

MEMORANDUM

State of Alaska Department of Law

TO: Kristy Tibbles
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Alaska Board of Game

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SUBJECT: March 2017
Copper Basin moose and
caribou hunts, Special
Board of Game meeting

GENERAL COMMENTS

In general, ethics disclosures: Before staff reports begin on any new agenda item, or, if preferred, at the very beginning of the meeting, Ethics Act disclosures and determinations must be made under AS 39.52.

In general, record-making: It is very important that Board members carefully explain and clearly summarize on the record the reasons for their actions and the grounds upon which the actions are based. The Alaska Supreme Court has stressed the importance of a clear record to facilitate the courts in determining that the Board's actions are within its authority and are reasonable. A clear record also assists the public in understanding the Board's rationale. If Board members summarize the reasons for their actions before they vote, it will help establish the necessary record.

In considering each proposal, and the specific requirements that apply in some cases, such as with the subsistence law, it is important that the Board thoroughly discuss and summarize on the record the basis and reasons for its actions. Consistency with past approaches is another important point for discussion. If a particular action does not appear to be consistent, Board members should discuss their reasons for a different approach.

The Alaska Administrative Procedure Act requires that State agencies, including the Board of Game, "[w]hen considering the factual, substantive, and other relevant matter, ... pay special attention to the cost to private persons of the proposed regulatory action." AS 44.62.210(a). This requirement to pay special attention to costs means, at a minimum, that the Board should address any information presented about costs, or explicitly state that no such information was presented, during deliberation of any proposal likely to be adopted. In our view, this requirement does not go so far as to mandate that the Board conduct an independent investigation of potential costs, nor does

it require that cost factor into the Board's decision more than, for example, conservation concerns might. However, it does require the Board to address and "pay special attention to" costs relevant to each regulation adopted.

In general, written findings: If any issue is already in court, or is controversial enough that you believe it might result in litigation, or if it is complex enough that findings may be useful to the public, the Department, or the Board in the future, it is important that the Board draft and adopt written findings explaining its decisions. From time to time, the Department of Law will recommend that written findings be adopted, in order to better defend the Board's action. Such recommendations should be carefully considered, as a refusal to adopt findings, in these circumstances, could mean that the Board gets subjected to judicial oversight and second-guessing which might have been avoided. The Alaska Supreme Court has stressed the importance of an adequate decisional document, or written finding, to a determination that the Board has acted within its authority and rationally in adopting regulations, and has deferred to such findings in the past.

In general, subsistence: For each proposal the Board should consider whether it involves or affects identified subsistence uses of the game population or portion of a population in question. If action on a proposal would affect a subsistence use, the Board must be sure that the regulations provide a reasonable opportunity for the subsistence uses, unless sustained yield would be jeopardized. If the Board has not previously done so, it should first determine whether the game population is subject to customary and traditional uses for subsistence and what amount of the harvestable portion, if any, is reasonably necessary for those uses. *See* 5 AAC 99.025 for current findings on customary and traditional uses and amounts reasonably necessary for subsistence uses. The current law requires that the Board have considered at least four issues in implementing the preference:

- (1) Identify game populations or portions of populations customarily and traditionally taken or used for subsistence; *see* 8 criteria at 5 AAC 99.010(b);
- (2) determine whether a portion of the game population may be harvested consistent with sustained yield;
- (3) determine the amount of the harvestable portion reasonably necessary for subsistence uses; and
- (4) adopt regulations to provide a reasonable opportunity for subsistence uses.

Reasonable opportunity is defined to mean "an opportunity, as determined by the appropriate board, that allows a subsistence user to participate in a subsistence hunt or

fishery that provides a normally diligent participant with a reasonable expectation of success of taking of fish or game.” AS 16.05.258(f). It is not to be construed as a guarantee of success.

