RC 100

Cover Page for Ahtna Tene Nene' RC

Attached is the Court's Decision and Order on Summary Judgment in *Ahtna Tene Nene' v. Alaska Board of Game,* 3AN-07-8072CI. Also attached is a brief filed in a related case by former Senior Assistant State Attorney General Kevin Saxby showing the continued application in the attached Court Order to a suggestion that the any bull hunt and additional moose season for the community subsistence hunt could be eliminated and replaced seasons and bag limits that mirror the general moose season.

A transcript of the Court's oral decision on Summary Judgment is attached. Pages 4 -5 of this RC (bold text added to demonstrate most relevant parts), are the Court's holding that eliminating a Tier I moose hunting opportunity – like the any bull hunt and the extended moose season for the community subsistence hunt – and replacing it with seasons and bag limits that are the same as the general hunt, violates the State subsistence law:

> The court finds the analyses by Plaintiffs persuasive in this case, and that A.S. 16.05.258(b)(1) requires the Board to appropriately consider that they must adopt regulations that provide a reasonable opportunity for subsistence users and they must adopt regulations to differentiate among consumptive uses that provide a preference for the subsistence uses if they are going to also allow regulations that provide for other consumptive uses. That is what the statute requires. . . . As to the identification of the moose hunt in Game Management Unit 13 as a general hunt, without further regulating the hunt to establish a preference for subsistence uses, the court finds that violates A.S. 16.05.258(b), and that is remanded to the Board of Game.

The Court's Order of June 5, 2007 (attached to RC at page 6) confirms the above ruling.

Pages 7-9 of the RC is a segment of a brief filed by the State in a related case in which the State cites (text underlined to highlight relevant parts) the ruling of the Superior Court declaring the general moose hunt inconsistent with the mandates of the subsistence law, and on page 9, that no final judgment has been entered in the this case and thus the Superior Court retains jurisdiction over this issue. The same situation remains today. No final judgment has been entered in this case - so the Attorney General's position taken in this brief remains relevant to the CSH subsistence moose issues before this Board.

Also on page 9, the Attorney General acknowledges that the "current regulations are viewed at least in part, as solutions to several of the issues raised in that case." In other words, the any bull quota and extended moose season for the CSH – the current regulations in place when the AG wrote this brief - were part of the Board's response to the Superior Court's Order.

The Order and legal positions taken in these documents remain relevant to the Board's considerations related to subsistence moose hunting opportunities.

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AHTNA V. BOARD OF GAME
Case No. 3AN-07-8072 CV

Judgment, June 5, 2008, 2:00 p.m.

In 3AN-07-8072, Ahtna Tene'-Nene Subsistence Committee v. Alaska Board of Game, and this is the time the court is going to put on its order based on the parties having both filed for Summary Judgment per Civil Rule 56. The court feels summary judgment is appropriate in this case as to most of the issues and will put on its reasons therefore with this order. We will get a copy of the CD to both parties.

The court has considered the pleadings and all the filings and the arguments of counsel to determine whether there are no genuine issues as to any material fact such that a party is entitled to judgment as a matter of law and does find that there are certain parts of these applications that lend themselves to summary judgment determination. The court has considered the requirements of the Administrative Procedure Act and the presumption that a regulation promulgated under that act is both procedurally and substantively valid, and that the burden is on the challenging party to prove otherwise, and that an agency regulation is upheld so long that it is consistent with and reasonably necessary to implement the statutes authorizing its adoption. When reviewing an agency regulation, courts consider first whether the agency exceeded its statutory mandate in promulgating the regulation, either by pursuing impermissible objectives or by employing means outside its powers, and whether the regulation is reasonable and not arbitrary, and finally whether the regulation conflicts with any other state statutes or constitutional provisions. And finally, where highly specialized agency expertise is involved in connection with the regulation that is being challenged, and the court is not to substitute its own judgment for that of the agency, and the court's role is to ensure only that the agency has taken a hard look at the salient problems and has genuinely engaged in reasonable decision making.

In reviewing the decisions of the Board of Game, the court notes that allocation decisions made by the Board require a deferential standard of review and Board decisions are upheld so long as they are not unreasonable or arbitrary and proper procedures have been followed. In looking at the issues filed for summary judgment in this case, the court would note that some of the issues that were initially part of the request for an injunction no longer exist because the Board of Game actually modified those particular aspects of the regulations. So I am focusing on the summary judgment motions as they were argued to the court. I am going to try to address these in the order of the issues that was in the State's filings so the parties can keep track if they wish to do so.

First, the Board's prohibition against hunting caribou and moose in other areas if you draw a permit in Game Management Unit 13 for that species. The court finds the arguments in case law advanced by the State are persuasive on this issue. This

requirement violates neither the subsistence statute nor the equal access clauses and the court is granting the State summary judgment on that issue.

Next, the Board's income question to differentiate between subsistence hunters. Given the deference that is required for the court to exercise as to the Board's decision, the court finds the State's arguments as to equalizing scores for households of up to four people within their purview. Certainly the agency has appropriately taken a hard look at the problem and engaged in reasoned decision making.

