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M E M O R A N D U M

DATE: December 17, 2013

TO: Mayor and Assembly Members

THROUGH: Nicholas Spiropoulos, Borough Attorney

FROM: Lisa Richard, Assistant Borough Attorney

RE: Revisions to MSB Title 24, Trapping

This memorandum is condensed and modified from a January 4, 2013 memorandum on proposed 24.05.105, Trapping. This memorandum concludes that proposed 24.05.105 should not be adopted without significant revision because it is likely to be determined preempted by state law. For a full, detailed analysis, please consult the prior memorandum.

The question is whether the Borough is preempted from regulating trapping, since the state manages wild animals and game. The answer is that the Borough could pass an ordinance that creates an "incidental" impact on trapping, but only if certain requirements are met. The ordinance cannot directly conflict with state law or substantially interfere with the state in carrying out state law. It also must be based on a legitimate local concern. Several sections of proposed MSB 24.05.10 would fail this test unless they are significantly revised.[1]

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[1] In 1982 a State of Alaska Attorney General opinion stated in part:

> A borough ordinance that did not directly address legitimate local concerns and which frustrated overall game management would probably be held invalid as preempted by the statewide interest in uniform game management. . . . The reason for this result is that effective statewide game management, including regulation of species that transverse local political boundaries, requires uniform management decisions, leaving no room for independent game management jurisdiction by local governments. Localized game control would 'substantially interfere' with the purposes of conservation and development of the resources and the functions of the Board of Game, under the test articulated in Liberati.

Authority of Board of Game to Adopt Regulations for Public Safety Purposes, Alaska Attorney General Opinion #166-486-82, 1982 WL 43763, ** 4-6.

Section A of 24.05.105 which would ban trapping near rights-of-way and trails is too broad. Section A could be modified by narrowing the no-trapping zones and placing them only along certain roads and trails known to be heavily travelled by domestic animals. The legislative history would have to reflect this intent.

Section B requires trappers to get express permission from private property owners which may be less problematic. If Section B is intended to protect the landowners' domestic animals, it might be upheld unless a court determines it "substantially interferes" with state game management. That seems unlikely since: (1) Section B does not actually prohibit any trapping; and (2) the state does not require permission prior to trapping on private land.[2] Enforcement of Section B could become tricky and should be made more explicit on enforcement.

Proposed Section C allows state and federal agency personnel to trap near roads and trails "for the protection of the health and safety of residents," with notice to the Borough. The Borough cannot dictate the purposes for which state and federal officials can trap. Second, the pre-notice requirement is onerous and not always possible or practical to achieve. 24.05.105 should contain a simple exception for state and federal officials carrying out their authorized duties with no limitations.

CONCLUSION

Overall, we recommend not adopting MSB 24.05.105, unless it is revised significantly. Please feel free to contact the Borough Attorney's Office if there are any questions regarding this Memorandum.

[2] This portion of the memorandum differs from the memorandum issued in January of 2013, which stated an unnecessarily restrictive view.

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M E M O R A N D U M

DATE: January 4, 2013

TO: Animal Care and Regulation Board

THROUGH: Nicholas Spiropoulos, Borough Attorney

FROM: Lisa Richard, Assistant Borough Attorney

CC: Carol Vardeman, Acting Animal Care and Regulation Manager for Administration

Matthew Hardwig, Animal Care and Regulation Manager for Enforcement

RE: Revisions to MSB Title 24, Memorandum #3

The Borough Attorney's Office is reviewing the Animal Care and Regulation Board's ("Board") proposed revision to Title 24 of the Matanuska-Susitna Borough code. This memorandum addresses MSB 24.05.105, Trapping. Section numbers begin with Section VIII to tie in with the second memorandum. Future memoranda will be forthcoming.

VIII. 24.05.105 Trapping.

Proposed MSB 24.05.105 would read in full:

(A) Except as provided in MSB 24.05.110, no person may engage in trapping within the Borough within 100 yards of the right-of-way of any publicly maintained road or within 50 yards of any trail incorporated within the Matanuska-Susitna Borough trails plan.

(B) Trapping of animals is prohibited upon privately owned property without the express permission of the owner of record.

(C) For the protection of the health and safety of the residents, the Alaska Department of Fish and Game, Alaska Department of Public Safety, United States Fish and Wildlife Service, or their authorized agents or designee, may upon notice to the Borough, trap animals within the area in which trapping is expressly prohibited by this chapter.

(D) This section shall not apply to the trapping or capturing of rats, mice, shrews, or similar vermin.

(E) Violation of this section shall be punishable as set forth in MSB 24.25.090.

Section A would impose a non-areawide but otherwise Borough-wide limitation on trapping regardless of the land use or land ownership involved. Proposed MSB 24.05.105 is unclear, however, as to whether it applies to wild animals as well as domestic. If it is intended to apply to wild animals such as game, this will raise additional questions about the authority of the Borough to regulate in that area. Both issues are discussed below.

A. Application of MSB 24.05.105 to wild animals.

Under the proposed revision, the Borough would lack jurisdiction over "wild animals," or over "game animals." Proposed MSB 24.05.020 reads as follows:

(A) The Borough has jurisdiction over domestic and domesticated animals. The Borough does not have jurisdiction over the following animals:

(1) wild animals;

(2) game animals; the taking or possession of which is regulated by the state or federal government.

While Section A of proposed MSB 24.05.105 refers to "trapping," it does not specify which animals are covered. Sections B and C do refer to trapping of "animals." Under the proposed revision "animal" is defined as "vertebrate domestic or domesticated members of the Animalia kingdom unless otherwise provided by this title." See MSB 24.05.010. "Domesticated" is defined as "animals owned which are commonly or historically adapted to man's use or pleasure." Id.

To summarize, not only would the jurisdiction of the Borough be limited to domestic animals, but the definition for "animal" would also limit the application to trapping of domestic animals, at least for sections B and C. It appears, however, that the Board did not intend for MSB 24.05.105 to be limited to trapping of domestic animals, because the next section, MSB 24.05.110, Live Animal Traps (already existing in code), addresses trapping of domestic animals.

B. State preemption

Since it appears that the Board's intent is to regulate trapping of wild animals, the next issue is whether the Borough has the power to regulate in that area and to what extent.

Issue:

Can the Borough regulate the trapping of game animals?

