

## **THRESHOLD ANALYSIS REQUEST FOR RECONSIDERATION RFR18-02**

### **ISSUE**

Wildlife Proposal WP18-11, submitted by Calvin Casipit of Gustavus, originally requested that the Board provide a Federal priority for moose in Unit 1C Berners Bay for Federally qualified subsistence users, or that Federal lands be closed to the harvest of moose by all users, or that it be clearly stated why a Federal subsistence priority for moose should not be provided to rural residents. The Federal Subsistence Board (Board) adopted Wildlife Proposal WP18-11 with modification in April 2018. The Board modified the proposal to allow the harvest of one bull moose by Federal drawing permit in Unit 1C per household, and a household receiving a State permit may not receive a Federal permit. The Federal harvest allocation will be 25% of the available bull moose permits, as determined by Alaska Department of Fish and Game (ADF&G), rounded up to the next whole number. The U.S. Forest Service, Juneau Office, in consultation with the ADF&G, will announce the annual harvest quota for the Sep. 15 – Oct. 15 season, beginning in 2019 (FSB 2018). In an email dated July 30, 2018, Territorial Sportsmen, Inc. submitted a timely request for reconsideration (RFR) of the Board’s action on Wildlife Proposal WP18-11 (**Appendix A**).

The Federal subsistence regulations in 36 CFR 242.20(d) and 50 CFR 100.20(d) outline the guidelines for submitting a request that the Board reconsider regulatory decisions (**Appendix B**). The Board will accept a request for reconsideration only if the request meets one or more of the following criteria:

1. Provides information not previously considered by the Board
2. Demonstrates that existing information used by the Board is incorrect
3. Demonstrates that the Board’s interpretation of information, applicable law, or regulation is in error or contrary to existing law

Territorial Sportsmen, Inc. made no claims with regard to the first two criteria. Rather, all of the claims submitted by Territorial Sportsmen, Inc. refer to the third criterion, which centers on the Board’s interpretation of information, applicable law, or regulation. This threshold analysis seeks to determine whether the RFR claims submitted by Territorial Sportsmen, Inc. meets this criterion.

### **EXISTING REGULATIONS**

#### **Federal Regulations**

##### **Unit 1C—Moose**

*Unit 1C—Berners Bay drainages—1 bull by Federal drawing permit*

*Sep. 15 – Oct. 15  
(will be announced  
starting in 2019)*

*Only one moose permit may be issued per household. A household receiving a State permit for Berners Bay drainage moose may not receive a Federal permit. The annual harvest quota will be announced by the USDA Forest Service, Juneau office, in consultation with ADF&G. The Federal harvest allocation will be 25% (rounded up to the next whole number) of bull moose permits.*

## **State Regulations**

### **Unit 1C—Moose**

*Unit 1C Berners Bay drainages only—One bull by permit DM041*

*Sep. 15 – Oct. 15*

## **BACKGROUND**

The Berners Bay drainage is a very small area and is comprised of 97% Federal public lands. Moose were transplanted to Berners Bay from the Matanuska and Susitna valleys in 1958 and 1960, and the population expanded quickly. However, the population has remained small due to limited habitat along the narrow river valley bottoms in this geologically isolated area. There is little or no immigration or emigration because the lowland areas along the rivers are surrounded by steep mountains and the ocean in Lynn Canal.

Population estimates have been made for the Berners Bay moose population since 2006. The 2006 population estimate was 131 moose. Subsequently, the population declined by 30%, due to harsh winter conditions that resulted in poor spring body condition and moderately low adult survival and pregnancy rates. Low calf survival is also believed to be a contributor (OSM 2018b). As a result of this decline, the State harvest season was closed 2007 – 2013 to give the moose population a chance to recover. The population began to recover in 2011 and was at harvestable levels by 2013. The most recent estimate, in 2016, was 141 moose, which is probably close to carrying capacity of the habitat (Barton 2008). ADF&G has used a variety of management strategies to manage the population, alternating from bull-only hunts to bull and cow hunts in an attempt to balance the herd's sex ratio and maintain a post-hunting survey count of 80 – 90 moose and a bull:cow ratio of 25 bulls:100 cows (OSM 2018b).

