

Federal priority only in times of shortage – a myth. State priority in times of plenty – the coming reality?

By Dick Bishop, past AOC President, and Mary Bishop, board member, AFWCF

Alaska's Board of Game has drafted a proposal to provide a subsistence "**priority**" in times of **plenty** for Nelchina caribou throughout Game Management Unit 13. The new program is called the "Community Harvest Permit Program" or CHP.

Rural residents already have a substantial priority for use on Unit 13 federal lands. Native corporation members also have private property rights and trespass control on over a million acres within Unit 13. Still, rural preference advocates have convinced most game board members that the Board has an obligation to provide even more preference — on all lands within Unit 13 — even when, thanks to predator control on state lands, caribou are relatively abundant

The CHP is not the same as 2009's court denied Ahtna CHP. But it does favor communities or groups and has strict requirements that mimic Ahtna customary and traditional practices— requirements that a tribal or other group could voluntarily enforce upon themselves as Tier I permitted individuals. Detailed reporting to the State is required on aspects of the hunt, ceremonial sharing, meat preservation, youth education, etc.

The CHP in Unit 13 is available only to those groups willing to comply with Ahtna customs and traditional practices-- proposed by Ahtna spokespersons and the Division of Subsistence. Minto Village has proposed a similar CHP for moose in their area.

If you object to this new BOG operating procedure, you should submit your comments ASAP. The Board meets to finalize proposals on March 4-10 in Wasilla.

Please submit written comments by fax or mail at least two weeks prior to the meeting (Feb. 18) so that they can be included in the board member's workbook. Comments received after that time will be accepted and submitted to the board members at the beginning of the meeting. Guidelines for providing written and public testimony are on pp ii and xvi of the proposal book – or call your local ADF&G office. **FAX testimony to 907-465-6094** – emailed testimony is not accepted.

Mail written comments to:
ATTN: Board of Game Comments
AK Dept. of Fish and Game, Board Support
P.O. Box 115526
Juneau, AK 99811-5526

Please consider:

1) opposing Proposal #50 (See Spring 2011 Proposal Book, #50, p. 65-69, submitted at request of the Board of Game.) **AND**

2) supporting Proposal #48, a repeal of any CHP hunt. (See Proposal #48, p. 64, submitted by AOC.)

More information is available below – and in an 11 page document entitled "Draft for External Review" (See www.wildlife.alaska.gov/division_info/chp_copper_basin.pdf) and p. 65-69 in the Proposal Book.

Let's start with the basics of the federal and state subsistence laws.

1. The federal subsistence law reigns on federal lands in Alaska (about 64% of Alaska).

The federal law says **only rural residents** can be subsistence users of fish and game and other renewable resources **on federal lands**. Rural residents must be given a subsistence priority over others. Their uses are considered "customary and traditional" (C&T). The priority is not triggered by a shortage of the resource...that is a popular myth.

[See sidebar documentation. "Is it Only in Times of Shortage?"]

Only about 25% of Alaska lands remain in which "common use" and "equal opportunity" can actually apply in practice. The State should not forfeit those protections in the Copper River Basin -- or on any other lands or waters through this "backdoor" CHP approach.

Enough is enough already!

2. The state subsistence law reigns on state and private lands in Alaska (about 24% state owned, 12% Native Corporation owned, and 1% other private ownership).

The state law says **all Alaskan residents are eligible for subsistence** hunting of game populations. However, if the harvestable portion of a game population is not sufficient to provide a reasonable opportunity for all subsistence uses, the Board of Game (BOG) shall distinguish among Alaskan users through a (Tier II) point system involving customary and traditional (C&T) use.

3. To be considered a subsistence use, the use (not user) must meet C&T criteria.

The 8 **state criteria** for C&T use were originally established by the Board of Fisheries (BOF) and BOG back in the early 1980's. At that time the Boards were attempting to conform to the federal law requiring that the subsistence priority be limited to rural residents. Applying the 8 criteria met the federal law requirement.

Later the Alaska Supreme Court (1989 McDowell decision) ruled a rural residency preference is unconstitutional. They did say that a preference based on **individual** criteria might meet the standards of Alaska's Constitution. The "8 criteria" have been modified only slightly since then. Location of residency **cannot** be a criterion for being a State subsistence user – but the wording of the 8 criteria still implies rural use patterns. These 8 criteria were slightly modified and adopted by the federal subsistence management program.

How does the state's BOG usually allocate subsistence hunting opportunity?

