HB

266

<TARGET><BILL>HB 266</BILL><SUBJECT>HB 266</SUBJECT><COMM>HRES29</COMM></TARGET>

Alaska State Legislature
House of Representatives
Representative Tammie Wilson

Interim
301 Santa Claus Lane 3B
North Pole, Alaska 99705
Phone - (907) 451-2723

Session
State Capitol Rm 412
Juneau, AK 99801
Phone - (907) 465-4797

Rep.Tammie.Wilson@akleg.gov

HB 266
Sponsor Statement

"An Act relating to the authority of the Board of Game to adopt, amend, or repeal regulations."

The clear intent of our constitutional framers and early legislators was to include the public in the process of managing and allocating our game resources. Alaska is unique, for example, among all states for operating a system of game advisory committees (ACs).

Unfortunately, this intent toward public participation has in recent years been frustrated by a commingling of the functions of the ***board*** of game with the ***Department*** of Fish and Game, the result of which has been public exclusion.

The legislature is empowered in Art. 8, Sec. 2 of the Alaska Constitution with managing and allocating all resources, including game. The legislature has in turn statutorily delegated that ***management*** authority by creating the Department of Fish and Game in the executive branch to manage fish and game resources. The legislature also delegated the ***allocation*** authority by creating the Board of Game, but they did not put this board in the executive branch, but in the legislative branch.

Current statute and regulation require proposals for the allocation of game resources to be submitted by a published deadline before the board meeting. Members of the public, advisory committees (AC), the department, and the board can submit such proposals. Typically, these proposals are published well ahead of the meeting for the interested public to scrutinize, and if they deem necessary, offer input.

The problem that has developed is that the board, using department staff for support, are developing proposals outside of the public purview. While individual members of the public and ACs must submit their proposals in advance of board meetings, the board and department staff can work on proposal language with no notice to the public. This language is often adopted as board regulation without the public having opportunity to engage in its development.

HB 266 will solve this problem and put the public back in control of the process of managing and allocating our game resources just as our framers intended.

29-LS1205\N
Bullard
3/31/16

CS FOR HOUSE BILL NO. 266( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-NINTH LEGISLATURE - SECOND SESSION

BY

Offered:
Referred:

Sponsor(s): REPRESENTATIVE WILSON

A BILL

FOR AN ACT ENTITLED

"An Act relating to the authority of the Board of Game to adopt, amend, or repeal certain regulations."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

*** Section 1.** AS 16.05.255(a) is amended to read:

(a) The Board of Game may**, subject to (*l*) of this section,** adopt regulations it considers advisable in accordance with AS 44.62 (Administrative Procedure Act) for

(1) setting apart game reserve areas, refuges, and sanctuaries in the water or on the land [OF THE STATE] over which it has jurisdiction, subject to the approval of the legislature;

(2) establishing open and closed seasons and areas for the taking of game;

(3) establishing the means and methods employed in the pursuit, capture, taking, and transport of game, including regulations, consistent with resource conservation and development goals, establishing means and methods that may be

employed by persons with physical disabilities;

(4) setting quotas, bag limits, harvest levels, and sex, age, and size limitations on the taking of game;

(5) classifying game as game birds, song birds, big game animals, fur bearing animals, predators, or other categories;

(6) methods, means, and harvest levels necessary to control predation and competition among game in the state;

(7) watershed and habitat improvement, and management, conservation, protection, use, disposal, propagation, and stocking of game;

(8) prohibiting the live capture, possession, transport, or release of native or exotic game or their eggs;

(9) establishing the times and dates during which the issuance of game licenses, permits, and registrations and the transfer of permits and registrations between registration areas and game management units or subunits is allowed;

(10) regulating [SPORT HUNTING AND SUBSISTENCE] hunting as needed for the conservation, development, and utilization of game;

(11) taking game to ensure public safety;

(12) regulating the activities of persons licensed to control nuisance wild birds and nuisance wild small mammals;

(13) promoting hunting and trapping and preserving the heritage of hunting and trapping in the state.

*** Sec. 2.** AS 16.05.255(c) is amended to read:

(c) **At least once a year, the Board of Game shall solicit proposals to amend, adopt, or repeal regulations. The department shall review a proposal and provide notice of the proposal to advisory committees established under AS 16.05.260 and to interested persons. The department shall make a copy of the proposal available at department offices and on the Internet website of the board.** If the **board** [BOARD OF GAME] denies a petition or proposal to amend, adopt, or repeal a regulation, the board, upon receiving a written request from the sponsor of the petition or proposal, shall**,** in addition to the requirements of AS 44.62.230**,** provide a written explanation for the denial to the sponsor not later than 30 days after the board

has officially met and denied the sponsor's petition or proposal, or 30 days after receiving the request for an explanation, whichever is later.

*** Sec. 3.** AS 16.05.255 is amended by adding a new subsection to read:

(*l*) The department shall provide notice of a proposal made by a member of the Board of Game to amend, adopt, or repeal a regulation in the same manner as notice is provided under (c) of this section except that the department shall provide at least 60 days' notice before the board considers the proposal. However, the 60-day notice requirement does not apply if

(1) at least three members of the board support the proposal and the board

(A) provides advisory committees and interested persons the opportunity to make recommendations or comment on the proposal; and

(B) makes written findings that

(i) the proposal requires the board's expedited consideration because of conservation concerns or significant regulatory problems;

(ii) the subject matter of the proposal would not be before the board for one calendar year but for the board member's proposal; and

(iii) the proposal is in the best interests of the public; or

(2) the proposal is to

(A) adopt an emergency regulation or order under AS 44.62.250; or

(B) adopt, amend, or repeal a regulation that the board finds in writing is necessitated by a court ruling or order.

HB 266
Explanation of Changes
HB 266 (29-LS1205\H) to CSHB 266 WORK DRAFT (29-LS1205\N)

Sec. 1- AS 16.05.255 (a): In the original version of the bill, (a)(8) of the current statute was amended by removing "prohibiting the live capture, possession, transport, or release of native or exotic game or their eggs"; this language was added back into the CS, resulting in no change to the current AS 16.05.255 (a)(8). Adding back in the language was made in response to a concern by the department.

Sec. 2- AS 16.05.255 (c): In the CS, the frequency of the requirement that the Board of Game shall solicit proposals to amend, adopt, or repeal regulations was changed to "at least once a year" from "at least twice a year" in response to a concern by the department that doing so twice per year would result in increased costs.

Sec. 3- AS 16.05.255: In the CS, several changes were made to the requirements for public notice for a board member's proposal as follows:

- The requirement for public notice of a board member's proposal was lowered from 65 days to 60.
- A new subsection (B) was added to allow an exemption to the 60-day requirement if the board finds in writing that a board member's proposal to adopt, amend, or repeal a regulation is necessitated by a court ruling or order. This exemption was added in response to concerns raised by the Department of Law, as well as the Chairman and other members of the Board of Game regarding the board's flexibility to respond to court decisions.

Additionally, language changes were made in the CS to section (l) for clarification purposes: no substantive changes were made with the new language. Several of the language changes were made at the request of the department.

Fiscal Note

State of Alaska
2016 Legislative Session

Bill Version: HB 266
Fiscal Note Number:
() Publish Date:

Identifier: HB266-DFG-AC-2-5-16
Title: BOARD OF GAME REGULATION PROPOSALS
Sponsor: WILSON
Requester: House Resources Committee

Department: Department of Fish and Game
Appropriation: Statewide Support Services
Allocation: Advisory Committees
OMB Component Number: 2231

Expenditures/Revenues

Note: Amounts do not include inflation unless otherwise noted below. (Thousands of Dollars)

	FY2017 Appropriation Requested	Included in Governor's FY2017 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY 2017**	**FY 2017**	**FY 2018**	**FY 2019**	**FY 2020**	**FY 2021**	**FY 2022**
Personal Services							
Travel							
Services	2.0		2.0	2.0	2.0	2.0	2.0
Commodities							
Capital Outlay							
Grants & Benefits							
Miscellaneous							
Total Operating	**2.0**	**0.0**	**2.0**	**2.0**	**2.0**	**2.0**	**2.0**
Fund Source (Operating Only)							
1004 Gen Fund	2.0		2.0	2.0	2.0	2.0	2.0
Total	**2.0**	**0.0**	**2.0**	**2.0**	**2.0**	**2.0**	**2.0**
Positions							
Full-time							
Part-time							
Temporary							
Change in Revenues	2.0		2.0	2.0	2.0	2.0	2.0

Estimated SUPPLEMENTAL (FY2016) cost: 0.0 *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY2017) cost: 0.0 *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

ASSOCIATED REGULATIONS

Does the bill direct, or will the bill result in, regulation changes adopted by your agency? Yes
If yes, by what date are the regulations to be adopted, amended or repealed? 12/31/16

Why this fiscal note differs from previous version:

Not applicable, initial version.

Prepared By: Glenn Haight, Executive Director — Phone: (907)465-6095
Division: Boards Support Section — Date: 02/05/2016 04:24 PM
Approved By: Kevin Brooks, Deputy Commissioner — Date: 02/05/16
Agency: Fish and Game

FISCAL NOTE ANALYSIS

STATE OF ALASKA
2016 LEGISLATIVE SESSION

BILL NO. HB 266

Analysis

This Bill stipulates that the Board of Game (board) shall solicit regulatory proposals twice a year, provide copies of the compiled proposals and notices of proposals to the public and advisory committees. Copies are to be available at local Fish and Game offices and on the board's website. The bill also defines a process for generating proposals requested by members of the board which would require a 65 day public notice period. The fiscal impact to this component is estimated at $2.0 in anticipation of having additional advisory committee teleconferenced meetings to discuss and comment on the proposals. It is anticipated for 20 advisory commitees to meet via teleconference at approimately $100 each.

Possible regulatory changes from this bill relate to the removal of duties by the board which will require the repeal of several sections of code. The bill may require technical changes to the board's regulatory process under 5 AAC 96.600. This section guides the Board of Fisheries and may require a bifurcation of the two board's processes.

Fiscal Note

State of Alaska
2016 Legislative Session

Bill Version: HB 266
Fiscal Note Number:
() Publish Date:

Identifier: HB266-DFG-BDS-2-5-16
Title: BOARD OF GAME REGULATION PROPOSALS
Sponsor: WILSON
Requester: House Resources Committee

Department: Department of Fish and Game
Appropriation: Statewide Support Services
Allocation: Boards of Fisheries and Game
OMB Component Number: 2048

Expenditures/Revenues

Note: Amounts do not include inflation unless otherwise noted below. (Thousands of Dollars)

	FY2017 Appropriation Requested	Included in Governor's FY2017 Request	Out-Year Cost Estimates				
OPERATING EXPENDITURES	**FY 2017**	**FY 2017**	**FY 2018**	**FY 2019**	**FY 2020**	**FY 2021**	**FY 2022**
Personal Services	1.9		1.9	1.9	1.9	1.9	1.9
Travel							
Services	6.0		6.0	6.0	6.0	6.0	6.0
Commodities							
Capital Outlay							
Grants & Benefits							
Miscellaneous							
Total Operating	**7.9**	**0.0**	**7.9**	**7.9**	**7.9**	**7.9**	**7.9**
Fund Source (Operating Only)							
1004 Gen Fund	7.9		7.9	7.9	7.9	7.9	7.9
Total	**7.9**	**0.0**	**7.9**	**7.9**	**7.9**	**7.9**	**7.9**
Positions							
Full-time							
Part-time							
Temporary							
Change in Revenues	7.9		7.9	7.9	7.9	7.9	7.9

Estimated SUPPLEMENTAL (FY2016) cost: 0.0 *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY2017) cost: 0.0 *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

ASSOCIATED REGULATIONS

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If yes, by what date are the regulations to be adopted, amended or repealed? 12/31/16

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Agency: Fish and Game

STATE OF ALASKA
2016 LEGISLATIVE SESSION

BILL NO. HB 266

Analysis

This Bill stipulates that the Board of Game (board) shall solicit regulatory proposals twice a year, and provide copies of the compiled proposals and notices of proposals to the public and advisory committees. Copies are to be available at local Fish and Game offices and on the board's website. This would require printing and mailing of one additional proposal book every year at an estimated cost of $4.0 for 1,500 books. The board must also issue a call for proposal estimated at $0.6.

The bill defines a process for generating proposals requested by board members and/or the board, and requires a 65 day public notice period. The fiscal impact to this component is the cost for mailing two public notices annually at approximately $0.6 each. The board may need to meet telephoncially to address proposals if they cannot be scheduled at a regularly scheduled meeting. The personal services estimate of $1.9 is the cost of board members' honorarium for holding an additional meeting with an additional $0.2 for teleconference services.

