MEMORANDUM

State of Alaska
Department of Law

TO: The Honorable Frank Rue
Commissioner
Department of Fish & Game

DATE: August 16, 1995

FILE NO.: 663-95-0363

TEL. NO.: 465-3600

SUBJECT: Scope of Board of Fish and Game authority under AS 16.05.251(a)(1) and AS 16.05.255(a)(1)

FROM: Steven A. Daugherty
Assistant Attorney General
Natural Resources Section - Juneau

I. INTRODUCTION

Your department has asked us for legal advice concerning the interpretation of AS 16.05.251(a)(1) and AS 16.05.255(a)(1). These statutes authorize the Alaska Board of Fisheries and Alaska Board of Game ("Boards") to adopt regulations setting apart fish and game reserve areas, refuges, and sanctuaries. The statutes limit such regulations to land and waters over which the Boards have jurisdiction,[1] and the regulations are subject to approval of the legislature. You have asked us to explain these provisions and the Boards' authorities under them in the context of a draft proposal submitted by several fish and game advisory committees.[2]

II. QUESTIONS

You have asked us to explain what authorities the Boards have under AS 16.05.251(1)(a) and AS 16.05.255(1)(a). You have also asked us to outline the procedures for exercising those authorities. As part of our explanation, you have requested that we (1) define the terms "game reserve area" and "fish reserve area," (2) explain the meaning of the phrase "over which it has jurisdiction," and (3) clarify the extent of the Boards' jurisdiction.

---

[1] The Board of Fisheries' authority is limited to waters over which it has jurisdiction. AS 16.05.221(1)(a). The Board of Game may set aside areas "in the water or on the land of the state over which it has jurisdiction." AS 16.05.251(1)(a).

[2] The draft proposal, submitted by the Anchorage, Iliamna, Naknek, and Nushagak advisory committees, would create a six million acre Central Bristol Bay Drainages Fish and Game Reserve. The advisory committees have expressed the belief that action by the Boards would serve to postpone disposals of state land in the proposed reserve.

III. SHORT ANSWERS

We have determined that the provisions for legislative approval in AS 16.05.251(1)(a) and AS 16.05.255(1)(a) are probably unconstitutional because they violate the separation of powers doctrine. Alternative interpretations that would allow the Boards to take action without legislative approval would probably result in unconstitutional delegations of power. In the past, when faced with a separation of powers issue, see 1988 Inf. Op. Att'y Gen. (Aug. 30; 663-88-0308), we have noted that we cannot predict with certainty how a court would rule on the issue and have recommended adherence to the statutory directive. We believe that this is the only manner in which the Boards can set aside reserves which will be legally defensible.

If the statutory directive is followed, any action by the Boards will essentially be a recommendation to the legislature. Such a recommendation will have no legal effect until enacted by the legislature and signed into law by the governor. Thus, action by the Boards will not result in an immediate legal barrier to disposal of state lands. A recommended approach for setting aside the reserves in a manner consistent with the statutory directive is presented below.

IV. DISCUSSION

A. Statutes at Issue.

Two subsections of the statutes defining the regulatory authorities of the Boards address the establishment of reserve areas, refuges, and sanctuaries.

> (a) The Board of Fisheries may adopt regulations it considers advisable in accordance with AS 44.62 (Administrative Procedure Act) for
>
> (1) setting apart fish reserve areas, refuges, and sanctuaries in the waters of the state over which it has jurisdiction, subject to the approval of the legislature;

AS 16.05.251(a)(1).

> (a) The Board of Game may adopt regulations it considers advisable in accordance with AS 44.62(Administrative Procedure Act) for

> (1) setting apart game reserve areas, refuges and sanctuaries in the water or on the land of the state over which it has jurisdiction, subject to the approval of the legislature;

AS 16.05.255(a)(1).

B. Meaning of "Game Reserve Area" and "Fish Reserve Area."

The term "reserve" as used in AS 16.05.251(a)(1) and AS 16.05.255(a)(1) is not defined in statute or in regulation. **Black's Law Dictionary** defines "reserved land" as: "public land that has been withheld or kept back from sale or disposition." **Black's Law Dictionary** 1308 (6th ed. 1990). Similarly, **Black's** defines the term "reservation" as "a tract of land, more or less considerable in extent, which is by public authority withdrawn from sale or settlement, and appropriated to specific public uses; such as parks, military posts, Indian lands, etc." Id. at 1307. These definitions suggest that a "reserve" is created when public lands are closed to certain uses and made available for other specified uses. The legislature has, by statute, created only one "reserve" in the state, the Bristol Bay Fisheries Reserve, see AS 38.05.140(f). However, it has created many refuges and sanctuaries which are specialized reserves. See AS 16.20.

