

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES LEGISLATIVE AFFAIRS AGENCY STATE OF ALASKA

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM

April 4, 2015

SUBJECT: Drafting notes for, and constitutional issues relating to
CSHB 137(FIN) (Work Order No. 29-LS0625\I)

TO: Representative Steve Thompson
Co-Chair of the House Finance Committee
Attn: Jane Pierson

FROM: Alpheus Bullard
Legislative Counsel

This memorandum accompanies the bill described above. I have a number of comments.

Drafting notes

Bears

I did not employ the term "coastal brown bear" that was used in the materials you provided. All brown bears in Alaska are the same species, and although there are recognized subspecies, the "coastal brown bear" is not listed in the government taxonomy. However, the context in which "coastal brown bear" was used in your materials suggests that the term was used only to distinguish brown bears located in certain game units. Accordingly, I drafted the bill to require a resident to have a big game tag to hunt *brown bear* in the applicable game units, unless the Board of Game (board) eliminates the bear tag and fee for all or a portion of the affected units.

Game units

You requested that the bill provide that state residents must have a big game tag to take bears in certain game units, unless the bear tag and fee is eliminated in all or a portion of a game management unit by the board. Game units are not set in statute, but are established by the board in regulation. Because the board may change the boundaries of existing management areas or the manner in which management areas are named or described, this bill applies to those units you requested, *as they are described* in regulations of the Department of Fish and Game (department) on January 1, 2016.

AS 16.05.240(d)

This bill includes changes to AS 16.05.340(d).¹ I modified this subsection to conform

¹ This subsection permits certain members of the military service, the United States Coast Guard, and their dependents to obtain special nonresident military hunting and sport

with the bill's establishment of a big game tag requirement (that may or may not be eliminated by the board for all or a portion of a game management unit) for residents taking sheep in certain game units and subunits.

AS 16.05.340(k)

The subsection establishing the intensive management surcharge (surcharge) is modeled on AS 16.05.340(j), which establishes a "sport fishing facility surcharge." Accordingly, a person who is eligible for a \$5 license under AS 16.05.340(a)(6) or a free license under AS 16.05.341 is exempt from the surcharge. Note that this surcharge is repealed on December 31, 2018, by the bill's "sec. 31." Please advise if the manner in which the surcharge is structured is inconsistent with your intent.

Eliminating the permanent identification card

As you requested, the bill replaces the permanent identification card for sport fishing, hunting, or trapping that is provided (under AS 16.05.400(b)) to state residents of 60 years of age or older with an identification card for state residents of at least 65 years of age that is valid for three years. The details of the transition between the card regimes is provided by sec. 32 of the bill. I made a number of choices as to how the transition is structured. The details are as follows:

1. State residents who were eligible for the free permanent identification card under AS 16.05.400(b), as that section read before the effective date of the bill, are eligible for the new card, notwithstanding the changes to AS 16.05.400(b). Accordingly, state residents born before January 1, 1956, are "grandfathered" into the new card regime and are eligible for a free three-year identification card.

2. A permanent identification card issued under AS 16.05.400(b) before the effective date of the bill is valid until December 31, 2018. After that date all permanent identification cards are void.

3. The bill requires the department to attempt to notify all holders of permanent identification cards that they are eligible for identifications cards that are valid for three years and that their permanent identification cards will cease to be valid on January 1, 2019.

Conservation decal revenue and the Fish and Game Fund

The materials you provided include new language relating to the "conservation decal." The language would have provided that revenue collected from the sale of the decals would be deposited into the fish and game fund. The fish and game fund is a dedicated fund. The Constitution of the State of Alaska permits the dedication of funds if the dedication is required by the federal government for state participation in federal programs. Revenue from the sale of conservation decals is not revenue "from hunting and fishing licenses" that the federal government requires be dedicated. *See* 50 C.F.R.

fishing licenses and certain big game tags at the rates charged resident hunting and sport fishing licensees.

80.20.² Accordingly, the bill that I am supplying you with provides that this revenue *may* be deposited into the fish and game fund.