Possible regulatory change from this bill relate to the removal of duties by the board which will require the repeal of several sections of code. The bill may require technical changes to the board's regulatory process under 5 AAC 96.600. This section guides the Board of Fisheries and may require a bifurcation of the two board's processes.

ARTICLE VIII

NATURAL RESOURCES

At the time of the constitutional convention, Alaska had a slender economic base. Mining and fishing were the economic mainstays, and neither industry was robust. Proponents of statehood believed that the future of the state of Alaska depended upon the successful development of all its natural resources. Statehood bills pending in Congress indicated that the new state government would acquire an enormous amount of land from federal holdings, and it would assume responsibility for managing all fish and wildlife. Alaska's delegate to Congress, Bob Bartlett, devoted his keynote speech at the constitutional convention to the role of resource development in Alaska's future and to the ease with which the benefits of this development could be lost by careless management: ". . . fifty years from now, the people of Alaska may very well judge the product of this Convention not by the decisions taken upon issues like local government, apportionment, and the structure and powers of the three branches of government, but rather by the decision taken upon the vital issue of resources policy."

Delegate Bartlett and others urged constitutional defenses against freewheeling disposals of public resources and colonial-style exploitation that would contribute nothing to the growth and betterment of Alaska. Such abuses were common in the early history of resource management in the western states, and manifestations of them were visible in contemporary Alaska under the complacent management of federal bureaus. Thus, the convention delegates sought to enshrine in the state constitution the principle that the resources of Alaska must be managed for the long-run benefit of the people as a whole—that is, the resources of the state must be managed as a public trust. They did not attempt to write a resource code; rather, they sought to fix the general concept of the public interest firmly in the resource law and resource administration of the state, as well as in the consciousness of Alaskans, so it would not be subverted through the indifference or avarice of future generations.

In drafting this article, delegates were unable to refer to other state constitutions or the *Model State Constitution* for ideas and guidance, as none of them dealt with natural resource policy as broadly as the Alaskans thought necessary. At the time of Alaska's constitutional convention, only the Hawaii Constitution addressed natural resource policy in a separate article, and that article was brief. Other state constitutions, if they contained reference to resources at all, focused on specific matters of local relevance, such as irrigation and water rights in the western states, tidelands in Washington, reforestation in Oregon, and so on. These state constitutions were, for the most part, written before modern principles of conservation and resource policy—sustained yield and multiple use, for

example—were articulated. Thus, Alaska's natural resource article was a unique product of the 1956 convention, and it remains unique among the states, even though constitutional treatment of natural resource and environmental issues in other states has grown through amendment and revision in recent years.

Article VIII of Alaska's constitution clearly establishes that the natural resources of Alaska should be developed. Indeed, to the convention delegates, the very success of statehood hung in the balance. But while this article creates a strong presumption in favor of resource development, it will not abide that which is wasteful, biologically exhaustive, rooted in special privilege, narrowly selfish or contrary to the rights of others and to the larger public interest. With certain exceptions, this article allows the government to sell, lease or give away public land and resources, but it may do so only in accordance with constitutional and statutory guidelines, and all transactions must be in full public view.

Despite their philosophical aversion to the "giveaway" of public resources, the delegates were enamored with the long-established federal method of disposing of public mineral lands, which allows a person to obtain the right to receive fee title to a legitimate mineral deposit by filing a claim to it and performing certain tasks thereafter. Meanwhile, a draft article on natural resources prepared by consultants to the convention called for the state to retain in public ownership the subsurface title to all mineral lands and to lease the right to produce minerals from these lands. Congress was predisposed to the same idea, and in all likelihood was going to prohibit the state from transferring out of state ownership the mineral rights to land acquired from the federal government. Nonetheless, in the constitution the delegates opted for the existing federal system of obtaining full title to mineral lands "if not prohibited by Congress." As it happened, Congress forced on the state the leasing alternative and required the state to retain ownership of the minerals on its land.

Delegates debated at some length the organization of the executive agency to be charged with managing natural resources. There was vocal public support for a commission of fish and game to oversee the management of those resources (as there was support for the creation of a constitutional board of education to head the state department of education). In the end, however, the delegates left the way open for a board to head a principal department but willed to the legislature the task of deciding when and where (see discussion of Article III, Section 25).

It is not surprising that controversies over resource management have been among the most bitter in Alaska's political history and that the courts have been called on frequently to decide the meaning of constitutional language in the context of these disputes. This is because natural resources loom so large in the lives of so many Alaskans, if not as a source of livelihood then as source of cherished recreation. It is also because the language of this article is general and often opaque. A major challenge of the resource agencies has been to manage in the interest of conservation and to satisfy the needs of various user groups without creating special privileges and exclusive rights, which the constitution abhors. The courts have had to determine when management schemes reasonably limit

access and reasonably allocate among user groups, and when they cross a constitutional threshold and violate guarantees of equal and open access to the public.

Section 1. Statement of Policy

> **It is the policy of the State 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.**

This is an emphatic statement that the policy of the state is to encourage the development of its land and resources, but in a manner that recognizes the collective interests of the people as the owners of these lands and resources. The meaning of the phrase "consistent with the public interest" is found elsewhere in this article. For example, it means that the principles of conservation must govern resource management (Sections 2 and 4); that everyone should be treated equally by management rules, particularly rules adopted in the interests of conservation that limit the access of some groups to certain resources (Sections 3, 15, 16 and 17); and that the public must be notified of all disposals of public land and resources, which may occur only according to the terms of general laws (Sections 8, 9 and 10). The delegates wanted the state's resources developed, not plundered. At the time of the convention, a current of opinion in Alaska was that corporate developments such as the Kennecott copper mine made insufficient lasting social and economic contributions to the territory, and that absentee owners of fish traps had unfair, exclusive rights of access to Alaska's salmon and were depleting the resource in their single-minded quest for profits.

Section 2. General Authority

> **The legislature shall provide for the utilization, development, and conservation of all natural resources belonging to the State, including land and waters, for the maximum benefit of its people.**

This section is a broad grant of legislative authority to implement the policy enunciated in Section 1. The original resource article of the Hawaii constitution written in 1950 began with a similar provision: "The legislature shall promote the conservation, development and utilization of agricultural resources, and fish, mineral, forest, water, land, game and other natural resources" (Article X, Section 1 of the 1950 constitution). In addition to utilization and development, conservation appears as an objective of resource management. The delegates understood the term in its traditional sense of "wise use." The Alaska Supreme Court has said: "The terms 'conserving' and 'developing' both embody concepts of utilization of resources. 'Conserving' implies controlled utilization of a resource to prevent its exploitation, destruction or neglect. 'Developing' connotes management of a resource to

make it available for use" *(Kenai Peninsula Fisherman's Co-op Association v. State,* 628 P.2d 897, 1981).

Section 3. Common Use

> **Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use.**

This section enshrines in the Alaska Constitution the common law doctrine that natural resources must be managed by the state as a public trust for the benefit of the people as a whole, rather than for the benefit of the government, corporations, or private persons. Sections 15 and 17 of this article reinforce the public trust doctrine of natural resource management in Alaska, and they work in harmony with this section to prohibit the state from granting to any person or group privileged or monopolistic access to the wild fish, game, waters, or lands of Alaska. Sections 3, 15, and 17 are known as the "equal access clauses" of the natural resources article. The Alaska Supreme Court has said that "although the ramifications of these clauses are varied, they share at least one meaning: exclusive or special privileges to take fish and wildlife are prohibited" (*McDowell v. State*, 785 P.2d 1, 1989). Allegations of a violation of this section typically involve an allegation of a violation of the other two as well.

Tension exists between the equal access clauses and other provisions of this article that require natural resource management to honor principles of conservation (Sections 2 and 4) and that expect "preferences among beneficial uses" (Section 4). Regulating the harvest of fish, game, and other resources in the interest of conservation involves limiting access to them in some manner, as for example with bag limits and closed seasons. Where is the line that separates legitimate regulatory measures from unconstitutional denial of access guaranteed by Sections 3, 5 and 17? This is a question that is often before the courts.

The Alaska Supreme Court has upheld traditional regulatory tools of fish and game management such as registration requirements and limitations on the means and methods of taking. For example, the court upheld designation by the Board of Fisheries of "superexclusive" fishing districts in which people who register to fish are barred from other districts *(State v. Herbert,* 803 P.2d 863, 1990). It upheld designation by the Board of Game of urban areas as "nonsubsistence areas" in which no priority may be given to subsistence hunting (*State v. Kenaitze Indian Tribe*, 894 P.2d 632, 1995). It has also upheld regulations that selectively ban certain equipment in the taking of fish and game. For example, it upheld a ban on spotter airplanes in the Bristol Bay salmon fishery (*Alaska Fish Spotters Assn v. State*, 838 P.2d 798, 1992), and it upheld a ban on airplanes and airboats as a means of access to certain areas for hunting (*Interior Alaska Airboat Association v. State*, 18 P.3d 686, 2001).

The courts have also upheld regulations of the Alaska Board of Fisheries that allocate resources among user groups. For example, the supreme court upheld an allocation of salmon among commercial and recreational fishermen *(Kenai Peninsula Fisherman's Co-op Association v. State,* 628 P.2d 897, 1981). The court of appeals upheld an allocation among commercial fishermen using different types of fishing gear *(Meier v. State Board of Fisheries,* 739 P.2d 172, Alaska Ct. App., 1987). The supreme court upheld a fixed quota of king salmon to commercial trollers that was challenged by sportsmen who claimed the quota amounted to a special privilege and limited the ability of the vast majority of the public to fish for king salmon *(Tongass Sport Fishing Assn v. State,* 866 P.2d 1314, 1987).

To be free of constitutional problems, resource laws and regulations must have adequate justification; they must have a reasonable basis for distinctions they make among various users; they must put everyone on an equal footing within a group of users; and they may not prevent anyone from belonging to a particular user group. A regulation may make access to a resource more convenient for some people and less so for others, but convenience of access is not protected by the constitution.

However, a law or regulation in the name of conservation may treat groups unfairly or convey a special privilege in violation of the common use and anti-monopolistic safeguards of Sections 3, 15, and 17. One such law was a subsistence measure adopted by the legislature in 1986 that made access to subsistence uses of fish and game dependent upon place of residency. According to the law, people who lived in areas determined to be urban were denied access to subsistence activities, and those who lived in areas determined to be rural were permitted access. In a decision with far-reaching political impact, the Alaska Supreme Court said the state could legally allocate subsistence resources among different groups if necessary to protect the resource, but it could not use place of residency as criterion for making that allocation (*McDowell v. State*, 785 P.2d 1, 1989). As a consequence of this decision, the federal government found that state management of fish and game on federal land failed to conform to provisions of the federal Alaska National Interest Lands Conservation Act of 1980, which requires that rural residents have a subsistence preference, and took from the state control of fish and game management on federal land in Alaska.

Another regulatory scheme found to violate the equal access sections of Article VIII was one that authorized exclusive areas for big-game guides. Permits for these areas, in which only the permit holder could guide hunters, were not available for competitive bidding. Rather, they were assigned on the basis of past use, occupancy and investment by guides. The permits were of unlimited duration and required no lease or rental payment to the state. The rules regarding the transfer of permits allowed the holder to sell a permit as if it were private property. The court said that although there was nothing unconstitutional about leases and exclusive concessions on state lands, this particular scheme for allocating hunting areas among competing guides was constitutionally offensive because it resembled "the types of royal grants the common use clause expressly intended to prevent. Leases and concession contracts do not share these characteristics" (*Owsichek v. State*, 763 P.2d 488, 1988).

As a result of the *Owsichek* decision, the attorney general advised the commissioner of the Alaska Department of Natural Resources that the department's proposal to limit the number of commercial fishing guides on the Kenai River by issuing permits according to criteria similar to those used by the guide board for exclusive hunting areas violated the common use and equal access clauses of the constitution (Memorandum of September 27, 1991).

Permits issued under the state's limited entry fisheries program share several of the characteristics that the court found objectionable in *Owsichek* (allocation of the permit on the basis of past use, sale of the permit as private property), but that program enjoys its own constitutional authorization (see the commentary below under Section 15).