Brief Answer:

Only in a limited fashion. While the state has not explicitly preempted all local regulations impacting game, game management is conducted by the state in Alaska. A borough could enact an ordinance with only an incidental impact on game, if it furthers legitimate local concerns and does not substantially interfere with state law. In addition, all ordinances enacted by a second class borough must be based on enumerated powers or adopted powers not prohibited by law. The Borough lacks "police powers" and thus cannot enact ordinances simply to benefit the health, safety and welfare of the public. A trapping ordinance

would have to be based on a specific power that the Borough possesses.

More specifically, proposed MSB 24.05.105 is too broad. The requirement for state or federal officials to provide prior notice to the Borough of trapping in carrying out their authorized functions would interfere with state game management. Likewise, the Borough's power to regulate animals does not cover the trapping of wild animals on private property. Also, while the Borough perhaps could limit trapping within or near certain roads and trails, the power to do so is much narrower than the scope of this ordinance.

Discussion:

1. Other municipal codes

There are several municipalities in Alaska, including Anchorage, the City of Seward, the City and Borough of Juneau, and Nome, which regulate trapping. All of these municipalities, however, are either cities or home rule municipalities, which have all powers not otherwise prohibited by law or by charter. Alaska Constitution, Art. 10, section 11. On the other hand, the Borough is a second class borough with powers enumerated by statute. See AS 29.35.210; AS 29.35.300. In addition, some of the other municipalities' ordinances are narrower than the ordinance the Borough is seeking to enact.

Anchorage municipal code makes it unlawful for a person to use any trap that might physically harm an animal in order to capture animals for "noncommercial reasons." AMC 8.55.040(A)(1). In addition, a person may not use a trap for "capture of domestic animals and noncommercial purposes of a type not approved by the chief animal control officer or designee." AMC 8.55.040(A)(2). The terms "commercial" and "noncommercial" are not defined in the section of code dealing with animals. See AMC 17.05.010 Definitions. One could argue that trapping with a state permit is a commercial activity, and that therefore Anchorage code does not regulate it. More significantly, "animal" under Anchorage municipal code excludes non-domestic

animals, unless otherwise stated in the code. AMC 8.55.005. Since it is not otherwise stated in AMC 8.55.010, "animal" means domestic animal, and therefore the Anchorage municipal code only prohibits trapping of domestic animals.

The City of Seward prohibits the trapping of wild or domestic animals within the city, with a few exceptions. COS 9.05.310. One of those exceptions is "[h]unting, trapping, or capturing of animals or birds by city, state or federal law enforcement, game department or animal control personnel while engaged in the performance of their official duties or any person authorized by the city manager or his designee for purposes of animal control or research." SCC 9.05.310(a).

The City and Borough of Juneau regulates trapping of wild and domestic animals. The code states: Except if done by an agent or employee of the federal, state, or municipal government on official business, it is unlawful for any person to set traps within one-half mile of any public or private street, road, right-of-way, or highway within the City and Borough." JCC 8.45.030. "Animal" is defined as "all domesticated nonhuman members of the kingdom Animalia." JCC 8.05.010. However, since the code specifically references both wild and domestic animals, it does apply to both categories.

Nome's code prohibits attempting to capture state regulated fur bearing land animals by using a trap that physically harms the animal within certain areas in the municipality. See NCC 10.30.150(a)(6). The areas include one specific geographic area within the city, within fifty feet of any residence, within one hundred feet of the centerline of a platted right-of-way, and within fifty feet of the centerline of certain types of road easements as specified. In addition, trappers must register the general location of their traps with the city prior to placing the traps. See NCC 10.30.150(a)(7). A special permit is available to trap in the prohibited areas if approved by the city council. See NCC 10.30.150(a)(9).

2. Municipal powers

Under the Alaska Constitution, home rule boroughs or cities can exercise "all legislative powers not prohibited by law or by charter." Alaska Constitution, Art. 10, section 11. A second class borough can only exercise certain powers, those specified under state law to be exercised on an areawide basis, and those granted on a nonareawide basis. See AS 29.35.210(a)(b).[1] A second class borough may also adopt other powers "not prohibited by law" by holding an election or by transfer from a city within the borough. AS 29.35.210(c); AS 29.35.300.

According to the Alaska Supreme Court, a power of a second class borough is not nullified simply because the state regulates in a particular area. Liberati v. Bristol Bay Borough, 584 P.2d 1115, 1121-22 (Alaska 1978). The reason is that the powers of municipalities are to be "liberally construed." Id. The Court stated in Liberati:

> We believe that an appropriate accommodation can be made between the statute and general law municipalities by a rule which determines preemption to exist, in the absence of an express legislative direction or a direct conflict with a statue, only where an ordinance substantially interferes with the effective functioning of a state statute or regulation or its underlying purpose.

Id. at 1122.

One important distinction between a second class borough and a home rule borough or city, is that the latter have "police powers." Consequently, a home rule borough or city can regulate

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[1] "Areawide" means "throughout a borough, both inside and outside all cities in the borough." AS 29.71.800(1). "Nonareawide" means "throughout the area of a borough outside all cities in the borough." AS 29.71.800(14).

for the protection of the health, safety and welfare of its citizenry, which gives it a much broader scope of regulation.[2]

State preemption in the area of wildlife management in Alaska was addressed by the Office of the Attorney General in 1982. The opinion concluded that the Board of Game was not empowered to enact regulations regarding firearm use except to carry out its wildlife management functions. One question asked and answered in the opinion was: "Do local governments, *ie.* cities and boroughs, have an obligation of authority on behalf of public safety or local zoning that preempts state authority to manage wildlife?" The opinion answered this question as follows:

> No, local governments cannot preempt state authority. However, local governments, in the exercise of valid police powers, may restrict the discharge of firearms or enact similar kinds of ordinances that may have an incidental effect on hunting and trapping. However, as discussed further below, where the local government ordinance goes beyond legitimate local concerns or where it frustrates a statewide program for game management, the local regulation must yield.
>
> . . .
>
> A borough ordinance that did not directly address legitimate local concerns and which frustrated overall game management would probably be held invalid as preempted by the statewide interest in uniform game management. For example, if a borough, through a firearms or similar ordinance, were effectively to close down huge areas of the state to hunting or trapping, for reasons not reasonably related to protection of life and property, the local ordinance would probably be held invalid as a frustration of the

[2] The Borough has not adopted "police powers," although the Borough could do so under Title 29 of the Alaska Statutes by having an election or by a transfer of the power from a city.

