

IN THE DISTRICT COURT FOR THE STATE OF ALASKA

FOURTH JUDICIAL DISTRICT AT BETHEL

STATE OF ALASKA,)
)
Plaintiff,)
)
vs.)
)
BRIAN IVAN,	4BE-12-627 CR)
FELIX FLYNN,	4BE-12-559 CR)
OSCAR EVON	4BE-12-674 CR)
SAMMY JACKSON	4BE-12-591 CR)
KENNETH ANDREWS	4BE-12-583 CR)
DAVID PHILLIP	4BE-12580 CR)
PETER HINZ,	4BE-12-575 CR)
HOWARD NICHOLAI,	4BE-12-617 CR)
MICHAEL FRYE,	4BE-12-567 CR)
PETER BERLIN,	4BE-12-570 CR)
YAGO EVAN,	4BE-12-573 CR)
NOAH OKOVIK,	4BE-12-571 CR)
JOHN ALEXIE,	4BE-12-569 CR)
PATRICK BLACK,	4BE-12-560 CR)
NATHAN EVAN,	4BE-12-657 CR)
MAX OLICK,	4BE-12-589 CR)
JOHN OWENS,	4BE-12-595 CR)
JAMES ALBRITE	4BE-12-582 CR)
AUGUSTINE PITKA	4BE-12-650 CR)
SAMMY G. JACKSON	4BE-12-590 CR)
JOSEPH SPEIN,	4BE-12-629 CR)
EUGENE NICOLAI	4BE-12-603 CR)
DANA KOPANUK,	4BE-12-675 CR)
TOM CARL,	4BE-12-604 CR)
MICHAEL ANDREW,	4BE-12-602 CR)
)
Defendants.)

MEMORANDUM DECISION ON FREE EXERCISE DEFENSE
AGAINST PROSECUTION FOR SUBSISTENCE FISHING

The defendants have challenged the State's right to prosecute these subsistence fishing cases. Their argument is that subsistence fishing for Chinook (king) salmon is constitutionally protected based on fundamentally held religious beliefs and practices. The prosecution of these cases arises from allegations that each of the fishermen was fishing on the Kuskokwim River in June 2012 using gillnets with a mesh size in violation of an emergency order restricting gillnet mesh size to prevent or limit the taking of Chinook salmon. The emergency order was issued based on a Chinook salmon run deemed too low to meet escapement goals for the Kuskokwim River, a failure of which jeopardized the viability of a continued Chinook run.

After the issue was briefed, the court heard three days of expert testimony. Testimony was presented on the religious beliefs and practices of the Yupik culture. There was also expert testimony on the management and biology of the Chinook salmon run on the Kuskokwim River.

In 1979, the Alaska Supreme Court decided *Frank v. State*, 604 P.2d 1068 (Alaska 1979). Frank, the defendant in the case, was charged with taking a moose out of season. He defended his actions as constitutionally protected under the free exercise of his religious beliefs. Frank argued moose meat was necessary for a funeral potlatch. In *Frank*, the Alaska Supreme Court set out a three part test which must be met to invoke the free exercise clause as a defense, in this case, to subsistence fishing for Chinook salmon. The court held, "[t]he 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." *Id.* at 1071.

To invoke the free exercise clause, the defendants' must show there is a religion involved. Based on the testimony of Robert Nick and Dr. Chase Hensel, the court finds there is a religion involved. Both Dr. Hensel and Mr. Nick testified as experts in Yupik

culture and spirituality. Dr. Hensel's area of expertise is in subsistence and how people talk about subsistence activities in relation to their system of belief. Mr. Nick's expertise derives from living a traditional Yupik subsistence life in the Yukon-Kuskokwim Delta for the last 71 years.

Robert Nick, a seventy one year old native elder, was called to testify about the Yupik culture and belief system. He also testified about the traditional subsistence way of life. Mr. Nick testified from a lifetime of personal experience in the traditional ways of Yupik subsistence hunting and fishing. His life crosses the divide between subsistence as a cultural, spiritual and essential method of survival to the present world where subsistence is blended with many modern conveniences and the adoption of Christianity into a blended belief system between the old and the new. His entire adult life, Mr. Nick has been a leader in his community and the Y-K Delta and his testimony was in all respects highly credible.

Mr. Nick testified that all things were created by God, or the Creator, and that all things have a spirit and are connected. He identified subsistence and the harvest of resources as the core principle connecting Yupik to the resource, both animal and fish, and the Creator. He testified that learning how to harvest and care for the animals or fish are, "the most basic moral and spiritual values that we learn from our parents."

Dr. Hensel testified that Yupik traditional beliefs are founded on an interconnectedness existing between human persons and animal persons. He testified there is a belief that a person's actions have a reciprocal effect on how animals and fish behave toward that person or his community. He gave an example of giving fish away (because sharing is an important Yupik cultural value) and the fish respond to this

appropriate human behavior by allowing themselves to be caught, or “presenting themselves” to the fisherman. In this reciprocal relationship where personal action includes speech, talking disrespectfully about animals or fish changes your personal moral standing, and possibly the moral standing of the entire community. Thus, according to Dr. Hensel’s testimony, a person’s daily conduct, including speech, affects their ability to catch the animal or fish they are seeking.