C. Meanings of "Over which it has Jurisdiction" and the Extent of those Jurisdictions.

The "jurisdictions" of the Boards as used in AS 16.05.251(a)(1) and AS 16.05.255(a)(1) are not defined in statute or regulation. The Boards' jurisdiction for regulating the taking of fish and game generally extends throughout the state, and includes authority over state, federal, and private lands.[3] Thus, except to the extent that it is preempted by federal law,[4] the

---

[3] Jurisdiction exists over federal land for purposes of regulation of taking of fish and game unless the state consents to federal jurisdiction, the state cedes exclusive jurisdiction to the federal government, or the state's laws are preempted by federal law. See Totemoff v. State, ____ P.2d ____, No. S-4236, slip op. at 3 (Alaska August 7, 1995); Defenders of Wildlife v. Andrus, 627 F.2d 1238, 1248 (D.C. Cir. 1980).

[4] See, e.g., Federal Subsistence Regulations at 36 C.F.R. pt.

(continued...)

regulatory jurisdiction of the Boards generally extends to all land within the state and to the edge of the territorial sea.[5] However, we conclude that the jurisdictions of the Boards for purposes of setting aside reserves are not coextensive with the regulatory jurisdiction of the Boards.

For purposes of AS 16.05.251(a)(1) and AS 16.05.255(a)(2), "jurisdiction" must be construed in the context of state action setting aside reserves. The power to set aside reserves must be limited to those areas in which the state would have authority to "reserve" or "withdraw" land. As such, we believe that the jurisdiction of the Boards for setting aside reserves, refuges, and sanctuaries is limited to state public lands, excluding federal and private lands, and to natural waters of the state, extending out to the edge of the territorial sea.[6]

D. Meaning of "Subject to the Approval of the Legislature."

The term "subject to the approval of the legislature" raises constitutional questions under the doctrine of "legislative veto" and under the doctrine of "separation of powers." An alternative interpretation that would allow the Boards to take action without legislative approval would probably not be

---

[4](...continued)
242 (1994)(U.S.D.A. Forest Service); 50 C.F.R. pt. 100 (1994)(U.S.D.I. Fish and Wildlife Service).

[5] The territorial sea extends three miles from a baseline which translates the natural undulations of bays and promontories into a series of connected straight lines of various lengths that conform to the general outline of the natural coast. See Convention on the Territorial Sea and Contiguous Zone, Apr. 29, 1958, entered into force Sept. 10, 1964, 15 U.S.T. 1606, 516 U.N.T.S. 205; 43 U.S.C. § 1312; 16 U.S.C.S. § 1856(a)(2) (Law. Co-op. 1984 & Supp. 1995).

[6] It is arguable that some waters may be beyond the jurisdiction of the Boards because of federal reserved water rights, see State v. Babbitt, 54 F.3d 549, 554 (9th Cir. 1995). However, we do not believe that reserved water rights would be a sufficient interest to serve as a basis for depriving the state of jurisdiction so long as the Boards' actions do not interfere with the federal navigational servitude or with the purposes for which waters are reserved. See Totemoff v. State, ___ P.2d ___, No. S-4236, slip op. at 15-31 (Alaska August 7, 1995).

supportable because of problems of severability and constitutional restraints on delegation of powers.

1. Legislative vetoes.

A "legislative veto" occurs when a legislative body acts to disapprove and hence "veto" an executive branch action that has been authorized by statute. 1 Norman J. Singer, Sutherland Statutory Construction § 3.18.59 (5th rev. ed. 1994). The principal case in Alaska on legislative vetoes is State v. A.L.I.V.E. Voluntary, 606 P.2d 769 (Alaska 1980). In A.L.I.V.E. Voluntary, the Alaska Supreme Court held that a statute allowing the legislature to annul a regulation by adopting a concurrent resolution violated the enactment provisions of article II of the Alaska Constitution.[7] That article sets out particular steps for exercising legislative power that are not satisfied by adopting a concurrent resolution. Id. at 772-773.

