

By:

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AUTHORITIES PRINCIPALLY RELIED UPON

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 (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;
- (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 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	Nonresident
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	(Subsistence and General Hunts)	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. 17 (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
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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
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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
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NONRESIDENT HUNTERS:

1 bull with 50-inch antlers or antlers with 4 or more brow tines on one side	Sept. 8-Sept. 17
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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)
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1 bull with spike-fort antlers or 50-inch	Sept. 1-Sept. 20
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antlers or antlers with 4 or more brow tines (Subsistence hunt only)
on one side; or

1 bull, by drawing permit only; up to 1,000 Sept. 1-Sept. 20
permits may be issued; or (General hunt only)

1 antlerless moose by drawing permit only; Sept. 1-Sept. 20
up to 200 permits may be issued; a person (General hunt only)
may not take a calf or a cow accompanied
by a calf

NONRESIDENT HUNTERS:

1 bull with 50-inch antlers or antlers with 4 Sept. 1-Sept. 20
or more brow tines on one side by drawing
permit only; up to 150 permits may be
issued

...

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 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;

(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 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;

(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.

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 144° 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 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.

JURISDICTIONAL STATEMENT

This court has jurisdiction over the issues in this case pursuant to AS 22.05.010(a) and (b). Final judgment was entered on November 7, 2011. [Exc. 1025]

The parties are:

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ISSUES PRESENTED FOR REVIEW

1. Did the Alaska Board of Game (Board) violate the equal access or equal

application clauses of Alaska's Constitution in authorizing, pursuant to AS 16.05.330(c) and 5 AAC 92.072, a Community Subsistence Hunt (CSH) for the Copper Basin?

2. Did the Board act within its statutory and constitutional authority in identifying two distinct patterns of subsistence use for moose and caribou in Game Management Unit (GMU) 13, a community use pattern and a household pattern, in establishing two different Tier I subsistence hunts reflecting these two distinct patterns of use, and in establishing different subsistence hunting opportunities for these two Tier I subsistence hunts in order to provide the required reasonable opportunity for these distinct subsistence use patterns?

I. STATEMENT OF THE CASE

A. INTRODUCTION

AFWCF has failed to demonstrate or provide any authority that demands that the same subsistence hunting opportunity must be provided to every Alaska resident without regard to their pattern of use or whether they need the same opportunity to meet their needs.¹ No case, law or constitutional provision requires this kind of nonsensical approach or denial of the realities of hunting patterns and life in Alaska.²

¹ AFWCF makes the extreme argument that "[a]ll Alaskan hunters are subsistence users." AFWCF Br. at 4. This of course is far from the reality in Alaska and inconsistent with

AFWCF appears to accept that the Board had the authority to identify two distinct patterns of subsistence uses for moose and caribou in GMU 13, a community based pattern and a household pattern of use.³ AFWCF's main complaint is that the Board did not have the constitutional or statutory authority to establish two different Tier I subsistence hunts reflecting these two distinct patterns of use, or to establish different subsistence hunting opportunities for the two Tier I subsistence hunts. *See, e.g.* AFWCF Br. at 15, 38. AFWCF takes this position without disputing that the subsistence hunting

the state laws defining and governing subsistence uses. For example, this Court in *State v. Morry*, 836 P.2d 358, 363 (Alaska 1992), recognized that Alaskans engaged in trophy hunting were not engaged in a subsistence use. If all hunting by Alaskans was subsistence hunting, there would be no need to establish subsistence use as the priority use of wildlife. AS 16.05.258(b). The Board has soundly rejected AFWCF's view. [Exc. 847, 861-62].

² In fact, several cases support the Board's authority to recognize the realities of different patterns of fishing, hunting and access to resources and to regulate accordingly. *See e.g., State, Dept. of Fish & Game v. Manning*, 161 P.3d 1215, 1222 (Alaska 2007)(recognizing the realities in Alaska that affect subsistence use and upholding regulations based on these realities); *Gilbert v. State*, 803 P.2d 391, 399 (Alaska 1990)(finding constitutional different regulations for different commercial fisheries fishing same stock of salmon based on the fisheries' different patterns of use); *Interior Alaska Airboat Association, Inc. v. State*, 18 P.3d 686, 694-96 (Alaska 2001)(upholding a constitutional challenge to hunting regulations providing different hunting opportunities to subgroups of hunters); *State v. Hebert*, 803 P.2d 863, 865-66 (Alaska 1990)(no constitutional violations for facially neutral Board of Fisheries regulations that were intentionally designed to advantage local commercial fishermen over nonlocals); *State v. Kenaitze Indian Tribe*, 894 P.2d 632, 641 (Alaska 1995)(Board must make allocation decisions that entail often competing and complex mixture of biological, social and socio-economic factors); *Tongass Sport Fishing Ass'n v. State*, 866 P.2d 1314, 1317 (Alaska 1994)(no violation of common use clause when Board allocated a fixed quota of fish to distinct user groups).

³ AFWCF Br. at 38.

opportunity required to meet the needs of the two distinct patterns of use differs in significant ways. *Id.* at 15.

AFWCF has not demonstrated that the Board acted arbitrarily or outside of its legal authority in finding that different hunting opportunities are necessary to provide a reasonable opportunity for the two distinct patterns of subsistence uses it identified for moose and caribou in GMU 13. AFWCF has not demonstrated that the hunting opportunity the Board provided for the CSH was not necessary to provide a reasonable opportunity to meet the needs of those engaged in that pattern of use. Nor has AFWCF demonstrated that the regulations in place for the household pattern do not provide a reasonable opportunity to meet the needs of those engaged in that pattern of use. AFWCF has failed to demonstrate how, by any measure, its view of the law is consistent with the intent of the subsistence statute – to provide the opportunity for the continuation of the subsistence way of life.⁴

AFWCF asks this Court to reach far beyond law and precedent and create a constitutional barrier where no harm has been demonstrated; a constitutional barrier that is blind to the realities of subsistence uses in Alaska; a constitutional barrier that would read all meaning out of the state subsistence law for places like GMU 13 where the

⁴ This Court has recognized that one purpose of Alaska's subsistence statutes is to ensure that those Alaskans who need to subsistence hunt in order to provide for their basic necessities are able to do so, and that another probable purpose is to preserve a customary and traditional way of life. *State, Dept. of Fish & Game v. Manning*, 161 P.3d at 1223 n. 38 (Alaska 2007). Alaska's fish and game laws are to be liberally construed to achieve their intended purposes. *Kenai Pen. Fisherman's Co-op v. State*, 628 P.2d 897, 903 (Alaska 1981).

identification of distinct patterns of subsistence use, and regulation for those uses, is essential to maintain the subsistence way of life practiced for centuries by communities in the area. As demonstrated below, the Superior Court was correct in finding that the law does not support AFWCF's extreme view.

