IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT KENAI

KENNETH MANNING,
Plaintiff,
and

THE ALASKA FISH AND WILDLIFE CONSERVATION FUND
Intervener Plaintiff,

vs.

STATE OF ALASKA,
DEPARTMENT OF FISH & GAME
Defendant,
and

AHTNA TENE NENE'
Intervenor Defendant.

Case No. 3KN-09-178CI

DECISION ON SUMMARY JUDGMENT

Plaintiff Kenneth Manning ("Manning") and intervenor-plaintiff The Alaska Fish and Wildlife Conservation Fund ("AFWCF") seek to overturn Board of Game ("Board") decisions in 2009 regarding the Unit 13 Nelchina Herd Caribou hunt. The issues before the court include the following:

1. Did the Board properly set the number of Unit 13 caribou reasonably necessary for subsistence at 600-1000 per year;

2. Did the Board properly find that customary and traditional subsistence uses only require one caribou every four years;

3. Did the Board properly change the subsistence caribou hunt in Unit 13 from a Tier II to a Tier I drawing hunt allowing a Tier I hunter no more than one hunt every four years, as well as other special restrictions;

4. Was the Board authorization of a residence-based community harvest permit ("CHP") lawful;

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5. Did the Board lawfully delegate to the Ahtna Tene Nené Subsistence Committee authority to administer a CHP hunt for eight Ahtna villages in the Nelchina area; and

6. Did the Board properly set aside 300 caribou for the CHP as well as up to 100 any-bull moose, and a number of restricted bulls equal to the number of individuals subscribing to the CHP permit, leaving only 300 caribou for all other Tier I hunters?

The Board and Ahtna Tene Nené contend the actions by the Board in 2009 were constitutional, authorized by statute, supported by substantial evidence, and appropriate. The motions for summary judgment focus exclusively on Board action in 2009, with reference to Board findings in 2006 regarding subsistence uses in this area. Board actions in 2010 are not before the court.

Procedural Setting: The issues were extensively briefed and argued at the preliminary injunction stage in 2009. Hearings were held in 2009 on the preliminary injunction challenges. A preliminary injunction to halt the 2009 hunt was not issued, but the court found that serious and substantial questions were raised and required changes in the Ahtna CHP for the 2009 caribou hunt to address the local residency problem.

Summary judgment motion practice ensued. This case was brought as an original action, not as an appeal from an administrative decision. In September 2009 the parties reported in line with Civil Rules 26(f) and 16. The parties, other than Manning, agreed there were no pertinent factual issues, no need for formal discovery practice, and no need for a trial. Manning moved to bifurcate the constitutional claims and to conduct discovery leading to a normal trial on those issues. Oral argument was conducted on the motions for summary judgment on January 4, 2010. At the January 21 pretrial conference Manning agreed to forego a separate trial on the constitutional issues, and all parties agreed that there were no genuine material factual issues in dispute.

The parties have focused on the Nelchina Caribou Herd in Unit 13. The Manning complaint includes challenges to the Board actions regarding moose in Unit 13. The Ahtna CHP covers both moose and caribou, and moose are addressed herein in that context.

The parties submitted supplemental information and authority. Ahtna filed a Notice of CHP Administrator's Final Report regarding the 2009 hunt. The report indicates that under the CHP for 2009 as of January 7, 2010, 66 any-bull moose, 27 restricted bulls, and 97 caribou were taken. Ahtna also submitted the CHP as issued by the Department on August 7, 2009, the CHP application form, the harvest plan for the 2009 CHP, and a copy of frequently asked questions and the responses re the 2009 Ahtna CHP. Other supplemental authority was submitted.

Outline of the Summary Judgment Motions:

AFWCF moved for summary judgment to invalidate the Ahtna CHP and the set aside of 300 caribou for the Ahtna CHP as violating Article VIII, sections 3, 15, and 17 of the Alaska Constitution, regulations, and case law. The motion was supported by an affidavit by Tony Russ, a lifelong Alaska resident who has either hunted or shared caribou meat from the Nelchina herd for 48 years.

Manning filed a motion for declaratory relief under the public trust doctrine. His motion challenges the legality of the Board's delegation of resource management and hunting permit authority to the Ahtna Tene Nené Subsistence Committee in the authorization for the Ahtna CHP. Manning relies on constitutional provisions, Alaska constitutional convention papers, the 1989 McDowell case, and Owsichek v. State, 763 P.2d 488 (Alaska 1988).

The State opposed the AFWCF motion and cross-moved for "summary judgment in its favor on the AFWCF's and Manning's claims." The State supported its position with

exhibits including findings, transcripts, and excerpts from the record before the Board. The State claims that neither Manning nor AFWCF have challenged the constitutionality of AS 16.05.330(c) in their complaints. The State contends the language in the statute "indicates that the legislature viewed subsistence as largely involving communal or cooperative behavior." The State points to findings made by the Board in 2006 on the eight criteria in 5 AAC 99.010 to identify customary and traditional uses in this area. The State concludes on page 12:

> In short, the customary and traditional use findings that are the prerequisites for any subsistence use of caribou in Unit 13, by anyone, are based on a pattern that is communal and local in nature, not individualized and urban.

On page 13 the State contends that the Alaska statutes require the Board to give preference and protect the communal subsistence users, which the State says, "means, among other things, that all other users must be eliminated before the identified customary and traditional, communal, use is restricted to a Tier II hunt."

Ahtna opposed the AFWCF motion for summary judgment and cross-moved for summary judgment. Ahtna supported its position with exhibits. Manning filed a Consolidated Opposition to Motions for Summary Judgment, supported by exhibits. The State filed a reply to the Manning and AFWCF oppositions to the State cross-motion for summary judgment. Ahtna filed a reply to the Manning and AFWCF oppositions to the Ahtna cross-motion for summary judgment.

STANDARDS FOR SUMMARY JUDGMENT

For summary judgment under Civil Rule 56 the moving party has the burden of proving that the opponent's case has no merit. This burden must be discharged by submission of information and material admissible as evidence. "The moving party has the

entire burden of proving that his opponent's case has no merit." Himschoot v. Dushi, 953 P.2d 507, 509 (Alaska 1998), quoting Nizinski v. Golden Valley Elec. Ass'n, 509 P.2d 280, 283 (Alaska 1973), cited favorably in footnote 12 in Barry v. University of Alaska, 85 P.3d 1022 (Alaska 2004). The non-moving party is not obliged to demonstrate the existence of a genuine issue for trial until the moving party makes a prima facie showing of its entitlement. Himschoot v. Dushi, 953 P.2d at 509, citing Shade v. Co & Anglo Alaska Service Corp., 901 P.2d 434, 437 (Alaska 1995). The non-moving party is entitled to have the record reviewed in the light most favorable to it and to have all reasonable inferences drawn in its favor. Reasonable inferences are those inferences that a reasonable fact finder could draw from the evidence. The non-moving party "must present more than a 'scintilla' of evidence to avoid summary judgment; [namely,] enough evidence to 'reasonably tend to dispute or contradict' the evidence presented by the [moving party]." Alakayak v. British Columbia Parkers, Ltd, 48 P.3d 432, 449 (Alaska 2002).

