

MEMORANDUM

State of Alaska Department of Law

TO: Alaska Board of Game DATE: May 7, 2015

CC: Kristy Tibbles FILE NO.: AN2014101430
Executive Director
Alaska Board of Game TEL. NO.: 269-5232

FROM: Cheryl Rawls Brooking SUBJECT: Proposal 207, as amended,
Assistant Attorney General adopted by the Board of Game
Natural Resources Section March 2015
Department of Law

REPORT TO BOARD OF GAME REGARDING PROPOSAL 207

At the Board's request, our office reviewed possible legal concerns raised in response to the adoption of Proposal 207. This memo summarizes our review, and our conclusion that Proposal 207 is a valid regulation within the authority of the Board to regulate hunting methods and means.

The following regulatory change resulting from Proposal 207 was submitted to the regulations attorneys in Juneau as an amendment to 5 AAC 92.085(a)(8). This language is subject to further modification before the regulation is filed with the Lt. Governor. The regulation is expected to be effective July 1, 2015.

(8) a person who has been airborne may not take or assist in taking a big game animal until after 3:00 a.m. following the day in which the flying occurred; **and from August 10 through September 20 aircraft may not be used by or for any person to locate Dall sheep for hunting or direct hunters to Dall sheep during the open sheep hunting season, however, aircraft other than helicopters may be used by and for sheep hunters to place and remove hunters and camps, maintain existing camps, and salvage harvested sheep. Restrictions in** this paragraph **do**[DOES] not apply to

...

(C) a person flying on a regularly scheduled commercial airline, including a commuter airline;

Background

The discussion of the Board with regard to Proposal 207 occurred over the course of three months at public meetings. At a public work session in Juneau on January 8,

2015, the Board voted to add the proposal to its agenda, publish notice, and request public comments. At a public meeting in Wasilla from February 13-20, 2015, the Board heard reports on Dall sheep from the Division of Wildlife Conservation, a summary of an Alaska sheep hunter survey report, and public testimony. In addition, a separate evening town hall style work session was held February 13th on the topic of Dall sheep, at which more than 160 people attended in person and by teleconference and approximately 42 people spoke. The Board voted to defer consideration of Proposal 207 to its March meeting in Anchorage. At a public meeting in Anchorage from March 13-18, 2015, the Board heard additional public testimony, discussed possible alternatives, and voted to adopt Proposal 207, as amended. (The Big Game Commercial Services Board met in Fairbanks in March and voted in support of the Board's action on Proposal 207.) At a special public teleconferenced meeting held on April 24, 2015, the Board voted to schedule a special public teleconference meeting on May 28 to discuss whether to rescind Proposal 207, as amended.

Federal aviation law does not preempt the Board's ability to restrict the use of aircraft for hunting.

Several persons questioned whether federal law preempts the Board's authority to restrict the use of aircraft. While acknowledging that the federal government has the authority to regulate airspace, it must also be acknowledged that the state has the authority to regulate hunting and trapping. Proposal 207 is a valid regulation restricting methods and means for taking game. The Board is not regulating airspace, but placing a limited restriction on the use of aircraft for hunting purposes during sheep hunting season. Howard Martin, Regional Counsel for the Alaska Region of the Federal Aviation Administration in Anchorage, agrees.

The Federal Aviation Administration has broad authority to regulate airspace, but does not preclude all state or local regulations that may impact use of aircraft.¹ Courts have invalidated state or local government laws in situations where a law would directly interfere with federal control of airspace management or airline safety.² Regulation of hunting is an area subject to regulation by the state, and in such instance, it is presumed that a state is authorized to regulate. Preemption will only be found if there is "a clear statement of the federal intent to do so."³ Proposal 207 does not improperly attempt to regulate airspace or regulate air carriers, and is not a prohibited attempt to regulate aircraft safety, but is a valid restriction regarding use of aircraft for hunting.

¹ *Alaska Bd. of Fish and Game v. Thomas*, 635 P.2d 1191 (Alaska 1981).

² For example, in a 5:4 decision in *City of Burbank v. Lockheed Air Terminal Inc.*, 411 U.S. 624 (1973), the Supreme Court found a city ordinance prohibiting jets from taking off at night, to control aircraft noise, was preempted by the Federal Aviation Act and the Noise Control Act.