B. STATEMENT OF FACTS

1. The Appeal in Ahtna I

This appeal is the outgrowth of an earlier appeal filed with this Court that has yet to be decided. Ahtna filed appeal S-13968 on August 5, 2009. The Alaska Fish and Wildlife Conservation Fund and the State of Alaska are also parties in that appeal.⁵ The issues in that appeal are nearly identical to those presented in this appeal as related to: 1) the constitutionality of regulations the Board adopted authorizing CSH permits; and 2) the legality of providing different subsistence hunting opportunities for the two distinct patterns of subsistence uses identified by the Board for caribou and moose in GMU 13.⁶ Consequently, much of the briefing and record Ahtna Tene Nene' provided in Ahtna I are directly on point to issues raised in this appeal.

⁵ Kenneth Manning is also a party to the appeal.

⁶ Compare the "Issues Presented for Review" section in Ahtna Tene Nene's appellate brief in S-13968 (pp. 1-2) to that same section, *supra* at pages 1-2, in this brief. Appeal S-13968 will hereinafter be referred to as "Ahtna I". The opening brief Ahtna Tene Nene submitted in Ahtna I will be referred to as "Ahtna Tene Nene' Br., Ahtna I." The Excerpts of Record for Ahtna I will be referred to as "Ahtna I Exc." The State's Brief in

Both appeals challenge the same statute, AS 16.05.330(c). The primary regulation authorizing community subsistence harvest permits, 5 AAC 92.072, is also central to both appeals.⁷ The Board amended sections of this regulation as a result on the Kenai Superior Court's decision in *Ahtna I* that invalidated the community hunt. [Exc. 24-52]; State Br. at 2, 7. It is this amended version of 5 AAC 92.072 that is at issue in this appeal. The former version is the focus of the appeal in *Ahtna I*.

The relevant difference between the two versions of 5 AAC 92.072 is that the amended regulation simply makes unmistakably clear what the Board intended to accomplish through the regulation at issue in *Ahtna I*.⁸ The Board added "members" or "groups" in several places in the amended regulation⁹ thereby foreclosing any possible

this appeal will be cited as "State Br." AFWCF's opening brief in this appeal will be cited as "AFWCF Br."

⁷ 5 AAC 92.074(d) establishes the Gulkana, Cantwell, Chistochina, Gakona, Mentasta, Tazlina, Chitina and Kluti Kaah community subsistence hunt area, but standing alone this regulation does not authorize any subsistence hunting opportunities. This regulation is not challenged in this appeal and it was not challenged in *Ahtna I*.

⁸ The Board's intent, that community subsistence harvest permits would be available to all Alaskans regardless of residency, is clearly demonstrated by the Board's record in first adopting the regulation and later when amending it in 2009, and in the Board and Department of Law's consistent interpretation of the regulation. *Ahtna Tene Nene's Ahtna I Br.* at 38; [Ahtna I Exc. 195-314 and particularly 204-07, 266-67]. The Board's interpretation of its own regulation is reviewed under the reasonable basis standard of review, "a deferential standard of review" that "properly recognizes that the agency is best able to discern its intent in promulgating the regulation." *Payton v. State*, 938 P.2d 1036, 1041 (Alaska 1997)(quoting *Rose v. Commercial Fisheries Entry Comm'n*, 647 P.2d 154, 161 (Alaska 1982)). See also *Native Village of Elim v. State*, 990 P.2d 1, 10 (Alaska 1999). The Kenai Court gave no deference to the Board's interpretation of its regulation. [Exc. 43-50].

⁹ [Exc. 61-63; 123-27].

interpretation like that of the Kenai Superior Court that the regulation was adopted and implemented solely for the benefit of the eight Ahtna villages issued a permit in 2009.¹⁰

The Board did not, however, amend subsection (d) of 5 AAC 92.072 after the Kenai Court's decision in Ahtna I. This subsection is a central focus of AFWCF's arguments in this appeal¹¹ just as it was in AFWCF's arguments in Ahtna I.¹²

(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.

5 AAC 92.072(d)(emphasis added). The Board's use of the highlighted language to establish a longer moose season¹³ for the CSH than for the Tier I household hunt is one of AFWCF's chief complaints. AFWCF also challenges the regulation that allows for the CSH to take 70 bull moose of any antler size (the "any bull" hunt),¹⁴ a regulation establishing a quota of 300 caribou for the community hunt,¹⁵ and regulations setting

¹⁰ The Board also amended 5 AAC 92.072 to clarify the Department's responsibility for administering community subsistence permits. [Exc. 61-63; 123-27]. These amendments are not at issue in this appeal.

¹¹ See, e.g. AFWCF Br. at 15, 22-24.

¹² AFWCF Br., Ahtna I at 13-19.

¹³ 5 AAC 85.045(a)(9)-(11)

¹⁴ *Id.*

¹⁵ 5 AAC 85.025(a)(8).

different moose hunting territory for those participating in the two Tier I caribou hunts.¹⁶ AFWCF Br. at 10.

The differences in the regulations governing the CSH in Ahtna I and those currently in place are relatively minor. For example, the CSH any bull hunt was changed from an allocation of 100 to 70 moose due to conservation concerns.¹⁷ The legal issue, however, remains exactly the same for both appeals – AFWCF argues that any difference in the hunting opportunity afforded to different Tier I hunts for the same game population violates Alaska’s Constitution and this Court’s decision in *State v. Morry*, 836 P.2d at 365-68.¹⁸

Ahtna Tene Nene’s briefing in Ahtna I is therefore squarely on point with the issues raised in this appeal. Ahtna will, when relevant, refer the Court to its opening and reply briefs in Ahtna I rather than repeating them at length in this brief.

2. The Board’s Findings and Regulations

The two Findings the Board adopted describing the customary and traditional subsistence use patterns for caribou and moose in GMU 13, Findings No. 2006-170-BOG¹⁹ and Findings 2011-184-BOG²⁰ are the foundation for the two separate Tier I subsistence hunts established by the Board. They support the Board’s determination that

¹⁶ [Exc. 0975]; 5 AAC 92.050 (a)(4)(I).

¹⁷ [Exc. 665-88].

¹⁸ AFWCF Br. at 27-39.

¹⁹ [Exc. 361-68].

²⁰ [Exc. 970-73].

different hunting regulations are necessary in order to meet the statutory mandate²¹- that each pattern of use be afforded a reasonable opportunity to meet the subsistence uses identified.

Using the eight criteria adopted by the Joint Boards of Fish and Game to identify customary and traditional subsistence uses (hereinafter “C&T uses”),²² the Findings draw distinctions between subsistence uses and non-subsistence uses of caribou and moose in the area, and between the community based and household based patterns of subsistence use. The community-based pattern of subsistence use is documented primarily in the 2006 Findings. [Exc. 361-68]. Ahtna Tene Nene’s opening brief in Ahtna I at pages 1-11 describes the 2006 Findings in detail, and the evolution of law, precedent and policy that led to both the 2006 and 2011 Findings. In summary, over time, the Board came to the conclusion that it must begin to better define what makes a hunt “subsistence use” and move away from an assumption that all hunting of caribou and moose in GMU 13 by Alaska residents is for “subsistence uses.” *Id.*; [Exc. 846-54] The Findings, and this appeal, have to do with the Board’s attempt to give meaning to the intent and substance of the State’s subsistence laws,²³ consistent with Alaska’s Constitution, and to establish a regulatory regime that provides reliable hunting opportunities that are “critical to the

²¹ AS 16.05.258(b).

