RC 105

Ahtna RC Regarding Additional Moose Hunting Opportunity in GMU 13

1. The Board could increase moose hunting opportunity in GMU 13 in a way that would have no impact on the current litigation over the community subsistence hunt. This additional hunting opportunity would also not impact groups that have already signed up for the 2013 hunt since it would be adding an opportunity instead of adding a more restrictive hunt condition. According to Ahtna's understanding through discussions the Department, a winter bull moose hunt could be established along the road corridor in parts of GMU 13 that would provide access to an underutilized segment of the moose population. Moose from other distant and inaccessible areas move down to river corridors and the road corridor during the winter. The Board could authorize a registration winter hunt for this area, open to all residents, for 50 bull moose (or more if consistent with conservation).

The Board would need to slightly revise the community hunt regulation to allow members of the community hunt to participate in registration hunts conducted within the community hunt area under the conditions provided in the registration hunt. 5 AAC 92.072(c)(2)(A) would need to be revised as follows – add language in bold type: "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, **may hold a registration permit for moose that is limited to an area that is within the community hunt area,"**

This would have no impact on the current litigation over the community hunt. The suggested winter hunt is a general resident hunt. The fact that community hunters could participate in this general hunt does not implicate any issue currently under litigation. For example, community moose hunters can, under current litigation, participate in the general moose hunt and season, and that hunting opportunity has not been challenged.

2. **Repealing the current community any bull hunt and extended season would have a significant negative impact on the existing litigation**, and potentially a significant impact on the discretion, ability and flexibility of the Board to deal with difficult subsistence and other hunting allocation issues in the future in areas far beyond the community hunt. The any bull community hunting opportunity is a central issue in the litigation in the Fairbanks Superior Court, *AFWCF v. State and Ahtna*, 4FA-11-01474CI. The Superior Court issued a decision finding that the Board has the constitutional and statutory discretion to identify different patterns of subsistence use, and that the Board may establish different hunting opportunities for these different patterns of use. A copy of the relevant parts of this decision with underlined text highlighting the holding is attached. This decision is now before the Alaska Supreme Court and is awaiting oral argument – the last stage before a decision is written. Changing the any bull provision for the CSH at this meeting may very well result in the case being declared moot. The chance to have this Board's broader authority and discretion affirmed in binding precedent would likely be lost if the Board eliminates the any bull hunt and the extended moose season for the community hunt.

3. The Board can make relatively minor changes to the CSH, for example the 5 or 10 year commitment by groups or limiting any bull harvest tickets to groups based on household number, without impacting the litigation. The issue in the litigation is whether the Board has the discretion to identify a separate community subsistence hunt pattern of use and adopt regulations that provide for that pattern of use. The Board is not significantly modifying the fundamental legal issues on appeal to the Alaska Supreme Court by making changes that further implement and clarify the community pattern of use that the Board previously relied upon in establishing the community subsistence hunts.

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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

Kenaitze Indian Tribe[36] Provision of AS 16.05.258 linking eligibility for Tier II subsistence participation to "proximity of the domicile of the subsistence user" to the target fish or game population violates article VIII, sections 3, 15, and 17 of the Alaska Constitution.

Manning[37] "Relative availability of other game" Tier II eligibility criteria was "not closely related to the State's interest in ensuring that Alaskans who need to engage in subsistence hunting are able to do so." Because the regulation was not closely related to the State's interest, it was in violation of article VIII, sections 3, 15, and 17 of the Alaska Constitution. The cost of food criteria and the gas criteria were acceptable under article VIII.

Manning[38] As noted *supra*, the superior court struck down the prior CHP because it was "fundamentally a local-residency based CHP." Additionally, the court found the Board exceeded its authority and violated the public trust doctrine by delegating the CHP administration to Ahtna.

III. Discussion

a. Facial Challenge

AFWCF bears the burden of "negati[ng] every conceivable basis which might support" AS 16.05.330(c) and 5 AAC 92.072 to sustain its facial challenge.[39] It is certainly possible that these provisions could be applied in a manner offensive to article VIII.[40] It is also possible that these provisions could be applied in a manner consistent with article VIII—as such, the facial challenge must fail.

b. As Applied Challenge

The level of scrutiny a court applies to an equal access challenge under article VIII is unclear.[41] However, regardless of the level of scrutiny applied, the threshold inquiry in a challenge brought under article VIII, sections 3,15, and 17—similar to an equal protection challenge brought under article I, section 1—is whether the law makes a classification or distinction between persons similarly situated. The current CHP makes no such distinction or classification between persons. The CHP does make a distinction between two equally available

[36] *State v. Kenaitze Indian Tribe*, 894 P.2d 632, 641 (Alaska 1995).
[37] *State v. Manning*, 161 P.3d 1215 (Alaska 2007).
[38] *Manning v. State*, 3KN-09-00179CI.
[39] *State, Dept. of Revenue v. Andrade*, 23 P.3d 58, 71 (Alaska 2001).
[40] For example, as Judge Bauman found in the prior CHP.
[41] *State, Dep't of Fish & Game v. Manning*, 161 P.3d 1215, 1221 n.35 (Alaska 2007) (avoiding the question of whether close scrutiny or demanding scrutiny applies to article VIII challenges).

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.