

**Special Publication No. BOG 2010-01**

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# **Alaska Native Funerary Ceremonies and Hunting Regulations**

**A Report to the Alaska Board of Game, January–February 2010**

**by**

**Alaska Department of Fish and Game,  
Division of Subsistence**

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**January 2010**

**Alaska Department of Fish and Game**

**Division of Subsistence**



## Symbols and Abbreviations

The following symbols and abbreviations, and others approved for the Système International d'Unités (SI), are used without definition in the reports by the Division of Subsistence. All others, including deviations from definitions listed below, are noted in the text at first mention, as well as in the titles or footnotes of tables, and in figure or figure captions.

### Weights and measures (metric)

centimeter	cm
deciliter	dL
gram	g
hectare	ha
kilogram	kg
kilometer	km
liter	L
meter	m
milliliter	mL
millimeter	mm

### Weights and measures (English)

cubic feet per second	ft <sup>3</sup> /s
foot	ft
gallon	gal
inch	in
mile	mi
nautical mile	nmi
ounce	oz
pound	lb
quart	qt
yard	yd

### Time and temperature

day	d
degrees Celsius	°C
degrees Fahrenheit	°F
degrees kelvin	K
hour	h
minute	min
second	s

### Physics and chemistry

*all atomic symbols*

alternating current	AC
ampere	A
calorie	cal
direct current	DC
hertz	Hz
horsepower	hp
hydrogen ion activity (negative log of)	pH
parts per million	ppm
parts per thousand	ppt, ‰
volts	V
watts	W

### General

*all commonly-accepted abbreviations*  
e.g., Mr., Mrs., AM, PM, etc.

*all commonly-accepted professional titles* e.g., Dr., Ph.D., R.N., etc.

Alaska Administrative Code AAC  
at @

compass directions:

east	E
north	N
south	S
west	W

copyright ©

corporate suffixes:

Company	Co.
Corporation	Corp.
Incorporated	Inc.
Limited	Ltd.

District of Columbia D.C.

et alii (and others) et al.

et cetera (and so forth) etc.

exempli gratia (for example) e.g.

Federal Information Code FIC

id est (that is) i.e.

latitude or longitude lat. or long.

monetary symbols (U.S.) \$, ¢

months (tables and figures): first three letters (Jan.,...,Dec)

registered trademark ®

trademark ™

United States (adjective) U.S.

United States of America (noun) USA

U.S.C. United States Code

U.S. state use two-letter abbreviations (e.g., AK, WA)

### Measures (fisheries)

fork length	FL
mid-eye-to-fork	MEF
mid-eye-to-tail-fork	METF
standard length	SL
total length	TL

### Mathematics, statistics

*all standard mathematical signs, symbols and abbreviations*

alternate hypothesis	H <sub>A</sub>
base of natural logarithm	e
catch per unit effort	CPUE
coefficient of variation	CV
common test statistics (F, t, χ <sup>2</sup> , etc.)	
confidence interval	CI
correlation coefficient (multiple)	R
correlation coefficient (simple)	r
covariance	cov
degree (angular)	°
degrees of freedom	df
expected value	E
greater than	>
greater than or equal to	≥
harvest per unit effort	HPUE
less than	<
less than or equal to	≤
logarithm (natural)	ln
logarithm (base 10)	log
logarithm (specify base)	log <sub>2</sub> , etc.
minute (angular)	'
not significant	NS
null hypothesis	H <sub>0</sub>
percent	%
probability	P
probability of a type I error (rejection of the null hypothesis when true)	α
probability of a type II error (acceptance of the null hypothesis when false)	β
second (angular)	"
standard deviation	SD
standard error	SE
variance	
population	Var
sample	var

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REGULATIONS: A REPORT TO THE ALASKA BOARD OF GAME,  
JANUARY–FEBRUARY 2010**

by

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Division of Subsistence, Anchorage, Alaska

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January 2010

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## INTRODUCTION

In January 2010, the Alaska Board of Game (BOG) will consider 4 proposals that address hunting for Alaska Native religious ceremonies that are part of a funerary or mortuary cycle. These ceremonies are often referred to as “potlatches.” This report provides background for these proposals and is organized into 2 parts. Part 1 provides general background on Alaska Native funerary ceremonies and includes a chronology of BOG actions regarding this issue as well as some definitions. Part 2 is a brief description of the potlatch as practiced by Athabascan groups living in east central Alaska. This report is not intended to be a comprehensive account but rather an outline of the ceremony to orient BOG members and provide context for the discussion.

The use of wild game for funeral potlatches, memorial potlatches, and other funerary ceremonies is a longstanding practice within some Alaska Native groups, particularly Athabascan and Tlingit groups. Every year, wildlife is harvested for these ceremonies. Existing regulations accommodate specific ceremonies, such as the Koyukon Athabascan celebration of the *Nuchalawoyya* (5 AAC 92.053) or the ceremony known as “Stickdance” (5 AAC 92.055). The former is a celebration practiced only at Tanana, Alaska, and the latter is practiced at either Kaltag or Nulato. Other regulations allow for the harvest of big game for cultural or educational purposes (5 AAC 92.033, 5 AAC 92.034).

## THE PROPOSALS

Three of the proposals address the issue of ceremonial harvest of moose *Alces americanus* and other big game in nonsubsistence areas (see Appendix A for maps of nonsubsistence areas). This issue is addressed in regulation at 5 AAC 92.019, “Taking of big game for certain religious ceremonies,” which differs from the regulations mentioned above in several ways: First, it is a statewide provision; second, it is not permit based; third, it requires reporting within a specific period of time (15 days) following the ceremony; and fourth, it requires that hunters notify the Alaska Department of Fish and Game (ADF&G) prior to hunting.

1. Proposal 11, submitted by ADF&G, would remove the reference to customary and traditional use findings in 5 AAC 92.019. See *Preliminary recommendations: Board of Game proposals, January 2010* (ADF&G 2010) for a revised version of the proposal.
2. Proposal 12, submitted by the Matanuska Valley Fish & Game Advisory Committee, would allow the taking of moose only from game populations that have been identified as having customary and traditional uses. This proposal would eliminate the ceremonial harvest of moose in nonsubsistence areas.
3. Proposal 13, submitted by the Tanana Chiefs Conference, would remove the reference to customary and traditional use findings in 5 AAC 92.019.
4. Proposal 14, submitted by the Ahtna Tene Nene’ Customary and Traditional Use Committee, would establish Ahtna criteria (tribal rules) for the ceremonial harvest of big game in Game Management Units (GMUs) 13, 11, 12 and 20A. According to the proposal, the intent is to ensure that the ceremonial harvests in these GMUs are linked to traditional Ahtna ceremonies.

# **PART 1: GENERAL BACKGROUND, CHRONOLOGY, AND DEFINITIONS**

## **GENERAL ADMINISTRATIVE BACKGROUND**

In 1979, the Alaska Supreme Court determined that the First Amendment to the U.S. Constitution and Article 1, Section 4 of the Alaska Constitution provide protection for the taking of moose for use in Athabascan funeral potlatch ceremonies (*Frank v. State*, 604 P.2d 1068 1979) (Appendix B). The Alaska Constitution states “No law shall be made respecting an establishment of religion, or prohibiting the free exercise thereof” (Article I, Section 4, Freedom of Religion). The state’s constitution also mandates that “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 uses” (Article VIII, Section 4, Sustained Yield) (see Appendix C for a chronology of BOG actions).

### **1980 Board of Game Finding 80-27-GB**

In 1980, the BOG noted that in *Frank v State* the Alaska Supreme Court held that the taking of moose for use in traditional funeral potlatch ceremonies of Alaska’s Athabascan people is protected by both the state and federal constitutions. The BOG filed a letter of intent (08-27-GB, Appendix D) in which it stated:

Before meaningful regulations governing the taking of game for religious ceremony can be adopted, it would be desirable to have an authoritative study of all religious ceremonies in which game meat is used, for all Native groups and subgroups, from all communities in the state where such religious ceremonies are practiced.

The BOG concluded that it was preferable not to adopt regulations governing the taking of game for religious ceremonies until definitive guidelines could be established. The BOG also recommended that the taking of game for religious ceremony should be informally administered by the Alaska Department of Public Safety Division of Fish and Wildlife Protection. In the interim, the BOG decided, guidelines established by the court in the *Frank v. State* case provided sufficient direction for the Division of Fish and Wildlife Protection and ADF&G to allow the taking of game for religious purposes.

Based upon this letter of intent, the BOG subsequently adopted in regulation 5 AAC 92.015 [1980 numbering], “Funeral potlatch report.” This regulation provided that "... any person who takes a moose for a funeral potlatch as authorized by *Frank v. State* 604 P.2d 1068 (Alaska 1979) shall, as soon as practicable, and not later than 15 days after the taking of the moose, submit a report to the Alaska Department of Fish and Game, P.O. Box 3-2000, Juneau, Alaska 99802, or the nearest office of the department, specifying the name and address of the person taking the moose, the date and location of take, and the name of the decedent for whom the potlatch was held." This regulation remained in effect until 1996, when it was substantially revised based on input by affected parties, the public, and ADF&G.

In 1995, the ADF&G commissioner advanced an initiative that explored regulations on the taking of wildlife for use in Alaska Native religious ceremonies. This was in response to an effort by the Tanana Chiefs Conference to amend the federal Native American Religious Freedom Act.



## 1996 Board of Game Finding 96-98-BOG

In 1996, the BOG determined that protections for the use of moose in Athabascan funeral potlatch ceremonies should be extended to other big game animals used as food (Appendix E), and extended to all Alaskan residents for use in Alaska Native funerary and mortuary ceremonies. The BOG also adopted regulations that provided for a harvest report due after the ceremony.

## 2002 Board of Game Actions

In 2002, the BOG added a requirement to 5 AAC 92.019, “Taking of big game for certain religious ceremonies,” for **prior notification** when taking game for religious ceremonies. In addition, the BOG also established the Koyukon Potlatch Ceremony regulation (5 AAC 92.017), which does not require prior notification. The BOG directed ADF&G to publicize the game populations for which the taking of a big game animal would be inconsistent with sustained yield principals. The BOG also added a reference to 5 AAC 99.025, “Customary and traditional uses of game populations” to 5 AAC 92.019, as well as the requirement of a positive customary and traditional finding before a species could be taken for religious ceremonies.

## Current Regulations

Currently there are 4 regulations governing the taking of big game for religious ceremonies. Two do not require a permit:

- **5 AAC 92.019 Taking of big game for certain religious ceremonies** (Eff. 8/8/87, Register 103; am 6/28/96, Register 138; am 7/1/2002, Register 162; am 7/1/2003, Register 166).).
- **5 AAC 92.017 Koyukon Potlatch Ceremony** (Eff. 7/1/2003, Register 166).