²² 5 AAC 99.010(b).

²³ See [Exc. 840-54](Dr. Fall of the Subsistence Division making a presentation to the Board on the regulatory and harvest history of subsistence moose and caribou management in GMU 13 and the development of the Board’s Findings for these uses).

maintenance of the subsistence way of life.”²⁴ [Exc. 361 (Board’s 2006 Findings)]; Ahtna Tene Nene’ Br., Ahtna I at 8-11; State Br. at 4-9.

The 2011 Findings were developed to “supplement” the Board’s 2006 Findings. [Exc. 0970]. Through the 2011 Findings, the Board recognized a traditional pattern of subsistence use “practiced among households and families” that exists along side of the “community-based pattern” of use. *Id.* The 2011 Findings also recognized that the household based pattern of subsistence use has “identifiable characteristics” which “separate it” from the “non-subsistence use patterns” of other Alaskan hunters. [Exc. 0971].²⁵ Importantly, the Board further recognized in the 2011 Findings that while both the household and community-based patterns of subsistence uses exhibit “most of the

²⁴ See also [Exc. 692-777](Robert J. Wolfe, Alaska Department of Fish and Game, Division of Subsistence, Technical Paper No. 284, *Local Traditions and Subsistence: A Synopsis from Twenty-Five Years of Research by the State of Alaska* (2004)). Dr. Wolfe’s work was cited in *McDowell v. State*, 785 P.2d 1, 5 n. 8 (Alaska 1989). The Paper provides case studies demonstrating the local and community-based nature of C&T subsistence uses in Alaska. *Id.* at 711-24. It includes a section comparing the patterns of use of fish and wildlife in nonsubsistence use areas to the patterns in subsistence communities. *Id.* at 697-711. The Paper also includes a section describing the Nelchina Caribou subsistence hunt in GMU 13. *Id.* at 741-755.

²⁵ The 2006 Findings also recognize that not all moose and caribou hunts by Alaska residents in GMU 13 are for subsistence uses. After finding that the application of the state subsistence law under the “all Alaskans” policy, and the resulting perpetual Tier II hunt, was threatening the continuation of the traditions and customary practices of those most dependent on the wildlife resources in the area, the Board determined that it must identify “the particular characteristics of [the] customary and traditional use patterns” of the area and “explore subsistence hunt provisions that reflect and accommodate” these patterns of use “while distinguishing those uses from other uses.” [Exc. 361-2].

criteria listed in 5 AAC 99.010(b) . . . different regulatory options may be necessary to provide reasonable opportunity for each.”²⁶ *Id.*

The Board’s 2006 Findings led to extensive changes in 2009 in how the subsistence caribou and moose hunts were defined and managed in GMU 13. These changes are the subject of the appeal in Ahtna I. They are described in detail on pages 14-21 of Ahtna Tene Nene’s brief in Ahtna I. *See also* State Br. at 3-8 (describing the Board’s Findings and the evolution of GMU 13 subsistence hunting regulations).²⁷

In October of 2010, following the Kenai Court’s ruling, the Board adopted changes to make unmistakable its intent²⁸ in originally adopting the regulation authorizing the CSH²⁹ that these hunts are open to all Alaskans that choose to participate in this pattern of use. [Exc. 61-63, 255-262, 279-83, 434-35]; State Br. at 7-9. The

²⁶ The Board’s Findings satisfy this Court’s instructions that, “to determine that an agency acted within its authority in adopting a regulation, it is vital that the agency clearly voice the grounds upon which the regulation was based in its discussion of the regulation or in a document articulating the decision.” *Alaska Fish Spotters v. State*, 838 P.2d 798, 801 (Alaska 1992).

²⁷ *See also* [Exc. 0782-828], James A. Fall, ADF&G, Division of Subsistence, Special Publication No. BOG 2010-05, *Overview of Nelchina Caribou Herd Regulation and Harvest History* 10 (October 2010). This report, which was presented during the October 2010 Board of Game meeting, provides a review of the regulatory and subsistence hunting history of caribou in GMU 13 over the last two decades (hereinafter cited as “Fall 2012”).

²⁸ *See e.g.* Board Chairman Judkins’ statement at the October 2010 meeting, “it was the department’s interpretation, both the Department of Law and the Board and the Department of Fish and Game, that even before such changes [in 2010] were made, that this [the CSH] was open to any group that wanted to apply, but we --- the intent of RC before you is to make it crystal clear on the face of the regulation that any group may do so.” [Exc. 259]; *see also* Ahtna Tene Nene Ahtna I Br. at 38; [Ahtna I Exc. 195-314 and particularly 204-07, 256-64 and 266-67].

²⁹ 5 AAC 92.072.

Board further amended 5 AAC 92.072 to address the Kenai Court's holding that core governmental functions were delegated away in the 2009 CSH. *Id.*

The Board also significantly modified the Tier I subsistence caribou hunt for the household pattern of use. 5 AAC 92.050(a)(4)(I) was amended such that a household could apply for and be issued a Tier I caribou permit annually rather than once every four years as was the case under the 2009 regulations. [Exc. 60, 121]. The bag limit for the household Tier I hunt was set at one caribou per household per year. 5 AAC 85.025(8); [Exc. 59, 281-82].

The Board made further changes to the CSH and Tier I Household hunts at its March 2011 meetings. The CSH bag limit was set at 1 caribou per household, matching the bag limit for the household Tier I hunt. The quota for the CSH remained at 300 caribou.³⁰ 5 AAC 85.025(a)(8); [Exc. 0977].³¹ The caribou season remained unchanged for both the CSH and the household hunts, from August 10 through September 20, and a second season from October 21 through March 31. *Id.* The Board instructed ADF&G that the season for the household Tier I hunt should close by emergency order when the Department determines that the allocation for that hunt (determined annually by the Department pursuant to Board instructions) has been reached. [Exc. 585-616]. Likewise,

³⁰ The Board is authorized to establish quotas for subsistence hunts pursuant to AS 16.05.258(e).

³¹ The season, bag limit and other conditions for the caribou CSH are included in the document produced by ADF&G entitled "The Copper Basin Caribou Community Subsistence Harvest Permit Program, 2011-2012" included at Exc. 0974-84. Likewise, a concise description of the regulations and conditions governing the moose CSH are

the CSH should close when the 300 quota has been reached, but the CSH caribou hunt should remain open after the household Tier I hunt has closed if the 300 quota has not been reached by that time. *Id.* It is also apparent from the Board's deliberations on the issue that the household hunt should remain open after the close of the CSH if the CSH fills the 300 quota before the household allocation is taken. *Id.*

The Board left the subsistence moose hunting regulations largely as they were in 2009 with the exception that the any bull quota for the community subsistence hunts was reduced at the March 2011 meeting from 100 to 70 any bulls. 5 AAC 85.045(a)(9)-(11); [Exc. 0988].³² There is no quota or limit on the number of antler restricted bull moose that may be taken in the CSH. *Id.* Under the CSH, each person signing up for the community hunt is issued a moose harvest ticket. The bag limit is one moose per harvest ticket. *Id.* The CSH moose season runs from August 10-September 20 throughout most of the CSH area.³³ *Id.*

included in the ADF&G publication entitled "The Copper Basin Moose Community Subsistence Harvest Permit Program, 2011-2012" included at Exc. 0985-995.