If possible, legislation should be construed to avoid the possibility of unconstitutionality. Kimoktoak v. State, 584 P.2d 25, 31 (Alaska. 1978). Following that principle, we believe that "approval of the legislature" can be construed as not being a legislative veto. That phrase can be interpreted to mean that the legislature may give its "approval" by following the enactment procedures set out in article II of the constitution, and only by following those procedures. See 1980 Inf. Op. Att'y Gen. at 6-9 (Oct. 9; A66-022-81). This interpretation will avoid the problem presented by the defective statute in A.L.I.V.E. Voluntary. That statute specified that the legislature could veto a regulation by adopting a joint resolution, a process that does not follow the steps required for exercising legislative power under article II. However, while this interpretation prevents an unconstitutional legislative veto from occurring, it does not address issues raised by the doctrine of separation of powers.

---

[7] The Supreme Court stated, "[W]hen the legislature wishes to act in an advisory capacity it may act by resolution. However, when it means to take action having a binding effect on those outside the legislature it may do so only by following the enactment procedures." State v. A.L.I.V.E. Voluntary, 606 P.2d 769, 773. (Alaska 1980).

2. Separation of powers.

The "separation of powers doctrine" prohibits one branch of government from encroaching on and exercising the powers of another branch. Bradner v. Hammond, 553 P.2d 1, 5 (1976) (citing Myers v. United States, 272 U.S. 52 (1926)). The doctrine is implicit in Alaska's constitution. State v. Williams, 681 P.2d 313, 315 n.2 (Alaska 1984); Bradner, 553 P.2d at 5. We have discussed the basis for the separation of powers doctrine in detail in a previous memorandum. See 1976 Inf. Op. Att'y Gen. (May 28; Pegues).

The threshold question under the doctrine is whether the power that will be exercised by a branch of state government is a proper function of that branch. See Bradner, 553 P.2d at 6. To answer that question, the Alaska Supreme Court has examined powers of the branches as set out in the constitution. For example, in Bradner v. Hammond, the court examined article III and concluded that the appointment of executive officers is a function of the executive branch, and that legislative confirmation is a "specific attribute of the appointive power of the executive." Bradner, 553 P.2d at 6, 7. In State v. Williams, the court examined its own rule-making powers, set forth in article IV of the constitution, to determine whether a particular court rule was within its judicial powers, or instead, was a power that should be exercised by the legislature. Williams, 681 P.2d at 315-318.

Article VIII of the Alaska Constitution vests special responsibility for the management of the state's natural resources in the legislature. Particularly relevant are sections 2 and 7, which provide:

> The legislature shall provide for the utilization, development, and conservation of all natural resources belonging to the State, including land and waters, for the maximum benefit of its people.

Alaska Const. art. VIII, § 2.

> The legislature may provide for the acquisition of sites, objects, and areas of natural beauty or of historic, cultural, recreational, or scientific value. It may reserve from the public domain and provide for their administration and preservation for the use, enjoyment, and welfare of the people.

Alaska Const. art. VIII, § 7. These sections indicate that setting apart special use areas, including reserves, is generally a lawmaking function.[8] However, once a lawmaking function is delegated to the executive branch, the legislature may not oversee the implementation and enforcement of the law.[9] Responsibility for the enforcement of the law rests on the executive branch, and oversight of the application of the law is the responsibility of the judicial branch.[10]

In other instances, we have concluded that provisions similar to the legislative approval requirement in these statutes are probably unconstitutional. See, e.g., 1987 Inf. Op. Att'y Gen. (April 1; 663-87-0392); 1985 Inf. Op. Att'y Gen. (Aug. 13; 166-065-86); 1981 Inf. Op. Att'y Gen. (Nov. 3; J-66-159-82). Some of these earlier opinions also involved areas in which the legislature has special constitutional responsibility under article VIII of the Alaska Constitution. See, e.g., 1988 Inf. Op. Att'y Gen. (Aug. 30; 663-88-0308)(critical habitat area plans); 1976 Inf. Op. Att'y Gen. (May 28;)(disposition of state lands).

Like provisions for legislative approval which we previously addressed, see, e.g., 1988 Inf. Op. Att'y Gen. (Aug. 30; 663-88-0308)(critical habitat plans), these statutes require legislative action before an executive action becomes effective.

---

[8] The legislature has already taken action similar to that provided by AS 16.05.251(a)(1) and AS 16.05.255(a)(1) when it adopted, in separate statutes, numerous game refuges and sanctuaries, range areas, and critical habitat areas. See AS 16.20.

[9] The United States Supreme Court has defined "legislative powers" as follows:

> Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them or appoint agents charged with such enforcement.

Springer v. Philippine Islands, 277 U.S. 189 (1928).

[10] See 1976 Inf. Op. Att'y Gen. at 7 (May 28; Pegues). The legislature may impose standards for application of the law, may provide for judicial review, and may change the law to provide more stringent requirements and guidelines. See id. at 8-9.