Permits are required for the following ceremonies:

- **5 AAC 92.053 Permit to take moose for Nuchalawoyya Potlatch.** This regulation provides for a permit for up to 3 moose per regulatory year for this potlatch ceremony practiced only in Tanana (Eff. 6/14/89, Register 110; am 8/10/91, Register 119; readopt 5/13/93, Register 126).
- **5 AAC 92.055 Stickdance permit,** which provides for up to 3 moose per regulatory year for this ceremony which is held alternatively in either Kaltag or Nulato, with a year between each ceremony (Eff. 10/27/90, Register 116; am 8/10/91, Register 119).

It should be noted that in addition to *Frank v. State* there have been other legal challenges to the taking of moose for potlatches. In 1985, the Tanana Chiefs Conference brought suit against the State of Alaska to challenge the ban on hunting moose out of season for memorial potlatches. In 1989, a federal court ruled that the taking of moose for memorial potlatches is a religious freedom protected under the First Amendment. This decision was subsequently overturned on appeal and it continues to be illegal to take moose out of season for memorial potlatches.

Similarly, legal sanction of taking moose for the *Nuchalawoyya* potlatch also began in court (cf. *Native Village of Tanana v. Cowper*, U.S. Court of Appeals, Ninth Circuit, No. 90-35454, W. 945 F2d 409). After an agreement by both parties to dismiss the case and provide the BOG the opportunity to develop appropriate regulations, the BOG adopted 5 AAC 92.055 in response to a

1989 proposal These regulations allow for the taking of up to 3 moose for the ceremony known as *Nuchalawoyya*.

While not based on a legal challenge, regulations providing for the taking of up to 3 moose per regulatory year for the potlatch ceremony known as Stickdance were adopted in 1990.

## **DEFINITIONS**

The ADF&G Division of Subsistence offers the following definitions, as found in the *American Heritage Dictionary* (American Heritage Dictionary 2004 [Dell reissue edition]). In all cases, the primary definition is presented here.

Ceremony – A formal act performed as prescribed by ritual, custom, or etiquette.

Rite – The prescribed form for conducting a religious or other solemn ceremony.

Ritual –The prescribed form of a ceremony (*note*: the fourth definition offered is “A customary or regular procedure”).

Religion – Belief in and reverence for a supernatural power or powers regarded as a creator or governor of the universe.

The division suggests that religious ceremonies, potlatches, or rituals might be defined as “sacred, set apart, and formal sets of rites with religious expressions established by custom or authority within a group, distinguished from the ordinary day-to-day taking of wild fish and game by families for food.”

## **ALASKA NATIVE FUNERARY CEREMONIES**

There are several types of Alaska Native funerary ceremonies in Alaska. The terms “funerary” and “mortuary” are used interchangeably in the literature, and refer to ceremonies connected with the death or burial of a person, or the commemoration of a deceased person. Types of formalized funerary ceremonies practiced in Alaska Native communities include, but are not limited to:

- Funeral potlatches,
- 20-day feasts,
- 40-day feasts,
- Memorial potlatches, and
- Pay-off potlatches.

## **Principal Alaska Native Groups with Formal Funerary Ceremonies**

Figure 1 presents a map of groups by language area.

Athabascan

Ahtna

Dena’ina or Tanaina

Deg Hit’an and Holikachuk

Han

Gwich'in  
 Koyukon  
 Tanana  
 Upper Kuskokwim  
 Upper Tanana  
 Tanacross  
  
 Eyak  
 Tlingit  
 Haida  
 Tsimshian  
 Yup'ik (in the Middle Kuskokwim River–Lower Yukon River area)



Figure 1.–Map of Alaska Native language groups.

The funeral potlatch is usually held shortly after the death of a family member. Funeral potlatches are generally unanticipated events. A central feature of the ceremony is the immediate and proper treatment of the remains of the deceased.

The other types of funerary ceremonies listed above represent a second ceremony held after a period of time after the death of a family member. These ceremonies often complete the funeral cycle of special observances. Many participants have reported that they believe that the spirit of the deceased completes the transition from the living to the spiritual world through these ceremonies, which have several names, including “memorial potlatch,” “20-day” feast or potlatch, “40-day” feast or potlatch, and “pay-off” potlatch, feast, or party. Their observance may be after a specified period of grieving, such as the 20-day or 40-day feast, or it may be related to the status of the person—more time may be needed to prepare for the final commemoration of important persons. People who have supported the immediate family through the time of their loss receive formal thanks and recompense. The rift in the community created by the death of an individual is made whole again.

## **PART 2: THE ATHABASCAN POTLATCH AS PRACTICED IN EAST CENTRAL ALASKA**

The potlatch is a religious and social event of unparalleled significance in Athabascan culture. The word “potlatch” refers to a ritualized distribution of gifts and food.<sup>1</sup>

Wild foods are vital element of the potlatch. Moose-head soup is often the culinary centerpiece, but every kind of wild food is served, including various species of ducks, geese, whitefishes, salmon, sheep, caribou, beavers, muskrats, bears, and berries.

For centuries, Alaska Natives have sustained themselves on wild foods, and these foods continue to play an important role in the contemporary economy and culture. Most Alaska Native cultures hold that meat is the source of human life; thus, animals and fish are treated with great respect. According to one Athabascan elder, game was “put on this earth by God to feed Native people.” She went on to say that when she was growing up, people “lived by the land,” and that her parents worked hard to get food, which was why she still cared about the animals. In most traditional Alaska Native cultures, hunting requires a strict code of ethics, which one Athabascan elder characterized as “kind of like the Bible.” Another elder expressed it this way:

[I]f we don't treat the animal right, that's been taught to us, we will not get so easy the animals...if we don't treat the animal right, anything right, you will never get animals no more...

The traditional rules governing hunting are strict: many preclude hunters, for example, from announcing their intention to hunt or even from referring to animals by name.

Some traditional rules relate to the correct treatment of humans, and it is in this arena that food has become woven into the social fabric that binds humans together for survival. The sharing of food is a cardinal virtue in Athabascan culture, as it is in most Alaska Native cultures. Tradition says that successful hunters should share moose or caribou meat with the entire community. People raised in this tradition learn the importance of sharing at early age. After a child harvests his or her first wild game animal, he or she is expected to give all of the meat to elders.

Wild foods are also shared at potlatches, which can be given for many reasons, the most important of which among the Athabascan are to bury and memorialize the dead. A funeral

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<sup>1</sup> Such distributions occur in almost every Alaskan Native culture but the information presented here pertains specifically to Athabascan cultures of east central Alaska. This information is from an ADF&G Division of Subsistence Resource Specialist's personal attendance at Athabascan potlatches from the early 1970s to the present, and from research conducted for his doctoral degree in anthropology.

potlatch is always held immediately following a funeral and the memorial potlatch is usually held within one year of the funeral. Both funeral and memorial potlatches are often attended by hundreds of people. Funeral or memorial potlatches held in the upper Tanana River and Copper River areas often draw guests from as far as Whitehorse, Nenana, Minto, Eagle, Anchorage, and Fairbanks.

The sequence of events for a funeral or memorial potlatch follows a prescribed pattern that includes feasting, oratory, singing, dancing, and a distribution of gifts. When a member of the community dies, the decedent's family, who are the potlatch hosts, announce the death, then people gather to console the grieving relatives. Hunters are designated by the grieving family to harvest moose or caribou. Meanwhile, the host family gathers additional food, gifts, and money necessary to hold the event. In addition to the fresh meat, there is often fish, waterfowl, an assortment of small game, and berries. The potlatch hosts are expected to feed all of the guests 3 times per day for each day of the event.

Both funeral and memorial potlatches usually last 3 days, and are often held during a weekend so as to accommodate the 5-day work week and to give more people the opportunity to attend. A memorial potlatch is similar to the funeral potlatch, but because it is a planned event, memorial potlatches are often much larger in terms of the amount of food and gifts distributed.

Feasts are held every night and all of the food prepared that day is served. Most wild foods are prepared outdoors, by the men. This relates to traditional rules associated with the harvesting and processing of large animals, where it is considered bad luck for young women to handle fresh meat. Moose meat is cut up and boiled in large, industrial sized pots, although some of the meat may be fried outdoors and served at lunches. The meat from the head, including the nose and the tongue, is made into a soup. Fish are fried or boiled, a rich soup is made from ducks, beavers are baked or roasted, and muskrats are boiled or roasted. Any leftovers are distributed to the guests: no food is retained by the hosts.

After the food is prepared, it is brought to the community hall. A large pot of moose-head soup is usually placed on the floor, near a long table on which the other food has been placed. Aisle-wide rolls of paper are laid, like carpet runners, on the floor between the rows of guests, and utensils and plates are distributed. Servers walk the aisles between the guests and serve boiled moose meat from cardboard boxes, berries in Styrofoam cups, and hot tea from steaming pots. Food is often piled high on plates so guests can take it home to eat later. In fact, aluminum foil is often distributed at the end of the feast so that guests can wrap their food. Five-pound coffee cans of moose-head soup are handed out to all of the elders present.

Once the feast is over, the ceremony continues. On the first and second night there are speeches, usually eulogies for the deceased, followed by dancing and singing. On the third and final night, there is the feast, followed by dancing and singing and then a distribution of gifts, which includes blankets, rifles, beadwork, and money, which the guests use to purchase fuel for their trip home.

One purpose of the potlatch is to help the relatives of the decedent grieve; another is to assist the decedent in making the transition from the living to the spiritual world. One way to assist in this transition is for the potlatch host to feed the spirit of the decedent by throwing bits of food into the fire, another is to show respect for the decedent by sharing large amounts of food with the potlatch guests.

Traditionally the decedent's blood relatives are forbidden to handle the corpse: that is the responsibility of the decedent's in-laws. They are responsible for taking care of all the funeral arrangements, including digging the grave, building the coffin and grave fence, and performing the burial. This must all be done very carefully in order to show proper respect for the deceased. In addition, all of the potlatch guests are invited to share the burden of grief with the decedent's blood relatives. To repay their in-laws and all of those who attended the funeral and potlatch the decedent's relatives shower the guests with food and gifts. The blankets given away in the potlatch symbolize warmth and affection while the rifles symbolize the ability to feed oneself.

Within a year after the death and funeral, a memorial potlatch must be held. This is similar to the funeral potlatch, but because it is a planned event, memorial potlatches are often much larger in terms of the amount of food and gifts distributed.

Funerary/mortuary rituals are part of the religious tradition of many Alaska Natives. Most of the published information about these ceremonies was collected in the early 20<sup>th</sup> century, and contemporary ceremonies are generally not well documented. The information about contemporary Athabascan potlatches presented in this report was offered to illustrate a specific funerary/mortuary tradition especially related to the uses of wild foods. In summary, funeral and memorial potlatches are events of unparallel significance in the spiritual and social life of the Athabascan people of east central Alaska. Wild foods are vital elements of these ceremonies, which follow a rich tradition of preparing and sharing these foods.