³² The 2009 GMU subsistence moose and caribou hunting regulations are described in detail in Ahtna Tene Nene's Ahtna I brief at pages 14-21.

³³ The Copper Basin CSH area established under 5 AAC 92.074(d) includes all of GMUs 13 and 11 and a portion of GMU 12. This area was established to be consistent with the traditional subsistence moose and caribou hunting area of the eight Copper Basin villages that petitioned the Board to create the area. *See infra* at pages 20-21; [Exc. 0976-77; 0987-88]. The CSH moose season for GMU 12 is shorter than that for GMUs 11 and 13, open only August 24-28 and September 8-17. [Exc. 989]; 5 AAC 85.045(a)(10).

The Tier I household moose hunt for GMU 13 provides for a one moose per hunter bag limit of antler-restricted moose³⁴ during a season open from September 1-20. 5 AAC 85.045(a)(11).³⁵ The general resident moose hunt in GMU 11 is open from August 20-September 20 for spike fork or 50 inch or three brow tine bull moose. 5 AAC 85.045(a)(9). All moose hunts in the section of GMU 12 included in the Copper Basin community harvest hunt area,³⁶ including the CSH, are open from August 24-28 and September 8-17. 5 AAC 85.45(a)(10). In parts of GMU 12, the any bull moose hunt is open to all Alaska residents for subsistence and non-subsistence uses. *Id.*

C. STATEMENT OF THE PROCEEDINGS

Ahtna Tene Nene' adopts the Statement of Proceedings described in the State's brief at page 9 with the following additions. On August 1, 2011, the State provided the Superior Court with a "Notice of Supplemental Authority" attaching the decision by Kenai Superior Court Judge Anna Moran denying a motion for a preliminary injunction by Kenneth Manning against the 2011 CSH, the same hunt at issue in this appeal.

Judge Moran determined that Manning was not harmed by the CSH because he had the "option of creating or joining a group to apply for a CHP permit" and that he had

³⁴ Antler restricted moose for the GMU 13 Tier I subsistence hunts are those with antlers that are spike fork or at least 50 inches across or with at least 4 brow tine on an antler. 5 AAC 85.045(a)(11); 5 AAC 92.990(26)(A)-(B)(defining how to measure moose antlers).

³⁵ The Board also authorized drawing hunts in GMU 13 for Alaska residents for any bull moose and cow moose and a drawing hunt for non-residents for antler restricted moose. 5 AAC 85.045(a)(11).

applied for and received a household Tier I permit, thus he was “as likely to take a caribou or moose under the Tier I system as he was under the old Tier II system.” [Exc. 1001]. Judge Moran also found that approximately 3,200 caribou would be available for harvest by other hunters after the 300 quota of caribou was taken by CSH participants, and that 3,148 household Tier I permits were issued in 2011, thus “all Tier I hunters have a reasonable opportunity to harvest caribou during the 2011 season.” [Exc. 1002].

Judge Moran found that the Board’s decision “to establish the CHP hunt was within its authority under AS 16.05.330(c). [Exc. 1003]. The Court also found that Ahtna community members would suffer irreparable harm if they were denied the opportunity to harvest moose and caribou under the CSH in 2011 because of the nutritional, cultural and traditional value of these hunts; “It is nearly impossible to value the economic and cultural loss that would affect other subsistence hunters if the Tier I hunt is enjoined.” [Exc. 1004-05]. The Court also rejected Manning’s arguments that the 2011 CSH violated Article VIII of the Constitution finding that the program “does not differentiate between subsistence hunters based on residency.” [Exc. 1008].³⁷

³⁶ 5 AAC 92.074(d).

³⁷ AFWCF accuses the Board of acting in “open defiance of judicial authority”, rejecting the Attorney General’s advice, and defying “Judge Bauman’s authority.” AFWCF Br. at 8. Judge Moran’s decision addresses a similar argument made by Manning that regulations adopted by the Board in 2010 and 2011 defy Judge Bauman’s Decision on Summary Judgment. Judge Moran found that the “2011 regulations are different from the previously litigated 2009 regulations and, therefore, do not defy the court’s ruling.” [Exc. 1006-07]. AFWCF repeatedly accuses the Board of ignoring the advice of the Attorney General. AFWCF Br. at 8, 31 and 39. The unsolicited advice by the Attorney General did not originate from the Senior Assistant Attorney who has served as the long-

After the Fairbanks Superior Court issued the decision on appeal here on August 5, 2011 granting summary judgment on all issues in favor of the State and Ahtna Tene Nene',³⁸ AFWCF moved for reconsideration. [Exc. 1023]. The Court requested responses by the State and Ahtna Tene Nene', and both parties filed oppositions. *Id.*; [Exc. 1010-22]. In its motion for reconsideration, AFWCF argued that the Superior Court overlooked the fact that the CSH was allocated a 70 any bull moose hunt. [Exc. 1010; 1019]. AFWCF also argued that the Superior Court overlooked this Court's

term day-to-day counsel for the Board. Mr. Saxby carefully stated that, "the attorney general has taken a personal interest in the community harvest issue and I'm directed to inform you that it is the Department of Law's advice that due to the current uncertain state of the law on point, the Board is advised to not adopt regulations providing for a community harvest hunt until after the Supreme Court has ruled on the current appeal." [Exc. 141]. The Board immediately recognized that this advice was politically driven, just as was the earlier highly unusual decision by the same attorney general that the State would not defend the Board in the Ahtna I appeal. *See* [Exc. 458; 141-44](statements of Board members Gussendorf, Spraker and Judkins, "are there any other political decisions that's been handed down"; Board has autonomy "so that political people could not control what the Board did"); *See also* [Exc. 157-166](statements of AFWCF counsel, Ahtna Tene Nene counsel and Board Chair Judkins). It is believed that AFWCF and its client the Alaska Outdoor Council were significantly involved in influencing then Attorney General Sullivan in taking the position not to appeal in S-13968, and in providing the unsolicited politically driven advice to the Board. If AFWCF or the AOC had no involvement in these actions by the Attorney General, AFWCF has the opportunity in its reply brief to so state. If, however, AFWCF did try to influence these decisions, AFWCF's statements portraying the Board as defying judicial authority are even more misleading. After the Board had made it clear that it wanted to address the hardships identified in its 2006 Findings by remedying the faults with the 2009 CSH perceived by the Kenai Court, it sought and was guided in the process by its senior attorney general Saxby. [Exc. 279-82; 622-23 (mistakenly identified as "Mr. Turner"); 627].

³⁸ [Exc. 433-49].

decisions in *Grunert I* and *Grunert II*.³⁹ [Exc. 1014-15; 1016-19]. Except for acknowledging a harmless typographical error, the Superior Court found AFWCF's arguments on reconsideration were without merit and denied them.⁴⁰ [Exc. 1023-24].

