

LEGAL SERVICES

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MEMORANDUM

June 11, 2014

SUBJECT: Constitutionality of government inspection of (5 AAC 92.012)
 (Work Order No. 28-LS1624)

TO: Representative Tammie Wilson
 Attn: Barbara Barnes

FROM: Lisa M. Kirsch 
 Assistant Revisor

You have asked whether 5 AAC 92.012(b) is consistent with Alaska Statutes and the Constitution of the State of Alaska. I believe the answer is yes, if the subsection is reasonably applied in the field to a person engaged in hunting.

This subsection is part of the section titled "Licenses and tags" and reads as follows:

(b) Upon request from an employee of the department or a peace officer of the state, a person may not refuse to present for inspection any license, harvest ticket, permit, or tag, any game, or any apparatus designed to be, and capable of being, used to take game.

There are three statutory authorities cited for this regulation. The first is AS 16.05.255 which gives the Board of Game broad authority to regulate sport hunting and subsistence hunting. Second is AS 16.05.258 which grants the boards of fish and game authority to adopt subsistence regulations, and the third is AS 16.05.340 which establishes fees and other rules for licenses, permits, and tags. The subsection you question appears to be consistent with these statutes. For example, the requirement in 5 AAC 92.012 that a person produce a game tag for inspection is consistent with AS 16.05.340(a) which requires that game tags must be in actual possession and immediately affixed to game.

The general requirement that a license or permit must be presented for inspection is common to many provisions in Alaska Statutes that require a person taking part in a regulated activity to produce a license or permit.¹ The constitutionality of a request to produce a license, harvest ticket, permit, or tag while engaged in an activity that requires

¹ See for example, AS 16.05.480 (commercial fishing license), AS 16.10671 (fish ticket), AS 16.10.267 (fish permit), AS 28.10.461 (car registration), and AS 28.15.131 (driver's license).

one appears to be well-settled, and such a request is also likely to be found consistent with the Alaska Statutes.

The question of whether a regulation that compels a person "to present for inspection . . . any game, or any apparatus designed to be, and capable of being, used to take game" violates constitutional prohibitions on unlawful search and seizure will depend on the facts and circumstances under which the request is made. Under certain circumstances, a government inspection that is reasonable may not be considered a search or seizure.²

In order to determine whether it is necessary to obtain a search warrant, one must first decide whether the proposed inspection would invade a constitutionally protected privacy interest. The Alaska Constitution, article I, section 14, and the U. S. Constitution, amendment IV protect individuals and their houses, papers, and effects, against unreasonable searches and seizures, but not against lesser intrusions. In addition, the Alaska Constitution, article I, section 22, protects the right of privacy. A governmental inspection that does not amount to a 'search,' or that is 'reasonable,' is permitted without a warrant.³

The location and the person's resulting expectation of privacy may control whether a government inspection is reasonable. Both the United States and the Alaska Supreme Courts have distinguished between activities undertaken in private and those activities in public.⁴ For example, the Alaska Supreme Court has held that commercial fisherman have no reasonable expectation of privacy in crab pots set in plain view in state waters, and that fish and game officers did not violate the constitution when they searched pots without notice or a warrant.⁵ The rationale that there is no expectation of privacy in the heavily regulated fishing industry may also apply to heavily regulated game hunting which, like fishing, involves the taking of a public resource in a public place.

Because the language of the regulation is broad it is not inconceivable that it could be applied in an unconstitutional manner. However, assuming it is reasonably applied, this regulation does not appear to be unconstitutional or inconsistent with the Alaska Statutes on its face.

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² 1984 Op. Att'y Gen. (May 1; file no. 166-346-83).

³ *Id.*, page 1.

⁴ *Katz v. United States*, 389 U.S. 347, 351, 19 L.Ed.2d 576, (1967); *Nathanson v. State*, 554 P.2d 456 (Alaska 1976).

⁵ *Nathanson* at 459.