This arguably makes the legislature into an executive agent. Id. at 3. As a result, we believe that the requirement of legislative review is probably constitutionally infirm. However, as we have noted in the past, we cannot predict with absolute certainty how a court would rule on the separation of powers issue. Further, as explained below, if a court did find the legislative approval provision invalid, we believe that would create a delegation of powers problem which would invalidate the subparagraphs dealing with setting aside reserves. Therefore, we recommend that as a matter of practicality, you comply with the provision or seek a more detailed grant of authority from the legislature.

3. The requirement of legislative approval is not severable.

As noted above, we believe that the provisions of AS 16.05.251(a)(1) and AS 16.05.255(a)(1) requiring legislative approval are unconstitutional because they violate the separation of powers doctrine. However, we do not believe that the Boards can set aside reserves without going through the legislative approval process because the provisions for legislative approval are not severable from the attendant grants of authority to the Boards.

Alaska has a general "severability" statute, AS 01.10.030, which provides that if a portion of a statute is found invalid, an attempt should be made to give the remainder of the statute legal effect. The Alaska Supreme Court has held that this general provision creates a slight presumption in favor of severability. Lynden Transport, Inc. v. State, 532 P.2d 700, (Alaska 1975). The Alaska Supreme Court has adopted a two-prong test for severability:

> A provision will not be deemed severable "unless it appears both that standing alone, legal effect can be given to it and that the legislature intended the provision to stand in case others included in the act and held bad should fall."

Id. at 713 (citing Dorchy v. Kansas, 264 U.S. 286, 290 (1924)).

Applying the first prong of this test to AS 16.05.251(a)(1) and AS 16.05.255(a)(1), if the phrase "subject to the approval of the legislature" is severed, that would result in a broad and unrestrained grant of authority to the Boards to set aside reserves, refuges, and sanctuaries. Such a broad delegation

of power to the Boards would probably violate the doctrine of nondelegation of powers.

Under article II, section 1 of the Alaska Constitution, the legislative power of the state is vested in the legislature. Restrictions on the legislature's power to delegate arise from this provision and from the doctrine of separation of powers, discussed above. See, e.g., State v. Fairbanks North Star Borough, 736 P.2d, 1140, 1142-43 (Alaska 1987); Boehl v. Sabre Jet Room, Inc., 349 P.2d 585, 588 (Alaska 1960). However, the nondelegation doctrine is not absolute; both the United States Supreme Court and the Alaska Supreme Court have recognized that delegation of legislative power is often necessary to achieve legislative purposes. See, e.g., Boehl, 349 P.2d at 588; Mistretta v. United States, 488 U.S. 361, 372 (1989). Under the nondelegation doctrine, delegations of legislative authority are only permissible where the legislature establishes an "intelligible principle" to guide and confine administrative decision making. State v. Fairbanks North Star Borough, 736 P.2d at 1143. A sliding scale analysis is applied; as the scope of the power delegated increases, the specificity of the standards given to govern its exercise must also increase. Id. (citing Synar v. United States, 626 F. Supp 1374, 1386 (D. D.C. 1986)).

In State v. Fairbanks North Star Borough, a statute authorizing the governor to withhold or reduce appropriations where receipts and surpluses would be insufficient to cover the appropriations was held to be an unconstitutional delegation of power. 736 P.2d at 1142-43. The court noted that it was under a duty to construe statutes to avoid constitutional infirmity where possible. Nonetheless, it held that a grant of sweeping power with no guidance or limitation was unconstitutional. Id.

Similarly, the power to establish reserves, refuges, and sanctuaries is sweeping.[11] As was the case in State v. North Star Borough, the legislature has given no detailed guidelines for the exercise of that power. The Boards are restrained only by their general purposes of conservation and development of fish and game resources and by the requirement that they follow the procedures of the Administrative Procedures Act. See AS 16.05.221; AS 16.05.251(a); AS 16.05.255(a). Thus, in the absence of the

---

[11] The immensity of this power is illustrated by the advisory committee proposal which we have been asked to review; this proposal involves setting aside over six million acres.

requirement of legislative approval, there are no substantive constraints on the Boards' actions so long as those actions serve the purposes of conservation and development of fish and game resources. The legislature has imposed no standards to ensure that its responsibilities under article VIII are met. Therefore, we believe that in the absence of legislative approval, AS 16.05.251(a)(1) and AS 16.05.255(a)(1) would represent impermissible delegations of power. These provisions would not satisfy the first prong of the severability test adopted in Lynden Transport.