> statewide management of game. The reason for this result is that effective statewide game management, including regulation of species that transverse local political boundaries, requires uniform management decisions, leaving no room for independent game management jurisdiction by local governments. Localized game control would 'substantially interfere' with the purposes of conservation and development of the resources and the functions of the Board of Game, under the test articulated in Liberati.

Authority of Board of Game to Adopt Regulations for Public Safety Purposes, Alaska Attorney General Opinion #166-486-82, 1982 WL 43763, ** 4-6.

It appears that the state has not directly preempted local ordinances affecting wildlife.[3] On the other hand, state regulation of wild animals is extensive, and therefore local government regulation is limited. As noted in the above Attorney General opinion, no borough can engage in game management, since that would impede state game management objectives. Local governments are restricted to ordinances which have the specific purpose of furthering legitimate local concerns. Even those ordinances will be preempted if they have a more than incidental impact on statewide game management.

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[3] I could not find any state law directly preempting local regulation of wildlife, which explains the existence of numerous municipal codes that do regulate trapping. At one time, there was a regulation in the state administrative code entitled: "Local restrictions on taking game." See 5 AAC 92.105 (Repealed 8/8/87.) This regulation did not pertain to local regulation of game, however. The regulation, when it was in effect, simply restricted the taking of game in specific geographic areas in the state. Other than that, I could not find any regulations or statutes regarding municipal regulation of trapping in state law.

For an ordinance to involve a legitimate local concern, it would have to be enacted pursuant to a legitimate power. As previously discussed, the other municipalities and cities in Alaska that have enacted ordinances impacting the trapping of game have all powers not otherwise prohibited, which includes "police powers." The Borough has not adopted "police powers" and cannot enact an ordinance to protect the health, safety and welfare of persons unless the ordinance is based on another enumerated power.

One of the Borough's specific powers as a second class borough under state law is the power to "license, impound, and dispose of animals." AS 29.35.210(3). Another enumerated power is land use and planning: "A first or second class borough shall provide for planning, platting, and land use regulation on an areawide basis." In addition, the Borough has explicit powers to manage and control Borough-owned property, and to regulate "municipal" rights-of-way and facilities. AS 29.35.010(8)(10).

3. The proposed ordinance under Borough powers

The proposed ordinance contains two separate areas of regulation, two exceptions, and a clause on enforcement. It regulates trapping within a certain distance of rights-of-way and trails, and trapping on privately owned property.[4] Section A prohibits trapping within 100 yards of the right-of-way of any publically maintained road, and within 50 yards of any trail within the Matanuska-Susitna Borough trails plan. Section B prohibits trapping on private property without permission by the owner. Section C allows state or federal officials to trap animals in carrying out their duties, but requires prior notice to the Borough. Section D makes an exception for rats, mice,

[4] The proposed definition for "Trap" is: "any device designed or used to capture or hold an animal, and that operates without direct human control. This includes any device for catching and holding wild or domesticated animals, including snares, nets, pitfalls, or clamp-like devices that spring shut suddenly." "Trapping" means "the placing or setting of a trap." MSB 24.05.010.

shrews or similar "vermin." Section E allows for enforcement pursuant to another section of Borough code.[5]

a. Rights-of-way and trails

Prohibiting trapping near rights-of-way and trails is permitted only if it is based on the exercise of a permissible power, furthers "legitimate local concerns," and does not "frustrate[] a statewide program for game management." See Alaska Attorney General Opinion #166-486-82 (previously cited in this Memorandum). Therefore, if the intent of Section A of proposed 24.05.105 is the protection of wild animals, the ordinance would clearly be preempted by state law, because the Borough cannot engage in game management. Other purposes, if they fall within a Borough power, may be acceptable. For example, the protection of domestic animals, such as livestock and pets, could be justified under the Borough's power to license, impound and dispose of animals.[6]

Even if the Borough has the power to regulate trapping in rights-of-ways and near trails for the protection of domestic animals, however, this would be invalid unless related to a legitimate local concern. Given the size of the Borough, a borough-wide regulation pertaining to all publically maintained roads and trails in the Borough trails plan covers quite a lot of territory. There is a low population density in many large areas of the Borough. In sparsely populated areas, the Borough's interest in protecting domestic animals such as livestock and pets is weaker. Trails that are heavily used by recreational snow machiners, hikers, skiers, hunters, or mushers could be an exception, and the Borough could have an interest in protecting the animals of these individuals, but the impact on state game management would also tend to be greater in these more rural areas.

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[5] The referenced section does not exist, indicating a typo.

[6] There would need to be a finding that trapping within public rights-of way and trails impacts domestic animals in an appreciable fashion, and that this impact is a concern to the public and the Borough.

The state's management of game under Title 16, the fish and game code, is comprehensive. It is illegal to engage in trapping, or to possess game or any part of a game animal, unless specifically permitted to do so by the state. AS 16.05.920(a).[7] Consistent with this, a permit is required to possess live game in the state. 5 AAC 92.029. Also, it is a public nuisance to trap in a manner prohibited by Title 16. AS 16.05.800.

In addition to issuing permits for trapping game, the State also tracks the populations of game animals and regulates those populations.

> The basis for the regulation requiring data from trappers is game management and protection. The department relies on data obtained from sealing forms in estimating animal populations, determining the health of populations, and in preparing regulatory proposals for adoption by the board of game. It is therefore imperative that the department receive accurate data; this fact is emphasized by the stringent penalties that attach to a violation. [FN2]

Alaska Attorney General Opinion #661-86-0590, 1986 WL 81189,* 1.

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[7] "Game" is:

> Any species of bird, reptile, and mammal, including a feral domestic animal, found or introduced in the state, except domestic birds and mammals; and game may be classified by regulation as big game, small game, fur bearers or other categories considered essential for carrying out the intention and purposes of AS 16.05-AS 16.40[.]

16.05.940(19).

In addition, the "resources" of the state are reserved to the people for their use, and the state is mandated to promote that use under the Alaska Constitution. Alaska's constitution contains what is referred to as "the common use clause." Alaska Constitution, Art. 8. Under that clause, it is a state policy to "encourage the settlement of its land and the development of its resources by making them available for maximum use consistent with the public interest." Id., Sect. 1. The state legislature is obligated to provide for the "utilization, development, and conservation of all natural resources belonging to the State, including its land and waters, for the maximum benefit of its people." Alaska Constitution, Art. 8, Sect. 2. The Commissioner of Fish and Game's function is to oversee the "protection, management, conservation, and restoration of the fish and *game resources* in the state." AS 16.05.010 (emphasis added).