II. STANDARD OF REVIEW

A grant of summary judgment is reviewed de novo. When interpreting the Alaska constitution and pure issues of law, the Court exercises its independent judgment, applying the rule of law which is most persuasive in light of reason, practicality, and common sense, taking into account the plain meaning and purpose of the law, as well as the intent of the drafters.⁴¹

When determining whether the Board properly applied the law to a particular set of facts, the Court reviews the Board's action for reasonableness. Under this standard, the Court looks to whether the agency's determination is supported by the facts and is reasonably based in law. The Court will not substitute its judgment for the Board's or alter the Board's policy choice when the Board's decision is based on its expertise. *Native Village of Elim v. State*, 990 P.2d at 5.

³⁹ *Grunert v. State*, 109 P.3d 924 (Alaska 2005) (“*Grunert I*”); *State of Alaska. Board of Fisheries v. Grunert*, 139 P.3d 1226 (Alaska 2006) (“*Grunert II*”).

⁴⁰ AFWCF claims that Judge McConahy “failed to address” the allocation of 70 bulls to the CSH and failed to consider the *Grunert* decisions. AFWCF Br. at 1, 40. The motions and decision on reconsideration cited above demonstrate that Judge McConahy was aware of both of these issues and AFWCF’s arguments in support thereof, and determined AFWCF’s arguments were without merit.

⁴¹ *Koyukuk River Basin Moose Co-Management Team v. Board of Game*, 76 P.3d 383, 386 (Alaska 2003).

The Board's interpretation of its own regulations is reviewed under the reasonable basis standard of review, "a deferential standard of review" that "properly recognizes that the agency is best able to discern its intent in promulgating the regulation." *Payton v. State*, 938 P.2d at 1041.

Regarding facial and as applied challenges to Alaska's Constitution:

A party raising a constitutional challenge to a statute bears the burden of demonstrating the constitutional violation. A presumption of constitutionality applies, and doubts are resolved in favor of constitutionality. The party attacking a statute has the burden to "negative every conceivable basis which might support it."

State, Department of Revenue v. Andrade, 23 P.3d 58, 71 (Alaska 2001). The Board's regulations are also presumptively valid. *Interior Alaska Airboat Ass'n, Inc. v. State, Bd. of Game*, 18 P.3d at 689.

III. ARGUMENT

A. THE BOARD ACTED REASONABLY AND WITHIN ITS AUTHORITY IN ESTABLISHING DIFFERENT HUNTING REGULATIONS FOR THE CSH AND HOUSEHOLD TIER I HUNTS

Central to this appeal are the differences in the hunting opportunity and restrictions that apply to the CSH and household Tier I subsistence moose and caribou hunts in GMU 13. The significant differences are, first, that the CSH has a longer moose season and allows the taking of 70 "any bull" moose while the household hunt allows only the harvest of antler restricted bulls. 5 AAC 85.045(a)(9)-(11); [Exc. 435, 0988].

Second, salvage of the head, heart, liver, kidneys, stomach and hide are required for the CSH moose hunt and salvage of the heart, liver, kidneys and fat are required for the CSH caribou hunt. [Exc. 435, 978, 989]. Salvage of these parts is not required for participants of the household Tier I hunt. 5 AAC 92.220(d); 5 AAC 92.990(a)(17); [Exc. 435].⁴² Finally, the household Tier I subsistence caribou hunter may only hunt for moose in GMU 13 while the CSH caribou hunters may hunt for moose in the CSH area defined in 5 AAC 92.074(d) which includes all of GMUs 11 and 13 and part of GMU 12. 5 AAC 92.050(a)(4)(I); [Exc. 0976].

The differences between the CSH and household hunt conditions are reflective of the pattern of subsistence use identified for each subsistence hunt. [Exc. 361-68; 970-73]. The Board's responsibility is to provide a reasonable opportunity for each subsistence use pattern identified by the Board,⁴³ and the regulations governing the two

⁴² The CSH conditions such as the salvage requirements are not a regulatory mandate. Instead the Board directed the Divisions of Wildlife and Subsistence to create hunt conditions for the CSH that reflect the community pattern of use the Board identified in its 2006 Findings. [Exc. 361-68, 550-62, 846-50, 0974, 0985]. The salvage requirements follow from the Board's Finding that the pattern of use is "characterized by thorough use of most of the harvested animal." [Exc. 0978, 0989]. On the other hand, the Board's 2011 Findings for the household pattern of use concluded that "there is less use of organ meat and almost no use of the hide or bones", thus the salvage requirements that apply to the CSH are not required for the household hunt. [Exc. 0972]; 5 AAC 92.220(d); 5 AAC 92.990(a)(17).

⁴³ Ahtna Tene Nene's opening brief in Ahtna I (at pages 24 through 33) includes argument and authority for Ahtna's position that the state's subsistence laws, including AS 16.05.258, AS 16.05.330(c), AS 16.05.940 (7), (33) and AS 16.05.094, authorize the subsistence hunting regulations the Board established for the CSH and the household hunt. Rather than repeating those arguments here, Ahtna refers the Court to its briefing in Ahtna I and the arguments advanced by the State in its brief at pages 23 through 26.

subsistence hunts identified for GMU 13 reflect the Board's efforts to fulfill that mandate. [Exc. 286-88].

The CSH is based on a pattern of use established primarily by the Ahtna villages in the Copper Basin. [Exc. 362]. The first step in establishing a CSH is to establish a "community harvest hunt area." 5 AAC 92.072(a)-(b). The Board considers the "customary and traditional pattern of use found under 5 AAC 99.010" when determining a community harvest hunt area. 5 AAC 92.072(b)(4). In this case the Board has identified these C&T uses in its 2006 Findings. [Exc. 361-68]. The Findings establish that the community based pattern of uses that originated in the Ahtna villages "involve an intimate and exclusive relationship between the user and a very particular set of places." [Exc. 365]. Based on the testimony of Ahtna elders, the Board concluded that "for practical and cultural reasons" people are "reluctant to travel outside of their traditional areas for subsistence purposes." *Id.* The Board found that the taking of caribou and moose "was done as part of a seasonal round of subsistence activities throughout defined areas used by the community." *Id.* "The Ahtna pattern exhibits a familiarity with the terrain and landscape including the associated history of the region transmitted through oral traditions and Ahtna geographic placenames." [Exc. 366]. The Board determined that it was "crucial" to provide subsistence hunting opportunity to the youth in the communities to perpetuate "traditional knowledge about hunting locations." *Id.*

Based on these Findings, the Board established a community harvest hunt area that encompassed the traditional hunting area of the eight communities that proposed

recognizing the area. [Exc. 976, 987]. The traditional territory includes all of GMUs 11 and 13 and part of GMU 12. 5 AAC 92.074(d). It was perfectly reasonable, and within the Board's authority,⁴⁴ to provide a reasonable opportunity for the community pattern of subsistence uses it identified in its 2006 findings by establishing a hunt area that conformed to the communities' traditional hunting grounds. It was also perfectly reasonable and consistent with the Findings to limit community moose and caribou hunting to that traditional territory. [Exc. 0975, 0986]. The Findings indicate that CSH hunters traditionally do not travel outside their traditional territory for subsistence hunting. [Exc. 365].

