MEMORANDUM

State of Alaska

Department of Law

TO: Kristy Tibbles
Executive Director
Alaska Board of Game

DATE: September 21, 2017

FILE NO.: JU2016200589

TEL. NO.: 269-5232

FROM: Cheryl Rawls Brooking
Assistant Attorney General
Natural Resources Section
Department of Law

SUBJECT: November 2017
Statewide Regulations
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.

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 8: This proposal would amend 5 AAC 92.095 to allow shooting wolf and wolverine with a trapping license on the same day airborne if the person is more than 300 feet from the airplane. AS 16.05.783 prohibits the same day airborne taking of a free-ranging wolf or wolverine, except as part of a predator control program, so the Board does not have the authority to adopt this proposed regulation.

Proposal 29: This proposal would amend 5 AAC 92.130 to remove the bag limit restriction for residents accompanying nonresident relatives. However, the Board of Game took this action at its February 2017 meeting. (The proposer may not have been aware of the change by the deadline for submitting proposals.)

Proposal 35: This proposal would allow nonresidents and residents to apply as a party for hunts having separate permits for residents and nonresidents.

The Board should consider AS 16.05.407, which requires nonresidents hunting brown or grizzly bear, goat, or sheep to be accompanied by a guide or a resident relative within the second degree of kindred.

Proposal 41: This proposal would amend 5 AAC 92.012(a) and 5 AAC 92.018 to exempt people who reside in federally qualified rural subsistence areas from the need to have an Alaska Waterfowl Conservation Tag (i.e., a "Duck stamp") to hunt migratory birds under State regulations. The Board may exempt certain "areas" where migratory game bird hunting occurs under the statutory authority found in AS 16.05.340(a)(17)(B), but does not have the constitutional authority to exempt people based on their residence.

The proposal also asks to amend 5 AAC 92.012(a) and 5 AAC 92.018 to exempt persons under the age of 18 from the need to purchase a Duck stamp. In considering this aspect of the proposal, it should be noted that, effective January 1, 2017, AS 16.05.340(a)(17)(A) was amended to exempt *residents* under age 18 from the need to purchase a Duck stamp, and AS 16.05.400(a) was amended to exempt *residents* under the age of 18 from the need to purchase a hunting or trapping license. This regulation change would be consistent with the current statute.

(The statutory amendments generally raised the age of exemption from 16 to 18 for residents, retaining the age of exemption at 16 for nonresidents. Corresponding regulatory changes will be addressed in the housekeeping changes proposed by the Department in Proposal 67.)

Proposal 48: This proposal would amend 92.135 to require guides to keep records of meat transfers and report to the Department. The Board can regulate the taking and use of

game, but does not have the authority to regulate guides. Guides and transporters are regulated by the Big Game Commercial Services Board.

Proposal 50: This proposal would amend 5 AAC 92.116 to establish extra guide use areas under AS 08.54.750(e) in intensive management areas for all predator species, not just the predator species targeted by the Board for intensive management.

The proposal, as written, is contrary to the statutory authority given to the Board of Game which provides: "A registered guide-outfitter may only conduct hunts in a guide use area under this subsection for the big game species identified by the Board of Game as the cause of the depletion or reduction of productivity of a big game prey population."

Proposal 54: This proposal would amend 5 AAC 92.070[1] to modify the Tier II subsistence point system, adopted under AS 16.05.258(b)(4)(B)(i) and (iii). For a game population at a Tier II level, the subsistence statute requires the Board to adopt regulations eliminating consumptive uses other than subsistence uses, and to distinguish between subsistence users based on

(i) "the customary and direct dependence on the game population by the subsistence user for human consumption as a mainstay of livelihood;" and

(iii) "the ability of the subsistence user to obtain food if subsistence use is restricted or eliminated."

(Note that subsection (b)(4)(B)(ii) was struck down by the Alaska Supreme Court in the *McDowell* decision but the legislature has not deleted the invalid language from the statute.)

5 AAC 92.070(a) addresses subsection (i) of the statute for an applicant's "customary and direct dependence on the game population by the subsistence user for human consumption as a mainstay of livelihood" and provides up to 85 points. Subsection (a)(3) is proposed to be deleted, which allows up to 25 points for the number of days during the year the applicant spends in the noncommercial harvest of wild fish and game within the hunt area boundary.

