

# MEMORANDUM

## State of Alaska Department of Law

TO:	Kristy Tibbles Executive Director Alaska Board of Game	DATE:	January 30, 2015
		FILE NO.:	JU2015
		TEL. NO.:	269-5232
FROM:	Cheryl Rawls Brooking Assistant Attorney General Natural Resources Section Department of Law	FAX:	278-4607
		SUBJECT:	February 2015 Central/Southwest Region Board 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 Procedure 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. The Board may base its determination of reasonable opportunity on all relevant information including 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 reduce or eliminate non-subsistence uses in order 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 53:** This proposal has three parts: Amend 5 AAC 92.044 to allow bait and lures for brown bear in Unit 17, amend 5 AAC 92.210 allow dead moose from natural mortality as bait/lure for bear, and amend 5 AAC 85.020 to eliminate two brown bear limit. The proposal does not suggest replacing the two brown bear limit with a one brown bear limit, and the Board would need to amend the proposal if it is the Board's intent to establish a one brown bear limit in 5 AAC 85.020. In addition, the proposed amendment to 5 AAC 92.044 regarding bait and lures for brown bear is a statewide regulation.

**Note regarding litigation:** The Board of Game adopted community subsistence hunt regulations for the Copper River basin in 2009. 5 AAC 92.072. A lawsuit challenged the regulations, *Manning v. State Dep't of Fish and Game*, 3KN-09-781 CI, and the Board responded to the court's decision by amending the regulations in 2011. Three lawsuits challenging the regulations for community subsistence harvest hunts for caribou and moose in the Copper River basin in Unit 13 are pending.

In the first suit, *Alaska Fish and Wildlife Conservation Fund v. State & Ahtna Tene Nene*, 4FA-11-1474CI, S-14516, plaintiff challenged the constitutionality of the regulations. The Fairbanks superior court granted the state's motion for summary judgment and the plaintiff appealed. Oral argument was held in December 2013, and a decision is pending.

In the second case, *Manning v. State and Saxby*, 3KN-11-367CI. Kenneth Manning challenged the constitutionality of the regulations and the elimination of Tier II hunts, and seeks to overturn current Unit 13 caribou and moose subsistence hunt regulations. The trial court ruled in favor of the State and awarded the State attorneys' fees in the amount of \$4573. Manning appealed to Alaska Supreme Court, S-15121. Oral arguments were held in May 2014 and a decision is pending.

Manning filed a new case in 2013, *Manning v. State, Dept. of Fish and Game*, 3KN-13-708 CI, again challenging the constitutionality of subsistence regulations and the elimination of the Tier II hunts for Nelchina caribou. This litigation is stayed, awaiting a rulings on the pending cases discussed above.

### **Board of Game Committee on Copper Basin Area Subsistence Hunting - Proposals 65-83: CSH proposals.**

**Proposal 70:** This proposal would add to 5 AAC 92.072 definitions of "community" and "individual" and "social group." The Department proposed definitions for the Board to

consider. “Social group” and “individual” are not used in the community or group subsistence hunt regulation. The Board may wish to consider defining “community” and “group,” but it is not recommended to define terms that are not used in the regulation.

**Proposal 71:** This proposal would implement a reporting and point system for Tier I community and group subsistence hunts. The Board should keep in mind the ruling in *State v. Morry*, 836 P.2d 358 (Alaska 1992), that the Board cannot adopt eligibility criteria for Tier I absent specific statutory authority.

**Proposal 72:** This proposal would adopt a Tier II point system to be applied to Tier I community and group subsistence hunts. The Board should keep in mind the ruling in *State v. Morry*, 836 P.2d 358 (Alaska 1992), that the Board cannot adopt eligibility criteria for Tier I absent specific statutory authority.

**Proposal 74:** This proposal would require the Board of Game to approve all applications for community-based subsistence hunts by communities or groups. AS 16.05.255 and AS 16.05.258 authorize the Board of Game to establish regulations, and the Board meets one to three times each year to address regulatory proposals. AS 16.05.050 authorizes the Commissioner of the Department of Fish and Game to exercise administrative powers. Regulations in 5 AAC 92.020 through 5 AAC 92.074 provide guidance to the Department for issuing all permits for taking game. If adopted this would be an unusual assumption by the Board of an administrative permitting function. The Board should also keep in mind the ruling in *State v. Morry*, 836 P.2d 358 (Alaska 1992), that the Board cannot adopt eligibility criteria for Tier I absent specific statutory authority.

**Proposal 83:** This proposal would discontinue the community or group subsistence community or group harvest moose hunt in Unit 13 and establish a weighted drawing hunt for residents when the harvestable surplus exceeds the minimum amount reasonably necessary for subsistence. The community or group subsistence hunt would continue in Unit 11 and portion of 12 unchanged. There is a legal concern regarding whether drawing hunts allow all residents a reasonable opportunity.

**Proposal 84:** This proposal would amend 5 AAC 85.045(a)(11) from any bull in Unit 13 to a subsistence drawing hunt for residents for 1 bull or antlerless moose by weighted drawing permit. There is a legal concern regarding whether drawing hunts allow all residents a reasonable opportunity.

**Proposal 88:** This proposal would amend 5 AAC 99.010 to calculate the number of subsistence users for determining ANS based on individual resident hunter data. This would affect a statewide joint board regulation, requiring approval of both boards, and would mandate a methodology for determining ANS applicable only in Unit 13.

**Proposal 89:** This proposal would amend 5 AAC 92.070 to change Tier II eligibility in Unit 13 for big game permits based on individual resident hunter data. Eliminate consideration of community costs of fuel, groceries, time spent hunting in the area of the hunt. This would amend a statewide regulation, but only eliminate use of the criteria for big game in Unit 13. For Tier II subsistence hunt eligibility, AS 16.05.258(b)(4)(B) requires consideration of “the customary and direct dependence on the fish stock or game population by the subsistence user for human consumption as a mainstay of livelihood” and “the ability of the subsistence user to obtain food if subsistence use is restricted or eliminated.” The factors currently stated in 5 AAC 92.070 are consistent with the statutory directive.

**Proposal 105:** This proposal is a recommendation to expand the Palmer Hay Flats State Game Refuge to incorporate adjacent parcels acquired by the State. This is not a regulatory action, but the Board may make a recommendation to the legislature under AS 16.05.255(a)(1) for the legislature to set aside land for inclusion in a game refuge.

**Proposal 130:** This proposal would amend 5 AAC 92.080 to allow same-day airborne hunting of wolves and coyotes in Central/Southwest Region if the hunter is at least 300 feet from the plane. This proposal partially conflicts with AS 16.05.783, which prohibits shooting or assisting in shooting a free-ranging wolf or wolverine the same day a person has been airborne, with an exception if authorized by the Board of Game for a predator control program. There is no similar restriction for coyotes, and same-day-airborne taking of coyotes is currently authorized under 5 AAC 92.095(8) when a person is more than 300 feet from the airplane.

**Proposal 204:** This proposal would amend 5 AAC 92.037(a) and 5 AAC 037(g)(1) to remove the trapping license requirement for falconry. Under current regulations, a trapping license is needed for taking furbearers only.