The amount of the harvestable portion of the game population that is reasonably necessary for subsistence uses will depend largely on the amount of the game population used for subsistence historically and the number of subsistence users expected to participate. This may require the Board to determine which users have been taking game for subsistence purposes, and which ones have not. Once the Board has determined the amount reasonably necessary for subsistence uses, the Board should by regulation provide an opportunity that allows the predicted number of normally diligent participants a reasonable expectation of success in taking the subject game. The Board may base its determination of reasonable opportunity on all relevant information including past subsistence harvest levels of the game population in the specific area and the bag limits, seasons, access provisions, and means and methods necessary to achieve those harvests, or on comparable information from similar areas.

If the harvestable portion of the game population is not sufficient to provide for subsistence uses and any other consumptive uses, the Board is required to eliminate non-subsistence uses in order to provide a reasonable opportunity for subsistence uses. If the harvestable portion of the game population is still not sufficient to provide a reasonable opportunity for all subsistence uses, the Board is required to eliminate non-subsistence consumptive uses and distinguish among the subsistence users based on the following Tier II criteria:

- (1) The customary and direct dependence on the game population by the subsistence user for human consumption as a mainstay of livelihood; and
- (2) the ability of the subsistence user to obtain food if subsistence use is restricted or eliminated. AS 16.05.258.

In general, Copper Basin community subsistence hunts: The Board adopted regulations authorizing the Copper Basin community subsistence hunts (“CSH”) for moose and caribou under the statutory authority found in AS 16.05.330(c). The decisions in *Alaska Fish and Wildlife Conservation Fund v. State*, 347 P.3d 97 (Alaska 2015) and *Manning v. State*, 355 P.3d 530 (Alaska 2015) addressed several legal questions raised with regard to the CSH and provide legal guidance to the Board when considering regulation changes:

- Consideration of different subsistence users’ patterns of use does not violate the equal access provisions of Title VIII of the Alaska Constitution if all Alaskans are eligible to participate in those patterns of use.

- Exclusive or special privileges to take wildlife are prohibited. The Board's determinations must apply equally to all Alaska citizens.

- "To be invalid under [the equal access clauses of Article VIII], a regulation must place 'limits . . . on the admission to resource user groups.' '[W]e have consistently defined 'user groups' in terms of the nature of the resource (i.e. fish or wildlife) and the nature of the use (i.e., commercial sport or subsistence).' We have refused to define 'user groups' based on a 'particular means or method of access' to the resource, and we have declined to recognize a constitutional right to 'convenient' access. Instead, we have repeatedly held that '[i]nconvenience is in no sense the equivalent of a bar to eligibility for participation in subsistence hunting and fishing and does not suffice to trigger an analysis under the equal access clauses."

- The equal access clauses of Article VIII do not guarantee access to a resource by a person's preferred means or method. Means of access may be restricted if the restrictions apply equally to all persons in the State and do not preclude all uses of the resource.

- Subsistence uses cannot be constitutionally limited to members of communities that had historically practiced subsistence hunting and fishing.

- The Board must adopt regulations that provide a reasonable opportunity for subsistence uses of game populations that are customarily and traditionally taken or used for subsistence.

- The regulations creating an individual subsistence hunt and a parallel community harvest hunt, based on a community hunting pattern originally defined by the Ahtna Athabascan residents and then later adopted by others, provide a reasonable opportunity for all Alaskans for each use pattern.

- The group size of 25 and the Board's findings regarding community use patterns were reasonable.

- Some differences between community and individual hunt seasons and size differences for moose hunting are permissible based on sufficient findings. For example, the allocation of bulls without antler restrictions to the community permit holders was supported by testimony to the Board that the community harvest permit holders prefer to hunt as close to home as possible, hunt in the same areas each year, and travel shorter distances to hunt. Although individual permit holders would also benefit from a longer season and fewer size restrictions, the board's regulations were not unreasonable.