All parties claim to be entitled to summary judgment as a matter of law. Because there is no genuine issue in dispute as to any material fact and because the parties' claims can be resolved as a matter of law, summary judgment is appropriate.

STANDARDS FOR REVIEW OF BOARD ACTION

The Alaska Supreme Court has established a two-step inquiry for review of regulations:

> First, we will ascertain whether the regulation is consistent with and reasonably necessary to carry out the purposes of the statutory provisions conferring rule-making authority on the agency. This aspect of review insures that the agency has not exceeded the power delegated by the legislature. Second, we will determine whether the regulation is reasonable and not arbitrary.

Kelly v. Zamarello, 486 P.2d 906, 911 (Alaska 1971). In an unrelated action challenging Board of Game regulations, the Alaska Supreme Court held:

> Regulations are presumptively valid and will be upheld as long as they are "consistent with and reasonably necessary to implement the statutes authorizing their adoption." But reasonable necessity is not a requirement separate from consistency. If it were, courts would be required to judge whether a particular administrative regulation is desirable as a matter of policy. Thus where a regulation is adopted in accordance with the Administrative Procedures Act, and the legislature intended to give the agency discretion, we review the regulation first by ascertaining whether the regulation is **consistent** with the statutory provisions which authorize it and second by determining whether the regulation is **reasonable and not arbitrary**.

Interior Alaska Airboat Ass'n, Inc. v. State, Bd. of Game, 18 P.3d 686, 689-90 (Alaska 2001) (footnotes omitted; emphasis added). The constitutional challenges in that case based on Article VIII, sections 2, 3, 4, 14, and 17 as well as Article I, section 1 of the Alaska Constitution were addressed one by one, and all were denied. The trial court was described as an intermediate court of appeal, and its findings of fact and conclusions of law regarding its grant of summary judgment were reviewed de novo by the Alaska Supreme Court.

In an earlier challenge to lack of action by the Board of Fisheries, the Alaska Supreme Court explained,

> When we interpret the Alaska constitution and pure issues of law, we substitute our judgment for that of the Board.[FN9] We interpret the constitution and Alaska law according to reason, practicality, and common sense, taking into account the plain meaning and purpose of the law as well as the intent of the drafters.[FN10]
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> FN9. *See Moore v. State, Dep't of Transp. and Pub. Facilities*, 875 P.2d 765, 767-68 (Alaska 1994).
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> FN10. *See Alaska Wildlife Alliance v. Rue*, 948 P.2d 976, 979 (Alaska 1997).
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> When we determine whether the Board properly applied the law to a particular set of facts, we review the Board's action for reasonableness. Under this standard, we "merely determine[ ] whether the agency's determination is supported by the facts and is reasonably based in law." This 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 1, 5 (Alaska 1999) (footnotes 11-13 omitted).

APPLICABLE, RELATED, OR NOTEWORTHY LAW

The following state constitutional provisions, federal and state statutes, and case law decisions reflect long standing principles and disputes regarding game management and subsistence in Alaska. Familiarity with the history provides context for the present dispute.

Constitution of the State of Alaska, Article VIII

Section 2: General Authority. The legislature shall provide for the utilization, development, and conservation of all natural resources belonging to the State, including land and waters, for the maximum benefit of the people.[1]

Section 3: Common Use. Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use.

Section 4: Sustained Yield. Fish, forests, wildlife, grasslands, and all other replenishable resources belonging to the State shall be utilized, developed, and maintained on the sustained yield principle, subject to preferences among beneficial users.

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 duress among fishermen and those dependent upon them for a livelihood and to promote the efficient development of aquaculture in the State.

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.

Alaska Native Claims Settlement Act, 43 U.S.C. § 1601 et seq.

[1] "[T]he question of how fisheries and wildlife resources were to be managed gave rise to one of the deepest controversies of the convention." Fisher, Alaska's Constitutional Convention, page 134, 1975.

Sec. 2(b) of the Act: [Congress finds and declares that] the settlement should be accomplished rapidly, with certainty, in conformity with the real economic and social needs of Natives, without litigation, with maximum participation by Natives in decisions affecting their rights and property, without establishing any permanent racially defined institutions, rights, privileges, or obligations, ...

Sec. 4(b) of the Act: All aboriginal titles, if any, and claims of aboriginal title in Alaska based on use and occupancy, including submerged land underneath all water areas, both inland and offshore, and including any aboriginal hunting or fishing rights that may exist, are hereby extinguished.

Alaska National Interest Lands Conservation Act, 16 U.S.C. § 3101 et seq.

Sec. 804. Preference for Subsistence Use. [T]he taking on [federal] public lands of fish and wildlife for nonwasteful subsistence uses shall be accorded priority over the taking on such lands of fish and wildlife for other purposes. Whenever [restrictions are necessary], such priority shall be implemented through appropriate limitations based on the application of the following criteria:

(1) customary and direct dependence upon the populations as the mainstay of livelihood;

(2) local residency; and

(3) the availability of alternative resources.

State of Alaska Statutes

The Legislature delegated substantial authority to the Department of Fish and Game, AS 16.05.050, and, with regard to wildlife, to the Board of Game. AS 16.05.221(b). The Board of Game was given regulation-making powers as set out in AS 16.05. AS 16.05.241. AS 16.05.255 details the subjects and areas for which it may adopt regulations. AS 16.05.258 addresses subsistence use and allocation of fish and game. AS 16.05.330 addresses licenses, tags, and subsistence permits. Subsection (c) gives the Board authority to adopt regulations for subsistence permits for areas, villages, communities, groups, or individuals as needed for administering the subsistence harvest of game.

Case Law

Unit 13 has been the subject of the following criminal and civil appellate decisions.

In Myrick v. State, not reported, 1983 WL 807771 (Alaska App. 1983) Leonard Myrick was convicted after a jury trial in Healy of taking a bull moose having less than a thirty-six inch antler spread and less than three brow tines on at least one antler in violation of a regulation in effect in Unit 13.