Section 4. Sustained Yield

> **Fish, forests, wildlife, grasslands, and all other replenishable resources belonging to the State shall be utilized, developed, and maintained on the sustained yield principle, subject to preferences among beneficial uses.**

This section bolsters the commitment to conservation found in Section 2. The principle of sustained yield management is a basic tenet of conservation: the annual harvest of a biological resource should not exceed the annual regeneration of that resource. Maximum sustained yield is the largest harvest that can be maintained year after year. State law defines maximum sustained yield as "the achievement and maintenance in perpetuity of a high level annual or regular periodic output of the various renewable resources of the state land consistent with multiple use" (AS 38.04.910). At the time of the constitutional convention, stocks of Alaska's salmon had been reduced to a sad remnant of their past bounty by neglect of the sustained yield maxim. The qualifying phrase "subject to preferences among beneficial uses" signals recognition by the delegates that not all the demands made upon resources can be satisfied, and that prudent resource management based on modern conservation principles necessarily involves prioritizing competing uses.

In a challenge to the legality of the state's predator control program, which sought to reduce the number of wolves and bears in certain areas so that more moose and caribou would be available to hunters, the Alaska Supreme Court determined that the constitutional mandate to manage wildlife on a sustained yield basis applied to predators as well as game animals, and that the phrase "subject to preferences among beneficial uses" allowed the board of game to give priority to prey over predators *(West v. State, Board of Game,* 248 P.3d 689, 2010). In this case, the court ruled that the plaintiffs failed to show that the department of fish and game had ignored considerations of sustained yield.

Section 5. Facilities and Improvements

> **The legislature may provide for facilities, improvements, and services to assure greater utilization, development, reclamation, and settlement of lands, and to assure fuller utilization and development of the fisheries, wildlife, and waters.**

This section is, strictly speaking, unnecessary because the legislature possesses the inherent power to provide for all facilities, improvements, and services it deems necessary to promote a public purpose. Its presence in the constitution is hortatory—that is, it *exhorts* the legislature to do these things in order to further the constitutional mandate to use and develop the state's resources. Commentary on this section submitted by the drafting committee at the convention noted that it was "not intended as an authorization for the state's entering business in competition with private industry."

Section 6. State Public Domain

> **Lands and interests therein, including submerged and tidal lands, possessed or acquired by the State, and not used or intended exclusively for governmental purposes, constitute the state public domain. The legislature shall provide for the selection of lands granted to the State by the United States, and for the administration of the state public domain.**

The public domain is government-owned land that has not been set aside for special use and remains open for private settlement and development in accordance with public land laws. Thus, all state lands, including tidelands and submerged land beneath navigable rivers and inland bays, are in the public domain except for parcels explicitly withdrawn for a specific governmental purpose. The second sentence of this section is a general authorization for the legislature to select land in accordance with the Statehood Act (it was evident at the time that Congress would make a large grant of federal land to the new state) and to provide for the administration of state lands. It is technically unnecessary, as managing state lands is an inherent power of all state legislatures.

Section 7. Special Purpose Sites

> **The legislature may provide for the acquisition of sites, objects, and areas of natural beauty or of historic, cultural, recreational, or scientific value. It may reserve them from the public domain and provide for their administration and preservation for the use, enjoyment, and welfare of the people.**

This language, like that of Section 5 and Section 6, is not necessary to authorize action which the legislature would otherwise be prevented from taking. However, it makes clear that special-purpose withdrawals are within the constitutional scheme even though development objectives are stressed in

other sections. That is, this section prevents constitutional objections to such withdrawals on the grounds that they are incompatible with commercial development.

Alaska Statute 38.04.070 authorizes land to be classified for forest and wildlife reserves, state parks (to protect areas with special recreational, scenic, cultural, historical, wilderness and similar values), state trails and wild and scenic rivers. However, these classifications may not impair public access for traditional recreational use unless they are less than 640 acres or the legislature approves (AS 38.05.200).

Section 8. Leases

> **The legislature may provide for the leasing of, and the issuance of permits for exploration of, any part of the public domain or interest therein, subject to reasonable concurrent uses. Leases and permits shall provide, among other conditions, for payment by the party at fault for damage or injury arising from noncompliance with terms governing concurrent use, and for forfeiture in the event of breach of conditions.**

This and the following section deal with public access to resources on state lands. This section authorizes the legislature to lease the public domain and issue permits for mineral exploration on it. Commentary on this section prepared by the drafting committee said:

> The legislature is authorized to lease state lands or interests therein. In granting leases, the potential uses of the land are to be considered so that maximum benefit can be derived. Each lease shall state the particular use or uses to be made of the lands as well as the conditions of the use and the term or tenure of the lease in order to facilitate reasonable concurrent use by others if occasion arises. "Reasonableness" of concurrent uses implies that possibilities of conflict in use should be kept to a minimum. Provisions of liability, forfeiture and other means of enforcement of the lease are to be provided in the instrument.

The legislature has exercised this authority in the Alaska Land Act, AS 38.05.

Section 9. Sales and Grants

> **Subject to the provisions of this section, the legislature may provide for the sale or grant of state lands, or interests therein, and establish sales procedures. All sales or grants shall contain such reservations to the State of all resources as may be required by Congress or the State and shall provide for access to these**

resources. Reservation of access shall not unnecessarily impair the owners' use, prevent the control of trespass, or preclude compensation for damages.

In addition to leasing, the legislature may sell or give away (by means of a grant) state-owned resources. "Interests therein" refers to specific, limited uses of the land, such as agricultural uses, which may be sold without transferring full title. The second sentence of this section anticipated that Congress would prohibit the new state from conveying away the mineral interests in its land, and, in fact, Section 6(i) of the Alaska Statehood Act bars the state from selling or giving away mineral rights. The background of this provision is discussed at length in *State v. Lewis,* 559 P.2d 630, 1977; see also Section 11 below, and Article XII, Section 13. A condition of sale or grant of the surface use of state land is that the state retains ownership of the subsurface mineral resources and may provide third party access to these resources. In the case *Hayes v. A.J. Associates* (960 P.2d 556, 1998), the court ruled that commercial developers who had purchased land from the state had to accommodate a person who staked mining claims on their land. Third-party access may not unduly impair the owner's right to use the land or to control trespass by others, and the owner may be compensated for damages caused by those seeking to exercise their right of access This little-known reservation of mineral rights to the state, and the right of anyone to stake mining claims in pursuit of these minerals, received widespread public attention in 2003 when homeowners in the Matanuska-Susitna valley discovered that the state had issued leases to a company to explore for coal bed methane gas on private, residential lots that had once been state land.

The Alaska Land Act, AS 38.05, implements this section by providing for the sale of land by auction, lottery and other methods.

Section 10. Public Notice

No disposals or leases of state lands, or interests therein, shall be made without prior public notice and other safeguards of the public interest as may be prescribed by law.

This section requires the state, when disposing of state lands and resources as authorized by Sections 8 and 9 above, to observe fixed legal procedures that protect the public's interest in these lands and resources. One such procedure is a formal announcement by the state that it intends to sell, lease or grant a specific parcel before the transaction occurs. This requirement is a protection against fraud and administrative wrongdoing, and against concessions, sales and leases that may inadvertently confer special privileges in violation of Sections 3, 15 and 17. The Alaska Supreme Court underscored the significance of this provision in *Alyeska Ski Corporation v. Holdsworth,* 426 P.2d 1006, 1967. In that case, an unsuccessful bidder for a state lease complained of procedural irregularities in the award of the bid. The Department of Natural Resources rejected the complaint and asserted that the commissioner's decision in the matter was final, not subject to review by the

courts. The court held otherwise, compelled by the "unequivocal constitutional mandate requiring that all leases of state lands are to be entered into in accordance with safeguards imposed by law." If the pertinent statutes and regulations were ambiguous regarding judicial review, the constitution was not, in the view of the court. The justices noted that Article VIII, Section 10 "reflects the framers' recognition of the importance of our land resources and of the concomitant necessity for observance of legal safeguards in the disposal or leasing of state lands."

In 1976, the voters turned down an amendment to this section which would have given the legislature veto power over all disposals of state-owned natural resources. The proposed amendment stemmed from legislative dissatisfaction with certain sales of state royalty oil that had been negotiated by the executive branch.

In a dispute over a contract issued by the Alaska Railroad Corporation to a company to remove gravel from the corporation's land, the Alaska Supreme Court said that the public notice requirement of this section applied to the contract, and that the requirement for public notice was not satisfied merely by the company applying for a conditional use permit from the local government prior to digging (*Laverty v. Alaska R.R.Corp.*, 13 P.3d 725, 2000).

Section 11. Mineral Rights

> **Discovery and appropriation shall be the basis for establishing a right in those minerals reserved to the State which, upon the date of ratification of this constitution by the people of Alaska, were subject to location under the federal mining laws. Prior discovery, location, and filing, as prescribed by law, shall establish a prior right to these minerals and also a prior right to permits, leases, and transferable licenses for their extraction. Continuation of these rights shall depend upon the performance of annual labor, or the payment of fees, rents, or royalties, or upon other requirements as may be prescribed by law. Surface uses of land by a mineral claimant shall be limited to those necessary for the extraction or basic processing of the mineral deposits, or for both. Discovery and appropriation shall initiate a right, subject to further requirements of law, to patent of mineral lands if authorized by the State and not prohibited by Congress. The provisions of this section shall apply to all other minerals reserved to the State which by law are declared subject to appropriation.**

This and the following section describe the methods by which citizens can acquire the right to explore for and produce minerals on state-owned land. These methods perpetuate the distinction between locatable and leasable minerals established in federal land law. Locatable minerals are gold, silver, lead, and other metallic minerals; the main leasable minerals are coal and oil.

Locatable minerals on federal land are managed under the U.S. Mining Law of 1872. According to this law, a person can prospect freely on the public domain, and, upon discovering a mineral deposit, file a claim that gives the right to produce and sell the mineral. Indeed, the prospector can patent a legitimate claim, that is, he may acquire from the government full ownership (fee title) to the land as well as to the minerals it contains. The alternative to locating mineral claims on public land is leasing the land from the government for a fee and sharing with the government the income from the sale of minerals produced from the lease (i.e., paying royalties).

Mining interests in the territory sought to perpetuate the location system for metallic minerals on state lands that would be acquired from the federal government at the time of statehood. However, Congress was mindful of the importance of resource income to the new state government and troubled by the "giveaway" of public resources inherent in a location system. Accordingly, it was inclined to require the state to adopt a leasing system for these minerals. Indeed, statehood bills pending in Congress at the time of the constitutional convention called for the leasing of minerals in all lands transferred to the state. A draft resources article prepared by the Public Administration Service (a private, nonprofit group serving as technical consultants to the convention) proposed that the delegates adopt a leasing system for metallic minerals rather than the existing location system. But the delegates nonetheless made clear in this section their preference for the location system, including the right to patent a claim, if Congress would not stand in the way. Thus, the next-to-last sentence allows a mining claim to be patented ". . . if authorized by the State and not prohibited by Congress."

As it happened, Congress in Section 6(i) of the Statehood Act prohibited the state from parting with the title to its minerals. This section says, in part:

> The grants of mineral lands to the State of Alaska . . . are made upon the express condition that all sales, grants, deeds, or patents for any of the mineral lands so granted shall be subject to and contain a reservation to the State of all of the minerals in the lands so sold, granted, deeded, or patented . . . . Mineral deposits in such lands shall be subject to lease by the State as the legislature may direct . . . .

The state government subsequently adopted a mining law that was nominally a leasing system, but which had the main attributes of the traditional location system (claims could not be patented, but they were otherwise similar to claims filed under the federal law). This system was challenged by a coalition of environmental, Native, and fishing groups on the grounds that it was not a true leasing system as contemplated in Section 6(i) of the Statehood Act because it required no rent or royalty payments to the state *(Trustees for Alaska v. State,* 736 P.2d 324, 1987). The Alaska Supreme Court upheld the challenge, and the U.S. Supreme Court refused to hear an appeal by the state. A new metallic mining law was adopted in 1989 that incorporates rental fees and royalties (AS 38.05.212).