In at least one case, the Alaska Supreme Court interpreted the "common use clause" to require maximum public access to and use of wildlife resources in the state:

> This court has never considered these questions before. However, in four cases, we have indicated an intent to apply the common use clause in a way that strongly protects public access to natural resources. First, with respect to article VIII generally, we have written, "A careful reading of the constitutional minutes establishes that the provisions in article VIII were intended to permit the broadest possible access to and use of state waters by the general public." FN10 Wernberg v. State, 516 P.2d 1191, 1198-99 (Alaska 1973). Given the text of the common use clause, the same policy should apply to wildlife as well.

Owsichek v. State, Guide Licensing and Control Bd., 763 P.2d 488, 492 (Alaska 1988)(emphasis added).[8]

All this relates to the question of whether the Borough could prohibit trapping "within 100 yards of the right-of-way of any publicly maintained road or within 50 yards of any trail incorporated within the Matanuska-Susitna Borough trails plan." See proposed MSB 24.05.105(A). While the protection of domestic animals such as livestock and pets could potentially be considered a matter of "local concern," the broader the impact of the Borough's regulation, the more likely it will be found to interfere with statewide game management. In some cases, the no trapping zone could be as wide as 800 feet, or for trails, as wide as 300 feet plus the width of the trail.[9] That amounts to a large area placed off limits to trapping in the Borough. It could also be argued that the Borough's restrictions run afoul of the state's mandate to manage wildlife resources for the broadest use of the public as is possible.

In conclusion, the ordinance as it is currently written would probably not be upheld if it were challenged. Alternatively, a much more limited version could be considered. For example, the ordinance could pertain to Borough land only, or could limit trapping only within a narrow distance of certain

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[8] In the Owsichek case, the issue was whether to devote some portion of the public wildlife resource for private use, and the Court rejected that.

[9] Consider that Borough code currently contains a restriction on unrestrained animals: "All animals shall be continuously under restraint." MSB 24.05.070(A). Exceptions are hunting and other animals "engaged in an organized activity that requires that an animal not be physically restrained." While this certainly allows for some untethered or unleashed animals in and near rights-of-way, it would be hard to justify an 800 foot wide no trapping swath based on the occasional hunting dog's activities. Horses and dog teams are usually restricted to or near to the right-of-way as well.

roads and trails which are specifically identified as being of local concern because of heavy use by domestic animals.[10]

There is an additional consideration. The locations of roads do not always match the rights-of-way, and this complicates proving a case in court. A professional survey is required in the absence of other strong evidence to prove the location of a right-of-way beyond a reasonable doubt. This is not a theoretical problem. The Borough currently encounters this in regard to enforcing MSB Title 11, which covers encroachments, and the Borough has been faced with the prospect of spending thousands of dollars to establish that a violation has occurred. The solution here would be to rephrase the ordinance to read "within x feet of y roads," and not to refer to the right-of-way as the defining feature. The power to license, impound and dispose of animals does not depend on the location of a right-of-way, and so the use of the terminology "roads" would be preferable.

b. Private land

The requirement in Section B to gain express permission from the record property owner in order to trap on private property appears to be intended to protect private property owner's rights. There would be a tenuous connection to protection of the public, because the public would in many cases be trespassing to be present on the property. The only enumerated power that could be connected to private property owner's rights would be the planning powers, which arguably might support such a provision, but this ordinance is not being put forward as a planning and land use ordinance. And again, the Borough does not have police powers, so it could not be justified simply based on public health, safety and welfare.

In addition, gaining permission from property owners' to trap is similar to a permit condition, which is handled by the

[10] A legislative finding that there is a specific danger to domestic animals near specific roads or trails would be necessary.

State Department of Fish and Game. Placing a precondition for trapping very likely interferes with statewide management of wildlife and for that reason would be considered preempted. Therefore, the Borough should not attempt to place requirements on trapping on private land throughout the Borough.

c. Requiring state and federal agencies to provide notice

Subsection C of the proposed ordinance reads:

> For the protection of the health and safety of the residents, the Alaska Department of Fish and Game, Alaska Department of Public Safety, United States Fish and Wildlife Service, or their authorized agents or designee, may upon notice to the Borough, trap animals within the area in which trapping is expressly prohibited by this chapter.

Proposed MSB 24.05.105(C).

This section is an exception, in that it allows certain agency personnel to conduct trapping where others cannot, and requires notice to the Borough. If state and federal personnel trap wildlife as authorized by their agencies (*ie.*, for an official function), then it would be in all likelihood relate to wildlife management activities. The Borough cannot "'substantially interfere' with the purposes of conservation and development of the resources and the functions of the Board of Game," however. See Alaska Attorney General Opinion #166-486-82. It may not always be practical, efficient, or even possible for the state to notify the Borough prior to trapping activities. Therefore, the requirement for notice should be removed by deleting the following: "upon notice to the Borough,".

CONCLUSION

Overall, the recommendation is to not adopt MSB 24.05.105, or to scale it down considerably. For example, Section A could be amended to prohibit trapping within a limited distance of

certain specified roads and trails that are heavily used by mushers, horseback riders, hikers and the like who are often accompanied by domestic animals. Section B regarding private land should be deleted. In Section C, the following language should be deleted: "upon notice to the Borough,". Section D is acceptable. Section E is acceptable but contains a typographical error that needs to be corrected.

Please feel free to contact the Borough Attorney's Office if there are any questions regarding this Memorandum.

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February 3, 2017

Lynn Mitchell, CPA
941 South Cobb Street
Palmer, AK 99645

Re: Authority of Matanuska-Susitna Borough to Regulate Trapping in the Government Peak Recreation Area.

Dear Ms. Mitchell:

1. INTRODUCTION

You have asked me to provide a legal opinion regarding the authority of the Mat-Su Borough to restrict the placing of large traps and cable snares in the Government Peak Recreation Area. (Hereinafter GPRA) Your request arises out of comments reportedly made by a Borough Assembly member stating that the Borough's authority is limited.

I called the Borough Attorney Nicolas Spiropoulos on January 13, 2017. We spoke informally. I want to emphasize that the discussion was amiable, and that Mr. Spiropoulos was helpful.