In State v. Kluti Kaah Native Village of Copper Center, 831 P.2d 1270 (Alaska 1992), the Alaska Supreme Court reversed a preliminary injunction by the superior court against the Board of Game imposition of a seven day moose hunt in Unit 13. The trial court

was found to have erred by concluding that the harm to the State was insignificant. The Alaska Supreme Court held that the state had an interest in developing and maintaining a uniform system of game allocation. The Alaska Supreme Court was concerned that the injunction did not adequately protect the interests of other subsistence hunters or guard against depletion of the moose population. Also, the court held,

> In determining whether to issue a preliminary injunction, the trial court should have considered the threat that multiple injunctions would represent to the moose population and the problems it would create for orderly game allocation.

State v. Kluti Kaah, 831 P.2d at 1274.

In Palmer v. State, Not Reported in P.2d, 1993 WL 13156637 (Alaska App. 1993), the court of appeals reversed a conviction of Howard Palmer for violating the one-caribou bag limit in Unit 13 by shooting two caribou where his wife and son also held caribou permits. The Alaska Supreme Court reversed the court of appeals in State v. Palmer, 882 P.2d 386 (Alaska 1994), finding that the invalid portion of the emergency regulation was severable. The Palmer court commented on the effect of its 1989 decision in McDowell v. State, 785 P.2d 1 (Alaska 1989):

> In McDowell, this court found that the rural preference expressed in AS 16.05.258 violated several provisions of the Alaska Constitution. 785 P.2d at 12. In addition to greatly increasing the number of eligible subsistence users, the McDowell decision cast doubt on the validity of many of the Board's subsistence regulations.
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> With respect to the Nelchina caribou herd, the increased number of eligible subsistence participants meant the Board would have to implement a Tier II subsistence hunt.[FN2]
>
> [FN2] The Board realized that the Nelchina herd was not big enough to accommodate the increased number of subsistence hunters who might want to participate. In such cases, former AS 16.05.258 provided for a Tier II hunt. Officials implementing a Tier II hunt limited the eligible subsistence hunters on the basis of three factors: customary and direct dependence on the fish stock or game population as the mainstay of livelihood, local residency, and availability of alternative resources. Former AS 16.05.258.

State v. Palmer, 882 P.2d at 387.

In Shepherd v. State, Dep't of Fish and Game , 897 P.2d 33 (Alaska 1995), hunting guides challenged the constitutionality of the statute requiring regulations adopted by Alaska Board of Game to give the taking of moose, deer, elk, and caribou by residents for personal or family consumption preference over taking by nonresidents in, among others, Unit 13. The court found that resident and non-resident hunters are disparate groups, not similarly situated for equal protection constitutional purposes.

Additional Case Law on Subsistence in Alaska:

In Madison v. Alaska Dep't of Fish & Game, 696 P.2d 168 (Alaska 1985), the Alaska Supreme Court struck down subsistence fishing regulations that imposed a rural residency requirement on Tier I subsistence users as violating the 1978 statute on subsistence. Before invalidating the Board action, the court observed,

> The board argues that the legislature intended to narrow the scope of subsistence fishing to mean fishing by individuals residing in those rural communities that have historically depended on subsistence hunting and fishing.

Madison, 696 P.2d at 174. After the Madison decision, the Secretary of the Interior notified the state that state law was no longer consistent with ANILCA and that federal management would begin unless consistency was achieved by June 1, 1986. The Legislature amended the subsistence statute in 1986 to provide a rural residency requirement for subsistence. The Secretary then found consistency.

In McDowell v. State, 785 P.2d 1 (Alaska 1989), the Alaska Supreme Court held the 1986 subsistence statute's rural residency requirement unconstitutional. The court held,

> We therefore conclude that the requirement contained in the 1986 subsistence statute, that one must reside in a rural area in order to participate in subsistence hunting and fishing, violates sections 3, 15, and 17 of article VIII of the Alaska Constitution.

McDowell v. State, 785 P.2d at 9.

In State v. Morry, 836 P.2d 358, 371 (Alaska 1992), the Alaska Supreme Court reversed a key trial court ruling in the context of a criminal case, namely, "the superior court's holding that the boards' All Alaskans policy for first tier eligibility is invalid."

In State v. Kenaitze Indian Tribe, 894 P.2d 632 (Alaska 1995), the court held,

> The Tier II proximity of the domicile factor violates sections 3, 15, and 17 of article VIII of the Alaska Constitution, because it bars Alaska residents from participating in certain subsistence activities based on where they live.

State v. Kenaitze Indian Tribe, 894 P.2d at 642. The court discussed appropriate review of Board allocation decisions:

> In reviewing allocation decisions made by the Board, a deferential standard of review is employed. Board decisions are upheld so long as they are not unreasonable or arbitrary and proper procedures have been followed. *Id.* (Board's decision favorable to commercial trollers concerning allocation of king salmon in Southeast Alaska not "unreasonable or arbitrary"); Gilbert v. State, Dep't of Fish & Game, 803 P.2d 391, 399 (Alaska 1990) (Board's decision allocating sockeye

> salmon between commercial fishing interests in two areas on the Alaska Peninsula not arbitrary or unreasonable); Meier v. State, Bd. of Fisheries, 739 P.2d 172, 174-75 (Alaska 1987) (Board's decision allocating sockeye salmon between commercial setnetters and driftnetters in Bristol Bay "reasonable and not arbitrary."). We have not subjected allocation decisions to the more rigorous least restrictive alternative test employed in cases where entry into a user class is restricted. Compare McDowell, 785 P.2d at 10; Owsichek, 763 P.2d at 498 n.17; and Johns v. Commercial Fisheries Entry Comm'n, 758 P.2d 1256, 1266 (Alaska 1988) with Tongass, 866 P.2d at 1319; Gilbert, 803 P.2d at 399; and Meier, 739 P.2d at 175. Allocation decisions are so complex and multi-faceted that they are not amenable to analysis under such a test.

State v. Kenaitze Indian Tribe, 894 P.2d at 641-42 (footnote omitted).

In State v. Manning, 161 P.3d 1215 (Alaska 2007), a majority the Alaska Supreme Court held that the criteria used to determine the relative eligibility of Tier II subsistence hunters did not violate the rule against residency-based criteria. The food and gas criteria used in the regulation did not violate the Alaska Constitution. Also the court held that Rule 11 sanctions were not appropriate against AAG Saxby. But the game ratio criteria violated the equal access clause in the Alaska Constitution.