Section 12. Mineral Leases and Permits

> **The legislature shall provide for the issuance, types and terms of leases for coal, oil, gas, oil shale, sodium, phosphate, potash, sulfur, pumice, and other minerals as may be prescribed by law. Leases and permits giving the exclusive right of exploration for these minerals for specific periods and areas, subject to reasonable concurrent exploration as to different classes of minerals, may be authorized by law. Like leases and permits giving the exclusive right of prospecting by geophysical, geochemical, and similar methods for all minerals may also be authorized by law.**

This section provides for a leasing system similar to that of the federal Mineral Leasing Act of 1920, whereby the rights to explore for and extract oil and gas and other nonmetallic minerals are leased by the state according to terms and conditions it may impose. Thus, for example, an oil company may not freely drill for oil on public land as a miner might prospect for gold; it must first obtain from the state a lease to a specific tract, which is normally issued at a competitive auction to the highest bidder (the state usually specifies that bids in excess of minimum required lease payments be in the form of a cash payment, but it may specify that the bid terms be royalty payments or share of net profits; see *Baxley v. State,* 958 P.2d 422, 1998, under Article II, Section 19). The company holding the lease must share the value of the product of the lease with the state by payment of a royalty. Royalties are payments to the landowner, who is typically a private person in other states. Royalties are not taxes, which the state government may collect from mineral production on its own land as well as private land.

This section is implemented by AS 38.05.135-180. Petroleum revenue from competitive oil and gas lease bonus bids, royalties, and taxes have been the financial lifeblood of the state of Alaska.

Section 13. Water Rights

> **All surface and subsurface waters reserved to the people for common use, except mineral and medicinal waters, are subject to appropriation. Priority of appropriation shall give prior right. Except for public water supply, an appropriation of water shall be limited to stated purposes and subject to preferences among beneficial uses, concurrent or otherwise, as prescribed by law, and to the general reservation of fish and wildlife.**

This section continues the traditional right in the western United States to use water on a "first-come-first-served" basis. This method differs from an early method of acquiring water rights used historically on the East Coast. Known as the "riparian method," it allocated water rights to owners of

the stream bank. In Alaska and the other western states, however, water rights were traditionally acquired by actual use of the water. Under this constitutional provision, which is further developed in state statute and regulation, a prior user of water has preference to it, but these rights may be withdrawn or limited in order to reallocate the water to a use that has a higher public priority (a hydroelectric development might displace placer mines, for example). The "reservation of fish and wildlife" clause in the last sentence means that those who appropriate water do not also acquire a property right to the fish or wildlife that use the water.

Section 14. Access to Navigable Waters

> **Free access to the navigable or public waters of the State, as defined by the legislature, shall not be denied any citizen of the United States or resident of the State, except that the legislature may by general law regulate and limit such access for other beneficial uses or public purposes.**

This section adopts the public trust doctrine regarding navigable rivers and other public waterways, whereby citizens of the state have the right to travel on and otherwise use these bodies of water. The government may not deny this use except by a general law that protects a public interest. For example, a state law may keep people away from a lake that supplies drinking water to a town, or impair navigation on a river by building a dam; but it may not protect the interests of a private fishing lodge by blocking public access to a stream. When the state sells or leases public land next to a navigable waterway or other public body of water, it must, because of this section, reserve a public access easement (AS 38.05.127; see also *CWC Fisheries, Incorporated v. Bunker,* 755 P.2d 1115, 1988, in which the court said that a sale of tidelands contained an implicit public access easement, by virtue of the public trust doctrine, even though such an easement was not mentioned in the patent). This section does not authorize trespass across private land to reach a navigable body of water.

Section 15. No Exclusive Right of Fishery

> **No exclusive right or special privilege of fishery shall be created or authorized in the natural waters of the State. This section does not restrict the power of the State to limit entry into any fishery for purposes of resource conservation, to prevent economic distress among fishermen and those dependent upon them for a livelihood and to promote the efficient development of aquaculture in the State.**

This is one of three "equal access" clauses of Article VIII; it applies specifically to fishing. It works with Sections 3 and 17 to guarantee that no one should have monopolistic access to any of Alaska's natural resources (see discussion under Section 1). The second sentence was added by amendment in

1972 to authorize an exception to the prohibition in the first sentence so that the state could institute a limited entry program for distressed fisheries.

The prohibition in the first sentence of this section derives from a federal law governing Alaska's fisheries during the territorial period. Section 1 of the White Act prohibited the U.S. secretary of commerce from granting an "exclusive or several right of fishery" or denying to any citizen "the right to take, prepare, cure, or preserve fish or shellfish in any area of the waters of Alaska where fishing is permitted."

The exception in the second sentence was the result of efforts to revitalize the depressed salmon fisheries in the mid-1960s. Restricting the number of boats in various state-managed fisheries had primarily economic objectives but also served long-term management and conservation goals. The legislature passed a limited entry law in 1968 (ch 186 SLA 1968), but a federal court found the law unconstitutional. The U.S. Supreme Court vacated that decision, but the issue was later litigated in state superior court, which found the law to violate Sections 3 and 15 of Article VIII and Section 1 of Article I.

Recognizing that a limited entry system would require constitutional authorization, the legislature placed such an amendment before the voters in 1972. The measure was ratified, and soon thereafter the legislature adopted a limited entry law (AS 16.43). The Commercial Fisheries Entry Commission administers the program. Constitutionality of the law has been upheld by the state supreme court *(State v. Ostrosky,* 667 P.2d 1184, 1983), and an initiative to repeal the law was rejected by a wide margin of the voters in 1976.

In 2005, in response to regulatory changes by the Board of Fisheries in certain salmon fisheries in Cook Inlet that reduced the number of salmon that fishermen in these fisheries could catch, the fishermen sued the state for compensation for the decline in the market value of their limited entry permits. The Alaska Supreme Court ruled that these permits did not have private property status that would require compensation in cases of a government "taking." To hold otherwise would effectively give permit holders an exclusive right to fish not enjoyed by other people in violation of sections 3 and 15 of this article *(Vanek v. State, Board of Fisheries*, 193 P.3d, 283, 2008).

A dispute over the meaning of this section which predates the limited entry issue centered on the question of whether leasing of tidelands for the purpose of set net fishing created an exclusive right of fishery. Attorney general opinions on the matter have said no. "While Section 15 of Article VIII prohibits the state from granting exclusive fishing rights through legislation or regulation, it does not preclude the state from granting property interests which, by their nature, lead to exclusivity of use for fishing. The fact that the motivating force behind the creation of the property interest is a desire to promote fishing is of no consequence . . . ." (1963 Informal Opinion Attorney General, March 13; see also 1983 Informal Opinion Attorney General, April 21).

Section 16. Protection of Rights

> **No person shall be involuntarily divested of his right to the use of waters, his interests in lands, or improvements affecting either, except for a superior beneficial use or public purpose and then only with just compensation and by operation of law.**

This section further reinforces the right of public access to state-owned resources by circumscribing the conditions under which this right may be infringed or revoked. Only a superior public purpose established in law may intervene, and a fair payment must be made if a specific existing right is extinguished.

A prime intent of the drafters of this section was to assure those who had built improvements on pilings over the tidelands could acquire property rights. At the time, many docks, warehouses, businesses, public buildings, and homes in coastal communities of Alaska were built over tidelands owned by the federal government, which considered these facilities, as a legal matter, in trespass. "Properly understood, section 16 establishes that substantial improvements on tidelands that existed at the time of statehood would give rise to protected property rights while tidelands that were unimproved at the time of statehood would be state property that could be disposed of only in accordance with other provisions of Article VIII" *(State, Dept. of Natural Resources v. Alaska Riverways, Inc.,* 232 P3.d 1203, 2010). In this case, the state supreme court rejected a claim that this section gave a riverbank property owner the right to build a dock over a state-owned riverbed without first obtaining a lease from the state.

In 1973, the state supreme court ruled that a person whose property access was impaired by the construction of a new state road was entitled to just compensation under this section. In that case, construction in Anchorage of the Minnesota Bypass across Chester Creek obstructed the flow of high water up the creek, which had been used by the plaintiff for many years as access from his property to Cook Inlet for commercial fishing. Also, the new road made access to his driveway difficult *(Wernberg v. State,* 516 P.2d 1191, 1973).

However, the court denied another claim for compensation under this section because the state's construction of a bridge downstream from the residence of the claimant did not keep him from using the river as a base for his floatplane, it merely made the use less convenient *(Classen v. State,* 621 P.2d 15, 1980).

Section 17. Uniform Application

> **Laws and regulations governing the use or disposal of natural resources shall apply equally to all persons similarly situated with reference to the subject matter and purpose to be served by the law or regulation.**

This section is an "equal protection of the laws" provision (see Article I, Section 1) that pertains specifically to natural resource management. It is one of three "equal access" clauses of Article VIII (see discussion of Section 3). Resource laws and regulations must apply equally to all people who are "similarly situated." Fishermen who claimed unequal treatment by a fishing regulation that granted a smaller allocation of fish to their district than to neighboring districts were told by the court that the districts were not "similarly situated" with respect to fish spawning patterns and historical catch levels and participation in the fishery. As a result, the court said the fishermen did not have a valid complaint under this section *(Gilbert v. Department of Fish and Game,* 803 P.2d 391, 1991).

Section 18. Private Ways of Necessity

> **Proceedings in eminent domain may be undertaken for private ways of necessity to permit essential access for extraction or utilization of resources. Just compensation shall be made for property taken or for resultant damages to other property rights.**

The state may use its power of eminent domain (forcing people to sell their property for the benefit of a larger public purpose) for a project that is privately owned, such as an oil pipeline or a road to a significant mining development. However, the owner must receive fair compensation for the property that is taken. (See also Article I, Section 18.)

The commentary that accompanied the draft of this section explained the intent of the constitutional convention's resources committee.

> This provision was borrowed from the Wyoming Constitution and modified to meet Alaskan conditions. The Wyoming provision states, "Private property shall not be taken for private use unless by consent of the owner, *except for private ways of necessity,* and for reservoirs, drains, flumes, or ditches on or across the lands of others for agricultural, mining, domestic or sanitary purposes, nor in any case without due compensation." In that arid state this provision was developed to assure access to water supply even though it might be necessary for a private person to secure easement across adjoining private lands. Since the adoption of the Wyoming Constitution, a number of western states have included a similar provision in their constitutions. Since the problem of essential access in Alaska is not limited to water

supply as in Wyoming, this article makes a general provision for the use of eminent domain proceedings to provide essential access for extraction and utilization of natural resources.

2013-34-JB

ALASKA JOINT BOARDS OF FISHERIES AND GAME

CRITERIA FOR DEVELOPMENT OF BOARD-GENERATED PROPOSAL

It has been suggested that criteria need to be established to guide the Alaska Joint Boards of Fisheries and Game, Board of Fisheries, and Board of Game (boards) members when deliberating on whether or not to develop a board-generated proposal. The boards will consider the following criteria when deliberating the proposed development and scheduling of a board-generated proposal:

1. Is it in the public's best interest (e.g., access to resource, consistent intent, public process)?

2. Is there urgency in considering the issue (e.g., potential for fish and wildlife objectives not being met or sustainability in question)?

3. Are current processes insufficient to bring the subject to the board's attention (e.g., reconsideration policy, normal cycle proposal submittal, ACRs, petitions)?

4. Will there be reasonable and adequate opportunity for public comment (e.g., how far do affected users have to travel to participate, amount of time for affected users to respond)?

Findings adopted this 16th day of October 2013.

Ted Spraker, Chairman
Alaska Board of Game
Vote: 6-0

Karl Johnstone, Chairman
Alaska Board of Fisheries
Vote: 7-0

Gmail

Edward Grasser <eddie@aksafariclub.org>

Re: Informal Sheep Working Group Meeting

Gary Stevens <garyatsls@cs.com> Fri, Dec 26, 2014 at 8:25 AM
To: barringer_19@yahoo.com, tspraker@alaska.net, tony.kavalok@alaska.gov, alaskanate@gmail.com, bruce.dale@alaska.gov
Cc: elk3006@alaska.net, eddie@aksafariclub.org, thorstacey@gmail.com, kandik@starband.net, sam@kodiakbearcamp.com, wantj43@gmail.com, kevinkehoe@alaskan.com

Morning Brett,

I will be there.

Thanks,
Gary

garyatsls@cs.com
Gary Stevens
907-229-4710

----Original Message----
From: Brett Barringer <barringer_19@yahoo.com>
To: Ted Spraker <tspraker@alaska.net>; tony.kavalok <tony.kavalok@alaska.gov>; alaskanate <alaskanate@gmail.com>; bruce.dale <bruce.dale@alaska.gov>
Cc: Tom & Spencie Netschert <elk3006@alaska.net>; Eddie Grasser <eddie@aksafariclub.org>; Thor Stacey <thorstacey@gmail.com>; Mark Richards <kandik@starband.net>; Gary Stevens <garyatsls@cs.com>; Sam Rohrer <sam@kodiakbearcamp.com>; Joe Want <wantj43@gmail.com>; Kevin Kehoe <kevinkehoe@alaskan.com>
Sent: Fri, Dec 26, 2014 7:15 am
Subject: Informal Sheep Working Group Meeting

All,

We will be having an informal sheep hunting working group meeting Saturday January 3rd. The meeting will take place at 10am in the Alaska fish and game headquarters conference room on Raspberry Road. The informal working group includes members from the Alaska Professional Hunter's Association, Alaska Backcountry Hunter's Association, Alaska Outdoor Counsel, Alaska Chapter Wild Sheep Foundation, Kenai Chapter of Safari Club International, Fish and Game, and the Alaska Chapter of Safari Club International. We formally request your presence to observe our informal working group's discussion. I understand this is short notice. Please RSVP, so we can account for food and refreshments. Thank you!

