

MEMORANDUM

State of Alaska Department of Law

TO: Kristy Tibbles
Executive Director
Alaska Board of Game

DATE: October 12, 2016

TEL. NO.: 269-5232

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SUBJECT: October 2016 Special
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 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.

Comments specific to items on the special meeting agenda for October 23, 2016:

Agenda Change Requests:

Agenda change requests (“ACRs”) are to be addressed under the Board’s policy, adopted as a regulation in 5 AAC 92.005.

Proposal 154:

A written request from Ahtna dated August 30, 2016 for a special meeting was put into proposal format, as Proposal 154, and asks for three regulation changes. The letter asked for a special meeting for the first two requests, and the last paragraph asked for a separate special meeting for the third request. The first two requests are for increased

caribou and moose quotas and extension of the Copper Basin community hunt season to at least September 25. The third request seeks revisions to the community hunt regulations. All three requests are presented at this meeting for the Board's consideration in making possible regulatory changes.

To the extent Ahtna is asking for opportunities that would apply only to the Ahtna group, the Board should consider limitations on its authority found in the public trust doctrine, and the equal access and common use clauses of the Alaska Constitution.

The decision in *Alaska Fish and Wildlife Conservation Fund v. State*, 347 P.3d 97 (Alaska 2015) addressed several legal questions raised with regard to the Copper Basin community subsistence hunt and provides legal guidance to the Board when considering regulation changes:

- Consideration of different subsistence users' patterns of use does not violate the equal access provisions of Title VIII of the Alaska Constitution if all Alaskans are eligible to participate in those patterns of use.
- Exclusive or special privileges to take wildlife are prohibited. The Board's determinations must apply equally to all Alaska citizens.
- "To be invalid under [the equal access clauses of Article VIII], a regulation must place 'limits . . . on the admission to resource user groups.' '[W]e have consistently defined 'user groups' in terms of the nature of the resource (i.e. fish or wildlife) and the nature of the use (i.e., commercial sport or subsistence).' We have refused to define 'user groups' based on a 'particular means or method of access' to the resource, and we have declined to recognize a constitutional right to 'convenient' access. Instead, we have repeatedly held that '[i]nconvenience is in no sense the equivalent of a bar to eligibility for participation in subsistence hunting and fishing and does not suffice to trigger an analysis under the equal access clauses.'"
- The common use clauses of Article VIII do not guarantee access to a resource by a person's preferred means or method. Means of access may be restricted if the restrictions apply equally to all persons in the State and do not preclude all uses of the resource.
- Subsistence uses cannot be constitutionally limited to members of communities that had historically practiced subsistence hunting and fishing.
- The Board must adopt regulations that provide a reasonable opportunity for subsistence uses of game populations that are customarily and traditionally taken or used for subsistence.

- The regulations creating an individual subsistence hunt and a parallel community harvest hunt, based on a community hunting pattern originally defined by the Ahtna Athabascan residents and then later adopted by others, provide a reasonable opportunity for all Alaskans for each use pattern.
- The group size of 25 and the Board's findings regarding community use patterns were reasonable.
- Some differences between community and individual hunt seasons and size differences for moose hunting are permissible based on sufficient findings. For example, the allocation of bulls without antler restrictions to the community permit holders was supported by testimony to the Board that the community harvest permit holders prefer to hunt as close to home as possible, hunt in the same areas each year, and travel shorter distances to hunt.
- Eliminating antler restrictions for moose for holders of community permits, while retaining antler restrictions for individual permit holders, did not allow community permit holders to take more bulls than individual permit holders. The size of bull distinction did not result in a greater bag limit for the community permit holders.
- The Board's ANS determination and allocation of up to 300 caribou to community harvest permit holders was not arbitrary or unreasonable, based on the evidence presented to the Board.