Likewise, the 2011 Findings, and the C&T use criteria of 5 AAC 99.010(b), support limiting the household Tier I caribou hunters to hunting moose in GMU 13. [Exc. 624]. The Board found that many of those practicing the household pattern "return year-to-year to one or more well-known and long-established camping/hunting sites." [Exc. 971]. One of the C&T use criteria is a pattern of taking and use "characterized by efficiency and economy of cost." 5 AAC 99.010(b)(3). The Board found that efficiency and economy of effort is fostered in the household hunt by "limiting hunting to a few well-known areas year after year." [Exc. 971]. Two other C&T use criteria define subsistence uses as identifying an area in which the long-term pattern of use has been established and that subsistence use is the harvest of a wide diversity of wildlife resources, not just a single species. 5 AAC 99.010(b)(4), (8). Limiting the household

⁴⁴ AS 16.05.258(b).

caribou hunters to hunting moose in GMU 13 is consistent with the 2011 Findings and with ensuring that those participating in the hunt are engaged in a subsistence use as defined by the eight C&T use criteria. [Exc. 848].

The Board's Findings and the mandate to provide reasonable opportunity also support the seasons established for the CSH and household moose hunts and the 70 any bull allocation for the CSH. The Board heard from numerous Ahtna community members about the benefit of the 2009 CSH - how for the first time in many years there had been enough moose to feed community members and fulfill sharing customs and obligations.⁴⁵ Community members also spoke about how customs, traditions and hunting areas and other issues require access to the any bull part of the GMU 13 moose population in order to meet community subsistence needs.⁴⁶

The Board's 2006 Findings are consistent with the testimony of the Ahtna community members. The Findings recognize that many of those engaged in the community based pattern of use travel "shorter distances to hunt" and "generally utilize less technology" than other hunters using the area. [Exc. 364]. "Most Ahtna elders testified they still prefer to walk to hunting areas and maintain permanent camps." *Id.* The Findings recognize the role of specialized hunters in the communities, the wide-

⁴⁵ Testimony of: Chris Gene of Gakona, Alaska [Exc. 465-70]; Darren Gene, Gakona [Exc. 470-72]; Albert Flurry, Tazlina and Eagle River [Exc. 476-82]; Eleanor Dementi, Cantwell [Exc. 482-484]; Dorothy Shin, Tazlina [Exc. 485-86]; Gloria Stickwan, CSH administrator for Ahtna Tene Nene' [Exc. 487-92; 0930-42]; Counsel for Ahtna, [Exc. 503-516; 0953-0963]; Danielle Boston, Chistochina [Exc. 571-20]; Marilyn Joe, Chitina [Exc. 923-26]; Gordon Carlson, Cantwell [Exc. 927-28]; Roy Ewan, Gulkana [Exc. 46]; Nicholas Jackson, Gulkana [Exc. 0947-52].

spread sharing patterns, the “commitment of considerable time and effort to accumulate adequate subsistence resources” and the need to allow “the maximum opportunity to harvest as many animals . . . as efficiently as possible.” [Exc. 365-68]. The Findings also recognize the importance of “relatively long” hunting experiences to pass on traditional knowledge and skills through the generations. [Exc. 366]. The Board was fully justified, and fulfilling its mandate to provide reasonable opportunity, in allocating 70 any bull moose and establishing a season from August 10 through September 20 for the CSH.

The Board was also justified in determining that the household Tier I moose hunt did not require an identical season and allocation. The 2011 Findings recognize that the household pattern of use is not characterized by the extensive networks of sharing and promotion of “traditional knowledge and behavior” like is prevalent in the community based pattern of use. [Exc. 971]. Unlike the community pattern, many household users have the means through off-road vehicles to travel far into the “remotest locations” to hunt. *Id.* The focus of the household pattern is more on “procuring food” than passing of traditional knowledge. [Exc. 971-72].

Along these lines, Michael Kramer, counsel for AFWCF in this appeal, provided his view about how to provide a reasonable opportunity for subsistence hunting in GMU 13. Mr. Kramer testified both personally and as Chair of the Fairbanks Fish and Game Advisory Committee. [Exc. 889]. Mr. Kramer testified that a reasonable opportunity for

⁴⁶ See e.g. [Exc. 0924-25; 0934-36; 0947].

subsistence uses could be provided for the Nelchina caribou herd in GMU 13 through a registration hunt open to all Alaskans. [Exc. 892]. When asked about the consequences of a registration hunt that could lead to a very short hunting period and tremendous crowding, Mr. Kramer replied,

our constituents, people that live in the Interior, just want the opportunity to hunt. Some – most people don't care whether it's a five minute hunt or an 88 day hunt as long as they have an opportunity to participate, as long as they can be in the field with an open season and have the opportunity to harvest a legal animal.

[Exc. 909]. Mr. Kramer went on to describe a registration hunt such as the one he was advocating for GMU 13 as “combat hunting for sure.” [Exc. 914]. He explained that by setting up this kind of crowded, compacted hunt, many people would “self select” – they would drop out because they wanted something more “aesthetically pleasing.” [Exc. 910]. If they did not like a five minute combat hunt, they could just “move on to something else.” *Id.* Mr. Kramer was asked at the end of his testimony if he considered himself a “subsistence hunter” to which he answered, “I do.” [Exc. 920].

The pattern of use Mr. Kramer described is very different than the community pattern described in the Board's 2006 Findings and through the testimony of Ahtna community members.⁴⁷ There is much more to the customary and traditional subsistence way of life as practiced in communities throughout Alaska than can be satisfied by short

⁴⁷ See *supra* at note 45.

crowded hunts.⁴⁸ Those practicing the community based pattern of use documented in the Board's 2006 Findings cannot simply move on to another area outside their traditional territory to shop around for a more satisfying hunting experience. Their subsistence way of life is tied to their traditional hunting areas. [Exc. 365-66].

There are no doubt those who practice a household pattern of subsistence use that would disagree with Mr. Kramer's view of a reasonable opportunity, and in fact the Board refused to go along with his view. 5 AAC 85.025(a)(8). However, there is nothing that Ahtna is aware of in the record on appeal that demonstrates any significant dissatisfaction among those practicing the household pattern of use with the moose season or bag limit the Board determined would provide a reasonable opportunity for that hunt.

If there was a claim that the Board did not provide a reasonable opportunity for the household pattern of use, the remedy would be to bring that issue before the Board as a proposal to amend the regulations governing that hunt, along with some evidence supporting the claim. The Board is required by the state subsistence law to provide a reasonable opportunity for each pattern of subsistence use it identifies. AS 16.05.258(b).⁴⁹ If, after raising the issue before the Board, the Board fails to provide a

⁴⁸ *State v. Kluti Kaah Native Village of Copper Center*, 831 P.2d 1270, 1272-73 (Alaska 1992)(irreparable harm suffered when subsistence moose hunt for village reduced to seven days because of lost opportunity to conduct traditional hunt and pass on knowledge to youth).