³ *Skysign Intern., Inc. v. City and County of Honolulu*, 276 F.3d 1109, 1115 (Ninth Cir. 2002). *See also*, *Center for Bio-Ethical Reform, Inc. v. City and County of Honolulu*, 455 F.3d 910 (9th Cir 2006). Local sign ordinance restricting aerial advertising was not preempted by federal regulation of navigable airspace.

Proposal 207 is similar to many other valid regulations restricting the use of aircraft for hunting and fishing, including the following:

- Use of a helicopter is prohibited for taking unprocessed game, hunters and hunting gear to or from the field.⁴
- “a person who has been airborne may not take or assist in taking a big game animal until after 3:00 a.m. following the day in which the flying occurred”⁵
- “a person who has been airborne may not use a firearm to take or assist in taking a wolf or wolverine until after 3:00 a.m. on the day following the day in which the flying occurred”⁶
- Use of aircraft to spot salmon for commercial fishing in the Bristol Bay, Alaska Peninsula, and Prince William Sound Areas is prohibited.⁷
- Use of motorized vehicles, including aircraft, to harass game, or to drive, herd, or molest game, is prohibited.⁸
- Use of drones is prohibited.⁹
- Use of motorized vehicles, including aircraft, is restricted or prohibited for hunting in controlled use areas.¹⁰

These restrictions are analogous to restrictions on vessels for hunting and fishing. The state may regulate the use of aircraft and vessels for hunting and fishing without interfering with federal navigation rights under the Commerce Clause of the U.S. Constitution.

Current regulations regarding professional standards for guides prohibit use of an aircraft in any manner to spot big game for the purpose of taking an animal, including Dall sheep.¹¹ The restriction in Proposal 207 already is, or should, be a consistent practice for guided hunts.

⁴ 5 AAC 92.080(3).

⁵ 5 AAC 92.085(8).

⁶ 5 AAC 92.095(8).

⁷ 5 AAC 06.379; 5 AAC 09.378; 5 AAC 24.378.

⁸ 5 AAC 92.080(5).

⁹ 5 AAC 92.080(7).

¹⁰ 5 AAC 92.540.

¹¹ 12 AAC 75.340(d)(8).

Proposal 207 is not unconstitutionally vague. Ordinary people would understand what conduct is prohibited, and it does not encourage arbitrary and discriminatory enforcement.

One person suggested that the proposed change is unconstitutional under the “void for vagueness” doctrine. The court will start with a presumption that a law is constitutionally valid, and will avoid a finding of unconstitutionality to the extent possible.¹² To show a law is void for vagueness, a challenger must show that it is written in a manner such that an ordinary person would not understand what conduct is prohibited, and it encourages arbitrary and discriminatory enforcement.¹³

Proposal 207 puts a reasonable person on notice of what conduct is prohibited.

- The prohibited conduct is specified - use of an aircraft to locate sheep for hunting or direct hunters to sheep.
- The time period during which the restriction is in effect is specified - from August 10 through September 20, during the open sheep hunting season.
- The type of vehicle is specified - aircraft.
- The game is specified – Dall sheep.

For additional clarity, allowable uses of aircraft for sheep hunting are described - aircraft may be used by and for sheep hunters to place and remove hunters and camps, maintain existing camps, and salvage harvested sheep.

Guidance from the Alaska Supreme Court indicates Proposal 207 is a valid regulation. Same day airborne restrictions, prohibition on intentionally feeding bears, defense of property and self, and prohibition of wanton waste regulations are not constitutionally vague or overbroad.¹⁴ Likewise, Proposal 207 is sufficiently clear that reasonable people would understand their rights under the regulation. “A statute which may be criticized because it fails to give adequate notice of every type of conduct which is prohibited may still be sustained (1) if the offense charged falls squarely within its prohibitions and (2) if a construction may be placed upon the statute so that its reach may be reasonably understood in the future.”¹⁵ “In determining the sufficiency of the notice a

¹² *Treacy v. Municipality of Anchorage*, 91 P.3d 252, 260 (Alaska 2004).

¹³ *Id.* at 261.

¹⁴ *Jordan v. State*, 681 P.2d 346 (Alaska App. 1984).

