

RC 13

### Presentation to the BOG

- The BOG has the legal authority to enforce its hunt conditions that:
- A genuine community exists at the time a group applies for the CSH; and
- A group in the CSH is genuinely engaged in the community pattern of use identified by the BOG for the Area

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### Morry Case

- 836 P.2d 358 (Alaska 1992)
- STATE of Alaska and Don Wilson, Appellants and Cross-Appellees,
- v.
- Riley T. MORRY and Kwethluk Ira Council,
- Interpreted the 1986 State Subsistence Law

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### Morry Holding

- "On the basis of the parties' arguments, our relevant decisions, and upon consideration of the applicable statutory provisions, we conclude that the superior court erred in its determination as to who is eligible to participate in subsistence hunting and fishing at the first tier. Simply stated, after McDowell there are no statutory standards for determining those individuals who are ineligible to participate in subsistence hunting and fishing."

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Submitted by Sky Stanky

### Recent Interpretations of Morry

- Alaska Fish and Wildlife Conservation Fund v. State of Alaska and Ahtna Tene Nene', FA- 11-1474C I.

"AFWCF argues that pursuant to Morry there is no statutory authorization to distinguish among Tier I users. AFWCF is correct and it's assertion that the Alaska Supreme Court held that the 1986 version of AS 16.05.258, as modified by McDowell, provided no grounds for distinguishing between users at the first tier level.

AS 16.05.258 has been amended several times since Morry. The current version bears little resemblance to the version discussed in 1992. Because the statutory interpretation holding of Morry applies to a version of the statute no longer in effect, that portion of Morry is inapplicable to the current version of AS 16.05.258.



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### ANCSA Legislative History

- Record supports interpretation that ANCSA lands would be a base for subsistence uses
- Issue left unresolved was extent of off-ANCSA hunting and fishing rights



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### Chitina Dip Netters Case

- 289 P.3d 903 (Alaska 2012)
- THE ALASKA FISH & WILDLIFE CONSERVATION FUND and The Chitina Dipnetters Association v. State of Alaska and Ahtna Tene Nene'



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**Chitina Dipnetter Holdings**

- AFWCF argues that the subsistence statute was intended to grant subsistence rights to any long-term users of an area, but this argument ignores the clear legislative intent in passing AS 16.05.940, which was to provide for actual subsistence uses and preserve a traditional culture and way of life. AFWCF cites Madison v. State, Department of Fish & Game in support of its proposition, but Madison only barred the complete exclusion of urban residents from the classification of subsistence users, it did not state that the subsistence statute was meant to classify those who do not have a " traditional, social, or cultural relationship to and dependence upon the wild renewable resources produced by Alaska's land and water" as subsistence users.




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**Chitina Dip Netter Case**

"AFWCF also maintains that it is improper for the Board to consider the " cultural, social and economic context in which harvest takes place," but as noted above the legislature specifically intended the Board to take this information into account. Personal use fisheries may meet the subsistence statute's consistency and duration requirements, but they may also fail to carry the cultural, social, spiritual, and nutritional importance that the subsistence statute protects.




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**Chitina Dipnetter Case**

- [14] Ch. 1, § 1(a)(3), SSSLA 1992 (" [C]ustomary and traditional uses of Alaska's fish and game originated with Alaska Natives, and have been adopted and supplemented by many non-Native Alaskans as well; these uses among others, are culturally, socially, spiritually, and nutritionally important and provide a sense of identity for many subsistence users."
- [34] When enacting the most recent version of the subsistence statute, the legislature stated its purposes and findings. These findings indicated that " there are Alaskans ... who have a ... dependence upon the wild renewable resources produced by Alaska's land and water..." Ch. 1, § 1(a)(1), SSSLA 1992 (emphasis added). "[T]hese Alaskans share ideals of respect for nature, the emphasis of using resources wisely, and the value and dignity of a way of life in which they use Alaska's fish and game for a substantial portion of their sustenance ..." Ch. 1, § 1(a)(2), SSSLA 1992 (emphasis added). The subsistence statutes must protect these uses where such dependence for sustenance is demonstrated.




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### First Alaska Supreme Court Case Upholding CSH

- 347 P.3d 97 (Alaska 2015)
- ALASKA FISH AND WILDLIFE CONSERVATION FUND, Appellant,
- v.
- STATE OF ALASKA and AHTNA TENE NENE', Appellees




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### AFWCF v State and Ahtna Tene Nene'

- Regulations promulgated Game establish two different systems of subsistence hunting for moose and caribou in Alaska's Copper Basin region: (1) community hunts **for groups following** a hunting pattern similar to the one traditionally practiced by members of the Ahtna Tene Nene' community; and (2) individual hunts.[1]
- The Fund argues that the community harvest permit system is unconstitutional because it creates classifications that result in disparate treatment of Alaskans who are otherwise similarly situated. The superior court rejected this argument, reasoning that "[a]ny Alaskan is eligible to participate in either opportunity [i.e., the individual hunt or the community harvest] **by complying with the regulatory requirements for each.**" We agree.




