

MEMORANDUM

State of Alaska Department of Law

TO: Kristy Tibbles Executive Director
Alaska Board of Game

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SUBJECT: March 4-10 and 26-30 Bd. of
Game meetings

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. At this point, the Board may find it useful to estimate which users are involved in subsistence uses and which are involved in another type of use. 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, keeping in mind that the current law provides no authority to directly limit participation to only subsistence users so long as the amount reasonably necessary for subsistence exceeds the harvestable portion. 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. In order to maintain the subsistence preference and a reasonable opportunity for subsistence uses, the Board may authorize issuance of subsistence permits for areas, villages, communities, groups or individuals as a way of reducing harvest by nonsubsistence users.

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 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 6, 7, 12, 13, 26, 28, 40, 79, 80, 101, 115, 133, and 134 : All of these proposals suggest that residents and nonresidents be treated differently under the regulations, as to species that are not automatically preferred for resident uses by statute. Therefore, the Board must ensure on the record that differential treatments of residents and nonresidents in each case is rationally related to a legitimate government concern or purpose if the suggested changes are to be adopted.

Proposal 8: This proposal suggests limitations on subsistence hunting that may require an examination of the need to consider a Tier II hunt.

Proposal 15: Federal regulations already state that, “You may not take a species of wildlife in any unit, or portion of a unit, if your total take of that species already obtained anywhere in the State under Federal and State regulations equals or exceeds the harvest limit in that unit unless specified otherwise in these regulations.” Federal regulations do not authorize the taking of more than one moose in any portion of Unit 9. Even if they did, the Board would have no authority to change federal regulations.

Proposal 36: The Board should consider the intensive management implications of this proposal.

Proposal 41: The proposal provides no justification for restricting hunting to those with at least 3 years of experience.

Proposals 42, 44, and 45: Each of these proposals suggests changing nonsubsistence area boundaries, an act that is within the purview of the Joint Boards of Fisheries and Game, not the Board of Game alone. Also, proposals 42 and 45 suggest regulatory changes that would require the Board to carefully examine, and determine, whether a reasonable opportunity for subsistence uses would continue to exist.

Proposal 43: The Department of Law does not view the exclusivity restrictions as unconstitutional. To the contrary, they have already survived one legal challenge making arguments similar to those made here.

Proposals 46 and 47: The Board must provide a reasonable opportunity for subsistence uses before nonsubsistence opportunities may be allowed. To limit all

subsistence users to one caribou every several years, the Board would need to find, based on facts in the record, that such an opportunity is reasonable in light of identified subsistence needs.

Proposal 48: This proposal is based on a misunderstanding. The Board does not determine which communities are qualified to participate in community harvest hunts. Under the regulations, all communities and groups of 25 or more are able to participate.

Proposal 67: Basic proxy hunting rules are set in AS 16.05.405 and may not be eliminated by the Board. That statute allows a person to proxy hunt for more than one person, so long as it is only one at a time. Community harvest permits are specifically authorized under AS 16.05.330. Community hunting for hire is already prohibited under 5 AAC 92.072(g).

Proposal 69: The Board's charge is to regulate to benefit the Alaskan people as a whole, within statutory guidelines, not on behalf of individuals or discrete businesses.

Proposals 72 and 177: These proposals request closures or limitations on consumptive uses in areas, citing various user conflicts and other concerns relating to the development of game resources as well as public safety concerns. Because the Board's statutory authority is limited to regulation "for purposes of the conservation and development of the game resources of the state," AS 16.05.221(b), it has long been the Department of Law's advice that the Board may not regulate for, primarily, public safety purposes. The Board certainly may allocate among uses, including nonconsumptive uses, but in doing so it must articulate a conservation or development of game rationale.

Proposals 75 and 101: These proposals ignore that Unit 16A is in a nonsubsistence area.

Proposal 78: Legislative intent cannot trump plain statutory language.

Proposal 94: The Board must provide a reasonable opportunity for subsistence uses before opening hunting to nonresidents.

Proposal 97: The decision as to whether subsistence hunting must be done under a Tier I or Tier II regime is driven by comparing the harvestable surplus to the amount reasonably necessary for subsistence, which this proposal does not address.

Proposal 121: The Board should adopt a plan under 5 AAC 92.125 if it decides to adopt something along the lines proposed here.

Proposal 127: Establishing seasons and bag limits, standing alone, would not require the introduction of new game species to an area.

Proposal 199: The Board has no authority to alter the amounts of fines.

Proposal 204: This proposal contains no information on the proposed hunting area, or on any of the other considerations listed under 5 AAC 92.072(b). Moreover, the Board probably cannot limit a community harvest permit hunting opportunity to only the Village of Minto.