5 AAC 92.070(b) addresses subsection (iii) of the statute for "the ability of the subsistence user to obtain food if subsistence use is restricted or eliminated" and provides up to 55 points. Subsection (b)(2) is proposed to be deleted, which allows up to 25 points for the availability of food for purchase in the community where most of the applicant's household's store-bought food was purchased during the past year.

[1] 5 AAC 92.070 is on page 1008 of the 2016-2017 edition of the "codified."

The proposal suggests several new factors to be added, in addition to the provisions in 5 AAC 92.070 that would remain unchanged. When considering any amendments to the Tier II scoring system, the Board's regulation must be consistent with the requirements of AS 16.05.258(b)(4)(B). We recommend the Board explain how each factor or change in regulation is consistent with the statute and is reasonably necessary, and how the factor would be scored for an applicant.

In addition to the language of the statute, we have some guidance from the Alaska Supreme Court: Distinctions based on residency violate the equal access provisions of the Alaska Constitution.[2] Use of a "community game ratio" or percent of hunters in an area is invalid as being based on residency.[3] Regulations that restrict access to game must address the important interest of ensuring that those Alaskans who need to engage in subsistence hunting in order to provide for basic necessities are able to do so.[4] The factors in 5 AAC 92.070(b), the availability of food for purchase in the community where the user purchases food, and the cost of gasoline in the community where the user purchases gas, are valid; these factors "are narrowly tailored and 'designed for the least possible infringement on article VIII's open access values.' They therefore survive constitutional review even if subjected to demanding scrutiny."[5]

Proposal 55: This proposal would amend 5 AAC 92.019 to expand the taking of game outside of seasons and in excess of bag limits established under 5 AAC 85. It would expand the ceremonies beyond funeral and mortuary religious ceremonies to include other potlatch ceremonies. Mortuary ceremonies would not need to be within one year of a death. A written permit would be required, and a harvest report form would be submitted within 15 days. The Department would be authorized to limit the areas where big game could be taken under this regulation, and could limit the big game species which may be taken. A permittee must be an Alaska resident, and have a hunting license.

5 AAC 92.019 allows for the taking, under conditions described in regulation, of big game species with a positive customary and traditional use finding outside the seasons or bag limits established by the Board of Game, for use in Alaska as food in customary and traditional Alaska Native funerary or mortuary religious ceremonies, and if the harvest is consistent with sustained yield principles. The regulation provides an affirmative defense to hunting out of season, and the burden of proving compliance with the regulation is on the hunter.

---

2 *McDowell v. State*, 785 P.2d 1 (Alaska 1989).

3 *State, Dep't of Fish and Game v. Manning*, 161 P.3d 1215 (Alaska 2007).

4 *Id.*

5 *Id.*

In accordance with the regulation, the Department maintains a list of game and areas where ceremonial harvests would be inconsistent with sustained yield principles and is prohibited.

The federal Ninth Circuit and the Alaska Supreme Court both recognize a religious exemption for funeral potlatches rooted in Alaska Native religion.[6] In each case the court distinguished memorial potlatches, saying there is time to plan for a memorial potlatch so there is no need to take game out of season. The Alaska Board of Game went further than what is legally required by adopting regulations allowing an exemption for both funeral and mortuary religious ceremonies.

In *Frank v. State*, the Alaska Supreme Court found that a moose could be taken out of season for a funeral potlatch by someone exercising a practice deeply rooted in his religion, where he was sincere in his religious beliefs. The constitutional right to free exercise of religion requires a state to accommodate religious practices by making exemptions from general laws except to the extent that doing so would harm a compelling state interest, such as sustained yield of the resource. The court noted that deaths may take place at any time of year and it is not part of the Athabascan culture to plan for them. The court distinguished a memorial potlatch, which can occur much later and is controllable and does not give rise to the same exigency.

In *Native Village of Tanana*, the Ninth Circuit held that there is no right to take a moose out of season for a memorial potlatch celebration, as there may be for a funeral potlatch. The evidence presented indicated that a memorial potlatch ceremony could occur anytime within one year following the death. No evidence was presented that the memorial potlatch could not occur during hunting season if fresh meat was desired.

In *Phillip v. State*, 347 P.3d 128 (Alaska 2015), in defense to criminal charges, a group of fishermen asserted a religious right to harvest king salmon in the Kuskokwim River. The court found that the state had a compelling interest in preserving the viability of the king salmon run that outweighed the defendants' assertion of "a religious right to 'unfettered' subsistence fishing" "without regard to emergency closures or gear restrictions." The court refused to grant a religious exemption in that case.