Mr. Spiropoulos acknowledged that the Borough generally has the authority to restrict trapping on Borough-owned lands; and that all of the developed ski and bike trails at the GPRA are on land owned by the Borough. But he advanced his opinion that the Mat-Su Borough's authority to regulate trapping in the GPRA is restricted because the Borough has agreed to co-management of the GPRA with the State of Alaska. Because of the applicable co-management agreement, he indicated that he believes the Borough is contractually obligated to obtain the State's consent to any restriction on trapping in the GPRA. In other words, he believes that the Borough Assembly does not have the authority to enact an ordinance restricting trapping in the GPRA without State consent.

I want to be fair to Mr. Spiropoulos. To do so, I must report that Mr. Spiropoulos indicated that he had not personally gone through the fine print and details of the co-management agreement[s], and was not the Borough Attorney when co-management was agreed to.

I told Mr. Spiropoulos that I would myself go through the co-management agreement[s], and dig into the details. I have done that.

This opinion letter contains my conclusions.

2. BACK GROUND, RELEVANT TERMS, AND DEFINITIONS.

The GPRA is divided into three parts: a Northern Subunit; a Southern Subunit, and a Mountain Subunit. The Northern Subunit contains the area slated for development as an alpine ski area, with ski lifts, one or more restaurants, and supporting facilities. The Northern Subunit lies North and West of the Hatcher Pass Road. Access is off the Hatcher Pass Road. This opinion letter is NOT about the Northern Subunit, although there is mention of it.

The Southern Subunit of the GRRA is located in the southern portion of the GPRA. Access is from Edgerton Road. Several maps are provided with this opinion letter. They clearly show the two subunits.

The Mountain Subunit of the GPRA is the remainder of the GPRA. No development is planned for this portion of the GPRA.

This opinion letter concerns ONLY the Southern Subunit, although mention of the Northern and Mountain subunits may be made for illustration and explanation.

There is a lengthy history of proposals and agreements regarding the GPRA, including a lease, more than one co-management agreement, and a lengthy asset management plan for the GPRA. Still in effect is the "Management Agreement Between the Department of Natural Resources and the Matanuska Borough", dated September 9, 2002, as amended. I refer to it hereinafter as "the Management Agreement of 2002".

The second document is titled "Hatcher Pass - Government Peak Unit, Asset Management & Development Plan". It adds to and fleshes out the Management Agreement of 2002, as amended. I refer to this document hereinafter as "the Plan". The Mat-Su Borough Assembly adopted this plan on November 20, 2012. The State concurred and approved this asset management and development plan.[1]

Borough owned land within the GPRA must be managed in accordance with this Plan. This is mandated as specified in a litigation related settlement agreement.[2]

The Plan is 444 pages long. I am not providing a copy because it is too long. It is available in pdf on the Internet. You can find the Plan at:

http://www.matsugov.us/plans/hatcher-pass-government-peak-unit-asset-management-development-plan

I will in this letter quote some of the relevant language from the Plan. However, to gain a sense of the intentions behind the Plan, I suggest that you read more than I what I quote in this letter.

3. SUMMARY OF CONCLUSIONS.

It is my opinion that the Management Agreement of 2002 and the Plan do not require the Borough Assembly to obtain State consent to an ordinance which would restrict the placing of traps and snares in those parts of the Southern Subunit which have been developed or are slated for future development. The Plan (a) provides for developed trails for hiking, skiing, biking and horseback riding, and even a small beginner downhill ski area; (b) directs prohibitions on uses that conflict with those activities; and (c) gives the Borough decision-making authority in the affected area.

I review below those portions of Plan which support my conclusions. I

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[1]See Appendix P of the Plan, at pages 443-444 of the Plan.

[2]See page 246 of the Plan where *Cascadia Wildlands Project v. State of Alaska* is cited.

want to confess, however, that because the Plan is so long, and because there are other documents that are mentioned in the Plan, some of which I have NOT reviewed, it is possible that I have missed something. I don't think so. But, if I have missed something, I sincerely hope that someone will point out my error. It is not my intention to mislead.

4. DISCUSSION OF THE GROUNDS FOR MY CONCLUSIONS.

I am attaching several maps. They show the two subunits of the Government Peak Management Area, and land ownership. As shown on the maps, almost all of the land within the Southern Subunit is Borough owned. The Plan indicates that the Southern Subunit consists of 1890 acres, of which 390 are State owned,[3] and State land is restricted to the Northern Subunit.

The maps also show the location of the developed ski and single track bike trails in the Southern Subunit, and future planned ski and single track trails. All of these trails are located in the Southern Subunit, on Borough owned land. State-owned land is shown on one of these maps, and it is very clear that State-owned land is not involved in the areas where there are trails currently, or where trails are planned.

At pages 15-16 of the Plan there is a description of the Southern Sub-Unit of the GPRA. It is as follows:

> The "Southern Sub-Unit" (1,890 acres) is the area where the Nordic facilities will be located. Other recreational activities also occur and are planned for in this Sub-Unit including but not limited to mountain running, hiking, mountain biking, equestrian trails and sledding. There is also a small area for Alpine skiing for beginners.

At page 16 the Plan commences with a review of what are referred to as "Administrative and Statutory Provisions Affecting This Plan". I quote from the language of the Plan, commencing at page 16, as follows:

"A variety of existing and administrative and statutory provisions

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[3]The Plan, at p. 193.

control land-use in the unit and do so under this Asset Plan:

"Development Lease. Originally issued by the State, ownership and management of the 55-year development lease has been transferred to the Borough. This reflects the interest of the Borough to develop the ski areas. When the lease was originally issued to Mitsui USA Ltd. in 1989, the State was the only land owner in the Government Peak Management Unit. Since that time, the Borough became the principal land owner where the majority of the ski and other recreational facilities would be built; the State has transferred its management to the Borough as it relates to the ski areas and related development. **The State retains decision-making authority on the use and management on other aspects of State land only.** Changes and amendments that are needed to the lease are discussed in more detail in Chapter 6 of this Plan.

State Management Authorities. State land within the Unit is managed under two authorities. Permitting, leasing and the general use of State land is the responsibility of the Department of Natural Resources, Division of Mining, Land and Water under Title 38 and the regulations adopted under 11 AAC 96. Recreational activities are the responsibility of the Division of Parks and Outdoor Recreation under Title 41 and the regulations adopted under 11 AAC 12. The Division of Mining, Land and Water has also delegated some Title 38 authorities to the Division of parks and Outdoor Recreation with a management agreement that is specific to the Hatcher Pass Management Area.

