Ahtna Comments on Proposal 74 – Enforcing Reporting

Requested By Staff Hillman

Proposal 74 should be amended to include direction to ADF&G to enforce the requirement that CSH administrators shall submit a report that is sufficient to demonstrate that the group is following the community C&T use pattern identified by the board. The subsistence division's point system should be used. Groups that do not achieve a score above 14 should be given a chance to file a conforming report. If the group cannot achieve a passing score after being provided this opportunity, the group and all members of the group should be excluded from the CSH for one year.

The board must also direct the department to establish hunt conditions that clearly inform participants that conforming with the community C&T use pattern is no "voluntary" but is a mandatory condition for participation in the CSH.

Ahtna strongly disagrees with any interpretation of the subsistence laws and constitution of Alaska that would limit the ability of the board to require reporting demonstrating that a community engaged in the Copper basin CSH is following the C&T use pattern that is the basis of the hunt. The board cannot only require reporting, it can enforce reporting. The board has the authority to direct ADF&G to penalize any group and all members of the group when a group has not submitted an adequate report just as the board penalizes other hunters for a failure to report.

The *Morry* case does not bar the board from enforcing the reporting requirement. The reporting requirement is meant to confirm that a group and the members of a group are engaged in a pattern of subsistence uses. All Alaskans remain eligible to participate in the subsistence hunt but only if they are engaged in the subsistence pattern of use. If a hunter is not engaged in a subsistence pattern of use, the hunter is not a subsistence hunter. The board not only may, but must assure that those who participate in subsistence hunts are engaged in a pattern of subsistence hunting. Without a means like reporting, hunts like the CSH are flooded with hunters who are not engaging in a subsistence pattern of use. The Board's intent to provide a reasonable opportunity for CSH hunters is frustrated by those gaming the system and making a abusing the current unenforced reporting requirement. Reporting is necessary, and enforcing the report requirement is essential in order to ensure the board's intent is fulfilled, and to ensure that subsistence users who are engaged in the C&T subsistence pattern have the reasonable opportunity intended through the hunt. Reasonable opportunity cannot be provided in the context of the CSH in GMU 13 without requiring and enforcing the reporting requirement.

Attached below are the relevant court decisions and statutes to support Ahtna's position.

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

(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.

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FOURTH JUDICIAL DISTRICT AT FAIRBANKS

ALASKA FISH AND WILDLIFE CONSERVATION FUND,

Plaintiff,

v.

STATE OF ALASKA,

Defendant,

and

AHTNA TENE NENE'

Defendant-Intervenor.

Case No. 4FA-11-00973 CI

MEMORANDUM DECISION & ORDER ON SUMMARY JUDGMENT

I. Introduction

Pending before the Court at this time is Alaska Fish and Wildlife Conservation Fund's (AFWCF's) Motion for Summary Judgment and the State of Alaska's (State's) Cross-Motion for Summary Judgment. Intervenor Ahtna Tene Nene' (Ahtna) supports the State's Cross-Motion. All parties agree that summary judgment is appropriate to resolve the issue, and all parties have waived oral argument.

AFWCF advances several arguments on summary judgment. First, that AS 16.05.330(c) is facially invalid under article VIII of the Alaska Constitution. Second, the current unit 13 moose and caribou community harvest permit (CHP)[1] system is invalid under article VIII as applied because of differences in the CHP hunt and the Tier I[2] hunt with respect to seasons and

[1] The parties and regulations also refer to the community harvest permit as a community subsistence harvest (CSH).
[2] Subsistence areas are commonly referred to as Tier I or Tier II (adequate for all subsistence needs or inadequate for all subsistence needs); given the current wording of AS 16.05.258, the statute envisions a four tiered approach. 5 AAC 92.990(48) defines Tier II as "the circumstance where the board has identified a game population that is customarily and traditionally used for subsistence and where, even after non-subsistence uses are eliminated, it is

opportunities. Any Alaskan is eligible to participate in either opportunity by complying with the regulatory requirements for each. The distinction between individuals begins after the individual exercises their free will and decides to participate in a CHP, the Tier I hunt, or not at all. *Hebert* controls the outcome of this case—the creation of parallel resource allocation regimes, where participation is open to all yet mutually exclusive with respect to the two regimes—does not implicate the equal access and uniform application clauses of article VIII.[42]

c. Statutory Authorization for Differentiation at the Tier I Level Under *Morry*

AFWCF argues that pursuant to *Morry*,[43] there is no statutory authorization to "distinguish among tier 1 users."[44] AFWCF is correct in its assertion that the Alaska Supreme Court held that the 1986 version of AS 16.05.258, as modified by *McDowell*,[45] provided no grounds for distinguishing between users at the first tier level. "As the subsistence statute presently stands (post *McDowell*) there are no legislatively enacted standards of eligibility for first tier subsistence users."[46]

