

MEMORANDUM

State of Alaska Department of Law

TO: Kristy Tibbles
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Alaska Board of Game

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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.

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 49 would amend 5 AAC 92.085 to allow crossbows in archery only hunts for hunters with a permanent identification card issued to individuals age 60+ under AS 16.05.400(b). **Proposal 51** would amend 5 AAC 85.055 to remove the bag limit restriction of one sheep every four years for nonresidents over age 60.

Under State law, there is no statutory authority to provide a methods and means exemption or bag limit allocation based on age 60+. (Statutes provide authority to distinguish based on age for certain specific purposes: A permanent license for hunting, trapping, and sport fishing may be issued to a resident age 60 or older. AS 16.05.400. There are laws allowing methods and means exemptions for persons with disabilities, and proxy hunting is authorized under AS 16.05.405 for residents who are blind, physically or mentally disabled, or over age 65. Youth hunts are expressly authorized in AS 16.05.255.)

Under Federal law, the Age Discrimination Act generally prohibits discrimination based on age unless

- (A) such action reasonably takes into account age as a factor necessary to the normal operation or the achievement of any *statutory* objective of such program or activity; or
- (B) the differentiation made by such action is based upon reasonable factors other than age. (42 USC 6103)

If a program provides special benefits for the elderly or children, the benefits may be considered necessary to the normal operation of a program. Factors to be considered include the rationale for the special benefits, the effect on other individuals, and other relevant factors.

Proposal 63 would repeal 5 AAC 92.530(7), to repeal the Dalton Highway Corridor Management Area. **Proposal 64** would amend 5 AAC 92.530 in some manner with regard to restrictions on the use of vehicles in the Dalton Highway Corridor. This note is an attempt to respond to questions, including those raised in Proposal 64.

Question: Why does 5 AAC 92.530(7)(B) address hunting but not trapping?

Answer: Subsection (B) addresses the statute, AS 16.05.789, that prohibits *hunting with a firearm* within the corridor.

Question: Do hunting restrictions in 5 AAC 92.530(7) allow travelers who exit the DHCMA (e.g. to travel by licensed highway vehicle or other motorized means to Nuiqsut, Anaktuvuk Pass, Bettles, Wiseman, Coldfoot airport, or by snow machine to a homestead outside the corridor) to hunt once they exit the DHCMA?

Answer: If authorized under AS 19.40.210, a transportation statute governing the James Dalton Highway Corridor, travelers can travel by licensed highway vehicles on

established roads. However, the regulation does not allow transport of hunters, hunting gear, or game by motorized vehicle unless one of the four exceptions in subsection (C) is met. Hunting is allowed outside the corridor. Use of vehicles for hunting is restricted by regulation. Use of off road vehicles, including snow machines, is restricted by statute.*

Question: Does the definition of “off-road vehicle,” in AS 19.40.210 affect use of a “licensed highway vehicle” and “snow machine” in 5 AAC 92.530(7)?

Answer: “Off-road vehicle” is not defined in AS 19.40.210, but we know it includes snow machine because of the language in subsection (a)(3) that provides an exception from the proscription of off-road vehicles for the use of snow machines in certain circumstances.

Question: When it is operated off the highway, is a “licensed highway vehicle” in 5 AAC 92.530(7) an “off-road vehicle,” as defined by 19.40.210?

Answer: If not on an established road, it should be considered as being “off-road.”

Question: Is the prohibition in 5 AAC 92.530(7) on use of motorized vehicles, with exceptions for use of licensed highway vehicles, snow machines, aircraft and boats consistent with restrictions placed on off-road vehicles and snow machines in AS 19.40.210?

Answer: Yes.

Question: Does the prohibition on hunting in 5 AAC 92.530(7)(B) also prohibit trapping?

Answer: No. This subsection addresses the statute, AS 16.05.789, that prohibits hunting with a firearm within the corridor. Trapping is not prohibited, but trappers are subject to restrictions on the use of off-road vehicles (including snowmachines) in AS 19.40.210.* The current version of 5 AAC 92.530(7)(C)(iv) allows game to be transported by motorized vehicles unless prohibited by statute. The Board cannot amend AS 19.40.210, but it can adopt regulations for taking game consistent with statutes. Trapping (and archery hunts) can occur on foot in the corridor. Or if someone is outside of the corridor and traveling completely across the corridor, or going to/from a homestead located outside of the corridor, then a snowmachine can be used to carry game or parts of game within the corridor.

Question: If 5 AAC 92.530(7)(B) allows use of firearms for trapping in 5 AAC 92.530(7), is this consistent with the prohibition of hunting with firearms in AS 16.05.789?

Answer: Yes. Trapping is not hunting, so trapping with a firearm is allowed.

Question: May a trapper or hunter crossing the DHCMA with a snow machine, stop to hunt or trap within the DHCMA, or become “parallel to the right-of-way of the highway” without violation of AS 19.40.210?

