

MEMORANDUM

State of Alaska Department of Law

TO: Kristy Tibbles
Executive Director
Alaska Board of Game

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TEL. NO.: 269-5232

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

SUBJECT: January 2022
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 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.

In general, Copper Basin community subsistence hunts: The Board adopted regulations authorizing the Copper Basin community subsistence hunts (“CSH”) for moose and caribou under the statutory authority found in AS 16.05.330(c). The decisions in *Alaska Fish and Wildlife Conservation Fund v. State*, 347 P.3d 97 (Alaska 2015) and

Manning v. State, 355 P.3d 530 (Alaska 2015) addressed several questions raised with regard to the CSH and provide 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 residents.
- “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 equal access 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 findings¹ regarding community use patterns were reasonable.

¹ Board findings for moose and caribou in the area were adopted in 2006, 2011, 2013, 2015, 2017, and 2019.

- Some differences between community and individual hunt seasons and size differences for moose hunting are permissible based on sufficient findings. A longer season and 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. Although individual permit holders would also benefit from a longer season and fewer size restrictions, the Board’s regulations were not unreasonable.

- 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.

- Regulations limiting community harvest permit holders and individual permit holders to one² caribou permit per household avoided a discrepancy in bag limits for caribou. [85.025(8), 92.071(a), 92.072(c)(2)(a).]

- The Board’s ANS determination and allocation of up to 300³ caribou to community harvest permit holders was not arbitrary or unreasonable, based on the evidence presented to the Board. It was not improperly manipulated to achieve a predetermined outcome.

² Amended to “up to 2” in 2017.

³ Increased to 400 in 2017.