- Eliminating antler restrictions for moose for holders of community permits, while retaining antler restrictions for individual permit holders, did not allow community

permit holders to take more bulls than individual permit holders. The size of bull distinction did not result in a greater bag limit for the community permit holders.

- Regulations limiting community harvest permit holders and individual permit holders to one caribou permit per household avoided a discrepancy in bag limits for caribou. [85.025(8), 92.071(a), 92.072(c)(2)(a).]

- The Board’s ANS determination and allocation of up to 300 caribou to community harvest permit holders was not arbitrary or unreasonable, based on the evidence presented to the Board. It was not improperly manipulated to achieve a predetermined outcome.

Comments on Individual Proposals

Proposal 1: This proposal would amend 5 AAC 99.025(a)(8) to add a positive customary and traditional use finding for bull moose that do not meet antler restrictions within the area defined in 5 AAC 92.074(d). The proposal would establish an ANS of 100 and limit the ANS to the community representing the eight villages in that area.

The proposal includes Game Management Unit 20A, which is not within the area described in 5 AAC 92.074(d) and was not on the call for proposals for this meeting.

If the Board has identified a game population, or portion of a game population, that is customarily and traditionally taken or used for subsistence, then the Board is to determine whether there is a portion that can be harvested consistent with sustained yield. If so, the Board is then to determine the amount of the harvestable portion that is reasonably necessary for subsistence uses (ANS). AS 16.05.258(a). “Game population” means “a group of game animals of a single species or subgroup manageable as a unit.” AS 16.05.940(20). Manageability is the key element in classification.¹

Currently moose in Units 11, 12, and 13 each have a positive customary and traditional use determination and ANS has been established. Allocations are subject to regulations adopted by the Board. The Board would first need to determine whether younger bull moose not meeting antler restrictions is a game population or portion of a population to be managed differently from the rest of the moose in the area.² The Board should also

¹ *Elim v. State*, 990 P.2d 1 (Alaska 1999).

² In *Koyukuk River Basin Moose Co-Management Team v. Board of Game*, 76 P.3d 383 (Alaska 2003), the court addressed whether an allocation by the Board within a Controlled Use Area resulted in a distinct “game population” for purposes of Alaska’s subsistence statute, AS 16.05.258. The court said:

clarify whether the defined population or portion of the population is to be based on current antler restrictions, meaning bulls that do not meet the 50 inch/spike fork/4 brow tine restrictions, or would be defined with regard to any antler restrictions that may be adopted by regulation. (See Proposals 26, 27 and 28.)

If the Board finds a manageable portion of a population within the larger moose population, the Board would determine if the portion of the game population (i.e., of bull moose without antler restrictions) is subject to customary and traditional uses for subsistence. If the Board make a positive determination, then the Board would determine if there is a harvestable surplus and what amount of the harvestable portion of the portion of the game population, if any, is reasonably necessary for those uses. The Board previously made a positive customary and traditional use determination for the moose population as a whole, and established the ANS for the larger population.

The proposal asks the Board to find the ANS to be 100. The Board cannot improperly manipulate the ANS to achieve a predetermined outcome.³ It should be clarified that an ANS determination for bull moose without antler restrictions is a portion of, not in addition to, the ANS for moose currently established. (The current ANS for moose is found in 5 AAC 99.025. Unit 11: 30-40. Unit 12: 60-70. Unit 13: 300-600.)

The Board may wish to review its previous findings in 2011-184-BOG, amending 2006-170-BOG, regarding establishing the current ANS of 300-600 moose in Unit 13.

In the 2015 *Manning* decision, the Supreme Court upheld the Board's ANS for caribou. The ANS for moose and caribou were amended by the Board in 2009, and the caribou ANS was challenged. The following guidance from the court may be helpful in considering ANS:

The board does not manage moose in the KCUA as a distinct game population. Rather, the board uses the larger GMUs and their subunits as the relevant game populations for managing Koyukuk moose. . . . [S]etting permit limits within the KCUA does not equate to game management under Alaska law.