Morry interpreted 1986 version of AS 16.05.258, which stated:

> (a) The Board of Fisheries and the Board of Game shall identify the fish stocks and game populations, or portions of stocks and populations, that are customarily and traditionally used for subsistence in each rural area identified by the boards.
> (b) The boards shall determine (1) what portion, if any, of the stocks and populations identified under (a) of this section can be harvested consistent with sustained yield; and (2) how much of the harvestable portion is needed to provide a reasonable opportunity to satisfy the subsistence uses of those stocks and populations.
> (c) The boards shall adopt subsistence fishing and subsistence hunting regulations for each stock and population for which a harvestable portion is determined to exist under (2b)(1) of this section. If the harvestable portion is not sufficient to accommodate all consumptive uses of the stock or population, but is sufficient to accommodate subsistence uses of the stock or population, then nonwasteful subsistence uses shall be accorded a preference over other consumptive uses, and the regulations shall provide a reasonable opportunity to satisfy the subsistence uses. If the harvestable portion is sufficient to accommodate the subsistence uses of the stock or population, then the boards may provide for other consumptive

[42] AFWCF expresses concerns as to the prior version of the CHP and requirements that may be imposed on the CHP in the future. AFWCF is likely correct that many of its proposed hypotheticals would violate article VIII. However, past problems are moot and future problems are not yet ripe.
[43] *State v. Morry*, 836 P.2d 358 (Alaska 1992).
[44] AFWCF's *Reply*, 21.
[45] *McDowell v. State*, 785 P.2d 1 (Alaska 1989).
[46] *Morry*, 836 P.2d at 368.

> uses of the remainder of the harvestable portion. If it is necessary to restrict subsistence fishing or subsistence hunting in order to assure sustained yield or continue subsistence uses, then the preference shall be limited, and the boards shall distinguish among subsistence users, by applying the following criteria: (1) customary and direct dependence on the fish stock or game population as the mainstay of livelihood; (2) local residency; and (3) availability of alternative resources.[47]

AS 16.05.258 has been amended several times since *Morry*.[48] The current version bears little resemblance to the version discussed in 1992.[49] Because the statutory interpretation holding of *Morry* applies to a version of the statute no longer in effect, that portion of *Morry* is inapplicable to the current version of AS 16.05.258.

The common thread in the article VIII cases is a constitutional prohibition on differentiating between subsistence **users** based on residency. AS 16.05.258(b)(1)-(3) contains the term **uses**, not **users**. Only AS 16.05.258(b)(4) (Tier II) allows for differentiation between **users**.[50] By the plural wording of subparts (1)-(3), for both "subsistence uses" and "other consumptive uses," the legislature must have envisioned multiple subsistence **uses** and other consumptive **uses**. Otherwise, the statute would read subsistence **use** and other consumptive **use**. AS 16.05.258(b)(1)(C) specifically authorizes the Board to "adopt regulations to differentiate among uses." AS 16.05.258(b)(2)(C) specifically authorizes the Board to "adopt regulations to differentiate among consumptive uses." Therefore, the current version of 16.05.258 provides explicit authorization to distinguish between **uses** in Tier I areas and in abundance areas, and between **users** in Tier II areas.

The presently disputed Board action distinguishes between **uses**, not **users**. This is a fairly fine distinction, but is evident that the Board did not distinguish between **users**, as all Alaskans are eligible to participate in the CHP. The CHP does distinguish between **uses**, one being the communal pattern identified by the Board and the other being the individual pattern identified by the Board.[51]

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[47] SLA 1986, ch 52 § 6.
[48] am § 2 ch 1 SSSLA 1992, §§1-2, ch 68, SLA 1995, §§ 1-2, ch 130, SLA 1996.
[49] *See supra* 6.
[50] As modified by *Kenaitze*, only by non-residency based criteria.
[51] Ahtna's *Memorandum in Opposition to AFWCF's Motion for Summary Judgment & in Support of Ahtna's Cross-Motion for Summary Judgment*, ex. E.

289 P.3d 903 (Alaska 2012)

THE ALASKA FISH & WILDLIFE CONSERVATION FUND and The Chitina Dipnetters Association, Inc., Appellants and Cross-Appellees,

v.

STATE of Alaska, DEPARTMENT OF FISH & GAME, BOARD OF FISHERIES, and Ahtna Tene Nené, Appellees and Cross-Appellants.