Borough Management Authorities. Borough land within the Unit is managed under MSB 23.

Tri-Party Management Agreement. A management agreement between the Borough and the State Department of Natural Resources, Divisions of Mining, Land and Water (DMLW), and Parks and

> Outdoor Recreation (DPOR) has existed since 2002.[4] This agreement provides that DPOR and DMLW will be the lead agencies in the natural resource permitting and recreation management of State land. DMLW is responsible for land-use decisions on State land. **The Borough is responsible for all land-use activities on land owned by the Borough.** In the case of the Alpine ski area (Northern Sub-Unit), where the land is owned by both the State and Borough, the agreement calls for a mutual decision-making process. The land exchange proposed in Chapter 6 will place all the improvements related to the Alpine ski area under Borough ownership and, as a result, eliminate the mutual decision-making process.

The emphasis is mine. It does not appear in the Plan.

The important point is that the Plan expressly provides that the Borough is responsible for "all land-use activities" on Borough-owned land within the GPRA. That includes, of course, the Southern Subunit of the GPRA, and the placing of large traps and large diameter cable snares is a "land-use activity".

There are only two references to trapping in the Plan. Neither reference indicates that trapping is a goal, or as relates to the Souther Subunit, an authorized use.

The first reference is at page 21. The language is as follows:

> This Development and Asset Management Plan will not:
>
> Directly affect private land (including Native Corporation and native allotments), Mental Health Trust Land, School Trust Land, or University of Alaska lands.
>
> Affect the authorities of the Alaska Department of Fish and Game to manage fish and wildlife and harvest regulations.

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[4]This is the same agreement as I have referred to above as the "Management Agreement of 2002", and of which I have attached a copy.

Note that the language quoted above provides only that the Plan does not "affect" State authority to manage wildlife and harvest regulations. It does not grant new authority to the State. Instead, it only provides that the Plan does not affect the State's authority.

That's important because Second Class Boroughs have the same authority as a private land owner to regulate activities on their land. Thus, Second Class Boroughs can add to restrictions on hunting and trapping on Borough-owned land. This point has been conceded by Mr. Spiropoulos.[5]

Furthermore, a restriction on trapping on less than 2,000 acres of Borough land is not game "management"; and would not be a "harvest regulation".

The second reference to trapping is included in language at pages 100-101. It is as follows:

> **Generally Allowed Uses**
>
> **Areas affected by the "Public Recreation-Dispersed" designation:**
>
> All Generally Allowed Uses are permitted except for year-round motorized use restrictions and those uses allowed by permit under the Special Use Designation (ADL 223585). Lawful trapping, hunting, and fishing, among other uses, are allowed on State land (11 AAC 96.020 and Borough land.

The most critical language here is the language regarding "areas affected". The Southern Subunit is NOT classified as "Public Recreation-Dispersed". It is classified as "Public Use Developed".[6] While trapping is mentioned as a currently authorized use pursuant to MSB Code on lands classified as "Public Recreation - Dispersed", trapping is not mentioned as an authorized use in the materials describing uses authorized on land classified as "Public Use Developed." Hunting

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[5]I addressed this authority in my opinion letter dated January 24, 2015.

[6]Page 199, of the Plan.

is mentioned as a possible use, but not trapping.[7]

My point is that there is no language in the Plan that expressly states that trapping is authorized on land which is classified as Public Use Developed. If trapping is an intended use of lands classified as Public Use Developed, the authorization must be inferred. An inference of authorization might be found at page 198 of the Plan, where the following language is found:

> The entire Southern Sub-Unit shall be managed the area for a variety of summer and winter non-motorized trail activities such as Nordic skiing, general hiking, mountain biking, and equestrian activities. Other recreational opportunities can occur as well such as berry picking, bird watching, hunting, **etc**.

[My emphasis.]

The abbreviation "etc." is the only indication in the Plan that trapping might be intended for land that is classified as "Public Use - Developed."[8] Despite hundreds of pages of statements of intent, goals, and authorizations, there is no express mention that trapping is authorized, or should be authorized, in areas to be developed. If trapping is authorized by the Plan, then authorization must be inferred.

But even if trapping is a use that is "inferred" because of the abbreviation, the Plan makes clear that uses that conflict with primary uses should not be allowed. For instance, the following language appears in the Plan, commencing at page 100:

> The Alaska Constitution and Borough code require that public land held by the Borough shall be managed for multiple purposes. There

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[7]See page 198 of the Plan.

[8]The abbreviation "etc" appears also in the chart at page 199 of the Plan in the box indicating Management Intent for the Southern Subunit. The management intent is stated to be for the development of "Nordic skiing facilities and other multi-season recreational facilities and trails, such as for general hiking, equestrian, mountain biking, sledding and tubing, camping, etc."

> are three exceptions to this multiple-use policy: land that is sold, leased, or otherwise taken from public management; **land designated by the Borough Assembly for a particular use (such as a park, municipal building or facility)**; or land dedicated through the platting process for a specific public purpose (such as open space, road, trail or for a utility).
>
> The multiple-use policy does not mean that all uses are allowed in all locations but, on all Borough-owned land combined, most opportunities can be available. This Asset Management Plan, and all other Borough asset management plans, emphasizes minimizing land use conflicts through plan guidelines rather than through prohibitions. **However, if the Borough determines a proposed use is incompatible with the designated use, the proposed use shall not be authorized or it shall be modified so that the incompatibility no longer exists.**

[My emphasis.]

Here is another example regarding conflicts between primary uses and "inferred" or less favored uses. This example appears in a section titled "Management Guidelines for the Southern Subunit", and concerns buffers. In this discussion, the Plan provides as follows:

> All Nordic, general hiking, equestrian, and mountain biking, etc. trails do not need to be buffered at this time. Currently the primary use of the land in this Sub-Unit is for various trail and other general recreational activities. **No other activities shall be permitted or authorized that would limit or infringe upon this primary use.**[9]

[My emphasis.]

Placing leghold traps in the middle of developed trails would directly "infringe upon" the use of the trails by horseback riders, runners, and skiers

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[9]The Plan at page 201.

engaged in skijoring. That's an undeniable fact. It is also an undeniable fact that some trappers use "trail sets" when trapping wolves.