However, the State also argues cost of living need not factor into the income question as adjustments for fuel and food costs in various communities are already considered. However, as the State itself argues, applicants with greater income have a greater access to alternative food sources. The cost of living varies throughout Alaska, sometimes dramatically between areas and communities. That cost of living impacts not just fuel and food, but every financial aspect including rent, electricity, heating fuel, gasoline, clothes, tools, ammunition, everything costs more in more remote areas.

If an Anchorage applicant earns $25,000 annually, his purchasing power for food may be markedly greater than an applicant from a smaller community who also earns $25,000 annually. Certainly fuel and food are major components of the expenditures of individuals. However, considering only those items ignores the higher cost of living for every other item.

Therefore, if total income is going to be factor in determining who gets a permit, an adjustment for cost of living must be considered, must be required. How the Board chooses to factor that in is up to them, but cost of living must be considered. So, the court is going to grant summary judgment to Plaintiff on the requirement for the cost of living consideration.

Next, the court is going to consider the Board's decision to award zero points for the ability to obtain food if the household income exceeds a certain threshold. The State's arguments and cases as to this issue are again persuasive. There is not a violation of the statutes or constitution in setting an upper limit on income, such that the "ability to obtain food" score becomes zero. The Board must distinguish between applicants to determine who gets permits. Any criteria will by definition lead to the elimination of some applicants. So long as all applications, or all applicants for GMU 13, are required to follow the same rules, there is no violation of the equal application clauses of the Alaska Constitution.

Next, the Board's decision that applicants must score points for both statutory criteria or their scores are zeroed out. The court would note a regulation may be invalid if it is fundamentally inconsistent with the legislative intent underlying the controlling statute. A reading of A.S. 16.05.258(b)(4)(B), the statute applicable in this case, requires both (i)

and (iii) to be utilized together. In other words, they are read in the conjunctive. Although the Board can establish criteria to measure customary and direct dependence and availability of alternate resources, it must then add (i) and (iii) together. If based on the established criteria, (i) is zeroed and (iii) is zeroed out, then the sum is zero. However, if the criteria set results in a positive number for either (i) or (iii), then there has to be a positive number for the total score.

What I am trying to say, to put it very frankly, is this: If you score 25 points for criteria (i) and 25 points for criteria (iii), then you have a score of 50. If you score 25 points for (i) and zero for (iii), you have a score of 25, not zero. If you have zero and zero, your score is zero. If you score zero and 25, your score is 25. You can't use one to zero the other one out, or you are not considering them in the conjunctive which is what is required by the very wording of the statute.

The State asserts the Board has identified or clarified that the moose hunt in Unit 13 is a general hunt not a Tier 1 hunt. The professionals have indicated that all of subsistence hunting can be met by the moose population in GMU 13 and, in fact, an additional 100 moose can be killed and is required for subsistence hunting. The State argues that there has been no change to regulations governing the moose hunts in GMU 13 and this just clarifies how the Board addresses that moose hunt.

The Plaintiffs argue there is a difference between a Tier 1 hunt and a general hunt and it shouldn't be labeled improperly. The court finds the analyses by Plaintiffs persuasive in this case, and that A.S. 16.05.258(b)(1) requires the Board to appropriately consider that they must adopt regulations that provide a reasonable opportunity for subsistence users and they must adopt regulations to differentiate among consumptive uses that provide a preference for the subsistence uses if they are going to also allow regulations that provide for other consumptive uses. That is what the statute requires.

The State asserts that the rules they have set up allowing no moose hunting by non-residents in GMU13, and stringent salvage requirements under the Tier II hunt, and no trophy antlers, meets the statutory requirement. The court finds this analysis problematic. If a hunt is being changed from a tiered hunt to a general hunt or vice versa, the Board should be utilizing the best available information as statutory requirements mandate. Even if no change is intended to current regulations for this hunt, future changes would be subject to less scrutiny if starting from a general hunt designation versus a Tier 1 designation.

The arguments of the Plaintiffs clearly carry the day on this issue. It is especially concerning that such clarification or redesignation of the hunt would be based on what appears to be dated data. Certainly some indication of the continuing accuracy of that data from the managers of the herd, or new data, should be

provided to the Board prior to such a change being considered. And if the hunt is changed from Tier 1 to a general hunt, the statute requires adoption of regulations to differentiate among consumptive uses that gives a preference for subsistence uses.

Therefore, the court is going to enter summary judgment to the State on all of the issues except the zeroing out of an entire application if one aspect is zero. If total income is to be used as limiting factor, total cost of living must be considered. As to those two issues, summary judgment is granted to the Plaintiffs.

As to the identification of the moose hunt in Game Management Unit 13 as a general hunt, without further regulating the hunt to establish a preference for subsistence uses, the court finds that violates A.S. 16.05.258(b), and that is remanded to the Board of Game. Establishment of such regulations should include data after 1992 where reasonably available, or testimony from the responsible State officials that such data, the data from 1992, is still reliable.

As I indicated, copies of this CD will be provided to both Plaintiffs and Defendants, and we will be off record.