---

[6] *Frank v. State*, 604 P.2d 1068 (Alaska 1979). (State did not show a compelling interest. The record did not support that taking a moose for a funeral potlatch would jeopardize population levels. Memorial potlatches distinguished.) *Native Village of Tanana and Tanana Chiefs Conference, Inc. v. Cowper*, 945 F.2d 409 (9th Cir. 1991) (unpublished opinion listed in table of decisions). (Athabascan memorial potlatch ceremonies are not unduly restricted by hunting regulations. Funeral potlatches distinguished.)

Proposal 56: (Also see Proposal 98 for the Central/Southwest Region.) This proposal would amend 5 AAC 92.072 for all community subsistence hunts statewide.

Currently any community or group of at least 25 people may submit an application to participate. AS 16.05.330 authorizes the Board of Game to adopt regulations "for issuance and expiration of subsistence permits for areas, villages, communities, groups, or individuals as needed for authorizing, regulating, and monitoring the subsistence harvest of" game. The proposal would eliminate the word "group" and define "community" as

> "a group **of 25 or more individuals** [OF PEOPLE] linked by a common interest in, and participation in **a consistent pattern of noncommercial taking, use, and reliance on a wide diversity of subsistence resources in** [,] an **identified** area [AND THE WILDLIFE POPULATIONS IN THAT AREA,] that **provides substantial economic, cultural or social, and nutritional elements of the subsistence way of life of the community and its members."**

The proposal would delete the word "resident" so that a member of a community need not reside near another member of the "community" as defined. It should be noted, however, that only an Alaska resident is eligible to participate in a community subsistence hunt. Although not all Alaskans participate in a subsistence lifestyle, all Alaskans, urban or rural, are eligible to participate in subsistence hunts, including community subsistence hunts.[7]

If adopted, the Board should clarify that this definition of community is only for the purpose of 5 AAC 92.072, and does not affect the meaning of the word "community" as used in other regulations, such as 5 AAC 92.070, or as generally used in Department publications.

The Department of Law has consistently advised that using scoring criteria to discriminate between, and eliminate, applicants for a Tier I hunt is impermissible.[8] In addition, subsistence uses cannot be constitutionally limited to members of communities that historically practiced subsistence hunting and fishing.[9] Any group of 25 or more persons who commit to follow the identified pattern of use is eligible to participate. Information from the required administrator reports and voluntary household reports may be useful for management purposes, but cannot be used to score or eliminate users.

---

[7] *Alaska Fish & Wildlife Conservation Fund v. State & Ahtna Tene Nene*, 347 P.3d 97 (Alaska 2015).

[8] *Alaska Fish & Wildlife Conservation Fund v. State & Ahtna Tene Nene*, 347 P.3d 97 (Alaska 2015); *State v. Morry*, 836 P.2d 358 (Alaska 1992).

[9] *Madison v. Alaska*, 696 P.2d 168 (Alaska 1985); *Alaska Fish & Wildlife Conservation Fund v. State & Ahtna Tene Nene*, 347 P.3d 97 (Alaska 2015).

The proposed failure-to-report penalty in subsection (f) would result in denying a permit for two years for all members of a community if the representative of the community does not submit a mandatory annual report under subsection (c)(3). All members of the community would be subject to the penalty and could not participate in a CSH for two regulatory years.

The Board should consider (1) whether a failure to report penalty should be retained if reporting is not required for all communities, because this would create two classifications of users and only one class would be subject to a potential loss of hunting opportunity, (2) the effect of the penalty in light of the two-year commitment to participate in the CSH and the prohibition on hunting moose and caribou elsewhere, and (3) whether a community representative's failure to report should result in a penalty preventing any member from participating in a CSH for a period of two years.

Proposal 59: This proposal would amend 5 AAC 92.072 and 92.070 to require all customary and traditional uses as eligibility criteria for all Tier II and community subsistence harvest permit applications.

It is unclear what constitutes "all customary and traditional uses." "Customary and traditional" is defined in statute to mean

> the non-commercial, long-term, and consistent taking of, use of, and reliance upon fish or game in a specific area and the use patterns of that fish or game that have been established over a reasonable period of time taking into consideration the availability of the fish or game.[10]

To the extent this proposal includes nonconsumptive uses, the Board does not have the authority to use nonconsumptive factors in adopting a regulation for discriminating between users when a game population is at a Tier II level.