Sincerely,

Dr. Brett A. Barringer
President Alaska Chapter SCI
907-947-0983 cell

Gmail

Edward Grasser <eddie@aksafariclub.org>

Re: Informal Sheep Working Group Meeting

Gary Stevens <garyatsls@cs.com> Sat, Jan 3, 2015 at 8:57 AM
To: barringer_19@yahoo.com, tspraker@alaska.net, tony.kavalok@alaska.gov, alaskanate@gmail.com, bruce.dale@alaska.gov
Cc: elk3006@alaska.net, eddie@aksafariclub.org, thorstacey@gmail.com, kandik@starband.net, sam@kodiakbearcamp.com, wantj43@gmail.com, kevinkehoe@alaskan.com

Good Morning,

Unfortunately, I can't make it today. I sincerely appreciate the invitation and look forward to working with everyone in the future. Hopefully, I will see most of you at the upcoming AC and BOG meetings.

Thanks for being involved!
Gary

garyatsls@cs.com

-----Original Message-----
From: Brett Barringer <barringer_19@yahoo.com>
To: Ted Spraker <tspraker@alaska.net>; tony.kavalok <tony.kavalok@alaska.gov>; alaskanate <alaskanate@gmail.com>; bruce.dale <bruce.dale@alaska.gov>
Cc: Tom & Spencie Netschert <elk3006@alaska.net>; Eddie Grasser <eddie@aksafariclub.org>; Thor Stacey <thorstacey@gmail.com>; Mark Richards <kandik@starband.net>; Gary Stevens <garyatsls@cs.com>; Sam Rohrer <sam@kodiakbearcamp.com>; Joe Want <wantj43@gmail.com>; Kevin Kehoe <kevinkehoe@alaskan.com>
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Sincerely,

Dr. Brett A. Barringer
President Alaska Chapter SCI
907-947-0983 cell

Gmail

Edward Grasser <eddie@aksafariclub.org>

Dall Sheep Working Group

Brett Barringer <barringer_19@yahoo.com> Wed, Dec 24, 2014 at 11:06 AM
Reply-To: Brett Barringer <barringer_19@yahoo.com>
To: "elk3006@alaska.net" <elk3006@alaska.net>, Eddie Grasser <eddie@aksafariclub.org>, Thor Stacey <thorstacey@gmail.com>, Sam Rohrer <sam@kodiakbearcamp.com>, Mark Richards <kandik@starband.net>, Ted Spraker <tspraker@alaska.net>, Kevin Kehoe <kevinkehoe@alaskan.com>, [redacted], Joe Want <wantj43@gmail.com>

All,

I have confirmation for a time and place. We will be meeting on Saturday January 3rd at the fish and game office on Raspberry Road here in Anchorage. The meeting will be at 10am. The office is locked and closed, so we will be let in all at once. Please be there a few minutes early, so we can start on time. Thanks and have a Merry Christmas!

Brett

[Quoted text hidden]

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT KENAI

KENNETH MANNING,
Plaintiff,
and

THE ALASKA FISH AND WILDLIFE CONSERVATION FUND
Intervener Plaintiff,

vs.

STATE OF ALASKA,
DEPARTMENT OF FISH & GAME
Defendant,
and

AHTNA TENE NENE'
Intervenor Defendant.

Case No. 3KN-09-178CI

DECISION ON SUMMARY JUDGMENT

Plaintiff Kenneth Manning ("Manning") and intervenor-plaintiff The Alaska Fish and Wildlife Conservation Fund ("AFWCF") seek to overturn Board of Game ("Board") decisions in 2009 regarding the Unit 13 Nelchina Herd Caribou hunt. The issues before the court include the following:

1. Did the Board properly set the number of Unit 13 caribou reasonably necessary for subsistence at 600-1000 per year;

2. Did the Board properly find that customary and traditional subsistence uses only require one caribou every four years;

3. Did the Board properly change the subsistence caribou hunt in Unit 13 from a Tier II to a Tier I drawing hunt allowing a Tier I hunter no more than one hunt every four years, as well as other special restrictions;

4. Was the Board authorization of a residence-based community harvest permit ("CHP") lawful;

D

5. Did the Board lawfully delegate to the Ahtna Tene Nené Subsistence Committee authority to administer a CHP hunt for eight Ahtna villages in the Nelchina area; and

6. Did the Board properly set aside 300 caribou for the CHP as well as up to 100 any-bull moose, and a number of restricted bulls equal to the number of individuals subscribing to the CHP permit, leaving only 300 caribou for all other Tier I hunters?

The Board and Ahtna Tene Nené contend the actions by the Board in 2009 were constitutional, authorized by statute, supported by substantial evidence, and appropriate. The motions for summary judgment focus exclusively on Board action in 2009, with reference to Board findings in 2006 regarding subsistence uses in this area. Board actions in 2010 are not before the court.

Procedural Setting: The issues were extensively briefed and argued at the preliminary injunction stage in 2009. Hearings were held in 2009 on the preliminary injunction challenges. A preliminary injunction to halt the 2009 hunt was not issued, but the court found that serious and substantial questions were raised and required changes in the Ahtna CHP for the 2009 caribou hunt to address the local residency problem.

Summary judgment motion practice ensued. This case was brought as an original action, not as an appeal from an administrative decision. In September 2009 the parties reported in line with Civil Rules 26(f) and 16. The parties, other than Manning, agreed there were no pertinent factual issues, no need for formal discovery practice, and no need for a trial. Manning moved to bifurcate the constitutional claims and to conduct discovery leading to a normal trial on those issues. Oral argument was conducted on the motions for summary judgment on January 4, 2010. At the January 21 pretrial conference Manning agreed to forego a separate trial on the constitutional issues, and all parties agreed that there were no genuine material factual issues in dispute.

The parties have focused on the Nelchina Caribou Herd in Unit 13. The Manning complaint includes challenges to the Board actions regarding moose in Unit 13. The Ahtna CHP covers both moose and caribou, and moose are addressed herein in that context.

The parties submitted supplemental information and authority. Ahtna filed a Notice of CHP Administrator's Final Report regarding the 2009 hunt. The report indicates that under the CHP for 2009 as of January 7, 2010, 66 any-bull moose, 27 restricted bulls, and 97 caribou were taken. Ahtna also submitted the CHP as issued by the Department on August 7, 2009, the CHP application form, the harvest plan for the 2009 CHP, and a copy of frequently asked questions and the responses re the 2009 Ahtna CHP. Other supplemental authority was submitted.

Outline of the Summary Judgment Motions:

AFWCF moved for summary judgment to invalidate the Ahtna CHP and the set aside of 300 caribou for the Ahtna CHP as violating Article VIII, sections 3, 15, and 17 of the Alaska Constitution, regulations, and case law. The motion was supported by an affidavit by Tony Russ, a lifelong Alaska resident who has either hunted or shared caribou meat from the Nelchina herd for 48 years.

Manning filed a motion for declaratory relief under the public trust doctrine. His motion challenges the legality of the Board's delegation of resource management and hunting permit authority to the Ahtna Tene Nené Subsistence Committee in the authorization for the Ahtna CHP. Manning relies on constitutional provisions, Alaska constitutional convention papers, the 1989 McDowell case, and Owsichek v. State, 763 P.2d 488 (Alaska 1988).

The State opposed the AFWCF motion and cross-moved for "summary judgment in its favor on the AFWCF's and Manning's claims." The State supported its position with

exhibits including findings, transcripts, and excerpts from the record before the Board. The State claims that neither Manning nor AFWCF have challenged the constitutionality of AS 16.05.330(c) in their complaints. The State contends the language in the statute "indicates that the legislature viewed subsistence as largely involving communal or cooperative behavior." The State points to findings made by the Board in 2006 on the eight criteria in 5 AAC 99.010 to identify customary and traditional uses in this area. The State concludes on page 12:

> In short, the customary and traditional use findings that are the prerequisites for any subsistence use of caribou in Unit 13, by anyone, are based on a pattern that is communal and local in nature, not individualized and urban.

On page 13 the State contends that the Alaska statutes require the Board to give preference and protect the communal subsistence users, which the State says, "means, among other things, that all other users must be eliminated before the identified customary and traditional, communal, use is restricted to a Tier II hunt."

Ahtna opposed the AFWCF motion for summary judgment and cross-moved for summary judgment. Ahtna supported its position with exhibits. Manning filed a Consolidated Opposition to Motions for Summary Judgment, supported by exhibits. The State filed a reply to the Manning and AFWCF oppositions to the State cross-motion for summary judgment. Ahtna filed a reply to the Manning and AFWCF oppositions to the Ahtna cross-motion for summary judgment.

STANDARDS FOR SUMMARY JUDGMENT

For summary judgment under Civil Rule 56 the moving party has the burden of proving that the opponent's case has no merit. This burden must be discharged by submission of information and material admissible as evidence. "The moving party has the

entire burden of proving that his opponent's case has no merit." Himschoot v. Dushi, 953 P.2d 507, 509 (Alaska 1998), quoting Nizinski v. Golden Valley Elec. Ass'n, 509 P.2d 280, 283 (Alaska 1973), cited favorably in footnote 12 in Barry v. University of Alaska, 85 P.3d 1022 (Alaska 2004). The non-moving party is not obliged to demonstrate the existence of a genuine issue for trial until the moving party makes a prima facie showing of its entitlement. Himschoot v. Dushi, 953 P.2d at 509, citing Shade v. Co & Anglo Alaska Service Corp., 901 P.2d 434, 437 (Alaska 1995). The non-moving party is entitled to have the record reviewed in the light most favorable to it and to have all reasonable inferences drawn in its favor. Reasonable inferences are those inferences that a reasonable fact finder could draw from the evidence. The non-moving party "must present more than a 'scintilla' of evidence to avoid summary judgment; [namely,] enough evidence to 'reasonably tend to dispute or contradict' the evidence presented by the [moving party]." Alakayak v. British Columbia Parkers, Ltd, 48 P.3d 432, 449 (Alaska 2002).

All parties claim to be entitled to summary judgment as a matter of law. Because there is no genuine issue in dispute as to any material fact and because the parties' claims can be resolved as a matter of law, summary judgment is appropriate.

STANDARDS FOR REVIEW OF BOARD ACTION

The Alaska Supreme Court has established a two-step inquiry for review of regulations:

> First, we will ascertain whether the regulation is consistent with and reasonably necessary to carry out the purposes of the statutory provisions conferring rule-making authority on the agency. This aspect of review insures that the agency has not exceeded the power delegated by the legislature. Second, we will determine whether the regulation is reasonable and not arbitrary.

Kelly v. Zamarello, 486 P.2d 906, 911 (Alaska 1971). In an unrelated action challenging Board of Game regulations, the Alaska Supreme Court held:

> Regulations are presumptively valid and will be upheld as long as they are "consistent with and reasonably necessary to implement the statutes authorizing their adoption." But reasonable necessity is not a requirement separate from consistency. If it were, courts would be required to judge whether a particular administrative regulation is desirable as a matter of policy. Thus where a regulation is adopted in accordance with the Administrative Procedures Act, and the legislature intended to give the agency discretion, we review the regulation first by ascertaining whether the regulation is **consistent** with the statutory provisions which authorize it and second by determining whether the regulation is **reasonable and not arbitrary**.

Interior Alaska Airboat Ass'n, Inc. v. State, Bd. of Game, 18 P.3d 686, 689-90 (Alaska 2001) (footnotes omitted; emphasis added). The constitutional challenges in that case based on Article VIII, sections 2, 3, 4, 14, and 17 as well as Article I, section 1 of the Alaska Constitution were addressed one by one, and all were denied. The trial court was described as an intermediate court of appeal, and its findings of fact and conclusions of law regarding its grant of summary judgment were reviewed de novo by the Alaska Supreme Court.