. . . .
[T]he board has substantial discretion to identify game populations, and . . . it can do so “in any rational manner” reasonably related to the purposes of the subsistence statute.

. . . .
Regulations directed at reducing competition or conflict among users of a game resource in specific areas do not amount to a concession that the animals within that smaller area are “manageable as a unit.”

³ *Manning v. State*, 355 P.3d 530 (Alaska 2015).

AS 16.05.258(b) refers to ANS in terms of subsistence *uses*, not *users*. The record reveals that the Board included a broad variety of subsistence uses in its ANS calculation. And even if the Board had defined subsistence uses of Nelchina caribou to include only local community hunting practices, it would not necessarily have violated the Alaska Constitution—considering certain users' patterns to define the subsistence uses placing demand on a game population affects only that game population's classification; it “does not affect any individual's ability to obtain a subsistence permit or to utilize that permit in a subsistence area.” The Board's subsistence definition applies equally to all of Alaska's citizens. Accordingly, the Board's ANS calculation does not implicate, nor violate, the equal access, uniform application, or equal protection clauses of the Alaska Constitution.

...
[C]onsiderable evidence in the record justifies the Board's ANS calculation and demonstrates that the Board took “a hard look at the salient problems and ... genuinely engaged in reasoned decision making.”

The Board reviewed extensive evidence on long-term harvest, customary and traditional use patterns, and caribou population trends, and it considered a number of proposals for defining subsistence uses of Nelchina caribou in making its ANS determination. It concluded the 600–1,000 ANS best fit the available data after considering at least eight possible ANS options. The Board identified substantial evidentiary support justifying the customary and traditional use definition applied in its ANS determination. And the Board continued to consider a number of proposed management regimes—including a Tier II hunt—after calculating the ANS, suggesting the ANS calculation was not merely a pretext for switching to a Tier I hunt. The Board concluded that “Tier II is off [the] table” only after comparing the adopted ANS to the harvestable surplus.

Although there is some evidence that the Board preferred that the ANS determination ultimately allow for a Tier I hunt, it does not appear that the ANS was improperly manipulated to achieve a predetermined outcome. The record provides sufficient evidentiary support demonstrating that the Board's ANS calculation is both procedurally and substantively reasonable. Accordingly the Board reasonably concluded that there is a reasonable opportunity for subsistence uses. Managing the Nelchina caribou hunt under Tier I through 5 A.A.C. 85.025(a)(8) is consistent with the statute and is reasonable and not arbitrary.

The proposal would limit the harvest of moose without antler restrictions to the one CSH community representing the eight villages in the area. This could be subject to a legal challenge. When the Board establishes the portion of the game population that can be harvested consistent with sustained yield that is reasonably necessary for subsistence uses, such determination is subject to the common use and equal access clauses of the

Alaska Constitution and should not be directed to a single community. When the Board initially created the Copper Basin community subsistence hunt, an allocation of 70 bulls was allowed only for the community representing the eight villages in the area. In July 2010, the hunt was held to be unconstitutional under Article VIII, sections 3, 5, and 17 of the Alaska Constitution as “fundamentally a local-residency based CHP.”⁴ After the Board expanded the hunt regulations to apply to all residents, the Alaska Supreme Court upheld the regulations in part because the user group is subsistence hunters, which means all Alaskans, urban or rural, are eligible to participate.⁵

Proposal 16: This proposal would amend 5 AAC 85.045 (moose seasons and bag limits) to eliminate the community subsistence moose hunt. Alternatively, the proposer would change opening day to September 1 to match the general season, and/or change the bag limit to one moose per group with the meat distributed by the group leader.

When considering any changes to the bag limit, the Board should keep in mind the direction provided from the Alaska Supreme Court indicating the bag limit for CSH participants should be the same as the bag limit for individual Tier I hunters.⁶

Proposal 20: This proposal would replace the CSH for moose with a Tier II moose season for 100 any bulls in Unit 13, one per household, August 20 to September 20.