For any game population that is not at a Tier II level, including a community subsistence hunt, the Board cannot adopt regulations that discriminate between users; all Alaskans are eligible to participate.

Proposal 62: This proposal would amend 5 AAC 92.029 to allow the release of sterilized, feral cats into the wild. If the Board adopts this proposal, it may determine that release must be under conditions established in a permit to be issued by the Department. Among other things to be determined by the Board, permit conditions could include where, and under what circumstances, release of the animal would be allowed.

---

[10] AS 16.05.940(a)(7).

Proposal 63: This proposal would amend 5 AAC 92.029 to expressly prohibit the release of feral cats into the wild. Release is already prohibited under the current regulation.

Alternatively, the proposal asks the Board to reclassify feral cats as "vermin" and allow a harvest with no bag limit and no closed season. The regulations do not define "vermin," but the Board has a classification of "deleterious exotic wildlife" as defined in 5 AAC 92.990(a)(21) for which there are no bag limits and no closed season under 5 AAC 85.075.

Proposal 64: (Proposal 90, deferred from the 2016 Statewide Regulations Meeting)

This proposal would amend 5 AAC 92.029 to eliminate domestic sheep and goats from the "clean" list and require a state permit if within 15 miles of wild sheep habitat:

> (b) **Domestic sheep and goats will be removed from the "Clean List" regulation.**
>
> **Any person in possession of domestic sheep (*ovis*) or goats (*capra*) must obtain a permit from the department within one year of implementation of this section. Animals located within 15 air miles of Dall sheep habitat must be contained within a Department approved facility (double fence, etc.) and certified disease free when testing becomes available. Animals located more than 15 miles from Dall sheep habitat will be issued a permit without stipulation online.**

The list of animals in 5 AAC 92.029(b) includes animals that do not require permits from the Department to possess, import, export, buy, sell, or trade, but may not be released into the wild. The Board of Game has the authority to remove the animals from the list and require a permit. However, the board's authority to regulate sheep and goats is limited. The Office of the State Veterinarian, under AS 03.05.013, has the authority to enforce provisions of Title 3 for animals under the jurisdiction of the Department of Environmental Conservation.

The DEC has jurisdiction to "issue orders or permits relating to or authorizing examination, inspection, testing, quarantine or embargo of animals or animal products . . . to prevent the spread of pests or contagious or infectious disease."[11] "Animal" is defined as "an animal other than a human being and includes a mammal, insect, bird, fish, and reptile, whether wild or domestic, and whether living or dead."[12]

---

11 AS 03.05.011.

12 AS 03.05.100.

The legislature delegated overlapping authority between the Board of Game and the Office of the State Veterinarian. Where these authorities overlap, there is room for consultation and coordination of efforts. The DEC Commissioner regulates agriculture, including domestic animals and livestock.[13] The Board of Game regulates game resources of the State, where game is defined to exclude "domestic birds and mammals."[14]

The Board is responsible for adopting regulations it considers advisable for the conservation, utilization, and development of game.[15] The Alaska Supreme Court held that "[a]s a general rule, conservation laws such as fish and game laws should be liberally construed to achieve their intended purposes. . . . The legislature established the Board for the purposes of conserving and developing fishery [game] resources. The terms 'conserving' and 'developing' both embody concepts of utilization of resources. 'Conserving' implies controlled utilization of a resource to prevent its exploitation, destruction or neglect. 'Developing' connotes management of a resource to make it available for use. If the Board is going to accomplish its designated purposes, it is necessarily going to make decisions concerning utilization of the resources it is charged with managing."[16]

Perhaps most important for consideration of Proposal 64 is the Board's conservation responsibility – "controlled utilization of a resource to prevent its exploitation, destruction or neglect."[17]

AS 16.05.920(a) has been referred to as the "cornerstone of the entire fish and game code."[18] "Unless permitted by AS 16.05 – AS 16.40 or by regulation adopted under AS 16.05 – AS 16.40, a person may not take, possess, transport, sell, offer to sell, purchase, or offer to purchase fish, game, or marine aquatic plants, or any part of fish, game, or aquatic plants, or a nest or egg of fish or game." Under its authority in AS 16.05.255(a)(8), the Board may adopt regulations "prohibiting the live capture, possession, transport, or release of native or exotic game or their eggs." Using this authority, the Board adopted 5 AAC 92.029 identifying certain species that may be possessed, imported, exported, bought, sold, or traded without a permit from the Department of Fish and Game, but may not be released into the wild.

