

MEMORANDUM

State of Alaska Department of Law

TO: Kristy Tibbles Executive Director
Alaska Board of Game

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SUBJECT: Spring '09 Bd of Game meeting

GENERAL COMMENTS

In general, ethics disclosures: Before staff reports begin on any new agenda item, or, if preferred, at the very beginning of the meeting, Ethics Act disclosures and determinations must be made under AS 39.52.

In general, record-making: It is very important that Board members carefully explain and clearly summarize on the record the reasons for their actions and the grounds upon which the actions are based. The Alaska Supreme Court has stressed the importance of a clear record to facilitate the courts in determining that the Board's actions are within its authority and are reasonable. A clear record also assists the public in understanding the Board's rationale. If board members summarize the reasons for their actions before they vote, it will help establish the necessary record.

In considering each proposal, and the specific requirements that apply in some cases, such as with the subsistence law, it is important that the Board thoroughly discuss and summarize on the record the basis and reasons for its actions. Consistency with past approaches is another important point for discussion. If a particular action does not appear to be consistent, Board members should discuss their reasons for a different approach.

The Alaska Administrative Procedures Act requires that State agencies, including the Board of Game, "[w]hen considering the factual, substantive, and other relevant matter,...pay special attention to the cost to private persons of the proposed regulatory action." AS 44.62.210(a). This requirement to pay special attention to costs means, at a minimum, that the Board should address any information presented about costs, or explicitly state that no such information was presented, during deliberation of any proposal likely to be adopted. In our view, this requirement does not go so far as to mandate that the Board conduct an independent investigation of potential costs, nor does it require that cost factor into the Board's decision more than, for example, conservation

concerns might. However, it does require the Board to address and “pay special attention to” costs relevant to each regulation adopted.

In general, written findings: If any issue is already in court, or is controversial enough that you believe it might result in litigation, or if it is complex enough that findings may be useful to the public, the department, or the Board in the future, it is important that the Board draft and adopt written findings explaining its decisions. From time to time, the Department of Law will recommend that written findings be adopted, in order to better defend the Board’s action. Such recommendations should be carefully considered, as a refusal to adopt findings, in these circumstances, could mean that the Board gets subjected to judicial oversight and second-guessing which might have been avoided. The Alaska Supreme Court has stressed the importance of an adequate decisional document, or written finding, to a determination that the Board has acted within its authority and rationally in adopting regulations, and has deferred to such findings in the past.

In general, subsistence: For each proposal the Board should consider whether it involves or affects identified subsistence uses of the game population or sub-population in question. If action on a proposal would affect a subsistence use, the Board must be sure that the regulations provide a reasonable opportunity for the subsistence uses, unless sustained yield would be jeopardized. If the Board has not previously done so, it should first determine whether the game population is subject to customary and traditional uses for subsistence and what amount of the harvestable portion, if any, is reasonably necessary for those uses. The current law requires that the Board have considered at least four issues in implementing the preference:

- (1) Identify game populations or portions of populations customarily and traditionally taken or used for subsistence; *see* 8 criteria at 5 AAC 99.010(b);
- (2) determine whether a portion of the game population may be harvested consistent with sustained yield;
- (3) determine the amount of the harvestable portion reasonably necessary for subsistence uses; and
- (4) adopt regulations to provide a reasonable opportunity for subsistence uses.

Reasonable opportunity is defined to mean “an opportunity, as determined by the appropriate board, that allows a subsistence user to participate in a subsistence hunt or fishery that provides a normally diligent participant with a reasonable expectation of success of taking of fish or game.” AS 16.05.258(f). It is not to be construed as a guarantee of success.

The amount of the harvestable portion of the game population that is reasonably necessary for subsistence uses will depend largely on the amount of the game population used for subsistence historically and the number of subsistence users expected to participate. Once the Board has determined the amount reasonably necessary for subsistence uses, the Board should by regulation provide an opportunity that allows the predicted number of normally diligent participants a reasonable expectation of success in taking the subject game. The Board may base its determination of reasonable opportunity on information regarding past subsistence harvest levels of the game population in the specific area and the bag limits, seasons, access provisions, and means and methods necessary to achieve those harvests, or on comparable information from similar areas.