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

AHTNA TENE NENE' SUBSISTENCE COMMITTEE, et al.	)	
Plaintiffs,	)	
v.	)	
The ALASKA BOARD OF GAME, et al.	)	
Defendants.	)	Case No. 3AN-07-8072 CI

Order Granting Summary Judgment

The Court, having considered the State's motion for summary judgment and all argument pertaining thereto, and for the reasons noted on the record on 5 June 2008, CDs provided,

IT IS HEREBY ORDERED THAT summary judgment is granted in the State's favor dismissing with prejudice all claims filed by the plaintiffs in this case, except the zeroing out of an entire application based on income and* Final judgment may be entered forthwith on all issues except the designation of the GMU 13 moose hunt as a general hunt.

DATED this 5 day of June, 2008.

Jack Smith

Hon. Jack Smith, Superior Court Judge

* the failure to consider cost of living when evaluating income. As to those issues, summary judgment is granted to Plaintiff. The Board's decision to label the moose hunt in GMU 13 a general hunt is remanded back to the Board, for compliance with AS 16.05.258(b)(3). JKS

I certify that on 6-10-08 a copy of the above was mailed to each of the following at their addresses of record. Clarkey, Sayles, Kendall

R Meade

Secretary/Deputy Clerk

6.

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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL COURT AT KENAI

KENNETH MANNING Plaintiff, v. STATE OF ALASKA, DEPARTMENT OF FISH AND GAME Defendant.	)	3KN-09-178CI

STATE'S OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

I. INTRODUCTION AND BACKGROUND FACTS

Alaska's subsistence law creates two different regulatory tiers under which increasing levels of protection are mandated for subsistence uses of fish and game resources.[1] The most restrictive level, popularly known as "Tier II," is required when the harvestable portion of a game population is insufficient to provide a reasonable opportunity for subsistence uses.[2] When this occurs, the Board of Game must adopt regulations that distinguish among subsistence users.[3] On the other hand, when the harvestable surplus is sufficient to provide for subsistence uses, the Board is obligated to adopt regulations which provide a reasonable opportunity for subsistence uses, and it may

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1 AS 16.05.258(b)(1)-(4).
2 *Id.*
3 *Id.*

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that if the applicant's score on this measure was zero, then the applicant's total score for the ability to obtain food would also be zero.[25]

- The Board added one more scoring change. Because the statute mandates that the Board distinguish among applicants based on both criteria, rather than just one or the other, it amended 5 AAC 92.070(c) to provide that if an applicant scored a total of zero points on either set of questions designed to measure those two statutory criteria, the total score for the application would be a zero.[26]
- Finally, the Board adjusted its point system to account for the new questions and maintain the 60/40 balance it has long kept between the two statutory Tier II criteria .[27]

The Ahtna Tene Nene' Subsistence Committee and several individuals sued to overturn several of these new rules, and sought a preliminary injunction on point. On July 20, 2007, the trial court entered an interim order enjoining application of several of the Tier II criteria, prohibiting application of the exclusivity rule, and requiring re-scoring of applications, less than three weeks before the hunt was to begin.[28] On June 5, 2008, following motions by the parties, the court entered summary judgment in that case, upholding several of the Board's adopted changes but invalidating others.[29] Among the changes the court found to be valid exercises of the Board's powers was the exclusivity requirement.[30] No final judgment has yet been entered.

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25 *Id.*

26 5 AAC 92.070(c), Register 186.

27 5 AAC 92.070, Register 186.

28 Exh. C, p.5.

29 Exhibit E.

30 *Id.* Note that the court granted summary judgment to the State on all claims, including the challenge to exclusivity, except for the rule that applications could be zeroed out based on income and designation of a moose hunt as a general hunt.

Moreover, as shown in the attached affidavits of Kurt Kamletz and Douglas Larsen,[143] depending on just how this court were to decide how to structure a Tier II hunt, it would take the Department of Fish and Game between 50 and 60 days to comply. Moreover, if the requirement that hunters obtaining permits to hunt moose or caribou elsewhere in the state is retained, ADF&G staff will need to cross check Nelchina Tier II permits against other permits awarded, for invalidation of one or the other.[144] This could delay issuance of all drawing, registration and subsistence hunting permits in the state.[145] Given these factors, it is unlikely that the Department could comply with a court order to initiate a Tier II hunt in time for August seasons to take place as planned.[146]

Finally, it will be helpful for this court to understand that no final judgment has yet been entered in the *Ahtna Tene Nene'* lawsuit discussed above, so the Anchorage Superior Court retains jurisdiction over at least some of the issues relevant to this case. Indeed, the current regulations are viewed at least in part, as solutions to several of the issues raised in that case. Any reworking of the current hunting regime could, therefore, put the State into the position of having to litigate more issues in that case, as well as this one.

For these reasons, as well as all of the others set forth above, the requested preliminary injunction should be denied.

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143 Exh.s F and M.
144 Exh.F, paragraph 11.
145 *Id.*
146 Exh.F, paragraphs 10 and 11 and Exh. M, paragraphs 3 and 5.