska's subsistence statute, in which the statutory to the duty to "distinguish among subsistence users" first was codified. The relevant language has been preserved in the current subsistence statute in AS 16.05.258(b)(4)(B).

100 *Id.* at 365.

101 *Morry*, 836 P.2d at 368 (emphasis added).

102 *See McDowell v. State*, 785 P.2d 1, 5-9, esp. n. 14 ("We have consistently taken the position that limits on admission to user groups are subject to scrutiny under the Article VIII equal access clauses.").

103 *State v. Kenaitze Indian Tribe*, 894 P.2d 632, 638 (Alaska 1995).

104 *State, Department of Fish and Game v. Manning*, 161 P.3d 1215, 1216 (Alaska 2007) (quoting AS 16.05.258(b)(4)(B)(i) and (iii) (emphasis added).

105 At. Br. 41-47.

106 5AAC 99.025(4).

107 5AAC 85.025(a)(16), (17), (18), and (21).

108 Exc. 446 (emphasis in original).

109 At. Br. 19-21,24-27.

110 R. 242-53. The definitions are now found at AS 16.05.940(31), (32), and (33)

111 R. 242-53 and *Morry*, 836 P.2d at 366-67.

112 R. 243. As just one example, *see* HB 600, introduced in the 27th Legislature.

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

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

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

116 At. Br. 25.

117 AS 16.05.258(c).

118 At. Br. 21-27.

119 At. Br. 22.

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

121 Exc. 123-27.

122 Exc. 125.

123 Exc. 692.

124 Exc. 692-694 (emphasis in original).

125 5 AAC 96.610(c).

126 Exc. 67.

127 AS 44.62.300(1).

128 *Gilbert v. State*, 803 P.2d 391, 394 (Alaska 1990) (citing *State v. First National Bank of Anchorage*, 660 P.2d 406, 425 (Alaska 1982)).

129 *Id.* at 395 (quoting 1970 House Journal 917-18).

130 *See Tongass Sport Fishing Ass'n v. State*, 866 P. 2d 1314, 1319 n. 13 (Alaska 1994).

131 *First National Bank*, 660 P.2d at 425.

132 *Chevron U.S.A. Inc. v. LeResche*, 663 P.2d 923, 929-30 (Alaska 1983).

133 *Gilbert*, 803 P.2d at 395.

134 *Id.*; Exc. 693.

135 At. Br. 31-32 (quoting *Owsichek v. State*, 763 P.2d 488 (Alaska 1988)).

136 763 P.2d at 489.

137 In *Owsichek* the Court said:

> We conclude that exclusive guide areas and joint use areas fall within the category of grants prohibited by the common use clause. These areas allow one guide to exclude all other guides from leading hunts professionally in "his" area. These grants are based primarily on use, occupancy and investment, favoring established guides at the expense of new entrants in the market, such as Owsichek. To grant such a special privilege based primarily on seniority runs counter to the notion of "common use."
>
> Moreover, the grants are not limited in duration. The statutes allow holders of EGAs to sell their "improvements," and the GLCB routinely transfers the EGA to the purchaser of the improvements or to the guide's designated successor. This practice allows a guide to effectively sell his EGA as if it were a property interest.
>
> Although the Board justified the program to the legislature as a means of improving wildlife management, it is apparent that area assignments are not based primarily on wildlife management concerns. Rather, the Board bases its decisions on use, occupancy and investment. Thus, the EGA program cannot be justified as a wildlife management tool like other restrictions on common use, such as hunting seasons and bag limits.
>
> *Id.* at 496-97 (citations omitted).

138 Exc. 666-690. Board members expressed concerns about the bull/cow ratio going down, and amended the proposal to reduce the any bull allocation from 100 to 70 moose. Exc. 671-74, 687-90.

139 *Kenai Peninsula Fisherman's Cooperative Ass'n v. State*, 628 P.2d 897 (Alaska 1981).

140 *Id.* at 904 (footnote omitted).

141 803 P.2d 391 (Alaska 1990).

142 803 P.2d at 398-99 (footnotes and citations omitted). Article VIII, section 4 of the Alaska Constitution (entitled "Sustained Yield") directs that "[f]ish, 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."

143 *Tongass Sport Fishing Ass'n v. State*, 866 P. 2d 1314 (Alaska 1994).

144 *Id.* at 1318.

145 838 P.2d 798 (Alaska 1992).

146 *Id.* at 801.

147 894 P.2d 632 (Alaska 1995).

148 *Id.* at 640.

149 18 P.3d 686 (2001).

150 *Id.* at 695.

151 *See, e.g.*, At. Br. 30, 35.

152 Exc. 447.

153 *Id.*

154 AS 16.05.920(33). ("Subsistence uses" means the noncommercial, customary and traditional uses of wild, renewable resources, by a resident... for the customary trade, barter, or sharing for personal or family consumption ...".)

155 AS 16.05.258(b) and (e).