Subsistence law does not allow a Tier I and Tier II hunt for the same game population. If bull moose without antler restrictions is determined to be a separate game population or portion of a population, see comments for Proposal 1 regarding determining the amount of the harvestable portion of the population or portion of a population that is reasonably necessary for subsistence.

Proposal 21: This proposal would eliminate all CSH moose hunts and replace with a Tier II or registration moose hunt with registration locally.

Subsistence law does not allow a Tier I and Tier II hunt for the same game population. If the Board amends the ANS (currently 300-600 moose) to a level that would result in a Tier II hunt, the change would become effective for the fall 2018 hunt.

⁴ *Manning & Alaska Fish & Wildlife Conservation Fund v. State of Alaska & Ahtna Tene Nene*, Case No. 3KN-09-178CI, decision dated July 9, 2010.

⁵ *Alaska Fish & Wildlife Conservation Fund v. State & Ahtna Tene Nene*, 347 P.3d 97 (Alaska 2015).

⁶ *Alaska Fish & Wildlife Conservation Fund v. State & Ahtna Tene Nene*, 347 P.3d 97 (Alaska 2015).

Proposal 24: To the extent this proposal would amend 5 AAC 85.045 to limit the harvest of 100 bulls without antler restrictions to residents of the community subsistence hunt area, it would likely be subject to legal challenge. The proposal would also extend the moose hunting season dates from Aug 20-Sept 20 to Aug 20-Sept 25 for Units 11, 12, and 13, and create a similar opportunity for 20A.

The Alaska Supreme Court upheld the Board's allocation of bull moose without antler restrictions to CSH participants, finding that all Tier I moose hunters are subject to the same bag limits.⁷ Limiting hunt participation to residents of a defined area would violate the equal access clauses of Title VIII of the Alaska Constitution. In 1989 the Alaska Supreme Court⁸ held that a subsistence hunting and fishing priority based on residence is unconstitutional. "[G]rant[s] of special privileges with respect to game based on one's residence [are] . . . prohibited." The court held that all Alaskans are eligible to participate as subsistence users in areas where state law authorizes subsistence uses.

The proposal includes Game Management Unit 20A, which is not within the CSH area described in 5 AAC 92.074(d) and is not on the call for this meeting.

Proposal 25: This proposal would eliminate the CSH for moose in Unit 13. Alternatively, the proposal would require a hunter to choose between the subsistence or general season. If the CSH is not eliminated, then the proposal asks that the Board restrict the CSH hunt area to within 50 miles of where the community lives and to limit the harvest of moose to "non-legal general season moose."

A restriction based on residence would likely be held unconstitutional.

The Board should clarify whether the phrase "non-legal general season moose" means bulls not subject to antler restrictions. No moose should be taken illegally.

Proposal 32: This proposal would amend 5 AAC 92.050 to allow one moose per household and would eliminate the requirement that prohibits any member of a household holding a Unit 13 subsistence permit from hunting caribou or moose in any other location of the state during that regulatory year. It would also impose an eligibility determination.

⁷ *Id.*

⁸ *McDowell v. State*, 785 P.2d 1 (Alaska 1989).

Subsistence uses cannot be constitutionally limited to members of communities that had historically practiced subsistence hunting and fishing.⁹ The Board lacks the authority to adopt eligibility criteria for Tier I users.¹⁰

The Board may consider changes to the bag limit, but should keep in mind the direction provided from the Alaska Supreme Court indicating the bag limit for CSH participants should be the same as the bag limit for individual Tier I hunters.¹¹

Proposal 33: This proposal would amend 5 AAC 85.025 to eliminate the caribou CSH, Tier I subsistence hunt, and drawing hunt and replace them with a registration hunt for one week hunt periods Aug 10-Sept 20 and two week periods Oct 21-March 31. Registration would begin July 1. Up to 2000, or maybe 3000, permits may be issued per period. Only one permit for one period may be held at any time. An unsuccessful hunter may register for additional periods that have permits available, but only after the current period ends.