Answer: Generally, no.* AS 19.40.210(a)(3) provides “this paragraph does not permit the use of a snow machine for any purpose within the corridor if the use begins or ends within the corridor or within the right-of-way of the highway or if the use is for travel within the corridor that is parallel to the right-of-way of the highway.” The exception for the use of a snow machine to access a homestead outside of the corridor is limited only to gaining access to that private property. A snow machine cannot be used for hunting and trapping within the corridor on state or private land. A snow machine can be used to transport game if a person is otherwise traveling under the authority in AS 19.40.210. A rule of reason should apply here, so it is not prohibited for someone accessing a homestead to travel a short distance parallel to the highway before continuing perpendicular. Travel is not always in a straight line.

Question: May a trapper or hunter use a snow machine to enter the DHCMA from outside the area and trap or hunt within the DHCMA if the trapper does not travel all the way across the DHCMA?

Answer: -No.*

Question: Can a resident of Wiseman or Coldfoot, more than ¼ mile from the Dalton Highway, drive a snow machine all around, then go walk out and trap or hunt the next day?

Answer: A resident of Wiseman or Coldfoot would be in violation of AS 19.40.210 by using a snow machine unless it is only to access a property that was a homestead and is outside of the corridor.*

Question: Could AS 19.40.210(a)(1) and (2), allowing off-road vehicles for oil and gas related travel or mining, or AS 19.40.100, allowing use of the Dalton Highway for industrial or commercial traffic throughout the year, be interpreted to allow trapping as a commercial activity?

Answer: No. AS 19.40.210(a)(1) and (2) are expressly limited to oil and gas and mining. Under AS 19.40.100, the Dalton Highway, but not the entire corridor, is to be maintained throughout the year for industrial and commercial traffic.

*ANILCA expressly provides that a federally qualified subsistence user may use a snow machine while engaged in federal subsistence activities on federal public lands. Federal law preempts state law in this instance. Public lands do not include waters where the state owns the submerged lands.

Proposal 73 would amend 5 AAC 85.020, 5 AAC 92.165, and 5 AAC 92.220 to eliminate the brown bear subsistence registration hunts for Units 21D, and Units 24, A, B, C, and D.

In considering whether to eliminate the subsistence hunt, the positive c&t findings and ANS established in 5 AAC 99.025(3) should be addressed. In addition, requirements

for sealing, salvaging meat, and salvaging hides are distinctions between subsistence hunts and general hunts that should be addressed. If the positive c&t and ANS determinations remain in place, a subsistence hunt should be in place.

In *State v. Morry*, 836 P.2d 358 (Alaska 1992) the plaintiff objected to the tag and sealing requirement as applied to subsistence hunting for brown bears. The Board had not reviewed all regulations when the current version of AS 16.05.258 became effective, and had not adopted specific regulations for subsistence. The court agreed with plaintiffs that the regulation in place at that time was invalid for subsistence hunts, in part because leaving the meat at the kill site is not a subsistence use; recognizing a distinction between non-commercial subsistence harvest and trophy harvest of brown bears.

Following is a quote from the *Morry* decision:

In particular, we find compelling the following arguments which were advanced by Morry and Kwethluk:

[w]hatever the ‘noncommercial, customary and traditional uses’ standard of the definition of ‘subsistence uses’ in AS 16.05.940(30) may mean, it is plainly related to non-trophy uses that are ‘for direct personal or family consumption as food, shelter, fuel, clothing, tools or transportation,’ for the ‘making and selling’ of handicrafts, and for ‘customary trade, barter or sharing.’ There is no hint that hunting for trophies is a subsistence use.... Many people, both residents of the state and non-residents, hunt grizzly bears for trophies and leave the meat at the kill site...

But it is not a subsistence use, and plaintiffs have contended throughout that it is manifestly unreasonable to apply the regulatory regime designed to govern such trophy-hunting practices to the uses in those places . . . where brown bears are hunted for the meat and raw materials.

Proposal 78 would amend 5 AAC 85.025 to eliminate the registration permit and general season harvest ticket for caribou for North Slope resident hunters. Article VIII of the Alaska Constitution prohibits the Board from adopting regulations that distinguish between residents solely based on domicile.

Proposal 92 would amend 5 AAC 92.104 to provide a specific methods and means disability exemption for a specific caribou hunt. **Proposal 130** would amend 5 AAC 92.104 and 92.540(3)(h) to prohibit disability exemption permits for the Yanert CUA in Unit 20A.

A person with physical or developmental disabilities, as defined in AS 16.05.940(25) and (26), may be entitled to a methods and means exemption to provide

reasonable accommodation for the individual under the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.* Federal ADA Title II regulations require the state to provide reasonable modifications to programs to provide access for persons with disabilities, if the modifications do not alter the fundamental nature of the program. (28 CFR 35.130(b)(7), 28 CFR 35.150).

To comply with ADA requirements, the board adopted 5 AAC 92.104 as guidance to be followed by the department when addressing requests for methods and means exemptions for persons with disabilities. Requests are handled on a case by case basis by the department, considering both the individual and the activity.