In Ahtna Tene Nene Subsistence Committee v. State of Alaska Board of Game, 3AN-07-8072 CI (Judge Smith presiding), a preliminary injunction was issued on July 20, 2007. The case was still pending on the merits when last updated by the parties herein. A hearing was conducted on the motion for preliminary injunction, and though affiants were not required to testify, 94-year old Chief Ben Neely wanted to make a statement, which the judge allowed. PI Hearing Transcript at 6-8; State Exh. C. The trial court applied the balance of hardships test and found that the plaintiff had a probability of success of the merits to the point of issuing a preliminary injunction to enjoin some of the regulatory changes, particularly the income factor and the exclusivity use area had to be revised, crafted by the court with the least amount of effort to re-do the Tier II scoring for the 2007 Unit 13 hunt. Id. at 153-56.

Additional Case Law in General:

In Owsichek v. State, 763 P.2d 488 (Alaska 1988), a registered guide challenged the Guide Licensing and Control Board's exclusive guide area ("EGA") program as violative of the common use provision in Article VIII, section 3 of the Alaska Constitution. Based on a careful reading of the constitutional minutes regarding the common use provision and prior case law, the court found that the common use clause was "intended to guarantee broad public access to natural resources" including wildlife. Id. at 492. The court observed that the Alaska constitutionalized common law principles imposing upon the state a "public trust duty" with regard to the management of fish, wildlife, and waters. Id. at 493 The court commented, "The extent to which this public trust duty, as constitutionalized by the common use clause, limits a state's discretion in managing its resources is not clearly defined." Id. at 495. The court concluded that the statutes and regulations regarding the Board's EGA

program "are in contravention of article VIII, section 3 of the Alaska Constitution." Id. at 498. The court noted that the EGA program may also violate article VIII, section 17, but did not decide the question because the parties had not briefed the issue and the court found much less constitutional history on section 17 than of the common use clause.

Supplemental Authority

[By Ahtna on 1-21-10] Superior Court Decision by Judge MacDonald in The Alaska Fish & Wildlife Fund v. State, 4FA-09-966 CI, regarding the Board of Fisheries' classification of the Chitina dipnet salmon fishery as subsistence or personal use.

[By AFWCF on 2-8-10] Report to the Board of Game by the Department's Area Management Staff of the Division of Wildlife Conservation on the first year (2009) of the moose and caribou hunt in question (the "DF&G Report"). Ahtna and the Department object to consideration of the DF&G Report. Among other things the DF&G Report states that "[m]any community hunters failed to abide by hunt conditions." The DF&G Report recommends on page 1:

> If the community hunt is continued in 2010-2011, there must be substantial changes to the administration of this hunt to ensure hunter understanding and compliance both for harvest control and to ensure conservation concerns are met.

The DF&G Report notes that there are only three community hunt areas in Alaska. The original two are "very small remote community hunts." The Report states, "Neither hunt has had any participation in recent years, one reason has been the lack of interest in taking on the administrative duties." The Report further indicates,

> While this is technically a State hunt, the burden of the hunt administration legally falls on Ahtna, an organization with no experience administering this type of program. ADF&G has helped each step of the way .... Without our active participation we believe we would not be able to provide a report of activities or evaluate the success of the program. Still, because the hunt is not administered by the State, the standard protocols ADF&G has developed over many years of administering hunts are not being followed.

The State opposition notes that this report does not rise to the level of an official Department position, but was considered by the Board in 2010 with no change from the action the Board took in 2009.

[By AFWCF on 2-19-10] 1991 Attorney General Opinion: AFWCF filed a notice of supplemental authority in February 2010 to bring the April 12, 1991 Alaska Opinion Attorney General (inf.) No. 227 to the court's attention. By letter response neither Ahtna nor the State object to taking the opinion into account, but both contend the opinion supports their position.

CONSIDERATION OF THE MERITS

A. Alleged Board Violation of the Alaska APA:

Manning contends in Count VI of the Amended Complaint that the Board's notice of the proposed regulations did not comply with the notice and comment procedures required by the Alaska Administrative Procedure Act ("APA"). The Board "is required to follow APA procedures where adopting regulations pursuant to its statutorily delegated authority." Kenai Peninsula Fisherman's Co-op. Ass'n, Inc. v. State, 628 P.2d 897, 904 (Alaska 1981). See also Morry v. State, 836 P.2d 358, 364 (Alaska 1992). The State seeks summary judgment based on the presumed validity of adopted regulations. Manning asserts that the Board's notice was not specific enough to adequately inform members of the public that their interests could be affected by the proposed regulations, and that the adopted regulations are therefore voidable under the APA. See AS 44.62.300; AS 44.62.310. See Kelly v. Zamarello, 486 P.2d 906, 911 (Alaska 1970) (Notice must contain the regulations proposed for adoption under AS 44.62.190).

Under the APA the public notice must contain "an informative summary of the proposed subject of an agency action." AS 44.62.200(a)(3). However, a procedural violation must be "substantial" before the regulation will be declared invalid. See AS 44.62.300. The challenger of a regulation's validity bears the burden to show that there has been a substantial failure to comply with the statute. See AS 44.62.100(a); see also Koyukuk River Basin Moose Mgmt. Team v. Board of Game, 76 P.3d 383 (Alaska 2003). It is insufficient to prove a minor violation. See Gilbert v. State, Dept. of Fish and Game, Bd. of Fisheries, 803 P.2d at 395 (Alaska 1990). See also Chevron, U.S.A. v. LaResche, 663 P.2d 923, 929 (Alaska 1983). The wording of a regulation that is adopted, amended, or repealed may vary in

content from the informative summary, "if the subject matter of the regulation remains the same and the original notice was written so as to assure that members of the public are reasonably notified of the proposed subject of agency action in order for them to determine whether their interests could be affected by agency action on that subject." AS 44.62.200(b). This construction of the notice requirement allows an agency to adopt regulations arising from meetings that vary from the notice.

In State v. First Nat'l Bank of Anchorage, 660 P.2d 406, 425 (Alaska 1982), the court held that the informative summary requirement was satisfied where the notice consisted merely of broad topics that would be considered. The court held that the general subject headings give "members of the public sufficient information to decide whether their interests could be affected by the agency action and thus whether to make their views known to the agency." State v. First Natl., 660 P.2d at 425. As long as the public can discern the general topic that the agency was addressing in its proposed regulations, the notice satisfies the informative summary requirement. See Chevron U.S.A. Inc. v. LeResche, 663 P.2d 923, 930 (Alaska 1983); but see Kenai Peninsula Fisherman's Cooperative Assn., Inc. v. State, 628 P.2d 897 (Alaska 1981) (improper notice was found where the notice stated that the meeting would set fishing season dates for the December 1977 season, but did not mention the planned adoption of a long-term management policy).