Moose hunting in the Berners Bay drainage has been administered by ADF&G under a State drawing permit since 1963. The number of permits available each year depends on the most current population estimate. An average of nine permits were issued annually from 1990 to 2016 (range 0-20). Since 1993, a majority of the applicants for the State bull moose hunt in Unit 1C Berners Bay (DM041) have been residents of Juneau (mean = 670/year). There were no bull or antlerless hunts from 2007 to 2013. The majority of applicants for the State antlerless moose hunt in Unit 1C Berners Bay (DM042) 1993 – 2006 also resided in Juneau (mean=587/year). There were no State antlerless hunts 2003 – 2005 or 2007 – 2018 (OSM 2018b). Juneau is classified as a non-rural area under Federal Subsistence Regulations and

therefore residents do not qualify for a subsistence priority for taking fish and wildlife on Federal public lands.

Rural residents of Units 1, 2, 3, 4 and 5 have a customary and traditional use determination for moose in Unit 1C. However, prior to the adoption of Wildlife Proposal WP18-11, there was no Federal open season for moose in the Berners Bay drainage of Unit 1C. Federally qualified subsistence users could only hunt for moose in Berners Bay if they were successful in obtaining one of a limited number of State drawing permits. In Berners Bay, the harvest demand from Federally qualified subsistence users (approximately 20 annually) exceeds the number of moose permits that are made available through the State drawing permit system (ADF&G 2017). Wildlife Proposal WP18-11 requested a Federal subsistence priority for moose on Federal public lands in Unit 1C Berners Bay, in accordance with the provisions of Title VIII of the Alaska National Interest Lands Conservation Act (ANILCA). The intent of Wildlife Proposal WP18-11 was to provide a subsistence priority to Federally qualified subsistence users who seek to harvest moose in Berners Bay (OSM 2018b).

The Southeast Alaska Subsistence Regional Advisory Council's (Council) feedback was influential in the Board's decision on Wildlife Proposal WP18-11. The Council initially opposed the proposal at its fall 2017 regulatory meeting (SERAC 2017). ADF&G and the Federal Interagency Staff Committee also opposed this proposal, resulting in its inclusion on the Board's consensus agenda. While the Council agreed that there needed to be a way to address the proponent's concern to provide a Federal subsistence priority for the harvest of moose in Berners Bay, it concluded that the proposal as written could not be implemented while maintaining the existing State management system on this limited population of moose. The Council felt it could not support this proposal as originally written based on the information given in the analysis, including limited information on how a Federal draw permit might work with a State draw. It was also concerned that this proposal could create a conservation concern. The Council requested more information and alternatives from Staff for its public meeting in February 2018. Berners Bay moose was placed on the Council's agenda to provide a forum for information exchange and an opportunity for further discussion on options to provide for a rural priority for hunting moose in Berners Bay in the future (FSB 2018:248).

At the February 2018 Council meeting, the Council received information from staff about how the Unit 6C moose hunt currently works, for comparison purposes. This hunt is managed with both State and Federal draw permits, and could be a model for the Unit 1C hunt. In Unit 6C, the annual harvest quota is announced by the U.S. Forest Service, Cordova Office, in consultation with ADF&G. The Federal harvest allocation is 100% of the antlerless moose permits and 75% of the bull permits issued. The State drawing takes place prior to the Federal drawing. If a Federally qualified subsistence user receives a State permit, that hunter is not eligible for a Federal permit. A hunter may have only one permit, either a State or Federal permit but not both (SERAC 2018, OSM 2018a).

Following further discussion during the February 2018 Council meeting, the Council requested that Wildlife Proposal WP18-11 be removed from the Board's consensus agenda at the April 2018 regulatory meeting. The Council also presented an alternative to the Board, based on the information received during the February 2018 Council meeting (FSB 2018). The Council's proposed alternative became the

basis for the Board's modification of Wildlife Proposal WP18-11, described in the first paragraph of this document. The Council also recommended, and the Board agreed, that implementation should be delayed until the 2019/2020 regulatory year, because the participants in the State drawing hunt had already been announced for the 2018 season (FSB 2018).