1. The BOG designates hunts as "subsistence" or as "general" hunts. Hunts are designated "subsistence" if the BOG determines that C&T subsistence use occurs in that location on that population.

2. "All Alaska residents are eligible for subsistence hunting of game populations where subsistence use occurs." (Permit Hunt Supplement, 2011-12) The BOG sets in regulation the "amount necessary for

subsistence” or ANS. State regulation says the ANS can be met by the harvestable surplus available on both state and federal land. The State biologists provide information on the harvestable surplus.

3. If the **harvestable** surplus is adequate “to provide a normally diligent participant with a reasonable expectation of success” the hunt is a State Tier I hunt. If the surplus is **not** sufficient, the BOG first **eliminates all non-resident** use and then, if necessary, distinguishes among all the state subsistence users using a point scoring system and the hunt becomes a State Tier II hunt.

But what has the Board of Game done with the Nelchina caribou hunt?

The BOG is proposing to **provide a subsistence priority use in times of plenty!** The BOG is pursuing **a new paradigm, a new standard, a new modus operandi** not required by state law.

The Nelchina caribou **Community Harvest Permit Program** (CHP) may be the first of this type, but it looks like it **may become the standard if little objection is raised**. The Village of Minto has also submitted a proposal for a Community harvest permit on moose—another “priority in times of plenty”—(Proposal #204, p.260, Spring 2011 Proposal Book).

Here is the background:

- The Nelchina herd spends ¾ of its time on state and private Native land, both lands subject to state regulations. (Native-owned private Ahtna lands, approximately 2 million acres some of which was chosen

The Alaska Fish & Wildlife Conservation Fund and the Alaska Outdoor Council are challenging the 8 criteria-- as used by the BOF& BOG-- in two lawsuits.

One lawsuit involves Chitina Dipnetting. A second lawsuit, called the Manning case, involves Nelchina caribou hunting. The Dipnetter lawsuit argues:
1) that the BOF improperly applied the 8 criteria in ruling that Chitina dipnetting is not a subsistence use;
2) that use of the 8 criteria is not consistent with the State’s Constitution.

That lawsuit is now proceeding to the Alaska Supreme Court.

specifically for its ability to provide subsistence resources, are usually closed to trespass to all but shareholders. Native and federal lands surround most of the road system in the Nelchina Basin. The private lands include occasional 17(b) easements for access to public owned state and federal lands.)

- But about 68% (average 387/yr) of the local harvest has come from federal lands and 32% (average 132/yr) from state lands since 1990.
- Currently rural residents of the Nelchina basin may receive, by Federal registration, a permit to harvest 2 caribou on federal land. No total harvest cap limits the take by federally qualified subsistence users on federal land. **Rural residents can take these 2 caribou in addition to anything they harvest under state law** on state, federal and private lands. The federal season may run 10 days longer in the fall than the state season.
- A great disparity already exists between “rural” and “non-rural” resident opportunity in Unit 13. A needlessly greater disparity will exist if the BOG approves the CHP.
- State biologists established a harvestable surplus of over 2000 caribou for the Nelchina Caribou Herd – which is substantially **above** the 600-1000 in regulation by the BOG as “Amount Necessary for Subsistence”.
- Alaska Statutes suggest that the BOG cannot adopt regulations that distinguish among subsistence users through limitations based on C&T dependence unless the harvestable surplus falls **below** the ANS. In this case, C&T use is being used by the BOG to determine what conditions a hunter must comply with in order to get the CHP permit.

The BOG could and should agree that a “reasonable opportunity for subsistence use” is being met by harvest opportunities on federal lands and under the state’s Tier I permit -- without the CHP.

Instead, by a vote of 4-3, the BOG proposed the Community Harvest Permit Program as one of three options for 2011-12 Nelchina caribou hunting. An opportunity is provided to all residents of the State to choose any one of the 3 options.

The BOG approved a total allocation of 300 caribou for the CHP program. **The board can change everything at the March meeting.**

In summary:

- Although there is no legal obligation to do so, this BOG proposal would provide a **“priority in times of plenty”**. The BOG is pursuing the CHP, **a new paradigm, a new standard, a new modus operandi** not required by state law.
- A great disparity already exists between “rural” and “non-rural” opportunity in Unit 13. A **needlessly** greater disparity will exist if the BOG approves the CHP.

If this passes, we can expect to see many more CHP in the future. See part (d) in the Proposal Book, p. 68. which, in part, says:

[Seasons will be the same], “unless separate community harvest hunt seasons are established.”