If the harvestable portion of the game population is not sufficient to provide for subsistence uses and other consumptive uses, the Board is required to reduce or eliminate non-subsistence uses in order to continue to provide a reasonable opportunity for subsistence uses. If the harvestable portion of the game population is still not sufficient to provide a reasonable opportunity for all subsistence uses, the Board is required to eliminate non-subsistence consumptive uses and distinguish among the subsistence users based on the following Tier II criteria:

- (1) The customary and direct dependence on the game population by the subsistence user for human consumption as a mainstay of livelihood; and
- (2) the ability of the subsistence user to obtain food if subsistence use is restricted or eliminated. AS 16.05.258.

In general, intensive management: Under AS 16.05.255 (e), (f) and (g), the Board should assure itself that the steps outlined below have been followed when acting on proposals dealing with ungulate populations.

First - Determine whether the **ungulate** population is **important for high levels of human consumptive use**.

- If so, then subsequent intensive management analysis may be required.
- If not, then no further intensive management analysis is required.

Second - Is the ungulate population **depleted** or will the Board be **significantly reducing the taking** of the population?

The Board must determine whether depletion or reduction of productivity, or Board action, is likely to cause a significant reduction in harvest.

- If either is true, then subsequent intensive management analysis is required.
- If not, then further intensive management analysis is not required.

Third - Is intensive management appropriate?

(a) If the population is depleted, has the Board found that consumptive use of the population is a preferred use? Note that the Legislature has already found that “providing for high levels of harvest for human consumption in accordance with the sustained yield principle is the highest and best use of identified big game prey populations in most areas of the State...” In the rare cases where consumptive use is not a preferred use, then the Board need not adopt intensive management regulations.

(b) If consumptive uses are preferred, and the population is depleted or reduced in productivity so that the result may be a significant reduction in harvest, the Board must consider whether enhancement of abundance or productivity is feasibly achievable using recognized and prudent active management techniques. At this point, the Board will need information from the Department about available recognized management techniques, including feasibility. If enhancement is feasibly achievable, then the Board must adopt intensive management regulations.

(c) If the Board will be significantly reducing the taking of the population, then it must adopt, or schedule for adoption at its next meeting, regulations that provide for intensive management *unless*:

1. Intensive management would be:
 - A. Ineffective based on scientific information;
 - B. Inappropriate due to land ownership patterns; or
 - C. Against the best interests of subsistence users;

or

2. The Board declares that a biological emergency exists and takes immediate action to protect and maintain the population and also schedules for adoption those regulations necessary to restore the population.

Comments on Individual Proposals

Proposals 13, 111, 143 and 223: Each of these proposals suggests that nonresidents be required to submit a completed guide-client agreement prior to applying for drawing permits. If the Board adopts one or more of these proposals, written findings in support should also be adopted.

Proposals 14, 15, 16, 17, 19, 47, 106, 108, 109, 158, 203, 212, 213 and 214: Each of these proposals requests action including discrimination in favor of residents and against nonresidents regarding a species for which the Legislature has not already directed that resident uses be preferred. Accordingly, to meet basic constitutional equal protection guidelines, if the Board decides to proceed along the lines proposed it must identify a legitimate governmental purpose served by the discrimination and state how that discrimination is rationally related to achieving the purpose.

Proposals 22, 24, 25, 26, 27, 28, 43, 118, and 121: Each of these proposals suggests eliminating a hunting or trapping use of a particular population. The Board certainly is authorized to do so, when conditions warrant, but it should keep in mind that the Legislature has charged it, overall, with preserving the heritage of hunting and trapping in the state. That duty should be recognized, and countervailing considerations identified, during deliberations to eliminate consumptive uses.

Proposal 37: Lynx are both furbearers and fur animals, subject to taking under both trapping and hunting licenses. The Board has the freedom to provide a reasonable opportunity for subsistence uses of these animals under either trapping or hunting regulations, or both.

Proposals 44, 51, 64, 67, 77, 78, 112, 174 and 186: Each suggests adopting special, more restrictive, seasons or bag limits for National Park Lands in order to assist federal agencies in meeting their obligations under ANILCA. In deliberating these proposals, the Board should keep the following principles in mind. First, the State of Alaska has not been in compliance with ANILCA since at least 1990, and the Board is not obligated by anything in that Act. Second, the National Park Service has not made any statement or argument that state regulations are preempted in these areas. Third, Federal Subsistence Board regulations in these areas are also very liberal and while not identical to state regulations, do not appear to set the stage for an argument that the conflicts are so great that preemption must be implied. Fourth, the Board should consider whether it might be asked to adopt special seasons and bag limits for other landowners.