## **REFERENCES CITED**

- American Heritage Dictionary. 2004 [Dell reissue edition]. 4<sup>th</sup> edition. J. P. Pickett, editor. Bantam Dell, New York.
- ADF&G (Alaska Department of Fish and Game). 2010. Preliminary recommendations: Board of Game proposals, January 2010. Alaska Department of Fish and Game Division of Wildlife Conservation, [Juneau]. <http://www.boards.adfg.state.ak.us/gameinfo/meetinfo/2009-2010/statewide09/Dept-AR-sw10pdf.pdf>

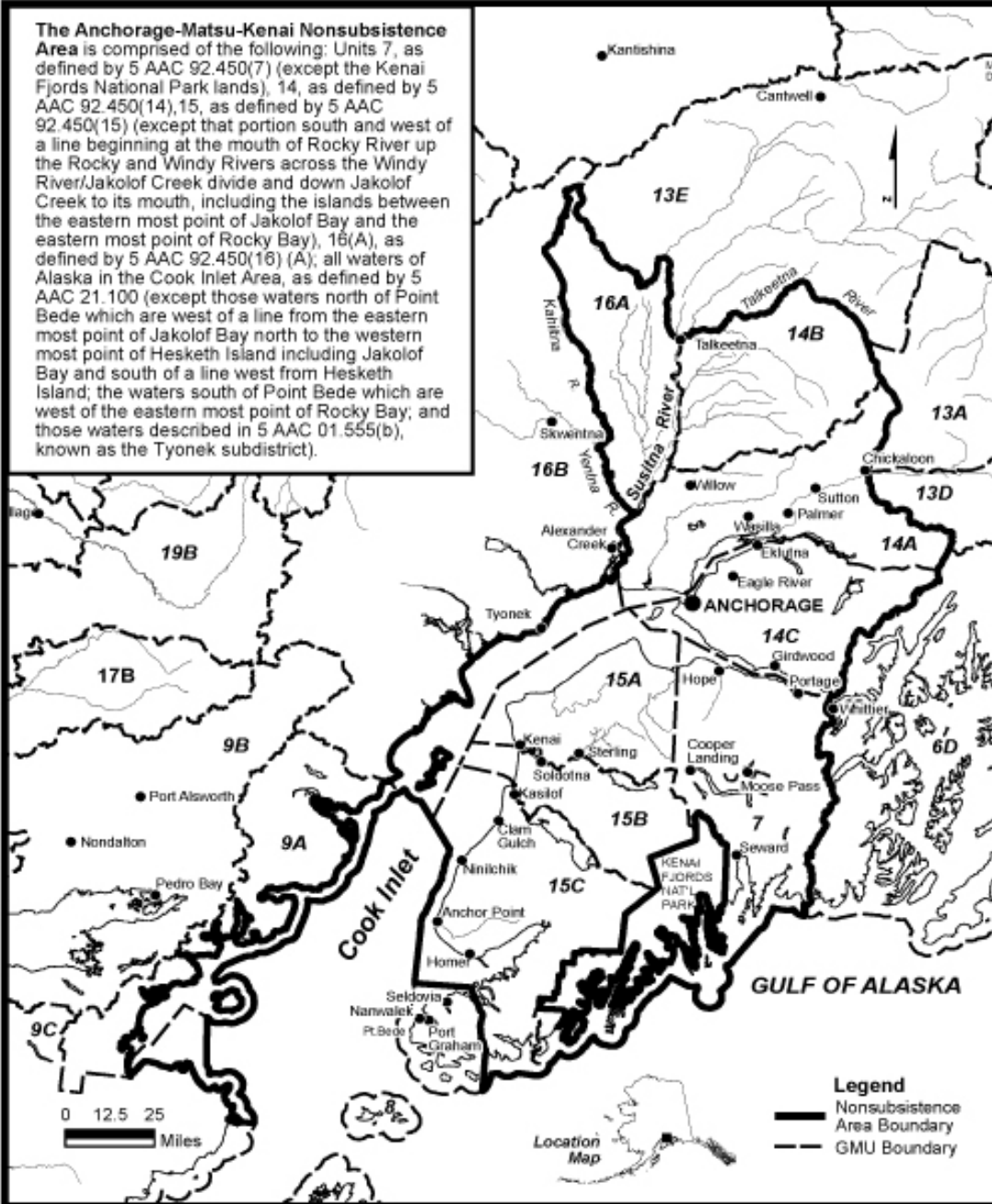
## **APPENDIX A: MAPS OF NONSUBSISTENCE AREAS**





# Anchorage Nonsubsistence Area

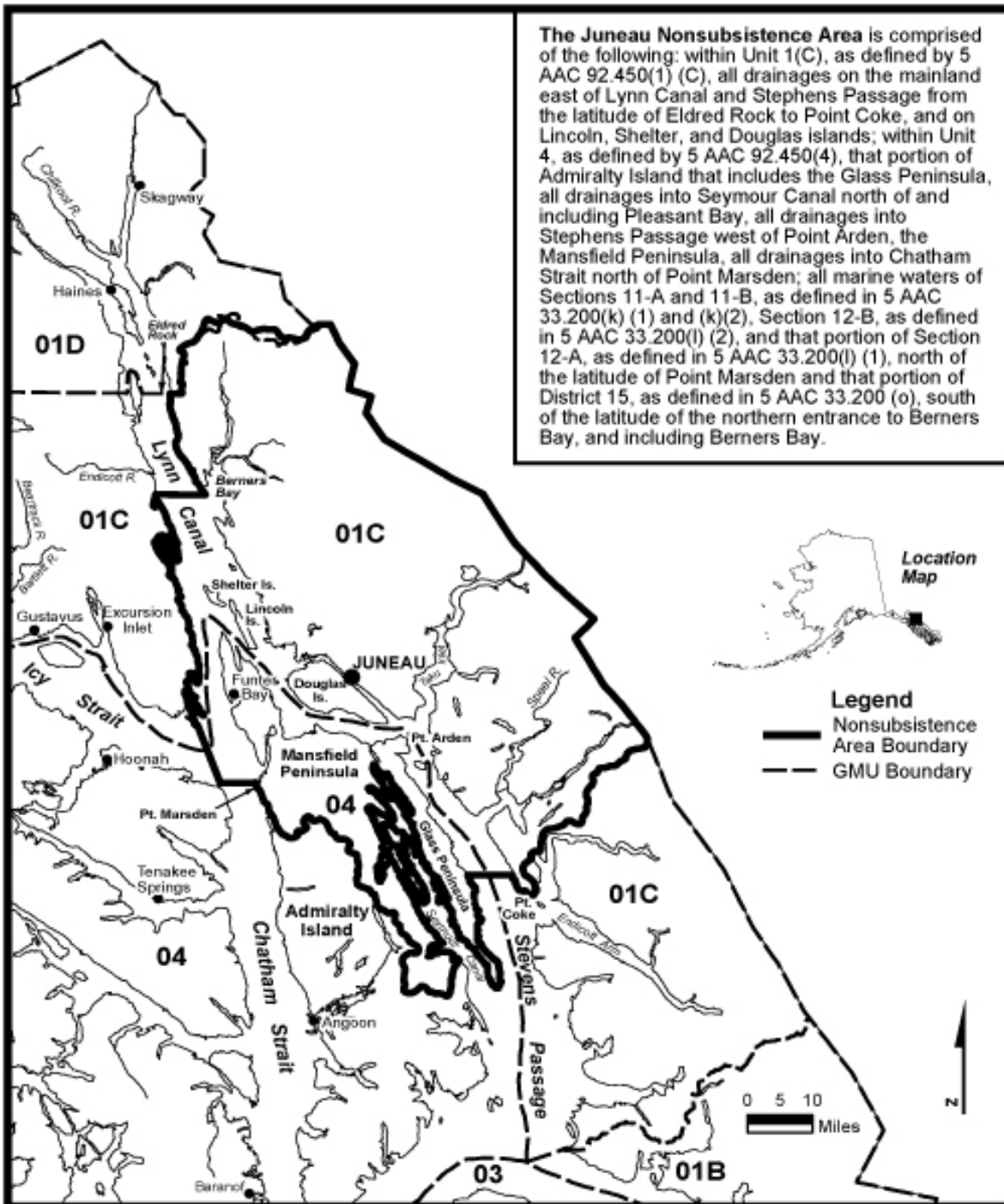
The Anchorage-Matsu-Kenai Nonsubsistence Area is comprised of the following: Units 7, as defined by 5 AAC 92.450(7) (except the Kenai Fjords National Park lands), 14, as defined by 5 AAC 92.450(14), 15, as defined by 5 AAC 92.450(15) (except that portion south and west of a line beginning at the mouth of Rocky River up the Rocky and Windy Rivers across the Windy River/Jakolof Creek divide and down Jakolof Creek to its mouth, including the islands between the eastern most point of Jakolof Bay and the eastern most point of Rocky Bay), 16(A), as defined by 5 AAC 92.450(16) (A); all waters of Alaska in the Cook Inlet Area, as defined by 5 AAC 21.100 (except those waters north of Point Bede which are west of a line from the eastern most point of Jakolof Bay north to the western most point of Hesketh Island including Jakolof Bay and south of a line west from Hesketh Island; the waters south of Point Bede which are west of the eastern most point of Rocky Bay; and those waters described in 5 AAC 01.555(b), known as the Tyonek subdistrict).