Constitutional issues

Local and special legislation

The bill you requested permits the board to require a resident of the state to purchase a big game tag to take a brown bear or sheep in certain defined areas of the state, but not others. This creates a constitutional issue. If the legislation permitted the board to require residents to have a big game tag in order to take brown bear or sheep in any region of the state, there would not be an issue. Article II, sec. 19 of the Constitution of the State of Alaska states in relevant part:

The legislature shall pass no local or special act if a general act can be made applicable. Whether a general act can be made applicable shall be subject to judicial determination.

A two-stage test is used to determine if an act is "local" or "special." "The first stage is a threshold inquiry as to whether the proposed legislation is of general, statewide applicability."³ If the court determines that the legislation is not "of statewide application," it will evaluate whether the legislation has a fair and substantial relationship

² **Sec. 80.20 What does revenue from hunting and fishing licenses include?** Hunting and fishing license revenue includes:

(a) All proceeds from State-issued general or special hunting and fishing licenses, permits, stamps, tags, access and use fees, and other State charges to hunt or fish for recreational purposes. Revenue from licenses sold by vendors is net income to the State after deducting reasonable sales fees or similar amounts retained by vendors.

(b) Real or personal property acquired with license revenue.

(c) Income from the sale, lease, or rental of, granting rights to, or a fee for access to real or personal property acquired or constructed with license revenue.

(d) Income from the sale, lease, or rental of, granting rights to, or a fee for access to a recreational opportunity, product, or commodity derived from real or personal property acquired, managed, maintained, or produced by using license revenue.

(e) Interest, dividends, or other income earned on license revenue.

(f) Reimbursements for expenditures originally paid with license revenue.

(g) Payments received for services funded by license revenue.

³ *Pebble Limited Partnership v. Parnell*, 215 P.3d 1064, 1078 (Alaska 2009).

to legitimate purposes.⁴ To satisfy the "fair and substantial relationship" standard, the classification established by the legislation must be tailored to the purpose of the legislation. The classification must be neither overinclusive nor underinclusive. *Isakson v. Rickey*, 550 P.2d 350, 362 (Alaska 1976). If the "fair and substantial relationship" standard is met, the bill will not be invalidated because of incidental local or private advantages. *State v. Lewis*, 559 P.2d 630, 643 (Alaska 1977).

In *Lewis*, the court agreed that legislation of statewide significance need not have an effect in all parts of the state; legislation does not become "local" merely because it operates only on a limited number of geographical areas rather than on a statewide geographical basis.⁵ In *Abrams v. State*, 534 P.2d 91 (Alaska 1975) the court found that the legislation establishing the Eagle River Borough was special and peculiar to the locality where the borough was established. Because there was nothing in the nature of the Eagle River-Chugiak area that justified a departure from the general law scheme for the establishment of boroughs, the statute violated art. II, sec. 19. However, in *Baxley v. State*, 958 P.2d 422 (Alaska 1998), the court upheld an act that modified oil and gas leases on the Northstar field because "the Act's exclusive focus on the Northstar leases reflects their unique nature, and because the Act fairly and substantially relates to legitimate state purposes." *Id.* at 431.⁶

In the present case, it is not clear to me how the bill's establishment of a big game tag requirement for particular game units or subunits might be interpreted to be "of statewide application." These big game tag requirements would apply only in certain areas of the state. Similarly, the "fair and substantial" relationship between this bill's residential big-game tag requirement for certain species in certain areas and a legitimate state purpose is

⁴ *Id.* at 1078 - 1079 (quoting *State v. Lewis*, 559 P.2d 630, 643, n. 44 (Alaska 1977) (cert. denied, 432 US 901 (1977)) and *Isakson v. Rickey*, 550 P.2d 359, 361-63 (Alaska 1976)).