There can be no doubt but that the Plan allows [and probably requires] the Borough to prohibit trail sets in the Southern Subunit. It is also obvious that the Borough has the authority to prohibit traps and snares on developed alpine ski trails in the Northern Subunit. That the Borough has this authority is common sense, and expressly provided in the Plan, by the language quoted above, and elsewhere.

It follows that since the Borough has authority to prohibit the placing of traps in trails, the Plan gives to the Borough the decision-making authority to prohibit the placing of traps and snare near trails; that is, if the Borough determines there is a conflict between a primary use [hiking, skiing, running, horseback riding] and an inferred use.

My experience here in Anchorage with trail running at Kincaid Park is that there are developed trails for both skiing and biking, and also numerous unofficial trails which provide short cuts between developed trails, and a more undeveloped running, hiking or biking experience. My point is that developed trails cause the evolution of many other trails in the vicinity of the developed trails; and that it makes sense to prohibit the placing of large traps and large diameter snares not only in and immediately adjacent to developed trails, but also in the entire area where developed trails are located.

For that reason, and all the reasons discussed above, it is my opinion that the Borough has the authority to prohibit the placing of large traps and large diameter snares on Borough-owned lands in the Southern Subunit, and is not barred from doing so by the Management Agreement of 2002, as amended, and the Plan.

However, if my opinion is not accepted, and if it is determined that the State must consent, the Plan contains provisions which provide for changes. These provisions are contained in Chapter Six of the Plan, which appears at pages 207-222 of the Plan.

Chapter Six addresses changes to the Plan and the use of discretion in

making decisions regarding activities and developments made pursuant to the Plan. It confirms that the Plan is a "step-down plan" and "constitute[s] the basis for subsequent management by the State and Borough in the Government Peak Unit."[10]

Language appears at page 209 stating that "[a] plan amendment to the Hatcher Pass Management Plan is required if other uses are to be restricted and/or if an expanded scope or intensity of use is intended." If a restriction on trapping in the Southern Subunit requires a plan amendment, the Plan provides that the Borough Assembly may make the Amendment. I quote the Plan as follows:

> Plan Amendments
>
> An amendment permanently changes the Asset Plan, which includes the guidelines by adding to or modifying the basic management intent. For example, an amendment might change the guidelines for the type and/or size of a buffer or the location of a permanent facility. Only the Borough Assembly may change the Asset Plan, add, amend or delete a guideline and change a land-use designation and/or classification. In addition, State review and concurrence are required for all Asset Plan amendments regarding changing uses, management intent or management guidelines to ensure compliance with the Hatcher Pass Management Plan.

The procedure is set forth at length, as follows:

> 1. The Borough Manager, or his designee, shall prepare a written Best Interest Finding (see Appendix "B", Best Interest Finding General Format) that specifies:
>
> the reasons for the amendment such as changed environmental, social or economic conditions; the alternative courses of action (what the plan, guidelines or classification are being proposed to be changed to), including a no change or action alternative; and why the amendment is in the public's best interest.

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[10]The Plan at page 209.

2. A public notice of the proposed decision shall be provided pursuant to Borough code. The public notice shall also be sent to the State Department of Natural Resources.

3. The Borough Manager, or his designee, shall submit a recommendation along with the comments and recommendation from the Alaska Department of Natural Resources and the comments received from the public to the Planning Commission for their consideration and a recommendation.

4. The Borough Manager shall submit a recommendation to the Borough Clerk for placing on the agenda for the Borough Assembly's consideration. Included with the recommendation shall be the comments, recommendations, concurrence or nonconcurrence from the Alaska Department of Natural Resources. Public comments and recommendations of the Planning Commission shall also be included.

As discussed above, it is my opinion that the enactment of an ordinance prohibiting trapping in the Southern Subunit would not be a change to the Plan but instead an act done in conformance with the Plan. But compliance with the procedural steps outlined above does not limit the Borough's authority. The Borough has the authority.

4. CONCLUSION.

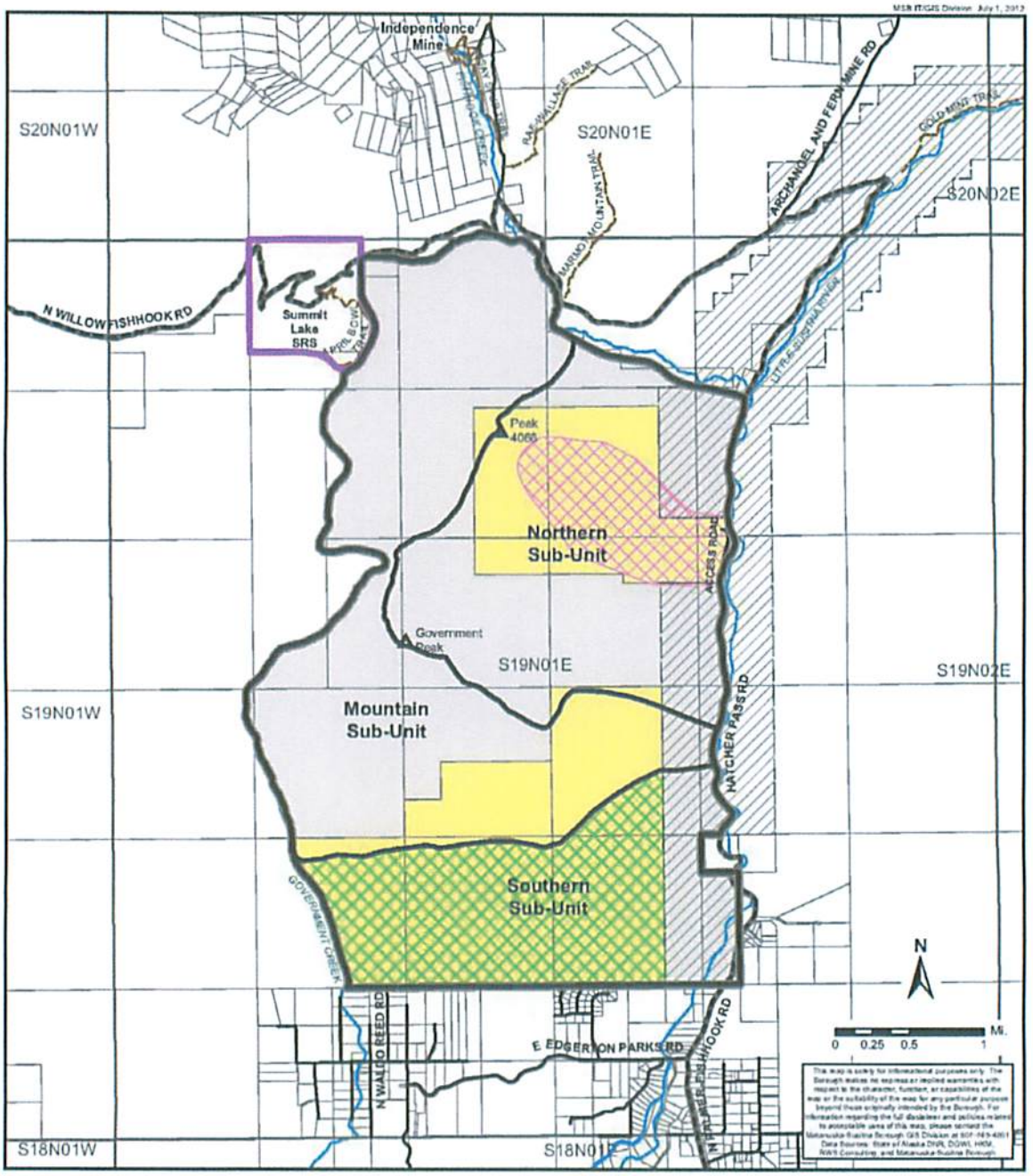
There is no contractual provision within the Hatcher Pass Management Area plan which restricts the Borough Assembly's authority to regulate trapping in the vicinity of the developed trails in the Southern Subunit of the Government Peak Recreation Area. Even if there were some contractual impediment to an ordinance prohibiting trapping in the Southern Subunit, the applicable co-management agreement, as amended and supplemented, provides an easy to follow procedure for obtaining the State's consent to a prohibition.