Alaska Department of Fish and Game  
Division of Subsistence and Boards

September 2007

# Juneau Nonsubsistence Area



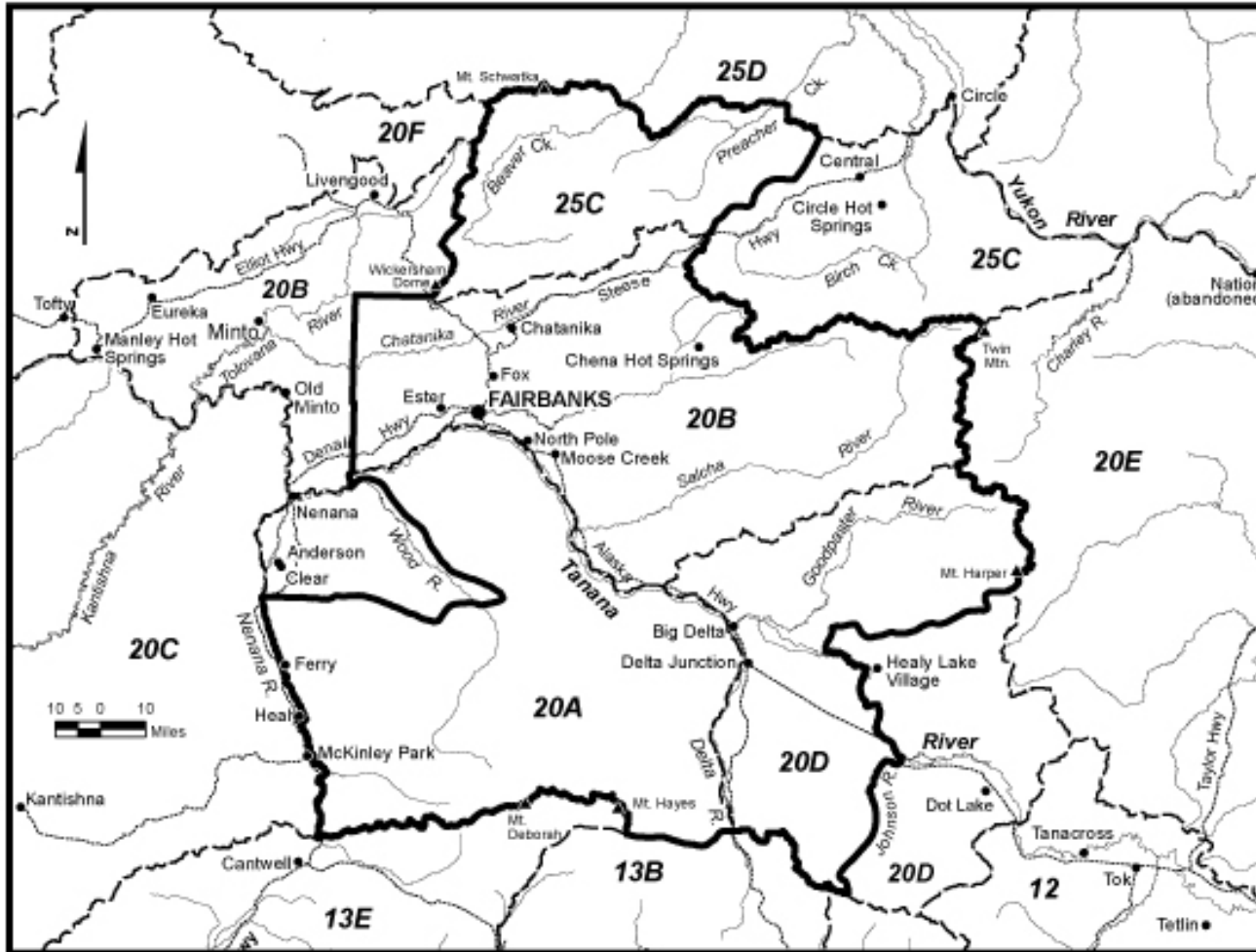
The Juneau Nonsubsistence Area is comprised of the following: within Unit 1(C), as defined by 5 AAC 92.450(1) (C), all drainages on the mainland east of Lynn Canal and Stephens Passage from the latitude of Eldred Rock to Point Coke, and on Lincoln, Shelter, and Douglas islands; within Unit 4, as defined by 5 AAC 92.450(4), that portion of Admiralty Island that includes the Glass Peninsula, all drainages into Seymour Canal north of and including Pleasant Bay, all drainages into Stephens Passage west of Point Arden, the Mansfield Peninsula, all drainages into Chatham Strait north of Point Marsden; all marine waters of Sections 11-A and 11-B, as defined in 5 AAC 33.200(k) (1) and (k)(2), Section 12-B, as defined in 5 AAC 33.200(l) (2), and that portion of Section 12-A, as defined in 5 AAC 33.200(l) (1), north of the latitude of Point Marsden and that portion of District 15, as defined in 5 AAC 33.200 (o), south of the latitude of the northern entrance to Berners Bay, and including Berners Bay.



Alaska Department of Fish and Game  
Division of Subsistence and Boards

September 2007

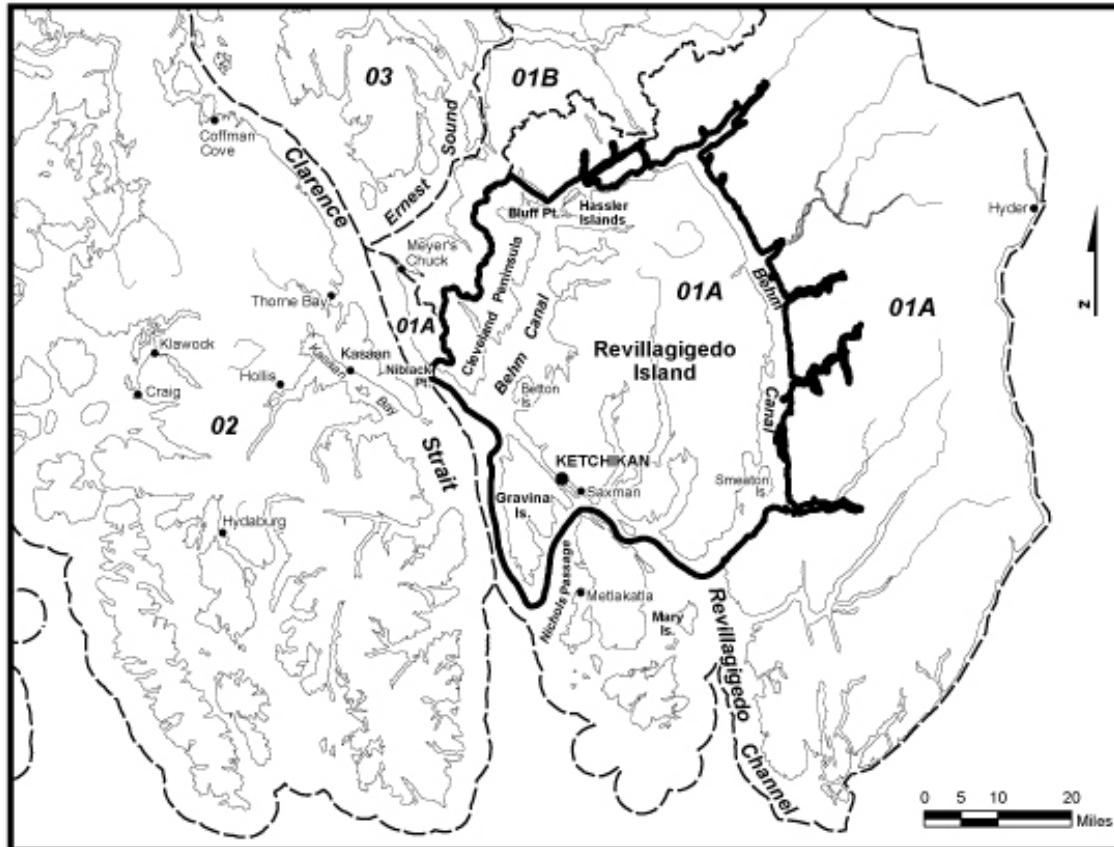
# Fairbanks Nonsubsistence Area



The Fairbanks Nonsubsistence Area is comprised of the following: within Unit 20(A), as defined by 5 AAC 92.450(20) (A), east of the Wood River drainage and south of the Rex Trail but including the upper Wood River drainage south of its confluence with Chicken Creek; within Unit 20(B), as defined by 5 AAC 92.450(20) (B), the North Star Borough and that portion of the Washington Creek drainage east of the Elliot Highway; within Unit 20(D) as defined by 5 AAC 92.450(20) (D), west of the Tanana River between its confluence with the Johnson and Delta Rivers, west of the east bank of the Johnson River, and north and west of the Volkmar drainage, including the Goodpaster River drainage; and within Unit 25(C), as defined by 5 AAC 92.450(25) (C), the Preacher and Beaver Creek drainages.



## Ketchikan Nonsubsistence Area



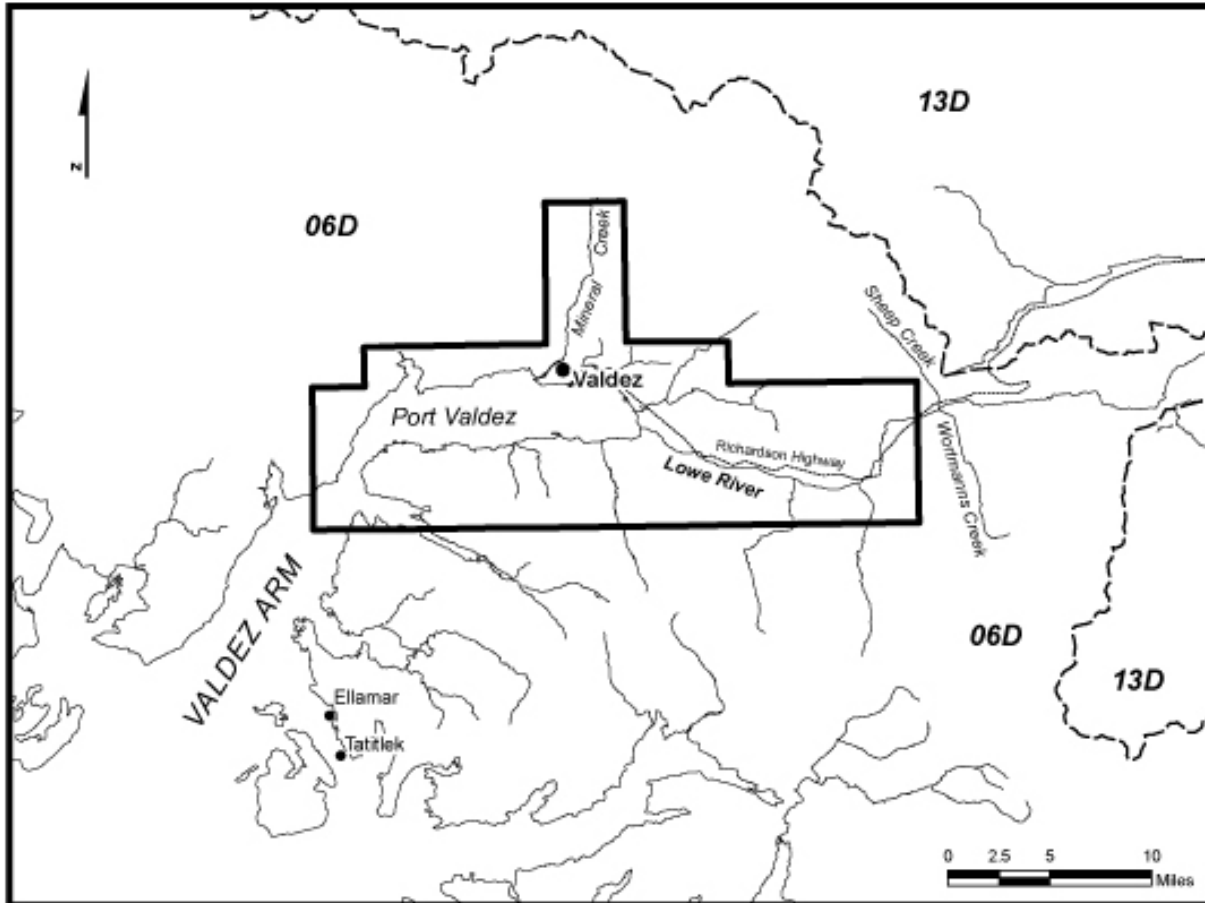
The Ketchikan Nonsubsistence Area is comprised of the following: within Unit 1(A), as defined in 5 AAC 92.450(1) (A), all drainages of the Cleveland Peninsula between Niblack Point and Bluff Point, Revillagigedo, Gravina, Pennock, Smeaton, Bold, Betton, and Hassler Islands; all marine waters of Sections 1-C, as defined by 5 AAC 33.200(a) (3), 1-D, as defined by 5 AAC 33.200(a) (4), 1-E, as defined by 5 AAC 33.200(a) (5), that portion of Section 1-F, as defined by 5 AAC 33.200(a) (6), north of the latitude of the southernmost tip of Mary Island and within one mile of the mainland and the Gravina and Revillagigedo Island shorelines; and that portion of District 2, as defined by 5 AAC 33.200(b), within one mile of the Cleveland Peninsula shoreline and east of the longitude of Niblack Point.