Proposals 57, 146, 147, 148, 149, and 150: Each of these proposals suggests reducing the take of a population that the Board has identified as important for high levels of human consumptive use. If the reduction would be significant, the Board must consider

whether intensive management regulations should be adopted, following the process outlined above.

Proposal 84: This proposal suggests a community harvest permit hunt that varies in several significant ways from the way that program is currently administered. If the Board proceeds to adopt regulations along the line proposed, it will have to make adjustments to the regulations for the community harvest permit program to accommodate these differences. For example, under this proposal, permittees would apparently be authorized to participate in both community harvest permit hunts and general, harvest ticket hunts, which is not currently allowed. Also, the proposal seems to contemplate a specific allocation to the community harvest permit hunt. It suggests different, more liberal, seasons and bag limits for the community harvest permit hunts, which is different from the current system. In addition to considering these changes, if the Board elects to adopt a regulation along these lines, it should consider whether this would be a “subsistence hunt only” and “by community harvest permit only.” Finally, the freedom to create such a hunt is completely dependent on the Board finding that the harvestable surplus is at least sufficient to provide for all subsistence uses, and that creating such a hunt would provide, or aid in providing, a reasonable opportunity for the subsistence uses.

Proposals 87, 88 and 90: Some may be confused, after reading the first two of these proposals, about whether a court has ruled that the Board is prohibited from using income as a Tier II scoring criterion, and that income may not be used to “zero out” any other scores. Neither impression would be true. What the Court said was that the Board may use income, but it must adjust it by the cost of living in different parts of Alaska if it chooses to do so. The Court did hold that income, or any other single criterion, may not be used to “zero out” an entire application. It did not hold, however, that it cannot “zero out,” for example, the applicants “ability to obtain food” score so long as a separate score is maintained for “customary and direct dependence”. It is the Dept. of Law’s opinion that the Board may continue to base scoring, in part, on income, and that income may be used to “zero out” the ability to obtain food, so long as the cost of living is factored in, if the Board so chooses.

Proposal 89: The Board does not currently prepare the list of communities. That has been a Department function.

Proposal 91: The Board has the authority to adopt regulations along the lines of what is proposed, but it is the Department of Law’s view that the current situation is not discriminatory, as Tier II hunters are not situated similarly to any other group. Under equal protection analysis, special privileges may warrant special rules.

Proposals 95, 97, 100, 101, 102, and 103: Before going to a drawing permit or allowing nonresident participation, the Board must adopt regulations that provide a reasonable opportunity for subsistence uses of moose.

Proposal 108: The Board allocates, not the Department.

Proposal 113: When considering this proposal, the Board must keep in mind that if the population remains depleted, the intensive management law mandates that it adopt intensive management regulations to restore the abundance or productivity of the population, so long as enhancement is feasibly achievable utilizing recognized and prudent active management techniques.

Proposal 142: The wording suggested is confusing. It might be better stated as a bag limit of 1 billy per year, by drawing or registrations permit only..., or 1 goat per 6 years, if a nanny is taken.

Proposals 168, 169, 189, 192 and 237: When considering these regulations the Board should be mindful of the need to maintain a clear separation between predator control activities and general hunting practices.

Proposals 187 and 188: If the predator control areas are expanded, the Board should adopt new findings on point.

Proposal 197: If the State needs the data acquired through sealing, presumably it needs it from successful hunters regardless of where they live. So, a more defensible option to achieve this goal would be to give people with difficulties travelling to an ADF&G office another option to meet sealing requirements.

Proposal 204: Only the Department is authorized to set fees for services it provides, and when it does so, it must set the fees at a level no higher than the amount necessary to recover the costs of the services rendered.

Proposal 220: This proposal appears to be an effort to limit illegal guiding. As such, the best agency to address it is the Big Game Commercial Services Board. If the Board of Game decides to address this problem, it could consider a broad rule such as a general prohibition on taking game spotted from the air or from a boat.

Proposal 224: The Department of Law does not believe the regulation is unenforceable, as the proposal implies.