⁴⁹ [Exc. 0886 (attorney general's statement "reasonable opportunity play a huge part" in subsistence law)]; [Exc. 0855 (Dr. Fall – reasonable opportunity is "key")]; [Exc. 0956, 0961 (Ahtna -importance of fair reasonable opportunity for all subsistence use patterns)].

reasonable opportunity, the remedy is a legal challenge under the reasonable opportunity mandate of the subsistence statute. Tearing down the opportunity the Board has established for a separate and distinct pattern of subsistence use, the community use pattern, is not the remedy for addressing whether the Board has provided a reasonable opportunity for the household hunt. The fact that the reasonable opportunity required to satisfy the household pattern of use is not exactly the same as the opportunity required to satisfy the community pattern of use does not raise statutory or constitutional equal access or equal protection issues.

B. ALASKA'S CONSTITUTION WAS NOT VIOLATED BY THE ESTABLISHMENT OR REGULATION OF THE CSH

Judge McConahy correctly ruled that there was no facial or as applied violation of Alaska's Constitution. He found that AFWCF failed to meet its burden of "negati[ng] every conceivable basis which might support" the constitutional application of AS 16.05.330(c) and 5 AAC 92.072. [Exc. 444]. The court found it "possible that these provisions could be applied in a manner consistence with article VIII – as such the facial challenge must fail." *Id.* AFWCF has admitted as much in agreeing that the Board has the authority to establish community hunts created under AS 16.05.330(c) and 5 AAC 92.072 for "a community that displays 'a custom of community-based harvest and sharing.'" [Exc. 387].

AFWCF also fails to demonstrate that the statute and regulation authorizing the CSH create a closed class of users because eligibility is “explicitly and exclusively based on residence.” *State v. Manning*, 161 P.3d at 1222. AS 16.05.330(c) includes no reference to residency or any other eligibility criteria that is susceptible to a per se constitutional challenge. The explicit language of 5 AAC 92.072, allowing a group of 25 or more Alaskans, regardless of place of residency, to apply to the department for a community subsistence permit forecloses any argument that residency is a bar to participation in this subsistence opportunity. In fact, groups from urban and rural Alaska applied for the 2011-12 community subsistence hunt. [Exc. 130-31].

AFWCF argues that the “court should apply a demanding scrutiny standard” in this case when determining whether there is a constitutional violation.⁵⁰ AFWCF Br. at 29. AFWCF is apparently referring to the equal protection type of analysis established in Part B of *McDowell v. State*, 785 P.2d at 9-12. The equal protection analysis is not applicable in this case because, as recognized by Judge McConahy,⁵¹ the subsistence users affected by the regulation are not similarly situated.⁵²

The current CHP makes no distinction [between persons similarly situated] 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

⁵⁰ Ahtna Tene Nene’s brief in Ahtna I at pages 33-39 contains arguments applicable to the constitutional issues raised in this appeal. Rather than repeating the arguments here, Ahtna refers the Court to that briefing and the State’s arguments in this appeal in its brief at pages 15-23.

⁵¹ [Exc. 444].

⁵² See also *State v. Manning*, 161 P.3d at 1221, n. 36.

begins after the individual exercises their free will and decides to participate in a CHP, the Tier I [household] hunt, or not at all.

[Exc. 444-45]. In addition to the options Judge McConahy recited above, any group of Alaskans can propose its own community harvest hunt area and thereby create a CSH that reflects the groups pattern of C&T subsistence use. 5 AAC 92.072(b); [Exc. 511-513; 612-14; 618-19].

Moreover, participants in the CSH and household subsistence hunts are being provided exactly the same legal rights and advantages even if the specific regulations governing the two hunts are different. The legal right mandated by the state subsistence law is that a reasonable opportunity be provided for the pattern of use a subsistence user is practicing. AS 16.05.258(b). The Board intended to provide a reasonable opportunity for both subsistence moose and caribou in GMU 13 when it adopted regulations and conditions defining and governing these hunts. [Exc. 0286-88; 0847-55]. All individuals participating in these two hunts are being afforded the same rights and opportunities – a reasonable opportunity to meet their subsistence needs according to the pattern of use they select.⁵³

⁵³ Section 4 of article VIII of the constitution explicitly provides that the use of resources shall be “subject to preferences among beneficial uses,” thus it “clearly authorizes some preferences based on uses.” *McDowell*, 785 P.2d at 14. “To the greatest extent possible, we must interpret the provisions of Article VIII consistent with each other.” *Id.* at 13-14. Applying this principle supports a ruling that the subsistence regulations in GMU 13 do not raise constitutional questions because the regulations are within the Board’s authority to regulate different subgroups of users within a user class differently based on their distinct use patterns of the resource.

AFWCF argues that the test in applying strict scrutiny is “whether the current CHP bears a substantial relationship to protecting Ahtna’s subsistence harvesting opportunities.” AFWCF Br. at 29. If this is the test, the testimony of Ahtna community members before the Board demonstrates that the CSH has been a most welcome and sought after improvement in the opportunity to practice the community pattern of subsistence use that defines their way of being. *See supra* at note 45. The Board’s 2006 Findings also demonstrate how important regulations that reflect community patterns and subsistence needs are to the continuation of the subsistence way of life for members of these communities. [Exc. 361-68]. The Board’s determinations as to the benefits served by its regulations are entitled to deference. *See supra* note 8.

AFWCF attempts to make an issue out of what it claims to be the Board’s “stated desire to ‘virtually guarantee’ a caribou permit every year for local resident subsistence users.” AFWCF Br. at 18. The statement AFWCF represents as the Board’s is actually a quote from the Kenai court’s 2010 decision. [Exc. 48]. The Superior Court also got the Board’s statement and intent wrong. The Board’s actual statement, taken directly from the Board’s 2006 Findings, is that: “[t]he Board’s long-term goal is to design a system to accommodate subsistence-dependent users in a manner that permits can be virtually guaranteed from year to year.” [Exc. 361].

There is a big difference between what the Kenai court interpreted and what the Board said – “subsistence dependent users” versus “local resident subsistence users.” Perhaps this helps to account for the Kenai court’s decision invalidating the 2009 CSH

regulations as “fundamentally a local-residency based CHP.” [Exc. 50]. In any event, the Board’s actual intent as reflected in the 2006 Findings should be welcomed by all those who practice and/or support the continuation of the subsistence way of life and implementation of the state subsistence law consistent with its intent. The state subsistence law provides a priority for subsistence uses and mandates that a reasonable opportunity be provided for such uses. AS 16.05.258. The statement AFWCF misrepresents and finds so objectionable when seen in its real light is simply a reflection of the Board’s commitment to fulfilling its duties under the subsistence law.