### **PRELIMINARY ASSESSMENT OF REQUESTOR'S CLAIMS**

Following the Board's decision to establish a Federal drawing permit for the bull moose hunt in Unit 1C Berners Bay, with an allocation of 25% of the bull moose permits for Federally qualified subsistence users, the Territorial Sportsmen, Inc., responded with this request (RFR18-02) to the Board to reconsider its decision. Territorial Sportsmen, Inc. states that the Board's action does not conform to the requirements of Title VIII of ANILCA. Territorial Sportsmen, Inc. states that there is no conservation concern for the Berners Bay moose population and that there has been no customary and traditional use of the Berners Bay moose population by rural users and thus there is no justification for shifting the hunt opportunities away from non-Federally qualified users towards Federally qualified subsistence users. All of Territorial Sportsmen, Inc.'s claims fall under Criterion 3, the Board's interpretation of information, applicable law, or regulation is in error or contrary to the existing law.

#### **Criterion 3. The Board's interpretation of information, applicable law, or regulation is in error or contrary to existing law**

Territorial Sportsmen, Inc. states that the Board's action is in error or contrary to the existing law for the following reasons:

ANILCA states that exclusion of non-Federally qualified hunters can occur only if there is a conservation issue or if it is necessary to preserve existing customary and traditional uses. Although the limited production of the small, introduced moose herd needs to be carefully managed, there is not a conservation problem associated with this population (*Claim 3.1*). Since this hunt requires that a hunter spend extra resources to access the area and to pass up easier moose hunts in the area, and in view of the fact that the customary users of this introduced moose herd are strongly weighted towards urban Juneau users, there is no justification for shifting this hunt towards rural users who have tended not to participate in the past (*Claim 3.2*). The fact that the Berners Bay moose occurs primarily on federal land does not in itself justify shifting hunting opportunity away from urban hunters towards rural residents.

#### **Claim 3.1 – Restriction of non-Federally qualified users is not justified because there is no conservation concern for the Berners Bay moose population**

##### *Preliminary assessment of Claim 3.1*

Territorial Sportsmen, Inc. states "there is not a conservation problem associated with this population." However, the intensity with which the Berners Bay moose population must be managed is contrary to this assertion. The population is currently managed by ADF&G through a drawing permit instead of a registration permit because there is a need to closely control the harvest of this essentially closed

population. The total demand from non-Federally qualified users and Federally qualified subsistence users exceeds the harvestable surplus of this population. This, combined with the limited geographic range and the lack of emigration or immigration, results in a chronic conservation concern for the Berners Bay moose population. The fact that the population is at the high end of its historical range does not diminish this conclusion. In accordance with Section 815(3) of ANILCA, restricting take for nonsubsistence uses is permitted when necessary for the conservation of a healthy population of moose or the continuation of subsistence uses of moose:

*Nothing in this title shall be construed as—*

*(3) authorizing a restriction on the taking of fish and wildlife for nonsubsistence uses on the public lands (other than national parks and park monuments) unless necessary for the conservation of healthy populations of fish and wildlife, for the reasons set forth in §816, to continue subsistence uses of such populations, or pursuant to other applicable law;*

Restricting harvest is required to ensure the conservation of a healthy moose population in Berners Bay.

*Conclusion:* There does not appear to be merit to this claim.

**Claim 3.2 – Restriction of non-Federally qualified users is not justified because there is no customary and traditional use of Berners Bay moose by rural users**

*Preliminary assessment of Claim 3.2*

Territorial Sportsmen, Inc. states that “there is no justification for shifting the hunt toward rural users.” They also assert that, under ANILCA, “exclusion of non-Federally qualified hunters can occur only if there is a conservation issue or if it is necessary to preserve existing customary and traditional uses.” However, “continuation of subsistence uses” and “customary and traditional uses” appear to be conflated in the latter statement. These terms are distinct and are addressed independently below.