**Legend**  
 — Nonsubsistence Area Boundary  
 - - - GMU Boundary



# Valdez Nonsubsistence Area



The Valdez Nonsubsistence Area is comprised of the following: within Unit 6(D), as defined by 5 AAC 92.450(6) (D), and all waters of Alaska in the Prince William Sound Area as defined by 5 AAC 24.100, within the March 1993 Valdez City limits.



## Legend

- Nonsubsistence Area Boundary
- - - GMU Boundary
- ..... Roads





**APPENDIX B: *FRANK V. STATE***





604 P.2d 1068

(Cite as: 604 P.2d 1068)

Supreme Court of Alaska.  
 Carlos FRANK, Appellant,  
 v.  
 STATE of Alaska, Appellee.  
 No. 3689.

Dec. 21, 1979.

Defendant was convicted in the District Court, Fourth Judicial District, Monroe Clayton, J., of unlawful transportation of game, a moose, illegally taken and he appealed. The Superior Court, Fourth Judicial District, Fairbanks, Gerald J. Van Hoomissen, J., affirmed and defendant appealed. The Supreme Court, Matthews, J., held that: (1) evidence established that use of moose meat at religious funeral ceremony was a practice deeply rooted in defendant's religion and that defendant was sincere in his religious beliefs, and (2) State did not meet its burden of proving a compelling state interest which would justify curtailing the religiously based practice.

Judgment reversed and case remanded with instructions to dismiss complaint.

Connor, J., dissented and filed opinion.

West Headnotes

**[1] Constitutional Law 92 ⇨ 1304**

92 Constitutional Law  
 92XIII Freedom of Religion and Conscience  
 92XIII(A) In General  
 92k1302 Free Exercise of Religion  
 92k1304 k. Freedom to Believe. Most Cited Cases  
 (Formerly 92k84.1, 92k84(1), 92k84)  
 Freedom to believe is protected absolutely by United States and Alaska Constitutions which prohibit laws restricting free exercise of religion. Const. art. 1, § 4; U.S.C.A.Const. Amend. 1.

**[2] Constitutional Law 92 ⇨ 1290**

92 Constitutional Law  
 92XIII Freedom of Religion and Conscience  
 92XIII(A) In General  
 92k1290 k. In General. Most Cited Cases  
 (Formerly 92k84.1, 92k84(1), 92k84)  
 Freedom to act on one's religious beliefs is protected, but such protection may be overcome by compelling state interest. Const. art. 1, § 4; U.S.C.A. Amend. 1.

**[3] Constitutional Law 92 ⇨ 1290**

92 Constitutional Law  
 92XIII Freedom of Religion and Conscience  
 92XIII(A) In General  
 92k1290 k. In General. Most Cited Cases  
 (Formerly 92k84.1, 92k84(1), 92k84)  
 Religiously impelled actions can be forbidden only where they pose some substantial threat to public safety, peace or order, or where there are competing governmental interests that are of the highest order and are not otherwise served. Const. art. 1, § 4; U.S.C.A.Const. Amend. 1.

**[4] Constitutional Law 92 ⇨ 1305**

92 Constitutional Law  
 92XIII Freedom of Religion and Conscience  
 92XIII(A) In General  
 92k1302 Free Exercise of Religion  
 92k1305 k. Beliefs Protected; Inquiry Into Beliefs. Most Cited Cases  
 (Formerly 92k84.2, 92k84(2), 92k84)  
 Free exercise clause may be invoked only where there is religion involved, where conduct in question is religiously based and where claimant is sincere. Const. art. 1, § 4; U.S.C.A.Const. Amend. 1.

**[5] Constitutional Law 92 ⇨ 1305**

92 Constitutional Law  
 92XIII Freedom of Religion and Conscience  
 92XIII(A) In General

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92k1302 Free Exercise of Religion

92k1305 k. Beliefs Protected; Inquiry

Into Beliefs. Most Cited Cases

(Formerly 92k84.2, 92k84(2), 92k84)

For religious practice to be within ambit of free exercise clause, it is not required that it be absolutely essential to religion and it is sufficient that the practice be deeply rooted in religious belief. Const. art. 1, § 4; U.S.C.A.Const. Amend. 1.

**[6] Game 187 ↻9**

187 Game

187k9 k. Criminal Prosecutions. Most Cited

Cases

In prosecution for unlawful transportation of game, a moose, illegally taken, wherein defendant contended that the moose had been shot for use in religious funeral ceremony, evidence established that use of moose meat at the ceremony was a practice deeply rooted in defendant's religion and that defendant was sincere in his religious beliefs. Const. art. 1, § 4; U.S.C.A.Const. Amend. 1.

**[7] Constitutional Law 92 ↻1290**

92 Constitutional Law

92XIII Freedom of Religion and Conscience

92XIII(A) In General

92k1290 k. In General. Most Cited Cases

(Formerly 92k84.1, 92k84(1), 92k84)

State has burden of demonstrating a compelling state interest to justify curtailing a religiously based practice. Const. art. 1, § 4; U.S.C.A.Const. Amend. 1.

**[8] Game 187 ↻9**

187 Game

187k9 k. Criminal Prosecutions. Most Cited

Cases

In prosecution for unlawful transportation of game illegally taken, wherein defendants established that the game had been taken for use in religious ceremony, State did not meet its burden of proving a compelling state interest which would justify cur-

tailoring the religiously based practice. Const. art. 1, § 4; U.S.C.A.Const. Amend. 1.

**[9] Constitutional Law 92 ↻1311**

92 Constitutional Law

92XIII Freedom of Religion and Conscience

92XIII(B) Particular Issues and Applications

92k1311 k. Indians in General. Most

Cited Cases

(Formerly 92k84.5(19), 92k84)

Accommodating religious beliefs of Indians by permitting killing of moose out of season for funeral ceremonies will not violate the establishment of religion clauses of United States and State Constitutions, since purpose of accommodation is merely to permit observance of ancient traditions of Indians and, as such, the exemption reflects nothing more than governmental obligation of neutrality in face of religious differences and does not represent involvement of religious with secular institutions. Const. art. 1, § 4; U.S.C.A.Const. Amend. 1.

**[10] Constitutional Law 92 ↻1292**

92 Constitutional Law

92XIII Freedom of Religion and Conscience

92XIII(A) In General

92k1292 k. Beliefs Protected; Inquiry Into

Beliefs. Most Cited Cases

(Formerly 92k84.2, 92k84(2), 92k84)

There can be no judicial examination of truth of religious belief, but whether religious belief is sincerely held is proper subject of adjudication. Const. art. 1, § 4; U.S.C.A.Const. Amend. 1.

**\*1069** R. Collin Middleton, Robert H. Wagstaff, Wagstaff & Middleton, Anchorage, for appellant.

Geoffrey Haynes, Asst. Atty. Gen., Avrum M. Gross, Atty. Gen., Juneau, for appellee.

Before RABINOWITZ, C. J., and CONNOR, BOOCHEVER, BURKE and MATTHEWS, JJ.

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(Cite as: 604 P.2d 1068)

## OPINION

MATTHEWS, Justice.

In October of 1975, Delnor Charlie, a young man from Minto, died. Immediately preparations were made for a ritual that had been performed countless times in Minto and other Central Alaska Athabascan villages. It is called the funeral potlatch, a ceremony of several days' duration culminating in a feast, eaten after burial of the deceased, which is shared by members of the village and others who come from sometimes distant locations.

Delnor Charlie's burial, as is traditional, was delayed until friends and relatives living elsewhere could reach Minto and until the foods necessary for the potlatch could be prepared. With the food preparation under way, Carlos Frank and twenty-five to thirty other men from the village formed several hunting parties for the purpose of taking a moose. It was their belief that there was insufficient moose meat available for a proper potlatch. One cow moose was shot, which Frank assisted in transporting to Minto. Some 200 to 250 people attended the final feast.

A passerby took note of one of the hunting parties and reported it to state officials, who investigated and subsequently charged Frank with unlawful transportation of game illegally taken, in violation of 5 AAC 81.140(b). [FN1] The season for moose hunting was closed and in any event there was no open season for cow moose in 1975. 5 AAC s 81.320 (Register 54 at 5-136, July 1975).

FN1. 5 AAC 81.140(b) states:

No person may possess or transport any game or parts of game illegally taken.

In the district court Frank admitted transporting the moose. He raised the defense that application of the game regulation to him, under the circumstances, amounted to an abridgment of his freedom of religion. After an extensive evidentiary hearing, Judge Clayton found that "the funeral potlatch is an integ-

ral part of the cultural religious belief of the central Alaska Athabascan Indian." He found further "that moose is an integral part of the diet and 'the staff of life' to these Athabascan Indians;" that the food for such a potlatch "is primarily required to be native food;" that moose is "more desirable" for such a celebration than any other native food; but that it is not "specifically required for this ceremonial occasion however desirable it may be." Judge Clayton thus concluded that Frank had not been denied his religious privileges. Frank was thereupon convicted and sentenced to a forty-five day jail term with thirty days suspended, a \$500 fine with \$250 suspended, one year probation, and a suspension of his hunting license for one year. Judge Clayton noted at sentencing that Frank was sincere in his beliefs and it was these beliefs which had carried him into a criminal violation.