---

13 AS 03.05.010

14 AS 16.05.940(19)

15 AS 16.05.221 and AS 16.05.255.

16 *Kenai Peninsula Fisherman's Co-op Ass'n, Inc. v. State*, 628 P.2d 897, 903 (Alaska 1981)

17 *Id.*

18 Memo dated January 15, 1993 from Sarah Gay, Supervising Attorney, Natural Resources Section, to McKie Campbell, Special Staff Assistant, Office of the Governor. (Certain responsibilities were subsequently transferred from DNR to DEC.)

The Board of Game and the Department of Fish and Game consider the species listed on the "clean list" to be "game," and this has been the understanding for more than 22 years:[19]

> Under the definition of "game" in AS 16.05.940, the board regulates all birds, reptiles, and mammals, including feral domestic animals, in the state except for domestic birds and mammals. Existing 5 AAC 92.029(b), referred to generally by your department and the public as the "clean list," sets out a list of species for which no Department of Fish and Game permit is required for possessing, buying, selling, etc. At first impression, it would seem that the list includes species that are considered to be "domestic" species -- dogs, cats, sheep, goats, cattle, horses, etc. However, the last phrase of the lead-in language of sec. 029(b) contains a prohibition on releasing the listed species into the wild. In order for that prohibition to be valid (i.e., within the board's authority), it follows that the species listed in sec. 029(b) must be "game" species. We have contacted members of your staff, who tell us that this interpretation is correct and that the board has decided that the species in the list are "game" in order to regulate the release of domestic mammals to the wild.

Prior to language adopted by the Board in December 1984, the clean list did not refer to release of animals. Criminal charges for illegally importing three nonneutered ferrets were dismissed by the Anchorage district court on the basis that ferrets were not "game."[20] At that time, there were no findings by the Board of Game that ferrets were not domestic. The Board was concerned about the possibility of ferrets establishing themselves in the wild and posing a danger to indigenous wildlife. In response, the Board adopted Proposal 5, as amended, to clarify its exercise of authority over game and to prohibit species on the clean list from being released into the wild. The revised regulation became effective in 1985, and remains in effect. "Regulations are presumed valid, and the burden of proving otherwise is on the challenging party."[21]

(Using its authority to regulate hunting methods and means, the Board also adopted 5 AAC 92.085(16) to prevent the use of domestic goats and sheep as pack animals for sheep, goat, or muskox hunting.)

---

[19] Memo dated July 19, 1995 from Deborah Behr, Regulations Attorney, to DFG Commissioner Frank Rue.

[20] *State v. Helfrich*, discussed in a memo dated May 23, 1984 from Sarah McCracken to the Board of Game.

[21] *Ellingson v. Lloyd*, 342 P.3d 825, 830 (Alaska 2014).

Consistent with prior interpretations and actions, and consistent with the statutory conservation responsibilities delegated by the legislature, the Board of Game has the authority to adopt the "clean list" to prevent the exploitation, destruction or neglect of the State's indigenous game resources, including preventing importation, possession, etc. of certain species without a permit that cannot be released into the wild. If a species on the clean list is removed, it is the Department's position that current regulations require a permit to possess, import release, or export that species.

Consistent with the statutory authority delegated by the legislature to the Office of the State Veterinarian under AS 03.05.011(a)(1), the State Veterinarian has the authority to require inspection, quarantine or embargo of animals or animal products to prevent the spread of pests or contagious or infectious disease.

Proposal 68: This proposal would create a new statewide regulation to allow season openings and closures by emergency order. This power is already in place. It was granted to the commissioner by the legislature under AS 16.05.060 and may be exercised "when circumstances require." However, the commissioner's authority cannot be exercised in a manner that directly contradicts action taken by the Board.[22]

[22] *See, Peninsula Marketing Association v. ADF&G and Native Village of Elim*, 890 P.2d 567 (Alaska 1995). The Board of Fisheries made a decision not to impose a reduced chum salmon harvest cap proposed by the commissioner, therefore the commissioner could not use his discretionary emergency power to imposed the reduced cap in absence of new information not considered by the Board.