¹⁵ *Larson v. State*, 564 P.2d 365, 372 (Alaska 1977).

statute must of necessity be examined in the light of the conduct with which a defendant is charged.”¹⁶

The Board of Game closed the Holitna/Hoholitna River corridor to the use of any boat equipped with a motor exceeding 40hp for hunting big game, including transportation of hunters, hunting gear, or their game.¹⁷ The regulation was challenged and upheld.¹⁸ The three hunters facing criminal charges tried to assert the regulation was unconstitutionally vague because it did not provide reasonable notice of what conduct is prohibited. The court disagreed:

The defendants contend that this regulation is unconstitutionally vague because the regulation does not specify whether it applies to boat owners, boat pilots, boat passengers, or some combination of the three. Such specificity is not required. The regulation prohibits any person-no matter what their ownership interest or fiduciary interest in the boat might be-from engaging in conduct (using a boat) under a particular circumstance (the boat is equipped with a motor rated at more than 40 horsepower) for a particular purpose (the “taking of big game” as defined in the regulation). Under the laws governing criminal responsibility, and under the facts of a particular case, it is conceivable that a boat owner, a boat pilot, and/or a boat passenger might violate this regulation. This does not make the regulation unconstitutionally “vague.”

The court then dispensed with the assertion that “big game hunting gear or equipment” is vague because certain gear could be used for survival as well as hunting. The undisputed facts were that defendants were moose hunting.

There may be difficulties in enforcement, particularly in a vast and remote geographic area, but there is no expectation that enforcement would be arbitrary and discriminatory. As with many other hunting regulations, enforcement may be limited by personnel and resources. Use of professional judgment by an enforcement officer does not mean a law is arbitrarily enforced.¹⁹ To show discriminatory enforcement, a challenger must show that the law gives unbridled discretion to law enforcement personnel and prosecutors to determine the scope of the law’s prohibition and to determine what constitutes the crime.²⁰ “We will not invalidate a statute on vagueness grounds absent evidence of a history of arbitrary or capricious enforcement.”²¹

¹⁶ *Parker v. Levy*, 417 U.S. 733, 757 (1974).

¹⁷ 5 AAC 92.540(7)(B)(ii).

¹⁸ Unpublished decision, *Berlin v. State of Alaska*, 1998 WL 426555 (Alaska App. 1998).

¹⁹ *Larson v. State*, 564 P.2d 365, 372 (Alaska 1977).

²⁰ *Summers v. Anchorage*, 589 P.2d 863, 867 (Alaska 1979) citing *Stock v. State*, 526 P.2d 3, 7-9 (Alaska 1974); *Hagblom v. City of Dillingham*, 191 P.3d 991, 998 (Alaska 2008).

²¹ *Stock* at 868.

Courts upheld similar regulations, and would likely uphold this regulation for Dall sheep.

The regulation adopted in Proposal 207 reflects a time-honored means and method regulation. It does not regulate aircraft or airspace, but regulates people during sheep hunting season. The Board has the authority to ban sheep spotting under its statutory authority to establish “the means and methods employed in the pursuit, capture, taking, and transport of game.”²²

5 AAC 92.085(a)(8) adopted by the Board of Game is similar to 5 AAC 06.379 adopted by the Board of Fisheries to prohibit the use of aircraft for spotting salmon for commercial fishing in Bristol Bay during periods open for commercial salmon fishing. The regulation was challenged and upheld by the Alaska Supreme Court.²³ The decision confirmed that the Board of Fisheries had the authority to adopt the regulation, and the regulation did not violate the Alaska Constitution.

In another relevant example,²⁴ the court upheld Board of Game regulations restricting use of aircraft and airboats in controlled use areas. The Noatak CUA in Unit 23 is closed from August 15 through September 30 to the use of aircraft for big game hunting, except between publicly owned airports.²⁵ Use of airboats for moose hunting was prohibited in the Nenana CUA during the moose hunting season. The court held that these regulations were a valid exercise of the Board’s authority to regulate means and methods, were reasonable and not arbitrary, and did not violate the constitution.²⁶

²² AS 16.05.255.

²³ *Alaska Fish Spotters Association v. State, Dept. of Fish and Game*, 838 P.2d 798 (Alaska 1992).

²⁴ *Interior Alaska Airboat Association, Inc. v. State of Alaska, Board of Game*, 18 P.3d 686 (Alaska 2001).

²⁵ 5 AAC 92.540(9).

²⁶ *Interior Alaska Airboat Association, Inc., supra*.