Mr. Nick gave direct narrative testimony about traditional Yupik cultural and spiritual beliefs. In addition to outlining traditional beliefs and customs, Mr. Nick provided several detailed examples from his life experience.

Based on the totality of the testimony of both Mr. Nick and Dr. Hensel, the court finds that subsistence activities related to hunting and fishing are deeply rooted in the religious beliefs of the Yupik culture. Therefore, the defendants meet the first prong of the *Frank* test, a religion is involved.

The second question this court has to answer is whether fishing for Chinook salmon and fish camp activities associated with the preparation of salmon is religiously based conduct. Based on the evidence presented and the test outlined by the Alaska Supreme Court in *Frank, supra*, this court finds that the conduct in question is “religiously based”.

The court’s finding that these activities are religiously based conduct is supported by Mr. Nick’s testimony. Mr. Nick also testified that fish camp is a source where family unity and values are taught and learned. He described fish camp as a place where

everyone is busy with a job where they have something to learn. The learning includes the catching, processing and preparation of the salmon for preservation. Fish camp is also a place where the wisdom and experience, including traditional ways and cultural customs, of the Elders is passed to children and grandchildren. Mr. Nick specifically testified, "[t]he family activities that occur in those fish camps provide the most memorable experiences and the best and most spiritual and moral and ethical values in one's life when they are growing up. It's those future generations that we strive and work hard for."

The evidence presented by both experts, and especially by Mr. Nick identified fishing as religiously based conduct. Therefore, this court is required, pursuant to the holding in *Frank*, to find that subsistence fishing for Chinook salmon and the attendant activities are religiously based conduct. The Yupik cosmology which defines the relationship between a person and all other living things through the conduct of the person is inseparably connected to the Yupik subsistence way of life. Subsistence activities including the taking and caring for Chinook salmon done largely at "fish camp" are, according to Mr. Nick's testimony, the activities where cultural heritage is passed from one generation to the next.

Other than the general practice of engaging in subsistence activities, Dr. Hensel was unable to identify any specific rituals or ceremonial practices associated with subsistence fishing for Chinook salmon. Under cross examination, Dr. Hensel testified, ". . . as far as I know there weren't specific ceremonies around salmon or any sort of

fish.” (Emphasis added.) He went on to say that both hunting and fishing are sacred activities but not *ritualistic* or *ceremonial* activities.

The court in *Frank*, addressed a specific ceremony: a funeral potlatch. However, the language it used to state the test it formulated was whether “. . . the *conduct* in question is religiously based,. . .”. *Id.* at 1071. (Emphasis added.) Thus, in addressing the issue of the need for moose meat to validate a funeral potlatch, the Supreme Court, defined the test for religious free exercise with the word “conduct” which is not limited to any ceremonial or ritual conduct or practices as those terms are more commonly used. This choice of language by the Supreme Court, leaves this court no choice but to find that the subsistence fishing activities associated with the harvest and preparation of Chinook salmon falls within the parameters of the test set forth in *Frank*. It might seem appropriate to distinguish between day-to-day activities centered in cultural or spiritual beliefs and ceremonies or rituals held to be essential to the practice of a religious belief. However, this distinction between ceremony and more general day-to-day conduct, under the language of *Frank*, does not exist and this court is not free to rewrite the holding of *Frank, supra*.

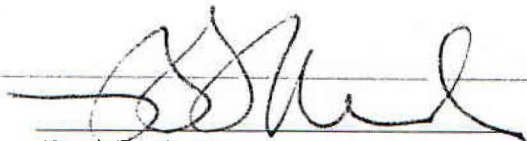
This court finds the first two parts to the three part test in *Frank* have been met. Assuming each defendant can meet their individual burden of “sincerity” of belief, the question remains, is there a compelling reason for the limitations placed by the State on the subsistence taking of Chinook salmon. This court finds that there is. This finding is based on the testimony of the research biologists who testified at length and in detail that

the Chinook salmon run was perilously small. The expressed concern was, "is this the year we wipe out the run?" This is unlike the underlying situation in *Frank* where the issue was the taking of one moose for purposes of a funeral potlatch. The *Frank* court stated, "[t]he 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." *Id.* at 1074.

However, that is exactly what the state argues, and in the view of this court, has proven in this case. This court finds based on the testimony of the fisheries biologists presented during the evidentiary hearing that the natural consequence of allowing the unfettered taking of Chinook salmon under the religious free exercise exception through subsistence harvest urged by the defendants would result in precisely the opposite of what the *Frank* court deemed a non-issue, that is the decimation of the species by over fishing. This finding is supported by the run data, weir data and extensive testimony by the fisheries expert witnesses. Therefore, this court finds the need to police the Chinook run, to ensure its continuity for future generations of Yupik fishermen and families, overcomes the argued for free exercise exemption which otherwise would apply.

It is so Ordered.

DATED: this 20th day of May 2013.

A handwritten signature in black ink, appearing to read "Bruce G. Ward", is written over a horizontal line.

BRUCE G. WARD
ACTING DISTRICT COURT JUDGE