

LEGAL SERVICES

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MEMORANDUM

January 26, 2024

SUBJECT: Executive Order 124; Transfer of authority to prohibit by regulation the live capture, possession, transport, or release of native or exotic game or their eggs
(EO 124; Work Order No. 33-GH2384\A)

TO:
Senator Gary Stevens
Senate President
Attn: Doug Gardner

FROM:
Alpheus Bullard
Legislative Counsel



You asked whether Executive Order (EO) 124 conforms to art. III, sec. 23, of the Constitution of the State of Alaska. The short answer is probably yes.¹

EO 124 transfers the authority to prohibit by regulation the live capture, possession, transport, or release of native or exotic game or their eggs from the Board of Game to the commissioner of fish and game (commissioner). The EO makes no statutory changes other than those necessary to effectuate the transfer of this authority. While new law is created in sec. 2 of the EO, that language is nearly identical to AS 16.05.255(a)(8), repealed by the EO.

The authority of the governor to issue EO 124 arises from art. III, sec. 23, Constitution of the State of Alaska. That section states:

The governor may make changes in the organization of the executive branch or in the assignment of functions among its units which he considers necessary for efficient administration. Where these changes require the force of law, they shall be set forth in executive orders. The legislature shall have sixty days of a regular session, or a full session if of shorter duration, to disapprove these executive orders. Unless disapproved by resolution concurred in by a majority of the members in joint session, these orders become effective at a date thereafter to be designated by the governor.

¹ The governor issued 12 executive orders this session, the analysis in this memorandum applies only to EO 124.

Prior governors have used executive orders to merge two departments together,² to transfer functions from one department to another,³ and to move the functions of a council to a department and eliminate the council.⁴ However, little authority sheds light on the permissible scope of an executive order. Simply because an executive order has been employed without disapproval in the past does not guarantee that it was legally permissible.

The minutes of the Alaska Constitutional Convention Proceedings do offer some guidance; the executive order power of the governor is discussed over the course of several pages. It is clear that the delegates viewed the power as enabling the governor to amend law as necessary to reorganize the functions of the executive branch.⁵ Summing up the power, Delegate Nordale stated "when the governor sees there are too many departments set up functioning by themselves or functioning under boards and there isn't any coordination, he has the right to suggest a reorganization and a different assignment of functions. Where his executive order might be contrary to the law which originally set up this department or board, that part of his executive order would have to be disapproved by a legislature. That is the way it works, just like the President."⁶ Delegate Hellenthal noted, "generally the executive branch of the government is supreme when acting in the executive sphere. In that sphere it cannot properly be interfered with by either the judiciary or the legislative branch."⁷

Despite the sweeping statements of the delegates, the power of executive orders is not without bounds. Importantly, an executive order may not be used to enlarge, diminish, or otherwise alter reorganized functions of the executive branch; these powers are reserved to the legislature. The power to pass laws is conferred upon the legislature by art. II, sec. 1, of the Alaska Constitution, which states: "The legislative power of the State is

² EO 39 (1977) merged the Department of Highways and the Department of Public Works into one department.

³ EO 107 (2003) transferred functions from the Department of Fish and Game to a deputy commissioner of natural resources.

⁴ EO 113 (2005) transferred the functions of the Telecommunications Information Council to the Department of Administration and eliminated the Council.

⁵ Alaska Constitutional Convention Minutes, 2226 - 2229 (January 16, 1956). (As Delegate Rivers explained, "It does give him the power to alter existing organizational structures that have been set up by law, but only after the legislature has failed to say 'No, we won't let you do that.'")

⁶ *Id.* at 2229.

⁷ *Id.* at 2228.

vested in a legislature consisting of a senate with a membership of twenty and a house of representatives with a membership of forty." As a consequence of the doctrine of separation of powers inherent in the Alaska Constitution, one branch of government is prohibited from encroaching upon or exercising the powers of another branch.⁸ The blending of governmental powers is permitted only to the extent granted by the constitution; it will not be inferred.⁹ Therefore, the most appropriate way to view the executive order power is as a limited power of the governor to amend statutes as necessary to reorganize the executive branch, a sliver of legislative power delegated to the governor by the constitution. Just as the legislature's power over executive branch appointments is limited to the confirmation of certain appointments as expressly provided by the constitution,¹⁰ and just as the governor's power to veto appropriations made by the legislature is limited to that provided by the constitution,¹¹ the governor's executive order power is limited to that expressly set out in art. III, sec. 23. The governor's executive order power will be narrowly construed and will be confined within the bounds expressed in the constitution.¹²

In sum, while the governor, through an executive order, has the power to "make changes in the organization of the executive branch," he may not go so far as to expand, contract, or otherwise change the functions of the reorganized board or department. Thus, the question becomes whether EO 124 expands, contracts, or changes the functions of the board and commissioner or whether the EO permissively makes changes in the organization of the executive branch.

⁸ *Pub. Def. Agency v. Superior Ct., Third Jud. Dist.*, 534 P.2d 947, 950 (Alaska 1975).

⁹ *Bradner v. Hammond*, 553 P.2d 1, 7 (Alaska 1976).

¹⁰ *Id. Dunleavy v. Alaska Legislative Council*, 498 P.3d 608, 612 (Alaska 2021).

¹¹ *Alaska Legislative Council v. Knowles*, 21 P.3d 367 (Alaska 2001).

¹² Few Alaska cases mention art. III, sec. 23, Constitution of the State of Alaska. In 1983, the Department of Corrections was created by EO 55. About three decades later, a prisoner filed a *pro se* lawsuit alleging, among other claims, that "DOC's creation by executive order violated the separation of powers doctrine." *Rae v. State, Dep't of Corr.*, 407 P.3d 474, 477 (Alaska 2017). The Alaska Supreme Court's analysis of this claim was cursory: it found "no merit" to the argument and simply noted that "the Constitution itself, in article III, section 23, clearly empowers the executive to adjust the organization of its agencies." *Id.* at 478. In *Suber v. Alaska State Bond Committee*, 414 P.2d 546, 556 (Alaska 1966), the Alaska Supreme Court held that sec. 23 was not implicated where the commissioner of commerce created an executive agency to carry out the provisions of legislation when the legislation gave him specific authority to hire staff.

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It is likely that the statutory changes made by EO 124, transferring the authority to adopt regulations for prohibiting the live capture, possession, transport, or release of native or exotic game or their eggs from the board to the commissioner, is within the limits of the governor's constitutional authority under art. III, sec. 23. As noted earlier in this memo, EO 124 does not make any statutory changes over those necessary to transfer a discrete duty from the an executive branch board to the commissioner of an executive branch department. This, combined with the fact that state courts have generally affirmed the powers of a strong executive branch, make it likely a court would find EO 124 to comply with the Alaska Constitution.

If you disagree with this assessment, or if you find EO 124 objectionable for policy reasons, the legislature's course of action is to disapprove the EO, as described in art. III, sec. 23, Constitution of the State of Alaska.¹³

If I may be of further assistance, please advise.

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¹³ See also Uniform Rule 49(a)(4).