



THE STATE  
of **ALASKA**  
GOVERNOR MIKE DUNLEAVY

## Department of Fish and Game

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Chief Brian Ridley  
Tanana Chiefs Conference  
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1st Chief Caroline Ketzler  
Nenana Native Association  
P.O. Box 369  
Nenana, Alaska 99760

Chair Carl Frank (Minto)  
Chair Olivia Irwin (Nenana)  
Minto-Nenana Advisory Committee

Dear Chiefs Ridley and Ketzler and Minto-Nenana Advisory Committee members,

I want to reach out personally to provide context for why proposals, HQ-F24-043 and HQ-F24-045, are located in the back of the Board of Game (board) proposal book published online earlier in September. The board does not have the legal authority to adopt the regulation changes requested in the proposals. When the board does not have authority to address a request, it is customary to place the proposal in the back of the proposal book with a brief explanation. This way, the public can see the proposals that were submitted, and can learn more about proponents' concerns, even though the board will not act on these proposals because they lack authority to address them.

I want to clear up a misunderstanding about the take of antlerless moose and provide a fuller summary to you, as the proponents, as part of our continuing discussion about ceremonial harvest of big game. Let me start by saying that I recognize that funerary and memorial potlatches are of unparalleled significance among Athabascan communities and that taking care of loved ones when they pass on requires care and respect by families and entire communities.

Proposal HQ-F24-043 was submitted by the Minto-Nenana Fish and Game Advisory Committee (AC) and Tanana Chiefs Conference (TCC) and seeks to do two things:

- 1) clarify that the taking of big game for certain religious ceremonies is independent of the local antlerless moose reauthorizations and instead only dependent on adherence to sustained yield principles; and
- 2) clarify that hunters who harvest big game for a customary and traditional Alaska Native funerary and mortuary ceremony do not do so under their individual bag limit.

Proposal HQ-F24-045 is very similar but addresses memorial potlatches, specifically. Here the Minto-Nenana AC, the Nenana Native Association, and TCC ask for:

- 1) the creation of new regulation that would confirm that the take of big game for memorial potlatches be limited only by the sustained yield principle and not subject to the status of antlerless moose reauthorizations in the hunt area; and

- 2) that harvest for memorial potlatches occur outside of a hunter's individual bag limits.

The *Frank case, Frank v. State*, 604 P.2d 1068 (Alaska 1979) provides the legal foundation for current regulation authorizing the take of big game for mortuary ceremonies, often referred to as potlatches. In the *Frank* case, the Alaska Supreme Court addressed a situation in which a moose was harvested out of season for use in the funeral potlatch of an individual from the community of Minto. The Court held that religious use of moose meat at a religious funeral ceremony, where such practice is deeply rooted in a person's religion and the person is sincere in such religious beliefs, is paramount and the state did not prove that there was a compelling reason to prevent the religious practice. The free exercise of religion clauses of the U.S. Constitution and Article I, Section 4 of the Alaska Constitution, protect religious conduct. Thus, the take of moose out of season and in excess of established bag limits is allowed for funeral potlatches when such take will not impact sustained yield of the moose population. The conviction for taking a moose out of season was reversed because the court found this kind of harvest should be protected and the state did not have a compelling reason to prevent it.

However, the protections outlined in the *Frank* case for funerary potlatches do not extend to memorial potlatches, which may be scheduled up to a year or more later. Regarding the differences between ceremonies the Alaska Supreme Court stated:

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.

In *Native Village of Tanana and Tanana Chiefs v. Cooper*, 945 F.2d 409 (9th Cir. 1991), the Ninth Circuit agreed with the *Frank* decision and distinguished between funeral and memorial potlatches:

The fact that regulations and the case law provide an exception for funeral potlatches, but no exception for memorial potlatches or any other type of potlatch does not render this statute less clear. Thus, the Tanana Chiefs argument must fail.

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The Tanana Chiefs Conference ... has not presented any evidence that the state unduly burdens the right to exercise their religious beliefs because it has not offered any proof that the memorial potlatches cannot be held during the moose hunting season.

Both federal and state court decisions distinguish between funeral and memorial potlatches. There may be a religious constitutional right to take game out of season and in excess of established bag limits for a funeral potlatch, but no such right for a memorial potlatch has been established by the courts. The board does not have authority to create regulations that are contrary to case law. Proposal HQ-F24-045 also asks that the harvest for memorial potlatches occur outside of a hunter's individual bag limit. The current regulation does not require a hunter to use their own bag limit, however, if a hunter chooses to use their own bag limit for ceremonial purposes, they can do that.<sup>1</sup>

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<sup>1</sup> 5 AAC 92.019(e) states that "It is an affirmative defense to a prosecution for hunting or taking big game outside the season or bag limit restrictions established in 5 AAC 85 that (1) the person is a resident of this state; (2) the hunting or taking was authorized under this section and the meat was used in a customary and traditional Alaska

Statutory and regulatory limitations on antlerless moose hunting also must be considered when thinking about ceremonial take of big game. If a hunter wants to take the first animal that presents itself, which may be a cow, such take may not be authorized. AS 16.05.780 provides that there can be no antlerless moose hunts unless recommended by the department, approved by the appropriate ACs, and approved by the Board of Game for that year. All three steps are required.

If there is no approved antlerless moose hunt for that year, the statute overrides the Board regulation, 5 AAC 92.019, that would otherwise allow an antlerless moose to be taken for a memorial potlatch. Even for a funeral potlatch, there may be constitutional sustained yield restrictions that may prevent the taking of fish or wildlife for religious purposes if there is a conservation concern (Phillip v. State, 347 P.3d 128 (Alaska 2015)).

To ensure sustained yield requirements are met, the Division of Wildlife Conservation issues a notice under 5 AAC 92.019(b), that is posted on the Department's website, identifying species and areas where harvest is prohibited under a ceremonial harvest permit. The absence of an antlerless moose population appearing on the list will not override the statutory requirements. In other words, if there is no antlerless moose hunt authorized under AS 16.05.780, there can be no antlerless moose hunt for a memorial potlatch even if there would not be a sustained yield concern.

As I said earlier, I understand that ceremonial harvest is an extremely important aspect of some Alaska Native cultural practices and that sharing ceremonial wild foods is a critical component of these practices. However, I must also work for the conservation of wildlife that support Alaskans and abide by the regulations and statutes that make that possible. I look forward to working with you on a path forward to address your concerns. This is one reason why the Division of Wildlife Conservation has provided funding to the Division of Subsistence for a statewide potlatch project where we hope to work with Alaskan communities across the state to better understand potlatch practices. In so doing, we also hope to develop a robust educational and outreach program for the department staff and public alike to improve ceremonial harvest utilization and reporting compliance throughout the state.

I am available to further discuss the board process and the constraints placed on addressing this matter due to the board's lack of legal authority if that would be helpful. Thank you for submitting these proposals and for your engagement in our regulatory process—it is through the participation of Alaskans that we can work together to improve our regulatory framework.

Respectfully,



Doug Vincent-Lang  
Commissioner

CC: Board of Game Members, State of Alaska  
Kristy Tibbles, Executive Director, State of Alaska  
Kyle Campbell, Regional Coordinator, State of Alaska

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Native funeral or mortuary religious ceremony; and (3) if the person who took big game, the requirements of (d) of this section have been met.”