In an earlier challenge to lack of action by the Board of Fisheries, the Alaska Supreme Court explained,

> When we interpret the Alaska constitution and pure issues of law, we substitute our judgment for that of the Board.[FN9] We interpret the constitution and Alaska law according to reason, practicality, and common sense, taking into account the plain meaning and purpose of the law as well as the intent of the drafters.[FN10]
>
> FN9. *See Moore v. State, Dep't of Transp. and Pub. Facilities*, 875 P.2d 765, 767-68 (Alaska 1994).
>
> FN10. *See Alaska Wildlife Alliance v. Rue*, 948 P.2d 976, 979 (Alaska 1997).
>
> When we determine whether the Board properly applied the law to a particular set of facts, we review the Board's action for reasonableness. Under this standard, we "merely determine[ ] whether the agency's determination is supported by the facts and is reasonably based in law." This court will not substitute its judgment for

the Board's or alter the Board's policy choice when the Board's decision is based on its expertise.

Native Village of Elim v. State, 990 P.2d 1, 5 (Alaska 1999) (footnotes 11-13 omitted).

APPLICABLE, RELATED, OR NOTEWORTHY LAW

The following state constitutional provisions, federal and state statutes, and case law decisions reflect long standing principles and disputes regarding game management and subsistence in Alaska. Familiarity with the history provides context for the present dispute.

Constitution of the State of Alaska, Article VIII

Section 2: General Authority. The legislature shall provide for the utilization, development, and conservation of all natural resources belonging to the State, including land and waters, for the maximum benefit of the people.[1]

Section 3: Common Use. Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use.

Section 4: Sustained Yield. Fish, forests, wildlife, grasslands, and all other replenishable resources belonging to the State shall be utilized, developed, and maintained on the sustained yield principle, subject to preferences among beneficial users.

Section 15: No Exclusive Right of Fishery. No exclusive right or special privilege of fishery shall be created or authorized in the natural waters of the State. This section does not restrict the power of the State to limit entry into any fishery for purposes of resource conservation, to prevent economic duress among fishermen and those dependent upon them for a livelihood and to promote the efficient development of aquaculture in the State.

Section 17: Uniform Application. Laws and regulations governing the use or disposal of natural resources shall apply equally to all persons similarly situated with reference to the subject matter and purpose to be served by the law or regulation.

Alaska Native Claims Settlement Act, 43 U.S.C. § 1601 et seq.

[1] "[T]he question of how fisheries and wildlife resources were to be managed gave rise to one of the deepest controversies of the convention." Fisher, Alaska's Constitutional Convention, page 134, 1975.

Sec. 2(b) of the Act: [Congress finds and declares that] the settlement should be accomplished rapidly, with certainty, in conformity with the real economic and social needs of Natives, without litigation, with maximum participation by Natives in decisions affecting their rights and property, without establishing any permanent racially defined institutions, rights, privileges, or obligations, ...

Sec. 4(b) of the Act: All aboriginal titles, if any, and claims of aboriginal title in Alaska based on use and occupancy, including submerged land underneath all water areas, both inland and offshore, and including any aboriginal hunting or fishing rights that may exist, are hereby extinguished.

Alaska National Interest Lands Conservation Act, 16 U.S.C. § 3101 et seq.

Sec. 804. Preference for Subsistence Use. [T]he taking on [federal] public lands of fish and wildlife for nonwasteful subsistence uses shall be accorded priority over the taking on such lands of fish and wildlife for other purposes. Whenever [restrictions are necessary], such priority shall be implemented through appropriate limitations based on the application of the following criteria:

(1) customary and direct dependence upon the populations as the mainstay of livelihood;

(2) local residency; and

(3) the availability of alternative resources.

State of Alaska Statutes

The Legislature delegated substantial authority to the Department of Fish and Game, AS 16.05.050, and, with regard to wildlife, to the Board of Game. AS 16.05.221(b). The Board of Game was given regulation-making powers as set out in AS 16.05. AS 16.05.241. AS 16.05.255 details the subjects and areas for which it may adopt regulations. AS 16.05.258 addresses subsistence use and allocation of fish and game. AS 16.05.330 addresses licenses, tags, and subsistence permits. Subsection (c) gives the Board authority to adopt regulations for subsistence permits for areas, villages, communities, groups, or individuals as needed for administering the subsistence harvest of game.

Case Law

Unit 13 has been the subject of the following criminal and civil appellate decisions.

In Myrick v. State, not reported, 1983 WL 807771 (Alaska App. 1983) Leonard Myrick was convicted after a jury trial in Healy of taking a bull moose having less than a thirty-six inch antler spread and less than three brow tines on at least one antler in violation of a regulation in effect in Unit 13.

In State v. Kluti Kaah Native Village of Copper Center, 831 P.2d 1270 (Alaska 1992), the Alaska Supreme Court reversed a preliminary injunction by the superior court against the Board of Game imposition of a seven day moose hunt in Unit 13. The trial court

was found to have erred by concluding that the harm to the State was insignificant. The Alaska Supreme Court held that the state had an interest in developing and maintaining a uniform system of game allocation. The Alaska Supreme Court was concerned that the injunction did not adequately protect the interests of other subsistence hunters or guard against depletion of the moose population. Also, the court held,

> In determining whether to issue a preliminary injunction, the trial court should have considered the threat that multiple injunctions would represent to the moose population and the problems it would create for orderly game allocation.

State v. Kluti Kaah, 831 P.2d at 1274.

In Palmer v. State, Not Reported in P.2d, 1993 WL 13156637 (Alaska App. 1993), the court of appeals reversed a conviction of Howard Palmer for violating the one-caribou bag limit in Unit 13 by shooting two caribou where his wife and son also held caribou permits. The Alaska Supreme Court reversed the court of appeals in State v. Palmer, 882 P.2d 386 (Alaska 1994), finding that the invalid portion of the emergency regulation was severable. The Palmer court commented on the effect of its 1989 decision in McDowell v. State, 785 P.2d 1 (Alaska 1989):

> In McDowell, this court found that the rural preference expressed in AS 16.05.258 violated several provisions of the Alaska Constitution. 785 P.2d at 12. In addition to greatly increasing the number of eligible subsistence users, the McDowell decision cast doubt on the validity of many of the Board's subsistence regulations.
>
> With respect to the Nelchina caribou herd, the increased number of eligible subsistence participants meant the Board would have to implement a Tier II subsistence hunt.[FN2]
>
> [FN2] The Board realized that the Nelchina herd was not big enough to accommodate the increased number of subsistence hunters who might want to participate. In such cases, former AS 16.05.258 provided for a Tier II hunt. Officials implementing a Tier II hunt limited the eligible subsistence hunters on the basis of three factors: customary and direct dependence on the fish stock or game population as the mainstay of livelihood, local residency, and availability of alternative resources. Former AS 16.05.258.

State v. Palmer, 882 P.2d at 387.

In Shepherd v. State, Dep't of Fish and Game , 897 P.2d 33 (Alaska 1995), hunting guides challenged the constitutionality of the statute requiring regulations adopted by Alaska Board of Game to give the taking of moose, deer, elk, and caribou by residents for personal or family consumption preference over taking by nonresidents in, among others, Unit 13. The court found that resident and non-resident hunters are disparate groups. not similarly situated for equal protection constitutional purposes.

Additional Case Law on Subsistence in Alaska:

In Madison v. Alaska Dep't of Fish & Game, 696 P.2d 168 (Alaska 1985), the Alaska Supreme Court struck down subsistence fishing regulations that imposed a rural residency requirement on Tier I subsistence users as violating the 1978 statute on subsistence. Before invalidating the Board action, the court observed,

> The board argues that the legislature intended to narrow the scope of subsistence fishing to mean fishing by individuals residing in those rural communities that have historically depended on subsistence hunting and fishing.

Madison, 696 P.2d at 174. After the Madison decision, the Secretary of the Interior notified the state that state law was no longer consistent with ANILCA and that federal management would begin unless consistency was achieved by June 1, 1986. The Legislature amended the subsistence statute in 1986 to provide a rural residency requirement for subsistence. The Secretary then found consistency.

In McDowell v. State, 785 P.2d 1 (Alaska 1989), the Alaska Supreme Court held the 1986 subsistence statute's rural residency requirement unconstitutional. The court held,

> We therefore conclude that the requirement contained in the 1986 subsistence statute, that one must reside in a rural area in order to participate in subsistence hunting and fishing, violates sections 3, 15, and 17 of article VIII of the Alaska Constitution.

McDowell v. State, 785 P.2d at 9.

In State v. Morry, 836 P.2d 358, 371 (Alaska 1992), the Alaska Supreme Court reversed a key trial court ruling in the context of a criminal case, namely, "the superior court's holding that the boards' All Alaskans policy for first tier eligibility is invalid."

In State v. Kenaitze Indian Tribe, 894 P.2d 632 (Alaska 1995), the court held.

> The Tier II proximity of the domicile factor violates sections 3, 15, and 17 of article VIII of the Alaska Constitution, because it bars Alaska residents from participating in certain subsistence activities based on where they live.

State v. Kenaitze Indian Tribe, 894 P.2d at 642. The court discussed appropriate review of Board allocation decisions:

> In reviewing allocation decisions made by the Board, a deferential standard of review is employed. Board decisions are upheld so long as they are not unreasonable or arbitrary and proper procedures have been followed. *Id.* (Board's decision favorable to commercial trollers concerning allocation of king salmon in Southeast Alaska not "unreasonable or arbitrary"); Gilbert v. State, Dep't of Fish & Game, 803 P.2d 391, 399 (Alaska 1990) (Board's decision allocating sockeye

> salmon between commercial fishing interests in two areas on the Alaska Peninsula not arbitrary or unreasonable); Meier v. State, Bd. of Fisheries, 739 P.2d 172, 174-75 (Alaska 1987) (Board's decision allocating sockeye salmon between commercial setnetters and driftnetters in Bristol Bay "reasonable and not arbitrary."). We have not subjected allocation decisions to the more rigorous least restrictive alternative test employed in cases where entry into a user class is restricted. Compare McDowell, 785 P.2d at 10; Owsichek, 763 P.2d at 498 n.17; and Johns v. Commercial Fisheries Entry Comm'n, 758 P.2d 1256, 1266 (Alaska 1988) with Tongass, 866 P.2d at 1319; Gilbert, 803 P.2d at 399; and Meier, 739 P.2d at 175. Allocation decisions are so complex and multi-faceted that they are not amenable to analysis under such a test.

State v. Kenaitze Indian Tribe, 894 P.2d at 641-42 (footnote omitted).

In State v. Manning, 161 P.3d 1215 (Alaska 2007), a majority the Alaska Supreme Court held that the criteria used to determine the relative eligibility of Tier II subsistence hunters did not violate the rule against residency-based criteria. The food and gas criteria used in the regulation did not violate the Alaska Constitution. Also the court held that Rule 11 sanctions were not appropriate against AAG Saxby. But the game ratio criteria violated the equal access clause in the Alaska Constitution.

In Ahtna Tene Nene Subsistence Committee v. State of Alaska Board of Game, 3AN-07-8072 CI (Judge Smith presiding), a preliminary injunction was issued on July 20, 2007. The case was still pending on the merits when last updated by the parties herein. A hearing was conducted on the motion for preliminary injunction, and though affiants were not required to testify, 94-year old Chief Ben Neely wanted to make a statement, which the judge allowed. PI Hearing Transcript at 6-8; State Exh. C. The trial court applied the balance of hardships test and found that the plaintiff had a probability of success of the merits to the point of issuing a preliminary injunction to enjoin some of the regulatory changes, particularly the income factor and the exclusivity use area had to be revised, crafted by the court with the least amount of effort to re-do the Tier II scoring for the 2007 Unit 13 hunt. Id. at 153-56.

Additional Case Law in General:

In Owsichek v. State, 763 P.2d 488 (Alaska 1988), a registered guide challenged the Guide Licensing and Control Board's exclusive guide area ("EGA") program as violative of the common use provision in Article VIII, section 3 of the Alaska Constitution. Based on a careful reading of the constitutional minutes regarding the common use provision and prior case law, the court found that the common use clause was "intended to guarantee broad public access to natural resources" including wildlife. Id. at 492. The court observed that the Alaska constitutionalized common law principles imposing upon the state a "public trust duty" with regard to the management of fish, wildlife, and waters. Id. at 493 The court commented, "The extent to which this public trust duty, as constitutionalized by the common use clause, limits a state's discretion in managing its resources is not clearly defined." Id. at 495. The court concluded that the statutes and regulations regarding the Board's EGA

program "are in contravention of article VIII, section 3 of the Alaska Constitution." Id. at 498. The court noted that the EGA program may also violate article VIII, section 17, but did not decide the question because the parties had not briefed the issue and the court found much less constitutional history on section 17 than of the common use clause.