As was explained to us, this allows overlapping cultural CHP’s, (Ahtna, Chickaloon, Eklutna) -- all having potentially separate seasons and cultural requirements defined and enforced by the State.

And we have over 200 tribal groups around the state.

When equality is no longer the standard, how much inequality is justifiable?

We do not understand why. Surely, enough is enough already! ♦

Is it “only in times of shortage”?

The federal subsistence priority according to:

Senator Ted Stevens in 1978 as ANILCA passage was being debated before Congress:

"Now, that is the one thing that I can assure the Alaska native people, and the rural Alaska, will mean, in any case where there's a limitation they will receive preference. And mind you, every annual regulation dealing with fish and game is a limitation."

Public Hearing, 4/5/78, US Senate Committee on Energy and Natural Resources.

Department of Interior in 1995 and State AG in 1981

"all other uses must be eliminated before "customary and traditional" subsistence use by rural residents can be restricted."

*4/11/95 memo from three federal Solicitors to Anchorage Regional Solicitor
and 12/2/81 letter from AG Condon to Governor Hammond.*

Federal Judge Russell Holland in 1989 -- when the state was in compliance with federal law -- and BEFORE the Alaska Supreme Court ruled in McDowell the priority is unconstitutional.

When Alaska Legal Services successfully challenged 6-month moose and 8-month caribou seasons.

"the Board of Game must in the future proceed with scrupulous care and caution in imposing seasons and bag limits on subsistence hunting. " (p.30 of 58)

"If bag limits and seasons are imposed on subsistence hunting, there must be substantial evidence in the record that such restrictions are not inconsistent with customary and traditional uses. It must be clear in the record that subsistence uses will be accommodated, as regards both the quantity or volume of use and the duration of the use. Need is not the standard. Again, it matters not that other food sources may be available at any given time or place. The standard is customary and traditional use of game." (p.32)

"the Board of Game shall review its subsistence hunting regulations for Lime Village, Alaska, and shall submit to the court for review reenacted subsistence hunting regulations in accordance with this decision." (p.42)

Bobby v. Alaska, 718 F.Supp 764 (D.Alaska 1989)

[Judge Holland eventually approved almost year-round seasons with community bag limit]

Alaska Federation of Natives "No Net Loss" policy of 1996 and '97:

"There must be no net loss from the current level of federal subsistence protections, including, but not limited to, the following points:

#7. The subsistence priority applies to all times, not just when there is a resource shortage. The Boards [of Fisheries and Game] are required to provide fully for customary and traditional uses before any non-subsistence uses may be allowed"

AFN Board of Directors, 3/4/96 and Re-affirmed at October 1997 AFN Convention

State of Alaska Attorney General in 1998:

[When the state says the priority exists in times of shortage, the state must mean whenever there are regulations.]

In an exchange regarding the Administration's proposed '98 constitutional amendment (HJR 102) Rep. Con Bunde asked the Asst Attorney General:

"Please define for me what [is] the Administration version of times of shortage?"

AG Stephen White responded: "Virtually, in my idea of times of shortage, demand versus supply, we're always there."

Public Hearing 5/29/98 State House Judiciary Committee

9th Circuit Court of Appeals, Judge D.W. Nelson in a 2000 opinion re: moose regulations.

"Because we are interpreting the meaning of a phrase that appears in a federal statute, (ANILCA), we owe the state regulatory agency's interpretation no deference.

"Deference to a federal agency's interpretation of a statute is based in part on the expertise it possesses in implementing federal policy ...Most fundamentally, unlike a federal agency, the state is delegated no authority under ANILCA...

"ANILCA provides for a number of important purposes all of which must be balanced by the Secretary of Interior. Subsistence living, although at the heart of ANILCA, is not a per se preemptive statutory priority. [Judge Nelson specifically negates the Interior Department's statement #2 above].

"We hold that... the term "priority" within the meaning of [ANILCA] as allowing it to balance the competing aims of subsistence use, conservation, and recreation, while at the same time providing subsistence hunters with a meaningful use preference, is reasonable.

Ninilchik Traditional Council v US. 227 F3d 1186(9th Cir. 2000)

ANILCA passed in 1980.

After 20 years of lawsuits, the 9th Circuit ruled that the language is not an absolute priority.

The Court ruled that only "a meaningful use preference" must be given.

The priority is always present; a priority based upon "customary and traditional use".