The subject matter of the Board's proposed regulations was identified and distributed for public comment in a "proposal book," in advance of the Board's public meeting in 2009. State Exh. J; State Exh. I. "Notice of Proposed Changes in Regulations of the Alaska Board of Game & Additional Regulations Notice Information." The public notice stated that "any or all of the subject areas covered by this notice," are proper subjects

for discussion at the Board meeting, and warned, "THE BOARD IS NOT LIMITED BY THE SPECIFIC LANGUAGE OR CONFINES OF THE ACTUAL PROPOSALS THAT HAVE BEEN SUBMITTED BY THE PUBLIC OR STAFF." Exh. I. The notice stated that the Board could consider topics, "including but not limited to ... community subsistence harvest areas and conditions...[and the]...Tier II subsistence hunting permit point system and priority for Tier II permits for Unit 13." Id. The proposal book stated: "It is unlikely that the ANS for moose and caribou in Unit 13 will allow for any significant harvest outside of what is needed for subsistence uses. The proposed community harvest permit system would provide an opportunity for the board to more narrowly, and more accurately define subsistence uses consistent with its Customary and Traditional Use finding for moose and caribou in Unit 13." Exh. J, at 7.

The proposal book notified the public of the possibility that the board might implement changes in the permitting process for Unit 13, that it might create a new community subsistence harvest system, and that it was considering more narrowly defining subsistence use under the "customary and traditional use" criteria. The Board's notice provided more detail than the public notice in First Nat'l Bank of Anchorage, and, unlike the notice provided in Kenai Peninsula Fisherman's Cooperative Assn., Inc., the Board's notice was not off-topic. The 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 satisfied the informative summary requirement of the APA with regard to the CHP.

The State argues that the Board has a long established practice of providing public notice similar to the notice provided for the 2009 Board meetings, without providing the full

wording of proposed regulations. The State contends the sheer scope, magnitude, and time sensitivity of the Board's responsibilities to manage wildlife throughout Alaska makes it impractical to provide more detail than it has historically provided before finalizing regulations after the public hearings. The State relies on the argument that the regulations on the 2009 Unit 13 caribou hunt are presumptively valid. See, e.g., Koyukuk River Basin Moose Co-Management Team v. Board of Game, 76 P.2d 383, 386-87 (Alaska 2003).

The court finds that the public notice for the 2009 Board meetings was not sufficient to alert the public that the Board might (a) find that subsistence use of caribou in Unit 13 only requires one caribou every four years, or (b) change the Unit 13 caribou hunt from a Tier II to a Tier I hunt when there was no significant change in the number of caribou in the Nelchina Herd. The proposal book conveyed the impression to the interested public that Unit 13 would remain subject to a Tier II hunt with a possible modification to accommodate a CHP. The statement in the proposal book that it is "unlikely" the moose and caribou populations would allow for any significant hunt outside subsistence uses suggested that AS 16.05.258(b)(3) or (4) was applicable. Given the unbroken chain of previous Tier II hunts in Unit 13 and no significant change in the population of the Nelchina Caribou Herd or the subsistence uses, the public was not reasonably notified in 2009 that the Board might change the Unit 13 Nelchina Caribou hunt to a Tier I hunt. The Board regulation adopted in 2009 to change the Unit 13 caribou hunt from Tier II to Tier I violated the due process requirements of the APA and is therefore invalid.

B. Alleged Violation of the Alaska Open Meetings Act:

Manning challenged meetings between Assistant Attorney Generals and Ahtna representatives and meetings between employees of the Department of Fish and Game and

Ahtna representatives as violating the Open Meetings Act ("OMA"). OMA is designed to ensure that meetings of a governmental body of a public entity are open to the public. See AS 44.62.310. OMA was amended in 1994 to narrow its scope. Individual actions are not within the scope of the OMA. See Krohn v. State, Dep't of Fish & Game, 938 P.2d 1019 (Alaska 1997). Under the amended OMA the Commissioner, Department employees, and Assistant Attorney Generals need not give public notice and an opportunity for the public to participate prior to meeting with private individuals such as Ahtna representatives.[2] The OMA challenge is summarily denied.

C. The Manning Taking of Tier II Property Rights Argument:

Manning contends that the Board decision that a Tier I hunt was appropriate for 2009 and 2010 constitutes an improper taking of his Tier II hunting rights. Under the Tier II factors, the parties do not dispute that Manning has a relatively high Tier II number as compared to other Tier II hunters. If a Tier I hunt is permitted for Unit 13 caribou, the Tier II priority position that Manning has accumulated over the years will be lost. He will have equal standing with all of the other Tier I hunters. As such he will have no greater or lesser chance of being awarded a Unit 13 caribou hunting permit than any other Tier I hunter. Manning argues that his Tier II position is a constitutionally protected right.

Personal hunting and fishing rights are more correctly viewed as privileges. See Herscher v. State Department of Commerce, 568 P.2d 966 (Alaska 1977)("The state's power

[2] It would be a violation of the OMA for three or more members of the Board of Game to meet privately with the representatives of any user group. However, an individual member of the Board is not precluded by the OMA from discussing game management issues with a member of the public. See Brookwood Area Homeowners Ass'n v. Municipality of Anchorage, 702 P.2d 1317, 1323 n.7 (Alaska 1985) ("Quadrant's representatives could have met with each Assembly member individually to discuss their development project and to lobby for the passage of a rezoning ordinance without violating the Open Meetings Act.").

over natural resources is such that it could entirely eliminate the role of hunting guides, and no problem of due process would arise."); Metlakatla Indian Community, Annette Island Reserve v. Egan, 362 P.2d 901, 916 (Alaska 1961) (dicta suggests court concurrence with the proposition that "fishing rights" as used in § 4 of the Alaska Statehood Act is more correctly viewed as fishing privileges). In an Attorney General Opinion in 1979, Assistant Attorney General Jon Tillinghast wrote:

> However, as our state supreme court stressed in Herscher, supra, the taking of fish and game resources in Alaska is in the nature of a privilege rather than a right, and the legislature may alter the statutory terms under which that privilege may be exercised, without the necessity for due process protections, and certainly without the need for compensation:

Alaska A.G. Opinion, File No. J-66-031-80, 1979 WL 22727. In McDowell v. State, 785 P.2d 1, 19 (Alaska 1989), the court stated that other courts have concluded in considering the degree of scrutiny in a constitutional context that "recreational hunting is not a fundamental right," citing Baldwin v. Montana Fish & Game Comm'n, 436 U.S. 371 (1978) (elk hunting by non-residents not fundamental); Utah Public Eomployees Ass'n v. State, 610 P.2d 1272 (Utah 1980) (entry in big game hunting permit drawing not fundamental).