Dated: February 3, 2017.

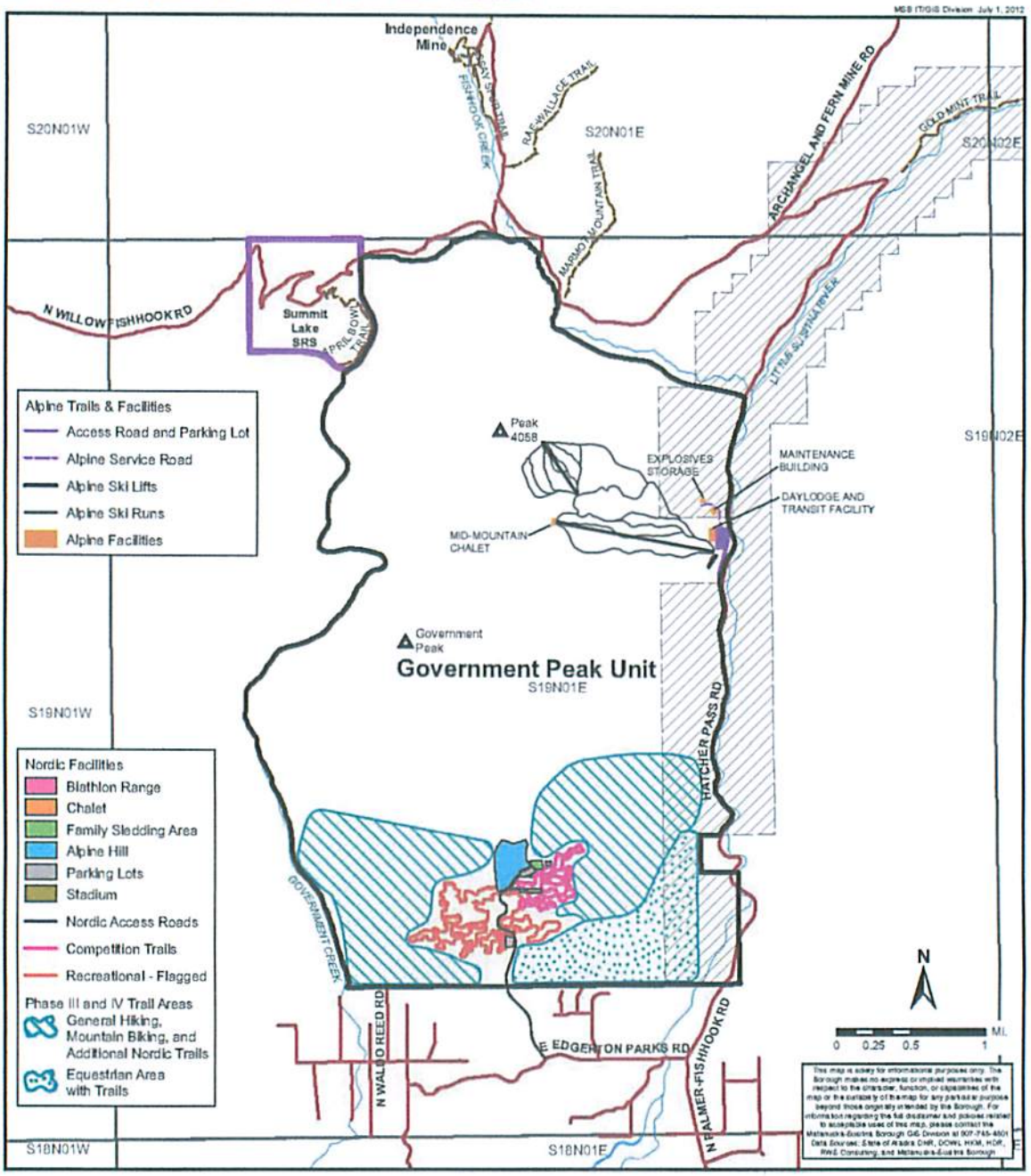
Kneeland Taylor

HATCHER PASS - GOVERNMENT PEAK UNIT
Asset Management and Development Plan

MAP 5
SUB-UNITS AND RECREATIONAL FACILITIES DEVELOPMENT AREAS



HATCHER PASS - GOVERNMENT PEAK UNIT
Asset Management and Development Plan
MAP 8
GOVERNMENT PEAK MANAGEMENT UNIT
FULL BUILD OUT
OF RECREATIONAL FACILITIES AND TRAILS



HATCHER PASS - GOVERNMENT PEAK UNIT
Asset Management and Development Plan
MAP 12
SOUTHERN SUB-UNIT
RECREATIONAL FACILITIES PHASES III AND IV