On appeal Superior Court Judge Van Hoomissen also determined "that the potlatch is an activity rooted in religious belief and a very integral part of the religious \*1070 tenets of the Athabascan Indian. . . . The sincerity of the natives of Minto in their religious beliefs is not doubted." However, he agreed with Judge Clayton that fresh moose meat was not such an "absolute necessity . . . as to override the compelling state interest of the State of Alaska in the management and control of its game for the benefit of all its people, native and white," and affirmed the conviction.

We have concluded that the free exercise clauses of the first amendment to the United States Constitution,[FN2] and article I, section 4 of the Alaska Constitution,[FN3] protect Frank's conduct and that the state has not demonstrated reasons which justify prohibiting it. We therefore reverse the conviction. Our reasons follow.

FN2. U.S.Const. amend. I states in part:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.

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FN3. Art. I, s 4 states:

No law shall be made respecting an establishment of religion, or prohibiting the free exercise thereof.

I

[1][2][3] No value has a higher place in our constitutional system of government than that of religious freedom. The freedom to believe is protected absolutely. *Cantwell v. Connecticut*, 310 U.S. 296, 303, 60 S.Ct. 900, 903, 84 L.Ed. 1213, 1218 (1940). The freedom to act on one's religious beliefs is also protected, but such protection may be overcome by compelling state interests. *Sherbert v. Verner*, 374 U.S. 398, 406, 83 S.Ct. 1790, 1795, 10 L.Ed.2d 965, 972 (1963). [FN4] A law imposing criminal or other penalties on the performance of acts which conscience compels, pressures the underlying beliefs and infringes to that extent the freedom to believe. As one commentator has stated:

FN4. Mr. Justice Brennan has recently questioned whether a sharp distinction can be made between religious beliefs and practices, quoting from Oliver Cromwell's directive regarding religious liberty for Catholics in Ireland:

As to freedom of conscience, I meddle with no man's conscience; but if you mean by that, liberty to celebrate the Mass, I would have you understand that in no place where the power of the Parliament of England prevails shall that be permitted.

*McDaniel v. Paty*, 435 U.S. 618, 631 n. 2, 98 S.Ct. 1322, 1330 n. 2, 55 L.Ed.2d 593, 604 n. 2 (1978) (concurring opinion) (citation omitted). See also L. Tribe, *American Constitutional Law* 79-80 (Supp.1979).

The violation of a man's religion or conscience often works an exceptional harm to him which, unless

justified by the most stringent social needs, constitutes a moral wrong in and of itself, far more than would the impairment of his freedoms of speech, press or assembly. The argument is not merely that avoiding compulsion of a man's conscience produces the greatest good for the greatest number, but that such compulsion is itself unfair to the individual concerned. The moral condemnation implicit in the threat of criminal sanctions is likely to be very painful to one motivated by belief. Furthermore, the cost to a principled individual of failing to do his moral duty is generally severe, in terms of supernatural sanction or the loss of moral self-respect. In the face of these costs, the individual's refusal to obey the law may be inevitable, and therefore in some perhaps unusual sense of the word, involuntary.

J. Clark, *Guidelines for the Free Exercise Clause*, 83 *Harv.L.Rev.* 327, 337 (1969). Because of the close relationship between conduct and belief and because of the high value we assign to religious beliefs, religiously impelled actions can be forbidden only where they pose "some substantial threat to public safety, peace or order," *Sherbert v. Verner*, 374 U.S. 398, 403, 83 S.Ct. 1790, 1793, 10 L.Ed.2d 965, 970 (1963), or where there are competing governmental interests that are "of the highest order and . . . (are) not otherwise served . . ." *Wisconsin v. Yoder*, 406 U.S. 205, 215, 92 S.Ct. 1526, 1533, 32 L.Ed.2d 15 (1972).

It has been clear at least since *Sherbert v. Verner* that in certain cases the free exercise clause requires government to accommodate religious practices by creating exemptions from general laws. *Sherbert* was \*1071 fired because she would not work on Saturday, the sabbath of her religion. Her claim for unemployment compensation was denied in the state courts because there was a condition of eligibility that a worker be available for work Monday through Saturday. The Supreme Court held that the state had a duty to make an exception to this policy so that *Sherbert's* exercise of her religion would not be penalized. 374 U.S. at 406, 83 S.Ct. at 1795, 10 L.Ed.2d at 971.

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Sherbert was followed in *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972). In *Yoder* there was involved a conflict between respondents' belief, rooted in the religion of the old order Amish, that children should not attend public school beyond the eighth grade, and a Wisconsin statute requiring all children to attend public schools through the age of sixteen. The court held that an exemption must be granted. *Id.* at 236, 92 S.Ct. at 1543, 32 L.Ed.2d at 37. Other courts, following *Sherbert*, have also required exceptions to facially neutral laws in order to protect religiously based conduct.[FN5]

FN5. See, e. g., *In re Jenison*, 375 U.S. 14, 84 S.Ct. 63, 11 L.Ed.2d 39 (Per curiam ) (state court decision vacated and remanded in light of *Sherbert* ), *On remand*, 267 Minn. 136, 125 N.W.2d 588 (Minn.1963) (exemption from jury duty required to accommodate religious belief); *Native Amer. Ch. of New York v. United States*, 468 F.Supp. 1247 (S.D.N.Y.1979) (exemption for religious use of peyote available to any bona fide religious organization); *Michaelson ex rel. Lewis v. Booth*, 437 F.Supp. 439 (D.R.I.1977) (municipal election may not be held on religious holy day); *Stevens v. Berger*, 428 F.Supp. 896 (E.D.N.Y.1977) (religious believers exempted from requirement of obtaining social security numbers for their children); *Geller v. Sec'y of Defense*, 423 F.Supp. 16 (D.D.C.1976) (Jewish chaplain must be permitted to wear beard); *People v. Woody*, 61 Cal.2d 716, 40 Cal.Rptr. 69, 394 P.2d 813 (1964) (exempting Navajo sect's use of peyote from criminal drug laws). In addition, numerous courts have found various prison regulations unnecessarily restrictive on prisoners' religious beliefs regarding: diet, See, e. g., *Kahane v. Carlson*, 527 F.2d 492 (2nd Cir. 1975); *Chapman v. Kleindienst*, 507 F.2d 1246 (7th Cir. 1974); observance of holy days,

See *X v. Brierley*, 457 F.Supp. 350 (E.D.Pa.1978); and hair, See, e. g., *Teterud v. Burns*, 522 F.2d 357 (8th Cir. 1975) (native American's braids); *Wright v. Raines*, 457 F.Supp. 1082 (D.Kan.1978) (beard).

## II

[4] The free exercise clause may be invoked only where there is a religion involved, only where the conduct in question is religiously based, and only where the claimant is sincere. *Wisconsin v. Yoder*, 406 U.S. 205, 215, 216, 92 S.Ct. 1526, 1533-1534, 32 L.Ed.2d 15, 25 (1972). These requirements are readily present here. We shall examine them in order.

The appellant presented impressive evidence concerning the religion of the Central Alaskan Athabascan people. Several Athabascans and expert anthropologists testified and anthropological works were received in evidence. The evidence was unrefuted, and in summary it shows the following.

Athabascan culture is highly individualized. From a complex belief system individual selection is tolerated and is the norm. Yet, there is a distinct belief system recognizable in Athabascan villages many miles apart. These beliefs have blended comfortably with Christianity which was introduced in the 19th century.

Death is the life crisis receiving the greatest attention in current Athabascan culture. While it may be awaited with equanimity, it is an event of predominant significance, whose repercussions are long felt in the village.

The funeral potlatch is the most important institution in Athabascan life. It is mandatory. Peter John, seventy-six, a former tribal chief in Minto, could not remember a death that was not followed by a funeral potlatch. It is apparently an obscenity to suggest that possibility. While a potlatch may be held to celebrate secular occasions, the funeral pot-

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latch is distinguished by its fundamentally sacred aspect. The ritual has its origins in antiquity and it has not changed in any important respect since anthropologists first began to describe it.

Food is the cornerstone of the ritual. From the moment the death is learned of, food preparation begins. People begin to arrive in the village from nearby and remote places. Food is brought by all participants to one or several houses associated with the deceased and is shared in several pre-burial meals. The body will not be buried until a sufficient quantity of the proper food is prepared for the post burial feast. In the case of Delnor Charlie this took four to five days.

Athabascans believe that the funeral potlatch is the last meal shared by the living with the deceased. It is a communion meal. The deceased is discussed and songs of eulogy are sung. The deceased is thought to partake of the meal and this helps his spirit on its journey.[FN6]

FN6. As the district court found:

No sharp line of demarcation separates the living from the dead. It is believed that the kunkubidza ("similar to dead but still the same") of the person who died is present at the funeral potlatch where he partakes of the communal feast by food which is burned and where he is honored by those who knew him and help him on his journey to yoyeet ("like up in the sky").

The funeral potlatch serves other functions. The grief of the family is to be eased. The community becomes involved and the sharing of food is the communal tie. Prayers are said for the dead and the living. All who have come and contributed are thanked. It is hoped that the funeral potlatch and one that is to follow, often more than a year later, the memorial potlatch, will assuage the spirits and prevent future deaths.

From the foregoing it is clear, and consistent with the findings of the courts below, that the funeral potlatch is a religious ceremony. The role of moose meat in that ceremony must next be examined.

Native foods comprise almost all of the foods served at the funeral potlatch. In a culture without many formal rules this is an absolute requirement. Native food means moose, bear, caribou, porcupine, fish, duck and berry dishes.

Of the native foods moose is at the apex. The most common big game animal is required, and in Central Alaska this is moose. As the district court found, it is the staff of life; it is the meat which the people regard as most important for their sustenance. However, the district court found that although the evidence indicated that moose is the most desirable of foods to be served, it is not "an essential requirement."

The district court's finding that moose was not essential for a funeral potlatch is based primarily on the following testimony of Chief Peter John:

Q. Could there be a potlatch without wild meat?

A. Well, it could be, maybe, but then I don't think I'll enjoy it.

However, John also stated that he had been to hundreds of potlatches and had never attended one in which there was no moose meat, a recollection shared by Catherine Atlla, fifty-two, and Carlos Frank. Barbara Lane, an anthropologist, provided this gloss on John's statements:

A. If a Roman Catholic priest were in some bush area up here and found himself without the proper wafers and wine, he could still perform his function with some substitute, but it wouldn't do in the sense If at all possible to have the proper foods, that's what you would use.

Q. But nevertheless it could be accomplished?

A. I believe so. As a dire strait, in some unusual circumstance.

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Other witnesses stated that moose meat is a necessary requirement having the sacramental equivalent to the wine and wafer in Christianity. Frank and all of the Athabascan witnesses, including Peter John, testified that they could not risk showing disrespect to the dead by failing to provide moose for the post burial ritual.