Manning has not shown that his comparatively high Tier II hunting factor position is a fundamental property right entitled to heightened constitutional scrutiny. Manning was not singled out by the Board. The existence of Tier II priority positions held by Manning and other Tier II hunters does not, in and of itself, preclude the Board from changing the Unit 13 caribou hunt from a Tier II to Tier I hunt. The Manning challenge on that basis to the actions of the Board is denied.

D. The Manning Challenge to the 2009 Board Finding that the Unit 13 Caribou Hunt Should Be a Tier I Rather than a Tier II Hunt:

Discretion is delegated in AS 16.05.258(a) to the Board of Game to "identify the ... game populations, or portions..., that are customarily and traditionally taken or used for subsistence." The Commissioner is obligated to provide recommendations to the Board regarding population identifications. The Board is obligated to make decisions on the harvestable number of caribou consistent with sustained yield and the number of caribou reasonably necessary for subsistence uses.

The parties do not challenge the Board's finding that for 2009-2010 the harvestable sustained yield from the Nelchina Caribou Herd is 600-1000 bull caribou. With federal control over a portion of the migratory range of the Nelchina Herd, the split of the harvestable sustained yield is 400 bull caribou to federal harvest control and 600 to State management.

Until 2009 the Board routinely concluded that the harvestable number of caribou in Unit 13 consistent with sustained yield was not sufficient to meet the subsistence use needs. Thus, a Tier II hunt was necessary under AS 16.05.258(b)(4). In 2009, no evidence was presented to the Board that the number of harvestable caribou had increased. Nevertheless the Board concluded that the 1000 harvestable caribou would meet 100 percent of the subsistence use needs, so that a Tier II hunt was not required. That determination appears to have been based on the Board's determination that subsistence users only need one caribou every four years. The Department has not identified factual evidentiary support for that determination by the Board. The Board's Findings in 2006 do not support that proposition. The only pertinent factual reference in the administrative record of the Board in

2009 was to an anecdotal comment of a Board member that he still had caribou in his freezer from two years ago.

Deference should be accorded Board determinations. See State v. Kenaitze Indian Tribe, 894 P.2d at 641-42, See also Native Village of Elim v. State, 990 P.2d 1 (Alaska 1999) (the expertise of the Board of Fisheries stands in contrast to a court trying to make natural resource management decisions such that deference to Board decisions is appropriate); Koyukuk River Basin Moose Co-Management Team v. Board of Game, 76 P.2d 383 (Alaska 2003) (plaintiff conceded that the Board has substantial discretion to identify game populations in any rational manner related to the purpose of the subsistence statute). There is no factual support in the administrative record for the determination that subsistence users only need one caribou every four years. There is no support in the record for the Board change of position in 2009 that the harvestable number of caribou in Unit 13 is sufficient to meet the subsistence needs of all subsistence users. The Board characterized its 2009 changes to the Unit 13 caribou hunt as an "experiment."

The court finds that the Board decision in 2009 to change the Unit 13 caribou hunt from a Tier II to a Tier I hunt was arbitrary and unreasonable because it was not supported by evidence in the administrative record.

E. The Manning and AFWCF Challenge to the Board Decision To Establish a CHP in Unit 13:

In 2009 the Board decided to issue a CHP for the Ahtna Tene Nené Subsistence Committee to administer a community subsistence harvest hunt for eight Ahtna villages in the Nelchina area setting aside 300 caribou for the CHP as well as up to 100 any-bull moose. and a number of restricted bulls. The Board has authority under AS 16.05.330 and the

regulations adopted thereunder to establish CHPs. Here one CHP was issued under which eight separate hunting areas were established; one for each of the eight authorized villages.

The question is whether the CHP adopted by the Board for Unit 13 caribou and moose violates any Alaska constitutional or statutory provision or Alaska case law. The State notes on page 23 of its August 31 Memorandum that "no case has yet addressed the Board's authority under AS 16.05.330(c)." The CHP portion of AS 16.05.330 was enacted in 1986 as part of the legislative response to the federal takeover of game management in Alaska and to a then recent Alaska Supreme Court decision. Extensive legislative history exists regarding the intent of the Legislature in 1986 with respect to providing protection for subsistence, especially rural based subsistence, but very little of that history addresses the legislative intent concerning the CHP concept in 330(c).

Part A of the McDowell decision makes a rural residency requirement unconstitutional under Article VIII, sections 3, 15, and 17 of the Alaska Constitution. The court held, "It follows that the grant of special privileges with respect to game based on one's residence is also prohibited." McDowell, 785 P.2d at 9. Part B of the McDowell decision provides that any system which closes participation to some, but not all, applicants creates a tension with the protections of Article VIII of the Alaska Constitution such that if the exclusionary criterion is not per se impermissible, "demanding scrutiny" is appropriate. Id. The fact that in 1986 the Legislature authorized the Board to establish CHPs does not trump the 1989 McDowell precedent, which must be applied on a CHP-by-CHP basis.

The State and Ahtna argue that the Ahtna CHP is not improper because anyone can choose to reside in one of the eight villages in question. Although it is true that anyone, in theory, could relocate to reside in any one of these eight Ahtna villages, that argument

does not defeat the fact that the Ahtna CHP as adopted constitutes a barrier to entry based on residency. Although it is not determinative of the legality of the CHP, the court notes that the Ahtna CHP Hunt Administrator notified those who received an Ahtna Harvest ticket that the ticket does not give the hunter permission to hunt on Ahtna lands and that "All Ahtna Lands are closed to hunting." Manning Exh. A. The notice does not indicate whether tribal members may hunt on Ahtna lands. The Ahtna CHP proposal 84 called not only for a Village resident requirement for the CHP, but also required Tribal membership, "The Ahtna community permit would apply to tribal members enrolled in the Ahtna Village tribes." Manning Exh. J, at 2. As adopted by the Board, the Ahtna CHP limits the participants to Ahtna Village residents and limits the subsistence sharing of caribou taken under the CHP to residents of the eight Ahtna villages. The Ahtna CHP, if implemented without change, has a residency based standard for taking and sharing a subsistence resource. The conditions for the community hunt set forth on the updated 7/31/2009 version provide in ¶ 2 that "Community hunters must be ... a member of the community." ¶ 4 provides that if you sign up as a community hunter, you are prohibited from holding a state harvest ticket or any other state hunt permit for moose or caribou that year. Also the hunter will be limited to hunting for moose or caribou only within the community harvest area. Pursuant to ¶ 8, all hunters are "encouraged" to salvage C&T parts of the animal including the heart, liver, and kidneys and, for moose, the head, hide, intestines, and stomach. Manning Exh. B.