When addressing concerns as to whether to restrict harvest by non-Federally qualified users, the Board considers whether or not there are enough resources to meet the harvest demands of all users. If there are not enough resources to meet all harvest demand, Section 804 of ANILCA establishes that subsistence is the priority consumptive use on Federal public lands:

*Except as otherwise provided in this Act and other Federal laws, the taking on public lands of fish and wildlife for nonwasteful subsistence uses shall be accorded priority over the taking on such lands of fish and wildlife for other purposes.*

The standard for restricting nonsubsistence uses on Federal public lands is outlined in Section 815(3) of ANILCA. In addition to the ability to restrict nonsubsistence uses when necessary for the conservation of healthy populations of fish or wildlife, the Board may also implement such restrictions to ensure the continuation of subsistence uses. Federally qualified subsistence users have had to rely on the State’s drawing permit system in order to harvest moose in Berners Bay since the inception of the Federal Subsistence Management Program in 1990. Demand for this resource by Federally qualified subsistence

users has regularly exceeded the number of permits available. In addition, the majority of successful applicants for these permits have been from the non-rural Juneau area.

With regard to customary and traditional uses, the Board determines which fish stocks and wildlife populations have been customarily and traditionally used for subsistence. Rural residents of Units 1 – 5 have a customary and traditional use determination for moose in Unit 1C (OSM 2010), entitling them to a subsistence priority, as outlined in Section 804 of ANILCA. The small number of Federally qualified subsistence users who receive a State draw permit is a function of the volume of applicants and is not evidence that they do not use or would not use the resource if provided additional opportunity. In addition, the Federal Subsistence Management Program does not differentiate between introduced and native populations of wildlife when making customary and traditional use determinations (OSM 2008). The administrative record shows that, at the April 2018 Board meeting, the historical use of Berners Bay moose by Federally qualified subsistence users, as well as by residents of the non-rural Juneau area, was discussed (FSB 2018). In addition, prior to making a final decision on Wildlife Proposal WP18-11, the Board was aware that Federally qualified subsistence users had little chance (<4%) of receiving a permit to hunt moose in Berners Bay under the existing State drawing system.

A careful review of the record demonstrates that the Board correctly interpreted and applied ANILCA law. The fact that there has never been a Federal subsistence hunt in Berners Bay does not eliminate the need to prioritize Federal subsistence uses over other consumptive uses on Federal public lands, as required by Section 804 of ANILCA.

*Conclusion:* The Board relied on relevant and factual information. There does not appear to be merit to this claim.

## **SUMMARY**

As discussed above, Territorial Sportsmen, Inc.'s claims appear to be without merit. No new relevant information was presented for the Board's consideration. None of the information the Board relied on was shown to be factually incorrect. There was no demonstration that the Board's interpretation of information, applicable law, or regulation was in error or contrary to existing law. There are sufficient conservation concerns to warrant restriction for non-subsistence use, as outline in Section 815, while Section 804 of ANILCA establishes that subsistence is the priority consumptive use on Federal public lands.

## **OSM CONCLUSION**

**Oppose** the request to reconsider WP18-11.

## **Justification**

Territorial Sportsmen, Inc.'s claims individually and collectively fail to reach the threshold for reconsideration as required under Federal subsistence regulations 36 CFR 242.20 and 50 CFR 100.20.

## LITERATURE CITED

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## INTERAGENCY STAFF COMMITTEE RECOMMENDATION

**Oppose** the request to reconsider WP18-11.

### **Justification**

The Interagency Staff Committee (ISC) found the threshold analysis for request for reconsideration RFR18-02 to be a thorough evaluation of the request and that it provides sufficient information for Federal Subsistence Board (Board) action on the request.

According to regulations under Subpart B § \_\_\_\_.20 the Board will accept a request for reconsideration only if it is based upon information not previously considered by the Board, demonstrates that the existing information used by the Board is incorrect, or demonstrates that the Board's interpretation of information, applicable law, or regulation is in error or contrary to existing law. The ISC concurs with the following conclusions presented in the RFR18-02 threshold analysis:

- No new relevant information was presented for the Board's consideration.
- None of the information the Board relied on was shown to be factually incorrect.
- There was no demonstration that the Board's interpretation of information, applicable law, or regulation was in error or contrary to existing law.
- There are sufficient conservation concerns to warrant restriction of nonsubsistence uses, as outlined in ANILCA Section 815, while Section 804 of ANILCA establishes that subsistence is the priority consumptive use on Federal public lands.