Supplemental Authority

[By Ahtna on 1-21-10] Superior Court Decision by Judge MacDonald in The Alaska Fish & Wildlife Fund v. State, 4FA-09-966 CI, regarding the Board of Fisheries' classification of the Chitina dipnet salmon fishery as subsistence or personal use.

[By AFWCF on 2-8-10] Report to the Board of Game by the Department's Area Management Staff of the Division of Wildlife Conservation on the first year (2009) of the moose and caribou hunt in question (the "DF&G Report"). Ahtna and the Department object to consideration of the DF&G Report. Among other things the DF&G Report states that "[m]any community hunters failed to abide by hunt conditions." The DF&G Report recommends on page 1:

> If the community hunt is continued in 2010-2011, there must be substantial changes to the administration of this hunt to ensure hunter understanding and compliance both for harvest control and to ensure conservation concerns are met.

The DF&G Report notes that there are only three community hunt areas in Alaska. The original two are "very small remote community hunts." The Report states, "Neither hunt has had any participation in recent years, one reason has been the lack of interest in taking on the administrative duties." The Report further indicates,

> While this is technically a State hunt, the burden of the hunt administration legally falls on Ahtna, an organization with no experience administering this type of program. ADF&G has helped each step of the way .... Without our active participation we believe we would not be able to provide a report of activities or evaluate the success of the program. Still, because the hunt is not administered by the State, the standard protocols ADF&G has developed over many years of administering hunts are not being followed.

The State opposition notes that this report does not rise to the level of an official Department position, but was considered by the Board in 2010 with no change from the action the Board took in 2009.

[By AFWCF on 2-19-10] 1991 Attorney General Opinion: AFWCF filed a notice of supplemental authority in February 2010 to bring the April 12, 1991 Alaska Opinion Attorney General (inf.) No. 227 to the court's attention. By letter response neither Ahtna nor the State object to taking the opinion into account, but both contend the opinion supports their position.

CONSIDERATION OF THE MERITS

A. Alleged Board Violation of the Alaska APA:

Manning contends in Count VI of the Amended Complaint that the Board's notice of the proposed regulations did not comply with the notice and comment procedures required by the Alaska Administrative Procedure Act ("APA"). The Board "is required to follow APA procedures where adopting regulations pursuant to its statutorily delegated authority." Kenai Peninsula Fisherman's Co-op. Ass'n, Inc. v. State, 628 P.2d 897, 904 (Alaska 1981). See also Morry v. State, 836 P.2d 358, 364 (Alaska 1992). The State seeks summary judgment based on the presumed validity of adopted regulations. Manning asserts that the Board's notice was not specific enough to adequately inform members of the public that their interests could be affected by the proposed regulations, and that the adopted regulations are therefore voidable under the APA. See AS 44.62.300; AS 44.62.310. See Kelly v. Zamarello, 486 P.2d 906, 911 (Alaska 1970) (Notice must contain the regulations proposed for adoption under AS 44.62.190).

Under the APA the public notice must contain "an informative summary of the proposed subject of an agency action." AS 44.62.200(a)(3). However, a procedural violation must be "substantial" before the regulation will be declared invalid. See AS 44.62.300. The challenger of a regulation's validity bears the burden to show that there has been a substantial failure to comply with the statute. See AS 44.62.100(a); see also Koyukuk River Basin Moose Mgmt. Team v. Board of Game, 76 P.3d 383 (Alaska 2003). It is insufficient to prove a minor violation. See Gilbert v. State, Dept. of Fish and Game, Bd. of Fisheries, 803 P.2d at 395 (Alaska 1990). See also Chevron, U.S.A. v. LaResche, 663 P.2d 923, 929 (Alaska 1983). The wording of a regulation that is adopted, amended, or repealed may vary in

content from the informative summary, "if the subject matter of the regulation remains the same and the original notice was written so as to assure that members of the public are reasonably notified of the proposed subject of agency action in order for them to determine whether their interests could be affected by agency action on that subject." AS 44.62.200(b). This construction of the notice requirement allows an agency to adopt regulations arising from meetings that vary from the notice.

In State v. First Nat'l Bank of Anchorage, 660 P.2d 406, 425 (Alaska 1982), the court held that the informative summary requirement was satisfied where the notice consisted merely of broad topics that would be considered. The court held that the general subject headings give "members of the public sufficient information to decide whether their interests could be affected by the agency action and thus whether to make their views known to the agency." State v. First Natl., 660 P.2d at 425. As long as the public can discern the general topic that the agency was addressing in its proposed regulations, the notice satisfies the informative summary requirement. See Chevron U.S.A. Inc. v. LeResche, 663 P.2d 923, 930 (Alaska 1983); but see Kenai Peninsula Fisherman's Cooperative Assn., Inc. v. State, 628 P.2d 897 (Alaska 1981) (improper notice was found where the notice stated that the meeting would set fishing season dates for the December 1977 season, but did not mention the planned adoption of a long-term management policy).

The subject matter of the Board's proposed regulations was identified and distributed for public comment in a "proposal book," in advance of the Board's public meeting in 2009. State Exh. J; State Exh. I. "Notice of Proposed Changes in Regulations of the Alaska Board of Game & Additional Regulations Notice Information." The public notice stated that "any or all of the subject areas covered by this notice," are proper subjects

for discussion at the Board meeting, and warned, "THE BOARD IS NOT LIMITED BY THE SPECIFIC LANGUAGE OR CONFINES OF THE ACTUAL PROPOSALS THAT HAVE BEEN SUBMITTED BY THE PUBLIC OR STAFF." Exh. I. The notice stated that the Board could consider topics, "including but not limited to ... community subsistence harvest areas and conditions...[and the]...Tier II subsistence hunting permit point system and priority for Tier II permits for Unit 13." Id. The proposal book stated: "It is unlikely that the ANS for moose and caribou in Unit 13 will allow for any significant harvest outside of what is needed for subsistence uses. The proposed community harvest permit system would provide an opportunity for the board to more narrowly, and more accurately define subsistence uses consistent with its Customary and Traditional Use finding for moose and caribou in Unit 13." Exh. J, at 7.

The proposal book notified the public of the possibility that the board might implement changes in the permitting process for Unit 13, that it might create a new community subsistence harvest system, and that it was considering more narrowly defining subsistence use under the "customary and traditional use" criteria. The Board's notice provided more detail than the public notice in First Nat'l Bank of Anchorage, and, unlike the notice provided in Kenai Peninsula Fisherman's Cooperative Assn., Inc., the Board's notice was not off-topic. The notice provided the public, including Tier II hunters, with information to determine that their interests might be affected by the proposed regulations regarding the establishment of a CHP for Unit 13. The court finds that the notice satisfied the informative summary requirement of the APA with regard to the CHP.

The State argues that the Board has a long established practice of providing public notice similar to the notice provided for the 2009 Board meetings, without providing the full

wording of proposed regulations. The State contends the sheer scope, magnitude, and time sensitivity of the Board's responsibilities to manage wildlife throughout Alaska makes it impractical to provide more detail than it has historically provided before finalizing regulations after the public hearings. The State relies on the argument that the regulations on the 2009 Unit 13 caribou hunt are presumptively valid. See, e.g., Koyukuk River Basin Moose Co-Management Team v. Board of Game, 76 P.2d 383, 386-87 (Alaska 2003).

The court finds that the public notice for the 2009 Board meetings was not sufficient to alert the public that the Board might (a) find that subsistence use of caribou in Unit 13 only requires one caribou every four years, or (b) change the Unit 13 caribou hunt from a Tier II to a Tier I hunt when there was no significant change in the number of caribou in the Nelchina Herd. The proposal book conveyed the impression to the interested public that Unit 13 would remain subject to a Tier II hunt with a possible modification to accommodate a CHP. The statement in the proposal book that it is "unlikely" the moose and caribou populations would allow for any significant hunt outside subsistence uses suggested that AS 16.05.258(b)(3) or (4) was applicable. Given the unbroken chain of previous Tier II hunts in Unit 13 and no significant change in the population of the Nelchina Caribou Herd or the subsistence uses, the public was not reasonably notified in 2009 that the Board might change the Unit 13 Nelchina Caribou hunt to a Tier I hunt. The Board regulation adopted in 2009 to change the Unit 13 caribou hunt from Tier II to Tier I violated the due process requirements of the APA and is therefore invalid.

B. Alleged Violation of the Alaska Open Meetings Act:

Manning challenged meetings between Assistant Attorney Generals and Ahtna representatives and meetings between employees of the Department of Fish and Game and

Ahtna representatives as violating the Open Meetings Act ("OMA"). OMA is designed to ensure that meetings of a governmental body of a public entity are open to the public. See AS 44.62.310. OMA was amended in 1994 to narrow its scope. Individual actions are not within the scope of the OMA. See Krohn v. State, Dep't of Fish & Game, 938 P.2d 1019 (Alaska 1997). Under the amended OMA the Commissioner, Department employees, and Assistant Attorney Generals need not give public notice and an opportunity for the public to participate prior to meeting with private individuals such as Ahtna representatives.[2] The OMA challenge is summarily denied.

C. The Manning Taking of Tier II Property Rights Argument:

Manning contends that the Board decision that a Tier I hunt was appropriate for 2009 and 2010 constitutes an improper taking of his Tier II hunting rights. Under the Tier II factors, the parties do not dispute that Manning has a relatively high Tier II number as compared to other Tier II hunters. If a Tier I hunt is permitted for Unit 13 caribou, the Tier II priority position that Manning has accumulated over the years will be lost. He will have equal standing with all of the other Tier I hunters. As such he will have no greater or lesser chance of being awarded a Unit 13 caribou hunting permit than any other Tier I hunter. Manning argues that his Tier II position is a constitutionally protected right.

Personal hunting and fishing rights are more correctly viewed as privileges. See Herscher v. State Department of Commerce, 568 P.2d 966 (Alaska 1977)("The state's power

[2] It would be a violation of the OMA for three or more members of the Board of Game to meet privately with the representatives of any user group. However, an individual member of the Board is not precluded by the OMA from discussing game management issues with a member of the public. See Brookwood Area Homeowners Ass'n v. Municipality of Anchorage, 702 P.2d 1317, 1323 n.7 (Alaska 1985) ("Quadrant's representatives could have met with each Assembly member individually to discuss their development project and to lobby for the passage of a rezoning ordinance without violating the Open Meetings Act.").

over natural resources is such that it could entirely eliminate the role of hunting guides, and no problem of due process would arise."); Metlakatla Indian Community, Annette Island Reserve v. Egan, 362 P.2d 901, 916 (Alaska 1961) (dicta suggests court concurrence with the proposition that "fishing rights" as used in § 4 of the Alaska Statehood Act is more correctly viewed as fishing privileges). In an Attorney General Opinion in 1979, Assistant Attorney General Jon Tillinghast wrote:

> However, as our state supreme court stressed in Herscher, supra, the taking of fish and game resources in Alaska is in the nature of a privilege rather than a right, and the legislature may alter the statutory terms under which that privilege may be exercised, without the necessity for due process protections, and certainly without the need for compensation:

Alaska A.G. Opinion, File No. J-66-031-80, 1979 WL 22727. In McDowell v. State, 785 P.2d 1, 19 (Alaska 1989), the court stated that other courts have concluded in considering the degree of scrutiny in a constitutional context that "recreational hunting is not a fundamental right," citing Baldwin v. Montana Fish & Game Comm'n, 436 U.S. 371 (1978) (elk hunting by non-residents not fundamental); Utah Public Eomployees Ass'n v. State, 610 P.2d 1272 (Utah 1980) (entry in big game hunting permit drawing not fundamental).

Manning has not shown that his comparatively high Tier II hunting factor position is a fundamental property right entitled to heightened constitutional scrutiny. Manning was not singled out by the Board. The existence of Tier II priority positions held by Manning and other Tier II hunters does not, in and of itself, preclude the Board from changing the Unit 13 caribou hunt from a Tier II to Tier I hunt. The Manning challenge on that basis to the actions of the Board is denied.

D. The Manning Challenge to the 2009 Board Finding that the Unit 13 Caribou Hunt Should Be a Tier I Rather than a Tier II Hunt:

Discretion is delegated in AS 16.05.258(a) to the Board of Game to "identify the ... game populations, or portions..., that are customarily and traditionally taken or used for subsistence." The Commissioner is obligated to provide recommendations to the Board regarding population identifications. The Board is obligated to make decisions on the harvestable number of caribou consistent with sustained yield and the number of caribou reasonably necessary for subsistence uses.