⁵ The *Lewis* case involved the Cook Inlet land exchange and the court accepted the premise that the land exchange, while only affecting land in Southcentral Alaska, required legislation to be accomplished and was of common interest to the whole state. The court relied heavily on the record developed by the legislature in support of the need for the land exchange and the decision to resolve serious issues surrounding Alaska Native land selections under the Alaska Native Claim Settlement Act through legislation authorizing the Cook Inlet land exchange.

⁶ See also *Hughes v. Treadwell*, 341 P.3d 1121 (Alaska 2015). In this recent case, the Alaska Supreme Court found that plaintiffs, in defending an initiative against, in part, a challenge that it enacted local or special legislation, had produced a record that "indisputably establishes that the Bristol Bay watershed has unique ecological, geographic, and economic characteristics." *Id.* at 1131 - 1132. While this challenge related to the prohibition on "local or special" legislation found in art. XI, sec. 7, the court held that the analysis to determine whether particular legislation is "local or special" is the same as that employed under art. II, sec. 19. *Id.* at 1131, n. 82.

also unclear.

Accordingly, to secure this requirement against constitutional challenge, it will be important to justify why a departure from a general law scheme is appropriate in this instance (i.e. why this bill does not provide the board, the body tasked with the conservation and development of the state's game resources, the discretion to decide which areas of the state a resident must have a big game tag to take a brown bear or sheep). You need to articulate why a more general act applying throughout the state would not serve the same legislative goals, and how the unique purpose (of this portion) of the bill is achieved through an act that applies only to state residents hunting bear and sheep in certain areas of the state.

If the state is able to demonstrate that requiring residents to have a big game tag to take a brown bear or sheep in some defined areas of the state but not others serves a legitimate state purpose, and that establishing this distinction in statute bears a fair and substantial relationship to that purpose, then the bill's provision relating to resident big game tags should be interpreted as constitutional.

Dedicated fund issue

The Alaska Constitution permits dedication of funds necessary to participate in federal programs but does not authorize any dedication beyond that required as a condition for participation in the federal programs.⁷ The federal aid requirements in wildlife and fish restoration programs (16 U.S.C. 669 - 669j and 16 U.S.C. 777 - 777n; respectively) only require that license, permit, and related fees be generally dedicated to the expenses of managing sport fish and wildlife resources of the state. While it is my opinion that the intensive management surcharge is license revenue that may be dedicated to the Fish and Game fund under the Constitution of the State of Alaska, this revenue may not be further dedicated to particular departmental programs or efforts.

Without a requirement for the specific dedication of funds as a condition of participation in a federal program, a court is likely to find that the legislature does not have the

⁷ Article IX, sec. 7 of the Constitution of the State of Alaska provides:

Dedicated Funds. The proceeds of any state tax or license shall not be dedicated to any special purpose, except as provided in section 15 of this article or when required by the federal government for state participation in federal programs. This provision shall not prohibit the continuance of any dedication for special purposes existing upon the date of ratification of this section by the people of Alaska.

This section has been construed to mean that "the dedication of any source of public revenue: tax, license, rental, sale, bonus-royalty, royalty, or whatever is limited by the state Constitution to those existing when the Constitution was ratified or required for participation in federal programs." *State v. Alex*, 646 P.2d 203, 210 (Alaska 1982), quoting with approval 1975 Alaska Op. Atty. Gen. No. 9 at 24 (May 2).

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constitutional authority to further dedicate funds derived from the intensive management surcharge established by this bill to purposes that are more specific than what is required for participation in the federal programs.

The goal of the Alaska Constitution's prohibition against dedicated funds is to protect the legislative prerogative to appropriate state funds to those purposes which best serve the interests of the state. Even *within* the context of the Fish and Game Fund, the prohibition against dedicated funds still serves to protect the prerogatives of the legislature by allowing the legislature to appropriate revenue derived from the sale of the surcharge to those departmental programs that satisfy the federal acts and that are in the best interests of the state.

Accordingly, that portion of the bill which provides that revenue from the surcharge must be allocated to intensive management programs conducted by the department is susceptible to a constitutional challenge.

If I may be of further assistance, please advise.

TLAB:Ind
15-313.Ind

Enclosure