At the preliminary injunction stage the court severed the residency portions of the Ahtna CHP in an attempt to salvage the remainder under the Alaska Constitution and applicable case law. Opening the Ahtna CHP at least in legal theory to any and all interested Alaskans proved confusing, difficult, and expensive for Ahtna to administer. There is

inherent, inescapable tension between the Alaska Constitutional provisions as interpreted and applied in the McDowell case and the concept of a community harvest permit as authorized in this instance by the Board. The Board's 2006 Findings regarding subsistence in the Unit 13 area do not alleviate the tension. The Board Findings in 2006 regarding the customary and traditional subsistence uses in Area 13 emphasize local residency and communal sharing. The Board found that local members of the community were being hindered in passing along their customary and traditional practices because younger and older members of the community could not obtain a Tier II permit. Following the observation that virtually since its inception the Tier II subsistence permit system has "plagued with public complaints about inequities, unfairness, and false applications," the Board's 2006 Findings include the following:

(1) The Tier II bag limits were 3 caribou per year, recently as of 2006 reduced to 2 per year (page 2);

(2) After 1950, historical use patterns changed rapidly with more mechanized access, cash employment, increased human population, increasing competition for wildlife, and fluctuating wildlife populations (page 3);

(3) The fall hunt traditionally followed the salmon harvest; the winter hunt was whenever meat was needed and game was available (page 4);

(4) Local hunters travel shorter distances to hunt and utilize less technology than non-local hunters (page 4);

(5) Local hunters take more than needed for their own families to provide for the community at large (page 5);

(6) Lifelong local residents do not share the non-local resident attitude of utilizing other areas (page 5);

(7) The traditional of local residents is to salvage and use all parts of the harvested animal in contrast to patterns based out of urban areas where the focus is on meat and antlers and most organs, bones, and the hide are left in the field (page 6);

(8) Traditions and roles regarding harvesting, providing, preparation, and storage are important within the Ahtna "engii" system regarding the human place within the natural world and a respectful treatment of animals (page 6);

(9) Local users learned how to hunt from family in the local area; most non-local users tend to be controlled by the law rather than long-term oral traditions and community-based values (page 6);

(10) It is "imperative to accommodate the customary and traditional family and community harvest sharing practices as part of the subsistence way of life to the maximum extent possible" (page 7);

(11) There are no non-local traditions of community-wide meat distribution (page 7);

(12) The separation of the interconnected diversity of resource uses by non-local users undermines the use of efficient and economic methods and means by local users (page 8);

(13) Under the State's Tier II permit system permits have been slowly shifting from local residents who are the most dependent upon wildlife resources to less subsistence-dependent urban residents (page 1);

(14) It is almost impossible for new and younger Alaskans to quality for Tier II permits despite a subsistence dependence on wildlife resources for food (page 1);

(15) The long term goal of the Board is to design a system to accommodate subsistence-dependent users in a way that permits can be virtually guaranteed from year to year (page 1);

(16) The customary and traditional subsistence uses of the Nelchina Caribou Herd and moose were established by Ahtna Athabascan communities in the Copper River Basin and have been passed between generations orally and through practices which were later adopted by other Alaska residents (page 2);

(17) The pattern of taking and use among Ahtna village residents is more economically cost and effort efficient than among non-local residents (page 4); and

(18) Ahtna members have a pattern of taking, use, and reliance where the harvest effort of products that are harvested are distributed or shared, including customary trade, barter, and gift-giving.

The customary and traditional subsistence practices of local residents are contrasted to the practices of urban users. The Board received evidence that Tier II hunters do not necessarily use their Tier II permit, which implied to the Board that the individuals who did not use their Tier II permit are not true subsistence hunters dependent upon wildlife resources for survival.

The theme throughout the Board's Findings in 2006 is that the customary and traditional subsistence uses established and practiced by local Ahtna community members

are in line with a traditional subsistence way of life, but the practices of urban-based subsistence users and subsistence users from other rural areas are not.[3] As fashioned by the Board in 2009, the Ahtna CHP hunt reflects the Board's Findings in 2006 and the expressed long-term goal of the Board to "virtually guarantee" a permit for a caribou every year for local resident subsistence users. The Ahtna CHP provides for eight separate community hunt areas and is designed to allow CHP participants to hunt every year that a CHP hunt is held. In contrast, the Tier I drawing permit hunt restricts participants from any other hunt and, if successful, from hunting again in Area 13 for three years.

The legislative history (even broadly defined) regarding AS 16.05.330 is limited. By letter of March 13, 1985, Governor Sheffield conveyed a proposed bill to the Speaker of the House to provide the Board of Fisheries and the Board of Game the same authority they had before the then recent February 1985 decision by the Alaska Supreme Court in Madison v. Alaska Department of Fish and Game. A Special Committee on Fisheries within the House received testimony in a heavily attended meeting on March 21, 1985, regarding the effect of the Madison decision. The Special Committee urged action that session on the subsistence issue in a "prompt but thorough manner." An unsigned letter of intent by Representative Miller, Chairman of the House Rules Committee, dated 5/2/85 for CSHB 288

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[3] In Payton v. State, 938 P.2d 1036 (Alaska 1997), the court reversed a Board decision not to characterize the upper Yenta River area as a subsistence use area. The court concluded,

> The Board erroneously required current users of salmon in the upper Yentna River area to have a familial relationship with prior generations of subsistence users in the area. We determine that this interpretation of 5 AAC 99.010(b) is inconsistent with AS 16.05.258(a) and AS 16.05.940(7). We also conclude that the Board failed to explain adequately why it determined 5 AAC 99.010(b)(5) does not favor a finding that uses of upper Yentna River area salmon are customary and traditional.

Payton v. State, 938 P.2d 1036, 1045 (Alaska 1997).

states that under the bill the boards will limit subsistence uses to "Alaska residents who are domiciled in rural communities and rural areas." Hearings were held, statements were made, but no legislation on subsistence was enacted in 1985.