C. THE HOLDING IN *MORRY* DOES NOT SUPPORT AFWCF’S CLAIM THAT THE COMMUNITY SUBSISTENCE HUNT VIOLATES THE CONSTITUTION OR OTHER LAWS

The Fairbank’s Superior Court correctly found that the holding in *State v. Morry*,⁵⁴ that “there are no legislatively enacted standards of eligibility for first tier subsistence users”, is not applicable because the 1986 subsistence law upon which that holding was based has been amended in significant and relevant ways. [Exc. 445-46]. As the Superior Court pointed out, the wording and structure of the current subsistence law supports the Board’s authority to identify multiple subsistence use patterns. *Id.*

The Superior Court also correctly recognized that that “the common thread in the article VIII cases is a prohibition on differentiating between **users** based on residency.” *Id.* (emphasis in original). This is key to understanding the legal issues in this appeal and

⁵⁴ 836 P.2d 358 (Alaska 1992).

in the Ahtna I appeal.⁵⁵ The Board consciously and carefully avoided applying the customary and traditional use criteria to users to define eligibility to participate in subsistence uses. Instead, the Board acted well within its statutory authority to identify patterns of subsistence uses, and to regulate according to those identified use patterns.⁵⁶

Morry upheld the Board's authority to perform this function:

. . . the boards *may* adopt regulations that recognize the needs, customs, and traditions of Alaska residents . . . Our holding is not to be taken as a direction to the boards that they should not consider traditional patterns and methods of taking fish and game for subsistence purposes in the formation of appropriate regulations.

836 P.2d at 370 (emphasis in original).

All Alaskans who want to participate in either of the Tier I hunts established by the Board may do so. They need merely to apply, and many have. [Exc. 130-131; 1002]. They do not need to show that they were previously engaged in or have established a customary and traditional pattern of use like that used to establish the community hunt. [Exc. 0974-95]. They must, however, conform their taking and use of the resource to the permit conditions, including aspects of the C&T use pattern identified by the Board in its findings. *Id.*; 5 AAC 92.072(c)(1)(F). This serves the legitimate purpose of ensuring that hunters are engaged in a community pattern of subsistence use when they are hunting

⁵⁵ Ahtna Tene Nene' Br. in Ahtna I at 14-21; Ahtna Reply Br. in Ahtna I at 13-16; [Exc. 351-53].

⁵⁶ Users are of course necessarily impacted by the Board's determination of customary and traditional uses. This is acknowledged in *Morry* when, in the first part of the decision the Court ordered the Board to adopt subsistence hunting regulations

under the opportunity provided through the community hunt. Since the Board made its regulations applicable to all Alaskans, and was distinguishing “between uses, not users,” *Morry* does not apply. [Exc. 446].

D. THE COMMUNITY HUNT DOES NOT HAVE A “PREFERENCE” OVER THE HOUSEHOLD TIER I HUNT.

AFWCF characterizes the different hunting opportunity established for the community hunt as an illegal “preference” over the other Tier I hunters. *See e.g.* AFWCF Br. at 44. This argument demonstrates a misunderstanding of a “preference” as that term is used in the state subsistence statute. Since both subsistence hunts are Tier I hunts for the same game populations, the subsistence “preference” works exactly the same for both hunts – neither has a priority over the other and both have a priority over other consumptive uses.

There are two aspects to the subsistence priority. The first is the requirement that at all levels of harvestable surplus except Tier II,⁵⁷ the Board must adopt regulations that provide a reasonable opportunity for subsistence uses. AS 16.05.258(b)(1)-(3). The Board has adopted such regulations for both Tier I hunts. *See supra* at pages 11-14. There is no preference or discrimination if each identified subsistence use is receiving

recognizing that Alaska hunters who take bears but do not use the meat may not be eligible to hunt under subsistence regulations. 836 P.2d at 363.

⁵⁷ AS 16.05.258(b)(4). Tier II is triggered when the harvestable surplus is below what is necessary to provide for subsistence uses. At that point, individual criteria are used to provide hunting opportunity to those most dependent on the resource. *Id.*

just what the subsistence statute mandates – a reasonable opportunity to satisfy the pattern of subsistence use the subsistence user is engaged in.

The second aspect of the priority is the restriction or elimination of subsistence uses once the harvestable surplus drops to the level where there is not enough for all consumptive uses or only enough to provide for subsistence uses. AS 16.05.258(b)(2)-(3). This priority is driven by the requirement that the Board identify the ANS - the “amount of the harvestable surplus that is reasonably necessary for subsistence uses.” 16.05.258(b). The Board performed this duty, and found an ANS of 600-1000 for caribou and 300-600 for moose, which incorporates the amount necessary for both Tier I hunts. [Exc. 0972]. Therefore, the priority in AS 16.05.258(b) is triggered at the same time for both hunts since they share the same ANS. For example, when the harvestable surplus falls below 1000 caribou, other consumptive uses will be eliminated and both Tier I hunts will continue. 16.05.258(b)(3). When the harvestable surplus falls below 600 caribou, both Tier I hunts will close and individual eligibility for subsistence hunt will be determined by the criteria in 16.05.258(b)(4). The subsistence law provides the same priority for both Tier I hunts.

E. AFWCF’S ARGUMENT THAT THE BOARD FAILED TO GIVE LEGAL NOTICE IN 2009 WHEN IT ADOPTED 5 AAC 92.072(d) IS PRECLUDED UNDER THE DOCTRINE OF COLLATERAL ESTOPPEL.

The doctrine of collateral estoppel “bars relitigation, even in an action on a different claim, of all issues of fact or law that were actually litigated and necessarily

decided in [a] prior proceeding.” *Wall v. Stinson*, 983 P.2d 736, 740 (Alaska 1999)(internal quotations and citations deleted). Collateral estoppel precludes relitigating an issue in a second action if the issue was actually and finally decided in the first action. *Id.* There is a three part test for determining if collateral estoppel applies: “1) The plea of collateral estoppel must be asserted against a party or one in privity with a party to the first action; 2) the issue to be precluded from relitigation by operation of the doctrine must be identical to that decided in the first action; and 3) the issue in the first action must have been resolved by a final judgment on the merits.” *Id.*

This test is satisfied here. The Kenai Superior Court in *Manning and AFWCF v. State and Ahtna*, Case No. 3 KN-09-178 CI, issued a final judgment on the merits that included a ruling that,

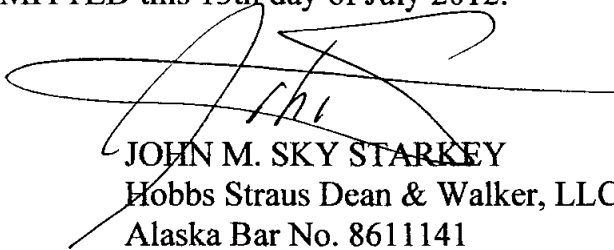
[the Board’s] notice provided the public, including Tier II hunters, with information to determine that their interests might be affected by the proposed regulations regarding the establishment of a CHP for Unit 13. The court finds that the notice satisfies the informative summary requirements of the APA with regards to the CHP.”

[Exc. 38](emphasis in original). Thus, AFWCF was a party to the first action, the issue to be precluded from relitigation is identical to that decided in by the Kenai Court, and the issue was resolved by a final judgment on the merits. Collateral estoppel applies, and AFWCF is foreclosed from relitigating the issue in this Court.

IV. CONCLUSION

Based on the argument above and the authority cited in support thereof, this Court should affirm the decision of the Fairbank's Superior Court upholding the validity of the GMU 13 subsistence moose and caribou hunts adopted by the Board. The Court should also award Ahtna Tene Nene' reasonable fees and costs for prevailing in this appeal.

RESPECTFULLY SUBMITTED this 13th day of July 2012.



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