Some clarification would be helpful regarding details of the proposal. For the purpose of applying for another permit, does an “unsuccessful hunter” include someone who did not hunt or would this be limited to someone who hunted but did not harvest a caribou? How many permits would be available for each period?

The proposal would also amend 5 AAC 92.050 to eliminate the requirement that prohibits any member of a household holding a Unit 13 subsistence permit from hunting moose in any other location of the state during that regulatory year. The limitation with regard to caribou would remain in place.

Currently up to 300 caribou may be taken under the CSH hunt in Unit 13, up to 5000 drawing permits may be issued, and there is no limit on Tier I subsistence permits. The ANS is 600-1000 for the Nelchina herd for Units 12 and 13.

The Board should consider whether subsistence hunters would be provided a reasonable opportunity, and whether equal access would be provided. Because permits are limited for each period, it is possible that a subsistence hunter may never receive a permit, while others may be fortunate to have several opportunities. Also consider that once the

⁹ *Alaska Fish & Wildlife Conservation Fund v. State & Ahtna Tene Nene*, 347 P.3d 97 (Alaska 2015).

¹⁰ *State v. Morry*, 836 P.2d 358 (Alaska 1992).

¹¹ *Alaska Fish & Wildlife Conservation Fund v. State & Ahtna Tene Nene*, 347 P.3d 97 (Alaska 2015).

harvestable portion of the herd is taken, anyone registered to hunt after that date would be unable to hunt caribou during that regulatory year.

Proposal 36: This proposal would amend 5 AAC 85.025 to allow two instead of one caribou per regulatory year by CSH permit holders, and would limit the caribou CSH to members of the community in the geographical area described in 5 AAC 92.074(d). It would also extend the season from Aug 10-Sept 20 to Aug 10-Sept 30.

The restriction to residents of the area is likely to be held unconstitutional if challenged. In addition, there is language from the Alaska Supreme Court¹² suggesting bag limits for the CSH permit holders and the individual permit holders should be the same.

Proposal 44: This proposal would amend 5 AAC 92.072 for all community subsistence hunts statewide. This meeting is limited, and the Board would need to amend the proposal to limit the application of any changes to Units 11, 12, and 13.

Currently any community or group of at least 25 may submit an application to participate. If an application is complete, and certified to be accurate, a permit is issued by the Department. The amendments to subsections (a), (b), and the beginning of (c) would require the Board, rather than the Department, to authorize a community to receive a CSH permit. The legislature, through AS 16.05.330,¹³ authorized the Board to adopt regulations for subsistence permits but does not authorize the Board to administer the permits. The Department, rather than the Board, has the authority to administer hunts adopted by the Board in regulation. AS 16.05.241 expressly excludes the Board from exercising administrative, budgeting, or fiscal powers.¹⁴ These statutes allow the Board to adopt regulations establishing the guidelines for a community or group hunt, but prevent the Board from selecting or rejecting applicants to determine whether each particular community or group would be eligible to participate in an authorized CSH.¹⁵

¹² *Alaska Fish & Wildlife Conservation Fund v. State & Ahtna Tene Nene*, 347 P.3d 97 (Alaska 2015).

¹³ AS 16.05.330(c) authorizes the Board of Game to adopt regulations “for issuance and expiration of subsistence permits for areas, villages, communities, groups, or individuals as needed for authorizing, regulating, and monitoring the subsistence harvest of fish and game.”

¹⁴ AS 16.05.241 provides: “Powers excluded. The boards have regulation-making powers as set out in this chapter, but do not have administrative, budgeting, or fiscal powers.”