Next session, by letter of April 24, 2986, to Senator Kelly, Governor Sheffield noted that he had introduced HB 288 in 1985. Governor Sheffield attached a 20-page background briefing document on HB 288. The briefing document explained, *inter alia*, that HB 288 was intended to address the problems said to have been caused by the decision in Madison v. Alaska Department of Fish and Game:

> IV.A. It [HS 288] would amend the definition of "subsistence uses" in statute to clarify that they are the customary and traditional uses by rural Alaska residents of fish and game. [Emphasis in original]

With regard to the CHP concept, page 8 of the March 12, 1986 Senate Resources Committee Staff report regarding SCS for CS for HB 288 states in pertinent part:

> Section 8 amends AS 16.05.330 to allow the boards to adopt regulations providing for subsistence permits. Those permits may be for all subsistence users within a rural area, for rural communities or villages, or for groups or individuals in rural areas. The boards are required to adopt a permit program when the subsistence preference requires reductions in the harvest by nonsubsistence users. Such a reduction should only take place in case of a resource shortage compared to the number of users. When that situation exists, the Department and boards should have such a system in place so they can closely monitor the harvest and the demand on the resource.

The April 3, 1986 Senate CS for CS for HB 288 used the phrase "rural areas" in its proposed 330(c) language, not "areas, villages, communities, groups, or individuals" as was eventually enacted.

The 2006 Findings by the Board regarding customary and traditional subsistence uses in Unit 13 were largely supported by testimony from local and nearby residents during the Board meetings in 2009. Local subsistence needs in Unit 13 for moose and caribou are

important, indeed vital to many families. There is no doubt that traditional local hunting receives significant and arguably unfair competition from non-local hunters who are perceived to have, and may well actually have, more financial resources, alternative access to other subsistence game, and state-of-the-art hunting equipment. However, based on the legal analysis and precedent established by the Alaska Supreme Court in McDowell v. State, 785 P.2d 1 (Alaska 1989), this court concludes that despite the Board's attempts to characterize it otherwise, the Ahtna CHP is fundamentally a local-residency based CHP. As such the Ahtna CHP violates sections 3, 15, and 17 of article VIII of the Alaska Constitution.

F. The Board Exceeded Its Authority by Delegating Hunt Administration Authority for the Ahtna CHP to the Ahtna Tene Nené Subsistence Committee.

Under the public trust doctrine, the State may not delegate control over fish and game management to private individuals or entities. See McDowell v. State. See also Informal Attorney General Opinion No. 227, 1991 WL 542011; Informal Attorney General Opinion No. 663-86-0504, 1986 WL 81121; Attorney General Opinion No. 663-88-0521, May 12, 1988 WL 249437. Delegations of authority that are merely ministerial rather than discretionary in nature may be delegated. The breadth of the CHP hunt administration responsibilities go beyond ministerial into discretionary determinations.

The court finds that AS 16.05.330(c) does not authorize the Board to delegate hunt administration authority under a CHP to a private individual or entity. The Ahtna CHP for Unit 13 must be administered by the Department. The Department may establish one or more CHPs within Unit 13, consistent with Alaska constitutional and statutory requirements, but must retain the administration responsibilities to ensure that accurate, timely information is provided to the public regarding who, when, and how interested Alaskans may apply to

participate in the community hunt. Delegating CHP hunt administration to the Ahtna Tene Nene Subsistence Committee unduly compromised the Department's game management duties and responsibilities. The Department needs to maintain control of the determination of the lawful criteria for selecting who may hunt, for establishing any special restrictions for the hunt and for the handling of the game, and for establishing the terms and conditions for a meaningful communal sharing of caribou and moose taken under a CHP.

G. The Board Decision To Allocate 300 Caribou to Tier I Permit Hunters for Caribou in Unit 13 for the 2009 and 2010 Hunts:

Given the court's finding that the Board violated Alaska law by changing the Unit 13 caribou hunt from Tier II to Tier I, this issue is moot.

H. Board Decision To Allocate 300 Caribou to the Community Harvest Permit in Unit 13 for the 2009 Hunt:

Given the court's finding that the Board violated Alaska law by authorizing a residency-based CHP for the Unit 13 caribou hunt, this issue is moot.

I. The Special Restrictions on the Unit 13 Caribou Hunt:

The Board imposed restrictions and special requirements on the 2009/2010 Unit 13 caribou hunts. Those special restrictions and requirements do not present issues of constitutional dimension. The Board has discretion in fashioning special restrictions to achieve its overall game management objectives. Reasonable minds could differ over conditions such as the requirement to destroy and leave caribou antlers in the field. Caribou antlers have been used for centuries as toys and for pipes, art carvings, jewelry, snow goggles, rustic furniture components, and trade. However, the Board is vested with considerable discretion and authority in this regard. Given the annual potential for Board review and modification of these conditions, the challenge to these restrictions is denied.

CONCLUSION

For the reasons set forth above, summary judgment is granted as follows:

- The motion by AWFCF to invalidate the Ahtna CHP is granted;
- The public trust doctrine improper delegation challenge by Manning to the Board's authorization of the Ahtna CHP is granted;
- The open meetings act challenge by Manning is denied;
- The argument by Manning that his Tier II priority status is a right entitled to heightened constitutional scrutiny is denied;
- The challenge by Manning to the adequacy of the public notice of the 2009 Board meetings is granted with regard to the Board change from a Tier II to a Tier I hunt and with regard to the finding that subsistence users of Unit 13 caribou only need one caribou every four years;
- The challenge by Manning to the Board's experiment to change the Unit 13 caribou hunt from Tier II to Tier I is granted;
- The Manning/AWFCF challenge to the allocation of 300 caribou to the Ahtna CHP and 300 caribou to the Tier I permit drawing hunt is moot;
- The challenge by Manning to the Board's special conditions for the 2009/10 Unit 13 caribou hunt is denied.

Based on the foregoing rulings, the Board is enjoined from proceeding with a Tier I hunt for caribou in Unit 13 this year, is enjoined from delegating CHP hunt administration authority to private entities or individuals, and is enjoined from authorizing an Ahtna CHP that is fundamentally residency-based.

DATED this 9th day of July, 2010.

Carl Bauman
SUPERIOR COURT JUDGE

CERTIFICATION OF DISTRIBUTION
I certify that a copy of the foregoing was mailed to each of the parties at their addresses of record:
Manning, Saxby, Starkey, Kramer
7-9-10 Roberts
Date Clerk