

MEMORANDUM

State of Alaska Department of Law

TO: Kristy Tibbles Executive Director
Alaska Board of Game

DATE: January 23, 2013

FILE NO.: JU2012200712

TEL. NO.:

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SUBJECT: February 2012 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. *See* 5 AAC 99.025 for current findings on customary and traditional uses and amounts reasonably necessary for subsistence 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. This may require the Board to determine which users have been taking game for subsistence purposes, and which ones have not. 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. In doing so, the Board must distinguish among the various uses, unless the harvestable surplus is so numerous as to be able to provide for all uses. 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 any other consumptive uses, the Board is required to 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**. The Board has already made many of these determinations. *See* 5 AAC 92.108. However, these past findings do not preclude new findings, especially if based on new information.

– 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? See 5AAC 92.106(5) for the Board’s current definition of “significant” as it relates to intensive management.

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

Proposal 47: This proposal suggests opening a non-resident caribou season with a \$1000.00 tag fee and a guide requirement. The nonresident guiding requirement is in statute, AS 16.50.407, and the Board may not adopt a regulation that is inconsistent with statute. Nor does the Board have the authority to set tag or permit fees.

Proposal 53: This proposal suggests a Tier II caribou hunt. The South Alaska Peninsula Herd, Units 9(D) & 10, currently has a positive C&T finding with an ANS of 100-150. 5 AAC 99.025(a)(4). The Board should determine whether the harvestable portion of the population is insufficient to provide a reasonable opportunity for subsistence uses before implementing a Tier II hunt. AS 16.05.258(b)(4).

Proposal 55: This proposal appears to suggest a special season for Brown Bear that would be open to local residents only, in violation of the equal access provisions of the Alaska Constitution as stated in *McDowell v. State* and subsequent decisions.

Proposals 64 and 125: In developing youth hunts, the Board should consider the requirements of AS 16.05.255(i).

Proposals 65 through 73: Each of these proposals would modify the existing Unit 13 caribou and moose hunting regulations and could also affect subsistence uses. The Board needs to determine, in each case, whether it is able to still provide a reasonable opportunity for subsistence uses and, therefore, whether other uses may be allowed.

Proposal 65: This proposal seeks in part to have the Board review each group's eligibility to participate in the CSH. The Board may not distinguish between subsistence users unless "the harvestable portion of the ... population is not sufficient to provide a reasonable opportunity for subsistence uses." AS 16.05.258(b)(4)

Proposal 66 and 67: These proposals seek to replace the current Tier I and CSH Nelchina Caribou permits or the current CSH moose permits with a weighted draw permit hunt. Draw permit hunts may not provide reasonable opportunity because "reasonable opportunity" is defined as an opportunity that allows a subsistence user to participate in a subsistence hunt with a reasonable expectation of success. AS 16.05.258(f). Additionally, as noted above, the Board may not distinguish between subsistence users unless "the harvestable portion of the ... population is not sufficient to provide a reasonable opportunity for subsistence uses." AS 16.05.258(b)(4)

Proposal 68: This proposes changes to statewide regulations (5 AAC 92.072 and 5 AAC 92.074) to increase the minimum number of people necessary to form a group for the Copper Basin Community Subsistence Harvest program from 25 to 50 or more residents. If this proposal is adopted, the Board should be careful at this meeting to change the requirements only for the Copper Basin CSH program and not those for CSH programs in other areas that are not in cycle for this meeting (e.g. Chalkyitsik or Yukon Flats).

Proposal 74: This proposal does not appear to indicate any justification for limiting hunting opportunity to those with three years of experience.

Proposal 75: The guide requirement for brown and grizzly bear is contained in statute, AS 16.05.407(a), and the Board may not adopt a regulation that is inconsistent with statute.

Proposals 80, 81, 82, 83, 84, and 85: In evaluating findings and objectives for intensive management, the Board should apply the criteria of 5 AAC 92.106.

Proposal 87: This proposal seeks to allow off-road vehicle use for elderly and disabled individuals. It is unclear whether this proposal seeks off-road vehicle access in state parks or in controlled use areas. Regulations concerning the use of off-road vehicles in state parks are adopted by the Department of Natural Resources and are beyond the power of the Board. Existing regulations allow a disabled individual to obtain a permit for off-road vehicle use in controlled use areas under the proper circumstances. *See* 5 AAC 92.104.

Proposals 104 and 105: Both of these proposals seek to prohibit bear snaring throughout Region IV, which is already prohibited under existing regulations in the Region, with the exception of predator control activities in the Unit 16 Predation Control Area conducted under a permit.

Proposal 109: This proposal suggests removing the nonresident guide requirement for sheep, goats, and brown bears. The nonresident guiding requirement is in statute, AS 16.50.407, and the Board may not adopt a regulation that is inconsistent with statute.

Proposals 109 and 110: Both of these proposals suggest raising fees—instituting or changing fees is not within the Board's powers.

Proposal 112: This proposal suggests requiring big-game guides to be Alaska residents. Guide qualifications are not within the Board's powers, and residency based restrictions on occupations are generally in conflict with the privileges and immunities clause of the United States Constitution.

Proposals 52, 90, 91, 109, 110, 111, 112, 113, 114, 115, 116, and 117: Each of these proposals suggests discriminating, in some way, in favor of residents and against nonresidents. While the Board has an obligation to provide a resident preference for the taking of moose, deer, elk, and caribou for personal or family consumption over nonresident taking, many of these proposals suggest resident preferences beyond the four species listed in statute. The Board may discriminate in favor of residents and against nonresidents in allocating hunting opportunity if it concludes that the game populations in question cannot sustain the expected demand by both residents and nonresidents. *Shepherd v. State, Dep't of Fish and Game*, 897 P.2d 33, 40-41 (Alaska 1995). In such cases, the Board may exclude or limit nonresident opportunity as appropriate under the circumstances.

Proposals 115, 116, 117, 118: Each of these proposals would allocate a certain percentage of drawing permits to residents and nonresidents. Current Board policy, 2007-173-BOG, states: "Allocations will be determined on a case by case basis and will be based on upon the historical data of nonresident and resident permit allocation over the last 10 years."

Proposals 45, 46, 49, 60: Each of these proposals suggests limitations on existing hunting opportunity or expansions of nonresident hunting opportunity that could also affect subsistence uses. The Board needs to determine, in each case, whether it is able to still provide a reasonable opportunity for subsistence uses and, therefore, whether other uses may be allowed.