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### AFWCF v. State and Ahtna Tene Nene'

"AS 16.05.258(b)(2) not only grants the Board the authority to differentiate between subsistence uses, it **requires the Board to adopt regulations that " provide a reasonable opportunity for subsistence uses"** of those game populations that are " customarily and traditionally taken or used for subsistence." **Here, after the Board identified the two customary and traditional subsistence use patterns of moose and caribou in the Copper Basin -- the community use pattern and the individual use pattern -- it was statutorily required to " provide a reasonable opportunity" for these subsistence uses of the relevant game populations.** The Board's findings described two very different use patterns, with different hunting areas and seasons, different parts of the animal consumed, and different cultural and social traditions associated with the hunt. **Because both patterns are " subsistence uses," the Board was required to provide " a reasonable opportunity" for each of them.**




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**AFWCF v. State and Ahtna Tene Nene'**

"The community use pattern also involves the " salvage **and use [of]** all parts of the harvested animal, in **conformance with traditions prohibiting waste.**" Hunters retrieve " the entire carcass and all bones, hide, head, heart, liver, kidneys, stomach, and fat," leaving only the antlers behind. Permit conditions therefore require meat salvage, the taking of " [a]ll edible meat from the frontquarters, hindquarters, ribs, neck, and backbone, as well as the heart, liver, kidneys, and fat."




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**AFWCF v. State and Ahtna Tene Nene'**

"The Board did so by its creation of the parallel community harvest and individual permit systems. The permit conditions for the community harvest closely track the Board's 2006 findings of customary and traditional use. The Board found that a community hunting pattern " was originally defined by the Ahtna Athabascan residents" but was " then adopted and modified by other local settlers in the early 20th century." The Board found that " [m]ost of the long-term subsistence patterns in this area are community-based,"




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**AFWCF v. State and Ahtna Tene Nene'**

"The Board set the group membership at 25 " to ensure that it really is a communal experience, and not just two hunting buddies together, that there really is some level of interaction and sharing and that there's a genuine group." This tracks the Board's 2006 findings about the community use pattern, which showed that the community or group potentially benefitting from a hunt was larger than a nuclear family -- **it involved " all family members, elders, [and] others in need.**"




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### AFWCF v. State and Ahtna Tene Nene'

"The community harvest permit also authorizes a larger hunting area than that open to individual hunters. Community harvest permit holders are allowed to hunt moose in all of Game Management Units 11 and 13 and part of Unit 12.[38] Individuals are limited to Unit 13.[39] This distinction is based on the Board's 2006 and 2011 findings about the different hunting areas frequented by community and individual hunters. The Board found that community hunters in the Copper Basin have "an intimate and exclusive relationship between the user and a very particular set of places generally in close proximity to the hunter's residence." Community hunters traditionally do not travel outside the Copper Basin to hunt, even when caribou and moose are hard to find.

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### Subsistence Statute

- 16.05.940(33) (Subsistence uses are the " noncommercial, **customary and traditional uses** of wild, renewable resources. .. for direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation, for the making and selling of handicraft articles out of nonedible by-products of fish and wildlife resources taken for personal or family consumption."

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### Subsistence Statute

AS 16.05.940(7) defines " customary and traditional" as " the noncommercial, long-term, and consistent taking of, use of, and reliance upon fish or game in a specific area and the use patterns of that fish or game that have been established over a reasonable period of time taking into consideration the availability of the fish or game."

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### Subsistence Statute

- (1) if the harvestable portion of the stock or population is sufficient to provide for all consumptive uses, the appropriate board
  - (A) shall adopt regulations that provide a reasonable opportunity for subsistence uses of those stocks or populations;
  - (B) shall adopt regulations that provide for other uses of those stocks or populations, subject to preferences among beneficial uses; and
  - (C) may adopt regulations to differentiate among uses;
- (2) if the harvestable portion of the stock or population is sufficient to provide for subsistence uses and some, but not all, other consumptive uses, the appropriate board
  - (A) shall adopt regulations that provide a reasonable opportunity for subsistence uses of those stocks or populations;
  - (B) may adopt regulations that provide for other consumptive uses of those stocks or populations; and
  - (C) shall adopt regulations to differentiate among consumptive uses that provide for a preference for the subsistence uses, if regulations are adopted under (B) of this paragraph;



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### Subsistence Statute

- (c) The boards may not permit subsistence hunting or fishing in a nonsubsistence area. The boards, acting jointly, shall identify by regulation the boundaries of nonsubsistence areas. A nonsubsistence area is an area or community where dependence upon subsistence is not a principal characteristic of the economy, culture, and way of life of the area or community. In determining whether dependence upon subsistence is a principal characteristic of the economy, culture, and way of life of an area or community under this subsection, the boards shall jointly consider the relative importance of subsistence in the context of the totality of the following socio-economic characteristics of the area or community:



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