Nos. S-14079, S-14099.

Supreme Court of Alaska.

December 7, 2012

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Before: CARPENETI, Chief Justice, FABE, WINFREE, and STOWERS, Justices.

OPINION

CARPENETI, Chief Justice.

I. INTRODUCTION

In 1999, the Board of Fisheries (the Board) made a positive customary and traditional use finding in the Chitina subdistrict for the first time, thereby changing it from a " personal use" to a " subsistence" fishery. The Board reversed this decision in 2003,

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returning Chitina to a personal use fishery. The Alaska Fish and Wildlife Conservation Fund (AFWCF) and the Chitina Dipnetters Association, Inc., after asking the Board to reconsider its 2003 finding in both 2005 and 2008,[1] brought this suit to challenge the Board's negative customary and traditional use finding for Chitina. They claimed that the regulation used by the Board to make such a finding, 5 Alaska Administrative Code (AAC) 99.010(b), was unconstitutional on its face and as applied. The superior court held that the regulation was valid and constitutional, but remanded for the Board to fully articulate the standard being used in its application of 5 AAC 99.010(b)(8). It also instructed the Board not to consider " the per capita consumption of wild food in the home community of various users" upon remand. On remand, the Board codified a definition of " subsistence way of life," allowed the parties to submit evidence, and upheld its previous classification. Because 5 AAC 99.010(b) is consistent with its authorizing statutes, is reasonable and not arbitrary, does not violate the Alaska Constitution's equal access provisions, and was constitutionally applied when the Board made its customary and traditional use finding for the Chitina fishery in 2003, we affirm this portion of the superior court's rulings. Because there is no indication that the Board actually relied on the per capita consumption of wild foods in the users' home communities when applying 5 AAC 99.010(b) and because that

statute because, rather than clarifying ambiguous statements by the legislature, the regulation introduces criteria that have no statutory basis and " inevitably lead to determinations in favor of rural residents that live near the resource and against non-rural users who travel to the resource." It also claims that by requiring the Board to examine community use patterns, the regulation leads to an impermissible focus on users rather than uses, which we struck down in *Payton v. State*. [13] Based upon these conclusions, AFWCF asks us to invalidate the entire regulation because it " inappropriately restricts [AFWCF's] ability to establish a subsistence fishery by imposing standards that shift the

focus of the C & T inquiry from the statutory requirements of consistency and duration to unrelated considerations such as the cultural, social, and economic context in which the harvest takes place."

We decline AFWCF's request and instead hold that 5 AAC 99.010(b) is constitutional, consistent with its enabling statute and reasonably necessary to carry out the purposes of the subsistence statute. Alaska Statute 16.05.251(a)(6) explicitly gives the Board authority to adopt regulations for classifying fisheries as commercial, sport, personal use, subsistence or other. Alaska Statute 16.05.258(a) requires the Board of Fisheries to " identify the fish stocks ... that are customarily and traditionally taken or used for subsistence." When read together, these statutes allow the Board to create regulations for classifying fish and for identifying the particular fish stocks that align with subsistence use patterns. We also reject AFWCF's assertions that the subsistence statute is clear enough on its own terms so that this regulation is unnecessary and it is only used to implement a rural bias. The subsistence statute provides a general definition of the requirements for subsistence use, but the regulation provides definitions of each specific component and guidelines for how they should be applied. The joint Board of Fisheries and Board of Game enacted 5 AAC 99.010(b) to provide a list of criteria that were relevant to consider when fulfilling their statutory mandate.

AFWCF argues that the subsistence statute was intended to grant subsistence rights to any long-term users of an area, but this argument ignores the clear legislative intent in passing AS 16.05.940, which was to provide for actual subsistence uses and preserve a traditional culture and way of life. [14] AFWCF cites *Madison v. State, Department of Fish & Game* [15] in support of its proposition, but *Madison* only barred the complete exclusion of urban residents from the classification of subsistence users, it did not state that the subsistence statute was meant to classify those who do not have a " traditional, social, or cultural relationship to and dependence upon the wild renewable resources produced by Alaska's land and water" as subsistence users. [16]

AFWCF also maintains that it is improper for the Board to consider the " cultural, social and economic context in which harvest takes place," but as noted above the legislature specifically intended the Board to take this information into account. Personal use fisheries may meet the subsistence statute's consistency and duration requirements, but they may also fail to carry the cultural, social, spiritual, and nutritional importance that the subsistence statute protects. [17] Since 5 AAC 99.010(b) is consistent with its authorizing statutes and is reasonable and not arbitrary, it is