

MEMORANDUM

State of Alaska Department of Law

TO: Kristy Tibbles Executive Director
Alaska Board of Game

DATE: September 30, 2010

FILE NO.: JU2010201668

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SUBJECT: Oct. 8-12, 2010 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. 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 1, 4, 7, 8, 10, 11, 12, 13, 15, 16, 17, 18, 19 24 and 30: All of these proposals suggest that the Tier II hunt be eliminated and some type of permit hunt available to all Alaskan applicants be instituted. As the discussion of the subsistence law set forth above illustrates, because the Board has found that Nelchina caribou are customarily and traditionally taken for subsistence uses, the Board is legally obligated to adopt regulations that provide a normally diligent participant with a reasonable expectation of success in taking a caribou, if the harvestable portion exceeds the amount necessary for subsistence. If it does not, then the Board must institute a Tier II hunt. None of the proposals suggesting that a random drawing be instituted set forth any rationale as to how a random drawing would provide a normally diligent participant with a reasonable expectation of success, so this is an area the Board should thoroughly explore if it decides to proceed along these lines...

Proposal 2: Allowing “any Alaskan resident” to participate in a subsistence hunt is contingent on a determination that the harvestable portion is sufficient to provide for all subsistence uses, in which case, as stated above, the Board is legally obligated to provide an opportunity that allows a normally diligent participant a reasonable expectation of success. If the Board decides to proceed along the lines suggested in this proposal it should thoroughly explore the degree to which participation in predator control efforts may be deemed to be part of “normal diligence” in this area.

Proposal 3: As explained above, a Tier I hunt is required when the harvestable portion meets or exceeds the amount necessary for subsistence. A Tier II hunt is required when the harvestable portion is insufficient to provide a reasonable opportunity for subsistence uses, i.e. is less than the amount necessary for subsistence. In other words, it is not legally permissible to have both a Tier I and Tier II hunt on the same population.

Proposal 5: See the comments for proposal 3. Also, because the Legislature has mandated that the Board base Tier II scoring on two remaining criteria, the Board has an obligation to measure applicants’ abilities to obtain alternative foods for Tier II hunts.

Proposal 6: Age has not been a scoring factor for Tier II hunts. The proposer may be referencing the questions designed to measure customary and direct dependence as a mainstay of livelihood. If the Board decides to address these questions it must do so in a manner that continues to measure an applicant’s customary and direct dependence on the population in question as a mainstay of livelihood.

Proposals 9, 19 and 25: For all Tier II hunts, the Board is legally obligated to continue to measure applicants' abilities to obtain alternative foods. The Alaska Supreme Court held, in the *Manning* decision, that the current questions measuring cost of food and cost of gas are constitutionally permissible ways of doing so. Also, the Board is obligated to base its decisions as to which hunting regulations to adopt on, among other things, whether the harvestable portion exceeds the amount necessary for subsistence, which requires the Board to establish a thoroughly-considered amount necessary for subsistence.

Proposals 13 and 30: Whether the area is a nonsubsistence area or not is a decision for the Joint Boards of Fisheries and Game, not for the Board of Game alone.

Proposal 14: The Board may proceed along the lines suggested in this proposal so long as it determines that it is able to provide a reasonable opportunity for all subsistence uses and that, after doing so, a sufficient harvestable portion will remain to allow for other uses.

Proposals 20 and 23: The court in the current *Manning* case found that the Nelchina community harvest hunt as set forth under existing regulations is fundamentally residency based, and enjoined its continuance. See pages 27 and 29 of the attached decision. However, at page 28, the court also said that, "[t]he Department may establish one or more CHPs within Unit 13, consistent with Alaska constitutional and statutory requirements, but must retain the administrative responsibilities to ensure that accurate, timely information is provided to the public regarding who, when, and how interested Alaskans may apply to participate in the community hunt." Accordingly, if the Board decides to proceed with regulations authorizing community harvest, it should make changes to the current regulations explicitly stating that community harvest permits are available to all Alaskan communities and ensuring that core governmental functions remain with the Department and are not delegated away.

Proposal 27: This proposal would continue, through the end of the season, the hunts ordered by the court in *Manning* to take place for the 2010-11 regulatory year. This is a special situation and does not apply after the close of the current season, since the subsistence law does not permit a Tier I and Tier II hunt to be adopted at the same time for the same population. Thus, the Board must come up with different regulations that apply for the 2011-12 and subsequent seasons.

Proposal 31: If the Board decides to adopt this proposal, it should reexamine and renew its findings under AS 16.05.783.