The claims of Territorial Sportsmen, Inc. appear to be without merit. None of the claims in RFR18-02 meet the threshold for reconsideration of the Board's decision on Wildlife Proposal WP18-11.

## APPENDIX A

**Name:** Matthew Robus, on behalf of the Territorial Sportsmen, Inc.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

**Organization:** Territorial Sportsmen, Inc.

**Regulation to be reconsidered:** Adoption at the April Federal Subsistence Board (FSB) meeting of a modified version of WP18-011, Berners Bay moose drawing permit hunt. The adopted regulation would award one quarter of allowable harvest to federally qualified hunters through a federal drawing. Publication in the Federal Register has apparently not happened as of this date.

**How we are affected:** Hunters who reside in Juneau, who have customarily dominated permit applications for this hunt, will lose 25% of their opportunity to hunt in Berners Bay. Juneau hunters participated in the introduction of the Berners Bay moose herd (via TSI funding) and have provided the majority of the “customary use” of this herd since hunting has been allowed. It is also likely that a larger portion of the allowable take will be granted to federally qualified users in the future, so the effect on non-federally qualified hunters could well expand if this decision is allowed to stand. The FSB’s action has shifted hunting opportunity away from non-federally qualified users towards hunters from federally designated communities without the ANILCA- required conditions being satisfied.

**How the FSB’s action is in error or contrary to existing law:** ANILCA states that exclusion of non-federally qualified hunters can occur only if there is a conservation issue or if necessary to preserve existing customary and traditional uses. Although the limited production of this small, introduced moose herd needs to be carefully managed, there is not a conservation problem associated with this population. Since this hunt requires that a hunter spend extra resources to access the area and to pass up easier moose hunts in the area, and in view of the fact that the customary users of this introduced moose herd are strongly weighted towards urban Juneau users, there is no justification for shifting this hunt towards rural users who have tended not to participate in the past. The fact that the Berners Bay moose herd occurs primarily on federal land does not in itself justify shifting hunting opportunity away from urban hunters towards rural residents.

**How we would like the regulation changed:** The FSB should reverse its decision and allow the pre-existing state drawing hunt to continue without change. The existing state permit system gives a fair chance to all hunters who wish to expend the extra resources necessary to successfully complete a Berners Bay hunt.

## APPENDIX B

### **§100.20 Request for reconsideration.**

*(a) Regulations in subparts C and D of this part published in the FEDERAL REGISTER are subject to requests for reconsideration.*

*(b) Any aggrieved person may file a request for reconsideration with the Board.*

*(c) To file a request for reconsideration, you must notify the Board in writing within sixty (60) days of the effective date or date of publication of the notice, whichever is earlier, for which reconsideration is requested.*

*(d) It is your responsibility to provide the Board with sufficient narrative evidence and argument to show why the action by the Board should be reconsidered. The Board will accept a request for reconsideration only if it is based upon information not previously considered by the Board, demonstrates that the existing information used by the Board is incorrect, or demonstrates that the Board's interpretation of information, applicable law, or regulation is in error or contrary to existing law. You must include the following information in your request for reconsideration:*

*(1) Your name, and mailing address;*

*(2) The action which you request be reconsidered and the date of FEDERAL REGISTER publication of that action;*

*(3) A detailed statement of how you are adversely affected by the action;*

*(4) A detailed statement of the facts of the dispute, the issues raised by the request, and specific references to any law, regulation, or policy that you believe to be violated and your reason for such allegation;*

*(5) A statement of how you would like the action changed.*

*(e) Upon receipt of a request for reconsideration, the Board shall transmit a copy of such request to any appropriate Regional Council and the Alaska Department of Fish and Game (ADFG) for review and recommendation. The Board shall consider any Regional Council and ADFG recommendations in making a final decision.*

*(f) If the request is justified, the Board shall implement a final decision on a request for reconsideration after compliance with 5 U.S.C. 551-559 (APA).*

*(g) If the request is denied, the decision of the Board represents the final administrative action.*