[5] Thus we would be inclined to hold that the district court was clearly erroneous in concluding that moose meat was not essential for the observance of a funeral potlatch. However, absolute necessity is a standard stricter than that which the law imposes. It is sufficient that the practice be deeply rooted in religious belief to bring \*1073 it within the ambit of the free exercise clause and place on the state its burden of justification. The determination of religious orthodoxy is not the business of a secular court. *Teterud v. Burns*, 522 F.2d 357, 360 (8th Cir. 1975); *Moskowitz v. Wilkinson*, 432 F.Supp. 947, 949-50 (D.Conn.1977); *Geller v. Secretary of Defense*, 423 F.Supp. 16, 17 (D.D.C.1976); *Monroe v. Bombard*, 422 F.Supp. 211, 215 n. 4 (S.D.N.Y.1976).

[6] We think the evidence is inescapable that the utilization of moose meat at a funeral potlatch is a practice deeply rooted in the Athabascan religion. While moose itself is not sacred, it is needed for proper observance of a sacred ritual which must take place soon after death occurs.[FN7] Moose is the centerpiece of the most important ritual in Athabascan life and is the equivalent of sacred symbols in other religions.[FN8]

FN7. Of course the need to take a moose out of season arises because deaths in a village may take place at any time of year and it is not part of Athabascan culture to plan for them. By contrast, the timing of the memorial potlatch, which follows the funeral potlatch often by more than a year, is controllable and it does not give rise to the same exigency as the funeral potlatch.

FN8. Our dissenting colleague has sugges-

ted that there was moose meat enough in the village to fulfill a symbolic role. The arresting officer, upon his arrival in Minto, did note some old, somewhat dried out, moose meat hanging outdoors, but there was no evidence that this was owned by someone who would make it available for use in the potlatch. In addition, there was evidence that there was a piece of moose meat which was served at one of the pre-burial meals. However, except for the moose which Frank transported, there was no moose meat available for the final feast. The only witnesses who spoke to this subject stated that there was not enough moose meat available for a proper potlatch. On this record it would be clearly inappropriate for us to take a contrary view.

The question of sincerity requires no extended discussion. The district court found Frank to be sincere in his beliefs. That conclusion is abundantly supported in the record.

### III

Having established that protected religious conduct is involved, we turn next to an evaluation of the competing state interest. There can be no question but that there is a very strong state interest underlying hunting restrictions. The game resources of Alaska occupy a place in the lifestyle of Alaskans which is unparalleled elsewhere in the United States. Rural Alaska natives are acutely aware of this. As we noted in *State v. Tanana Valley Sportsmen's Association* :

For hundreds of years, many of the Native people of Alaska depended on hunting to obtain the necessities of life. To this day, despite incursions of those of different cultures, many Alaska Eskimos, Indians and Aleuts, eke out a livelihood by reliance on fish and game. . . . Not only is the game of prime importance in furnishing the bare necessities of life, but subsistence hunting is at the core of the

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cultural tradition of many of these people. It has been claimed that their very lifestyle is threatened if they are deprived of this traditional method of obtaining the wherewithal for existence.

583 P.2d 854, 859 n. 18 (Alaska 1978) (citations omitted). Illustrative of the importance of wildlife in Alaska is the fact that our state constitution contains specific requirements governing its use and management. See Alaska Constitution, article VIII, sections 2, 3 and 4.

It is not enough, however, simply to conclude that there is a compelling state interest in maintaining a healthy moose population. The question is whether that interest, or any other, will suffer if an exemption is granted to accommodate the religious practice at issue.[FN9] Thus, in *Wisconsin v. Yoder*, \*1074 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972), the inquiry was not limited to the importance of compulsory school attendance generally. Also needed was an examination of “the impediment to those objectives that would flow from recognizing the claimed . . . exemption.” *Id.* at 221, 92 S.Ct. at 1536, 32 L.Ed.2d at 28.

FN9. Congress' recent enactment of 42 U.S.C.A. s 1996 (Supp.1979), which provides in part that

it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites(,)

was largely motivated by laws such as those seeking to preserve endangered species. The House report accompanying 42 U.S.C.A. s 1996, notes that Indian

peoples have long sought protective legislation for certain species and yet

such laws, when combined with more restrictive regulations, insensitive enforcement procedures and administrative policy directives, . . . have interfered severely with the culture and religion of American Indians.

H.R.Rep.No.1308, 95th Cong., 2nd Sess. 3, Reprinted in 1978 U.S.Code Cong. & Ad.News 1262, 1263. It is suggested by the House report that such impacts “upon the exercise of traditional Indian religious practices” are not in “compliance with the constitutional injunction that Congress shall make no laws abridging the free exercise of religion.” *Id.* at 1262. See also 16 U.S.C.A. s 668a (Supp.1979), which authorizes the taking of bald eagles “for the religious purposes of Indian tribes,” and 25 C.F.R. s 11.87H (1978), which declares it to be lawful for one to “buy, sell, possess, or use peyote in any form in connection with the religious practices, sacraments or services of the Native American Church.” 21 C.F.R. s 1307.31 (1979) also exempts the religious use of peyote.

The state contends that widespread civil disobedience will result if Athabascans are allowed to take moose out of season when necessary for a funeral potlatch. As the state's brief colorfully puts it: “Alaskans seem to have a marked tendency to come unglued over fish and wildlife allocation issues.” The state predicts as a result, general non-observance of the game laws, a “downward spiral into anarchy”, “poaching and creek robbing,” and “tragic confrontations” between recreational hunters and Athabascans.

We give no credence to this argument. It is, first of all, not supported by any evidence. Moreover, its



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prediction of general lawlessness is an extreme and unwarranted comment on the general character of the state's citizens. Interests which justify limitations on religious practices must be far more definite than these. "Justifications founded only on fear and apprehension are insufficient to overcome rights asserted under the First Amendment." *Teterud v. Burns*, 522 F.2d 357, 361-62 (8th Cir. 1975). See *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 508, 89 S.Ct. 733, 737, 21 L.Ed.2d 731, 739 (1969).

[7][8] The state does not urge that an exemption granted to Athabascans needing moose meat for a funeral potlatch will result in so many moose taken as to jeopardize appropriate population levels. The trial record is silent on that question. We are not advised as to how many funeral potlatches are held each year, nor how many moose are legally taken, nor the level of harvest which would cause a population decline. All the record reveals is that there was but one funeral potlatch in Minto in 1975, and that one moose was needed for it. The burden of demonstrating a compelling state interest which justifies curtailing a religiously based practice lies with the state.[FN10] On this record, that burden has not been met.

FN10. *Sherbert v. Verner*, 374 U.S. 398, 407, 83 S.Ct. 1790, 1795, 10 L.Ed.2d 965, 972 (1963).

#### IV

[9][10] Finally, we turn to the state's argument that granting an exemption in this case would amount to an establishment of religion contravening the establishment clauses of the first amendment to the United States Constitution and article I, section 4 of the Alaska Constitution. [FN11] These clauses are designed to prevent "sponsorship, financial support, and active involvement of the sovereign in religious activity." *Walz v. Tax Commission*, 397 U.S. 664, 668, 90 S.Ct. 1409, 1411, 25 L.Ed.2d 697, 701 (1970). See *Bonjour v. Bonjour*, 592 P.2d 1233,

1241-42 (Alaska 1979). Accommodating the religious beliefs of Athabascans by permitting the killing of a moose for a funeral potlatch does not rise to the level of these \*1075 interests. The purpose of such an accommodation is merely to permit the observance of the ancient traditions of the Athabascans.[FN12] As such, the exemption "reflects nothing more than the governmental obligation of neutrality in the face of religious differences, and does not represent that involvement of religious with secular institutions which it is the object of the Establishment Clause to forestall." *Wisconsin v. Yoder*, 406 U.S. 205, 234, n. 22, 92 S.Ct. 1526, 1543 n. 22, 32 L.Ed.2d 15, 36, n. 22 (1972), quoting *Sherbert v. Verner*, 374 U.S. 398, 409, 83 S.Ct. 1790, 1796, 10 L.Ed.2d 965, 974 (1963).[FN13] Arguments similar to the state's were dismissed as plainly wrong in *Sherbert and Yoder*. [FN14]

FN11. See notes 2 and 3 *Supra*.

FN12. See, e. g., *Jones v. Butz*, 374 F.Supp. 1284, 1292 (S.D.N.Y.), *Aff'd. mem.*, 419 U.S. 806, 95 S.Ct. 22, 42 L.Ed.2d 36 (1974), holding 7 U.S.C.A. s 1902(b) (Supp.1979), which exempts certain religiously prescribed methods of animal slaughter from the requirements of the Humane Slaughter Act, to be consistent with the establishment clause.

FN13. One commentator has suggested that no accommodation which is even "arguably compelled" by the free exercise clause can violate the establishment clause:

In attempting to distinguish between situations where accommodating programs to religious needs has been held excessive and those where it has been held permissible or even mandatory, it is helpful to posit a dichotomy between Governmental actions arguably (even if not beyond doubt) compelled by the free exercise clause, and Governmental actions supportive of religion in ways

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clearly not mandated by free exercise. Actions “arguably compelled” by free exercise are not forbidden by the establishment clause.

L. Tribe, *American Constitutional Law* 822 (1978) (emphasis in original). See also *Wondzell v. Alaska Wood Products, Inc.*, 601 P.2d 584, Opn. No. 1720 (Alaska, 1979).

FN14. As a part of its argument concerning the establishment clause the state contends that the state, and the courts, will become unduly entangled in religion by the necessity of separating spurious claims from genuine ones. While it is correct that there can be no judicial examination of the truth of a religious belief, *United States v. Ballard*, 322 U.S. 78, 86-87, 64 S.Ct. 882, 886-887, 88 L.Ed. 1148, 1154 (1944), whether a religious belief is sincerely held is a proper subject of adjudication. *United States v. Seeger*, 380 U.S. 163, 185, 85 S.Ct. 850, 863, 13 L.Ed.2d 733, 747 (1965); *People v. Woody*, 61 Cal.2d 716, 40 Cal.Rptr. 69, 77, 394 P.2d 813, 821 (1964); *In re Grady*, 61 Cal.2d 887, 39 Cal.Rptr. 912, 913, 394 P.2d 728, 729 (1964).