Similarly, under the second prong of the Lynden Transport test, we find it unlikely that the legislature intended the provision for establishment of reserves to stand in the absence of the provision for legislative approval. Such intent would be shown if "the remaining parts are so independent and complete that it may be presumed that the legislature would have enacted the valid parts without regard to the invalid part." Jefferson v. State, 527 P.2d 37, 41 (Alaska 1974). The same rationale that led us to conclude that the statutes were not capable of standing on their own also leads us to conclude that the legislature would not have intended the Boards to exercise this type of power without legislative oversight.

As noted above, the legislature has special responsibilities for the management of the state's natural resources under article VIII of the Alaska Constitution. Where the legislature has explicitly delegated power over the disposition of lands and resources, it has imposed detailed guidelines and conditions on the exercise of that power. See AS 38. The legislature has also expressed a preference for allowing multiple purpose use of land. See, e.g., AS 38.05.300 (limiting classification of land by the Commissioner of the Department of Natural Resources to prevent the closure of contiguous areas of over 640 acres to multiple purpose use); AS 38.04.065 (land use plans for state owned lands). We conclude that the legislature would not have intended to delegate broad authority to the Boards for setting aside reserves without providing substantive guidelines to ensure that its responsibilities were being met and that natural resources were being used in a manner consistent with maximum public benefit.

The requirement of legislative approval of reserves is not severable from the grants of authority to the board under either prong of the severability test adopted in Lynden Transport.

Therefore, the Boards cannot set aside reserves without obtaining legislative approval.

V. RECOMMENDED APPROACH

For the above reasons, we recommend that the Boards proceed in a manner consistent with the statutory requirement of legislative approval. This is consistent with advice which we have given the Department of Fish and Game in the past. See 1988 Inf. Op. Att'y Gen. (Aug. 30; 663-88-0308). Normally the Boards would develop a draft plan, publish notice with respect to adoption of that plan, receive public comment, and then finalize the plan and adopt it into regulation. In this instance, however, the requirement, "subject to approval by the legislature," complicates that approach.

In similar situations in the past, we have recommended preparing a draft plan, following of the Administrative Procedure Act process up to but not including the point of actual adoption, and then submitting a short bill to the legislature which, if enacted, would approve the plan as developed. Under this approach, the legislature would not statutorily designate the reserve, but would simply authorize the Boards to do so. The Boards would take final adoption action after enactment by the legislature. The Boards would be able to amend the plan in response to any limitations or plan amendments mandated by the enacted legislation.[12]

Future amendments to reserves set aside through this process may require similar procedures unless the plan approval enacted by the legislature contains provisions providing guidelines for amendments and allowing the Boards to make amendments under the Administrative Procedures Act.[13] If such language is added to the proposed plan and approved by the legislature, it will not be necessary to return to the legislature for approval of future amendments.

---

[12] If legislative mandates result in a plan which falls outside the scope of the original legal notice of proposed regulations a new public notice would be required before adoption.

[13] The statutes do not make it clear whether amendment or repeal of reserves established by regulation would require legislative approval.

Another option would be for the Boards to develop a plan under the Administrative Procedure Act, adopt it as a recommendation, and present a bill containing the entire plan to the legislature for direct enactment.[14] If such a bill were to be passed and enacted, the reserve would be established by statute instead of regulation, and no further action by the Boards would be

The decision as to which of the above approaches to use should be made by the Boards after consideration of the implications of each approach. No matter which approach the Boards take, we recommend that the plan contain a provision that states when the plan will become effective (i.e., upon enactment by the legislature or after adoption by the Boards following enactment of legislative approval).

You may also wish to pursue a legislative change to AS 16.05.251(a)(1) and AS 16.05.255(a)(1). While such a path would not accomplish your current objectives within a reasonable time frame, it could be of assistance if the Boards desire to take similar action in the future.

VI. CONCLUSION

We hope the above analysis answers your questions. If we can provide you with additional assistance in this matter, please contact us at your convenience.

SAD:prm

---

[14] We note that the approach that we previously recommended may be cumbersome and may present problems under the Administrative Procedure Act. Possible problems include the following: (1) public notice might become stale during the enactment process and supplemental notice might be required before adoption of regulations, (2) the legislature might enact a bill which would not allow the Boards to adopt a plan falling within their original public notice and thus necessitate a new public notice prior to adoption, and (3) the legislature might enact a bill establishing a reserve without Board action, so that a regulation would no longer be reasonably necessary.