¹⁵ The superior court held that the Board of Game was not authorized to delegate administration of the CHS permit hunt to Ahtna and stated: “The Ahtna CHP for Unit 13

Although not all Alaskans participate in a subsistence lifestyle, all Alaskans, urban or rural, are eligible to participate in subsistence hunts, including community subsistence hunts.¹⁶ The Board can, among other things, adopt regulations describing areas, seasons, bag limits, methods and means, and uses of the game. The Board has adopted 5 AAC 92.071 to give direction to the Department for managing and administering the CSH.

Subsection (c)(1) retains the current process allowing a representative of the community to apply to the Department for a CSH permit.

With regard to subsection (c)(2)(B), an individual would be unable to change “communities” for three years. This should be clarified regarding whether the intent is to mean calendar years or whether it should be regulatory years. 5 AAC 92.990(86) defines “year” to mean a calendar year. As written, the sentence uses both regulatory and calendar years.

The description of the information (eight elements describing customary and traditional use pattern of the game population) to be included in the annual community hunt reports would be deleted by proposed changes in subsection (c)(3) and replaced with the community’s need to describe the “community’s practice of the customary and traditional use pattern described by the board in authorizing” the permit. After five consecutive years, the Department may waive the community’s reporting obligation. As stated above, the Department, rather than the Board, would administer the applications. The Board may wish to consider language to be included in the regulation regarding information to be included in the community’s annual reports if the eight elements are to be eliminated.

Subsection (c)(3) also proposes changing the requirement for each community to “make efforts” to collect reports from each household and instead would require each household to submit a report on its practices. The Board may wish to consider what information is to be included in the annual household reports that would be helpful to the Board or the Department. The Board may also want to clarify whether a waiver of the community’s reporting would also waive household reporting.

Subsection (d) would improperly allocate game to a specific user group, in violation of the equal access and common use clauses of the Alaska Constitution.

must be administered by the Department.” *Manning and AFWCF v. State and Ahtna Tene Nene*, 3KN-09-178CI, Decision on Summary Judgment.

¹⁶ *Alaska Fish & Wildlife Conservation Fund v. State & Ahtna Tene Nene*, 347 P.3d 97 (Alaska 2015).

The penalty in subsection (f) for a “community member” is linked to the proposed mandatory requirement for households to report annually under subsection (c)(3). It should be clarified that all members of the household would be subject to the penalty.

Also, the Board may wish to consider (1) whether a failure to report penalty should be retained if reporting may not be required for all communities, and (2) the effect of the penalty in light of the two-year (or the proposed three-year) commitment to participate in the CSH and the prohibition on hunting moose and caribou elsewhere. (Note that a holder of a subsistence permit in Unit 13 may transfer the permit to a family member within the second degree of kindred. 5 AAC 92.052(22).)

Subsection (h) would allow the Department to delegate authority to the community or group representative, unless it would be inconsistent with patterns and practices identified by the Board. This delegation is likely subject to challenge based on an earlier court decision. “The [CSH] for Unit 13 must be administered by the Department.”¹⁷

Subsection (i)(2) would allow each community to define its pattern of use (economic, cultural or social, and nutritional). This should not be interpreted to require past use as a condition of participation.¹⁸ Subsistence uses cannot be constitutionally limited to members of communities that had historically practiced subsistence hunting and fishing.¹⁹ Any group of 25 or more persons who follow the identified pattern of use is eligible to participate. Because subsistence is limited to residents, members of a community need to be Alaska residents. Community participation should not be limited by residency, and all Alaskans would be eligible to participate.

¹⁷ *Manning and AFWCF v. State and Ahtna Tene Nene*, 3KN-09-178CI, Decision on Summary Judgment.

¹⁸ *Madison v. Alaska*, 696 P.2d 168 (Alaska 1985).

¹⁹ *Madison v. Alaska*, 696 P.2d 168 (Alaska 1985); *Alaska Fish & Wildlife Conservation Fund v. State & Ahtna Tene Nene*, 347 P.3d 97 (Alaska 2015).