#### V

If the reason the state did not urge that exemptions for funeral potlaches will endanger moose populations is that such a showing cannot be made, the state may be well advised to adopt regulations governing the taking of moose for such purposes. Carefully designed regulations would have the effect of guarding against abuses and aid in record keeping, which would be of value in determining the impact of the exemption on moose populations. There exist models for similar religious accommodations. For example, 16 U.S.C.A. s 668a (Supp.1979), authorizes the Secretary of the Interior to allow eagles to

be taken “for the religious purposes of Indian tribes,” upon a finding that the taking is compatible with the preservation of the species. Regulations have been published implementing this. 50 C.F.R. s 22.22 (1978). Similarly, the Wisconsin legislature has recently enacted a statute permitting the taking of deer by Winnebago Indians for religious ceremonies, and has directed the state Department of Natural Resources to promulgate appropriate regulations.[FN15]

FN15. Wis.Stat. Ann. s 29.106 (West Supp. 1978-79). Detailed administrative regulations, promulgated prior to the statute had achieved the same end. See Wis. Dept. of Nat. Resources, Sec’y’s Directive, “Taking of Deer by Winnebago Indians for Religious Purposes” (Dec. 15, 1976).

In view of the result we have reached we have no occasion to consider the appellant’s other claims.

The judgment is reversed and this case is remanded with instructions to dismiss the complaint.

CONNOR, J., dissents.  
CONNOR, Justice, dissenting.  
I must respectfully dissent.

On the record I am unable to conclude that a freshly killed moose was necessary to \*1076 conduct the funeral potlatch. While it is traditional that as many native foods as possible should be served, it has not been established by the evidence in this case that fresh moose meat is indispensable for such a ceremony.[FN1] It is merely desirable that such meat be served at those functions.[FN2] For this particular potlatch there was already on hand a moose hind quarter, bear meat, and fish. No ducks, porcupine, rabbit or caribou were used, although they are also considered native food which may be served at a funeral potlatch. To the extent that moose meat was desirable because it had magico-religious, i. e., symbolic, significance, it was already available.

FN1. Although the anthropologists present-

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ted by appellant testified that, on the basis of their personal observations, they believed the use of fresh moose meat at a funeral potlatch is an important tradition of the Athabascan culture, they were not aware of any documentation showing that it is essential or required.

FN2. Former Tribal Chief Peter John testified that there could be a potlatch without wild meat, "but then I don't think I'll enjoy it." He also testified that although "it would be best to have . . . fresh meat," it would not be a disgrace to serve frozen moose meat.

Unless the use of fresh moose meat rises to the level of a cardinal religious principle, unless it is central to a religious observance, it cannot qualify as a practice protected by the "free exercise" clauses of either the state or federal constitutions. See *Wisconsin v. Yoder*, 406 U.S. 205, 219, 92 S.Ct. 1526, 1535, 32 L.Ed.2d 15, 27 (1972); *Sherbert v. Verner*, 374 U.S. 398, 406, 83 S.Ct. 1790, 1795, 10 L.Ed.2d 965, 971 (1963).

Because there was not a sufficient showing made here a case for the application of those clauses was not made out.

For these reasons, I would affirm the judgments of the district and superior courts.

Alaska, 1979.  
*Frank v. State*  
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**APPENDIX C: CHRONOLOGY OF ADMINISTRATIVE  
ACTIONS**



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Date Action

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- 1979 In 1979, the Alaska Supreme Court determined that the First Amendment to the U.S. Constitution and Article 1, Section 4 of the Alaska Constitution provide protection for the taking of moose for use in Athabascan funeral potlatch ceremonies (*Frank v. State*, 604 P.2d 1068 (Alaska 1979)).
- 1980 Board of Game Finding 80-27-GB. The Alaska Supreme Court (in *Frank v State*) held that taking of moose for use in traditional funeral potlatch ceremonies of Alaska's Athabascan people is protected by both the state and federal constitutions. The Board of Game (BOG) concluded that it was preferable not to adopt regulations governing the taking of game needed for religious ceremonies and until definitive guidelines could be established, and that the taking of game for religious ceremonies should be informally administered by the Alaska Department of Public Safety Division of Fish and Wildlife Protection. In the interim, the BOG decided, guidelines established by the court in the *Frank v. State* case would provide sufficient direction for the Division of Fish and Wildlife Protection and the Alaska Department of Fish and Game (ADF&G) to allow the taking of game for religious purposes.
- 1995 The ADF&G commissioner advanced an initiative that would explore regulations dealing with the taking of wildlife for use in Alaska Native religious ceremonies.
- 1996 Board of Game Finding 96-98-BOG. The BOG determined that protections for the use of moose in Athabascan funeral potlatch ceremonies should be extended to other big game animals used as food, and extended to all Alaskan residents. The BOG adopted regulations that provide for a harvest report after the ceremony.
- 2002 Board of Game Actions. The BOG added a requirement for prior notification when taking game for religious ceremonies in 5 AAC 92.019.  
The BOG also established the Koyukon Potlatch Ceremony regulation at 5 AAC 92.017, which does not require prior notification.  
The BOG clarified which game populations were allowed for use in religious ceremonies. In doing so, the BOG added reference to 5 AAC 99.025 within regulation 5 AAC 92.019, "Taking of big game for certain religious ceremonies," and added a requirement of a positive customary and traditional use finding before a species could be taken under the provision for taking big game for religious ceremonies.
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**APPENDIX D: ALASKA BOARD OF GAME FINDING 80-27-GB**



ALASKA BOARD OF GAME

LETTER OF INTENT REGARDING  
USE OF ALASKA'S GAME FOR RELIGIOUS CEREMONY

The Alaska Board of Game recognizes and respects traditional religious practices of Alaska's Indians, Eskimos, and Aleuts, some of whom use game animal meat during religious ceremonies.

During its March-April, 1980, meeting in Fairbanks, the Board received extensive written and oral testimony from diverse members of the Alaska Native community on proposed regulations that would govern taking of game for meat to be used during religious ceremonies.

The number and variety of religious ceremonies involving use of game meat by Alaska's Natives may vary from group to group, within groups, and from area to area. These variances include:

1. reasons for holding religious ceremonies;
2. a need for different foods for religious ceremony within a region, and from region to region;
3. acceptance of meat from highway kills for ceremonies by some groups or individuals, and objections to such meat from others who say it is not suitable for religious ceremonies;
4. in the case of funeral ceremonies, length of time after death, the number of religious ceremonies held to honor a deceased individual, and the relationship to the deceased (i.e., clan, relatives, friends) of individuals who assume responsibility for arranging religious ceremonies at the time of a death, or at some later date.

In Frank v. State, 604 P.2d 1068 (Alaska 1979), the Alaska Supreme Court held that taking of moose when moose meat is not otherwise available for use in traditional funeral potlatch ceremonies of Alaska's Athabascan people is protected by both the state and federal constitutions--at least where the person taking the moose is sincere in his or her religious beliefs and where the taking will not jeopardize appropriate resource population levels. These constitutional protections also may apply to the taking of other game species by non-Athabascans for use in traditional ceremonies according to the following principles:

1. there must be a religion involved;
2. the conduct in question must be religiously based; and
3. the person claiming constitutional protection must be sincere in his or her beliefs.

Because of the complexity and variety of the traditional religious practices of Alaska's Natives, and in order to protect all of these religious beliefs, the Board concludes that it is preferable at this

time to not adopt regulations governing the taking of game needed for religious ceremony. Such regulations could have an influence on the date, place, time, and extent of some religious ceremonies. Regulations could have an adverse impact on the religious experience.

Before meaningful regulations governing the taking of game for religious ceremony can be adopted, it would be desirable to have an authoritative study of all religious ceremonies in which game meat is used, for all Native groups and subgroups, from all communities in the state where such religious ceremonies are practiced.

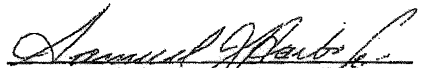
Until definitive guidelines can be established, the Board believes that the taking of game for religious ceremony should be informally administered by the Division of Fish and Wildlife Protection. In the interim, the guidelines established by the court in the Frank case provide sufficient direction for the Division of Fish and Wildlife Protection and the Department of Fish and Game to allow the taking of game for religious purposes.

Game meat used in religious ceremonies that can be scheduled and planned in advance should be obtained during regularly scheduled hunting seasons when feasible and consistent with religious practices and beliefs.

Full cooperation must exist between State officials and Natives who participate in the taking of game to be used in religious ceremonies. To the maximum extent possible and practicable, Native participants should provide advance notice to the nearest Fish and Wildlife Protection office, or official, when a need exists for the taking of game outside of the regular season. In all cases, a full accounting of such game must be made to the Department of Fish and Game after the fact if the nonregulatory approach is to succeed, either as a temporary or a permanent arrangement.

ADOPTED: Fairbanks, Alaska  
April 4, 1980

VOTE: 6/0

  
Dr. Samuel J. Harjo, Jr., Chairman  
Alaska Board of Game

**APPENDIX E: ALASKA BOARD OF GAME FINDING 96-98-  
BOG**



**ALASKA BOARD OF GAME FINDINGS**  
**Taking of Big Game for Certain Religious Ceremonies**  
**96-98-BOG**

During the publicly convened Board of Game meeting in March 1996, the Board heard public and advisory committee testimony and ADF&G staff reports on the taking of big game for certain religious ceremonies. Based on testimony and reports, and after due consideration, the Board finds that:

- 1) Protection for the use of moose as part of the Athabascan funeral potlatch ceremony, as authorized in Frank v. State 604 P.2d 1068 (Alaska 1979), should extend to other big game animals used as food in customary and traditional Alaska Native funerary or mortuary religious ceremonies. The Board heard testimony from several residents and advisory committee representatives describing the use of big game species as part of funerary and mortuary practices in Alaska Native religious ceremonies. The Board also heard ADF&G staff reports describing the harvest patterns, use of big game in these ceremonies, and associated practices with respect to the taking of big game for religious purposes.
- 2) There is a compelling state interest in regulating the take of big game for any reason. Provisions for allowing and regulating the take of big game are important and necessary for managing game consistent with the constitutionally mandated sustained yield principle. Testimony by ADF&G staff indicates that there are no known cases where sustained yield has been threatened by taking of big game for Alaska Native religious ceremonies. The ADF&G will notify the public of any big game populations for which the taking of a big game animal would be inconsistent with sustained yield principles and which are closed to taking. Notification by the users to the department of the number of big game animals taken from a population is necessary and important as part of responsible management of the big game populations.
- 3) The adoption of this proposal provides regulations which are reasonable and least intrusive with respect to Alaska Native religious practices. The regulations adopted by the Board provide for a harvest report after the ceremony. The Board heard testimony in support of a harvest report only after the taking of big game or after the ceremony, within a specified amount of time. The regulations provide for an annual cycle of twelve months in which to harvest big game for religious ceremonies, described as a necessary and customary practice in some of the mortuary and funerary ceremonies. The regulations adopted by the Board provide that the big game harvest for funeral or mortuary religious ceremonies does not count as a hunter's individual bag under general or subsistence regulations, because the Board heard testimony that the harvest for a ceremony is an additional harvest above that normally used to feed one's family during a yearly cycle.