The parties do not challenge the Board's finding that for 2009-2010 the harvestable sustained yield from the Nelchina Caribou Herd is 600-1000 bull caribou. With federal control over a portion of the migratory range of the Nelchina Herd, the split of the harvestable sustained yield is 400 bull caribou to federal harvest control and 600 to State management.

Until 2009 the Board routinely concluded that the harvestable number of caribou in Unit 13 consistent with sustained yield was not sufficient to meet the subsistence use needs. Thus, a Tier II hunt was necessary under AS 16.05.258(b)(4). In 2009, no evidence was presented to the Board that the number of harvestable caribou had increased. Nevertheless the Board concluded that the 1000 harvestable caribou would meet 100 percent of the subsistence use needs, so that a Tier II hunt was not required. That determination appears to have been based on the Board's determination that subsistence users only need one caribou every four years. The Department has not identified factual evidentiary support for that determination by the Board. The Board's Findings in 2006 do not support that proposition. The only pertinent factual reference in the administrative record of the Board in

2009 was to an anecdotal comment of a Board member that he still had caribou in his freezer from two years ago.

Deference should be accorded Board determinations. See State v. Kenaitze Indian Tribe, 894 P.2d at 641-42, See also Native Village of Elim v. State, 990 P.2d 1 (Alaska 1999) (the expertise of the Board of Fisheries stands in contrast to a court trying to make natural resource management decisions such that deference to Board decisions is appropriate); Kovukuk River Basin Moose Co-Management Team v. Board of Game, 76 P.2d 383 (Alaska 2003) (plaintiff conceded that the Board has substantial discretion to identify game populations in any rational manner related to the purpose of the subsistence statute). There is no factual support in the administrative record for the determination that subsistence users only need one caribou every four years. There is no support in the record for the Board change of position in 2009 that the harvestable number of caribou in Unit 13 is sufficient to meet the subsistence needs of all subsistence users. The Board characterized its 2009 changes to the Unit 13 caribou hunt as an "experiment."

The court finds that the Board decision in 2009 to change the Unit 13 caribou hunt from a Tier II to a Tier I hunt was arbitrary and unreasonable because it was not supported by evidence in the administrative record.

E. The Manning and AFWCF Challenge to the Board Decision To Establish a CHP in Unit 13:

In 2009 the Board decided to issue a CHP for the Ahtna Tene Nené Subsistence Committee to administer a community subsistence harvest hunt for eight Ahtna villages in the Nelchina area setting aside 300 caribou for the CHP as well as up to 100 any-bull moose. and a number of restricted bulls. The Board has authority under AS 16.05.330 and the

regulations adopted thereunder to establish CHPs. Here one CHP was issued under which eight separate hunting areas were established; one for each of the eight authorized villages.

The question is whether the CHP adopted by the Board for Unit 13 caribou and moose violates any Alaska constitutional or statutory provision or Alaska case law. The State notes on page 23 of its August 31 Memorandum that "no case has yet addressed the Board's authority under AS 16.05.330(c)." The CHP portion of AS 16.05.330 was enacted in 1986 as part of the legislative response to the federal takeover of game management in Alaska and to a then recent Alaska Supreme Court decision. Extensive legislative history exists regarding the intent of the Legislature in 1986 with respect to providing protection for subsistence, especially rural based subsistence, but very little of that history addresses the legislative intent concerning the CHP concept in 330(c).

Part A of the McDowell decision makes a rural residency requirement unconstitutional under Article VIII, sections 3, 15, and 17 of the Alaska Constitution. The court held, "It follows that the grant of special privileges with respect to game based on one's residence is also prohibited." McDowell, 785 P.2d at 9. Part B of the McDowell decision provides that any system which closes participation to some, but not all, applicants creates a tension with the protections of Article VIII of the Alaska Constitution such that if the exclusionary criterion is not per se impermissible, "demanding scrutiny" is appropriate. Id. The fact that in 1986 the Legislature authorized the Board to establish CHPs does not trump the 1989 McDowell precedent, which must be applied on a CHP-by-CHP basis.

The State and Ahtna argue that the Ahtna CHP is not improper because anyone can choose to reside in one of the eight villages in question. Although it is true that anyone, in theory, could relocate to reside in any one of these eight Ahtna villages, that argument

does not defeat the fact that the Ahtna CHP as adopted constitutes a barrier to entry based on residency. Although it is not determinative of the legality of the CHP, the court notes that the Ahtna CHP Hunt Administrator notified those who received an Ahtna Harvest ticket that the ticket does not give the hunter permission to hunt on Ahtna lands and that "All Ahtna Lands are closed to hunting." Manning Exh. A. The notice does not indicate whether tribal members may hunt on Ahtna lands. The Ahtna CHP proposal 84 called not only for a Village resident requirement for the CHP, but also required Tribal membership, "The Ahtna community permit would apply to tribal members enrolled in the Ahtna Village tribes." Manning Exh. J, at 2. As adopted by the Board, the Ahtna CHP limits the participants to Ahtna Village residents and limits the subsistence sharing of caribou taken under the CHP to residents of the eight Ahtna villages. The Ahtna CHP, if implemented without change, has a residency based standard for taking and sharing a subsistence resource. The conditions for the community hunt set forth on the updated 7/31/2009 version provide in ¶ 2 that "Community hunters must be ... a member of the community." ¶ 4 provides that if you sign up as a community hunter, you are prohibited from holding a state harvest ticket or any other state hunt permit for moose or caribou that year. Also the hunter will be limited to hunting for moose or caribou only within the community harvest area. Pursuant to ¶ 8, all hunters are "encouraged" to salvage C&T parts of the animal including the heart, liver, and kidneys and, for moose, the head, hide, intestines, and stomach. Manning Exh. B.

At the preliminary injunction stage the court severed the residency portions of the Ahtna CHP in an attempt to salvage the remainder under the Alaska Constitution and applicable case law. Opening the Ahtna CHP at least in legal theory to any and all interested Alaskans proved confusing, difficult, and expensive for Ahtna to administer. There is

inherent, inescapable tension between the Alaska Constitutional provisions as interpreted and applied in the McDowell case and the concept of a community harvest permit as authorized in this instance by the Board. The Board's 2006 Findings regarding subsistence in the Unit 13 area do not alleviate the tension. The Board Findings in 2006 regarding the customary and traditional subsistence uses in Area 13 emphasize local residency and communal sharing. The Board found that local members of the community were being hindered in passing along their customary and traditional practices because younger and older members of the community could not obtain a Tier II permit. Following the observation that virtually since its inception the Tier II subsistence permit system has "plagued with public complaints about inequities, unfairness, and false applications," the Board's 2006 Findings include the following:

(1) The Tier II bag limits were 3 caribou per year, recently as of 2006 reduced to 2 per year (page 2);

(2) After 1950, historical use patterns changed rapidly with more mechanized access, cash employment, increased human population, increasing competition for wildlife, and fluctuating wildlife populations (page 3);

(3) The fall hunt traditionally followed the salmon harvest; the winter hunt was whenever meat was needed and game was available (page 4);

(4) Local hunters travel shorter distances to hunt and utilize less technology than non-local hunters (page 4);

(5) Local hunters take more than needed for their own families to provide for the community at large (page 5);

(6) Lifelong local residents do not share the non-local resident attitude of utilizing other areas (page 5);

(7) The traditional of local residents is to salvage and use all parts of the harvested animal in contrast to patterns based out of urban areas where the focus is on meat and antlers and most organs, bones, and the hide are left in the field (page 6);

(8) Traditions and roles regarding harvesting, providing, preparation, and storage are important within the Ahtna "engii" system regarding the human place within the natural world and a respectful treatment of animals (page 6);

(9) Local users learned how to hunt from family in the local area; most non-local users tend to be controlled by the law rather than long-term oral traditions and community-based values (page 6);

(10) It is "imperative to accommodate the customary and traditional family and community harvest sharing practices as part of the subsistence way of life to the maximum extent possible" (page 7);

(11) There are no non-local traditions of community-wide meat distribution (page 7);

(12) The separation of the interconnected diversity of resource uses by non-local users undermines the use of efficient and economic methods and means by local users (page 8);

(13) Under the State's Tier II permit system permits have been slowly shifting from local residents who are the most dependent upon wildlife resources to less subsistence-dependent urban residents (page 1);

(14) It is almost impossible for new and younger Alaskans to quality for Tier II permits despite a subsistence dependence on wildlife resources for food (page 1);

(15) The long term goal of the Board is to design a system to accommodate subsistence-dependent users in a way that permits can be virtually guaranteed from year to year (page 1);

(16) The customary and traditional subsistence uses of the Nelchina Caribou Herd and moose were established by Ahtna Athabascan communities in the Copper River Basin and have been passed between generations orally and through practices which were later adopted by other Alaska residents (page 2);

(17) The pattern of taking and use among Ahtna village residents is more economically cost and effort efficient than among non-local residents (page 4); and

(18) Ahtna members have a pattern of taking, use, and reliance where the harvest effort of products that are harvested are distributed or shared, including customary trade, barter, and gift-giving.

The customary and traditional subsistence practices of local residents are contrasted to the practices of urban users. The Board received evidence that Tier II hunters do not necessarily use their Tier II permit, which implied to the Board that the individuals who did not use their Tier II permit are not true subsistence hunters dependent upon wildlife resources for survival.

The theme throughout the Board's Findings in 2006 is that the customary and traditional subsistence uses established and practiced by local Ahtna community members

are in line with a traditional subsistence way of life, but the practices of urban-based subsistence users and subsistence users from other rural areas are not.[3] As fashioned by the Board in 2009, the Ahtna CHP hunt reflects the Board's Findings in 2006 and the expressed long-term goal of the Board to "virtually guarantee" a permit for a caribou every year for local resident subsistence users. The Ahtna CHP provides for eight separate community hunt areas and is designed to allow CHP participants to hunt every year that a CHP hunt is held. In contrast, the Tier I drawing permit hunt restricts participants from any other hunt and, if successful, from hunting again in Area 13 for three years.

The legislative history (even broadly defined) regarding AS 16.05.330 is limited. By letter of March 13, 1985, Governor Sheffield conveyed a proposed bill to the Speaker of the House to provide the Board of Fisheries and the Board of Game the same authority they had before the then recent February 1985 decision by the Alaska Supreme Court in Madison v. Alaska Department of Fish and Game. A Special Committee on Fisheries within the House received testimony in a heavily attended meeting on March 21, 1985, regarding the effect of the Madison decision. The Special Committee urged action that session on the subsistence issue in a "prompt but thorough manner." An unsigned letter of intent by Representative Miller, Chairman of the House Rules Committee, dated 5/2/85 for CSHB 288

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[3] In Payton v. State, 938 P.2d 1036 (Alaska 1997), the court reversed a Board decision not to characterize the upper Yenta River area as a subsistence use area. The court concluded,

> The Board erroneously required current users of salmon in the upper Yentna River area to have a familial relationship with prior generations of subsistence users in the area. We determine that this interpretation of 5 AAC 99.010(b) is inconsistent with AS 16.05.258(a) and AS 16.05.940(7). We also conclude that the Board failed to explain adequately why it determined 5 AAC 99.010(b)(5) does not favor a finding that uses of upper Yentna River area salmon are customary and traditional.

Payton v. State, 938 P.2d 1036, 1045 (Alaska 1997).

states that under the bill the boards will limit subsistence uses to "Alaska residents who are domiciled in rural communities and rural areas." Hearings were held, statements were made, but no legislation on subsistence was enacted in 1985.

Next session, by letter of April 24, 2986, to Senator Kelly, Governor Sheffield noted that he had introduced HB 288 in 1985. Governor Sheffield attached a 20-page background briefing document on HB 288. The briefing document explained, *inter alia*, that HB 288 was intended to address the problems said to have been caused by the decision in Madison v. Alaska Department of Fish and Game:

> IV.A. It [HS 288] would amend the definition of "subsistence uses" in statute to clarify that they are the customary and traditional uses by rural Alaska residents of fish and game. [Emphasis in original]

With regard to the CHP concept, page 8 of the March 12, 1986 Senate Resources Committee Staff report regarding SCS for CS for HB 288 states in pertinent part:

> Section 8 amends AS 16.05.330 to allow the boards to adopt regulations providing for subsistence permits. Those permits may be for all subsistence users within a rural area, for rural communities or villages, or for groups or individuals in rural areas. The boards are required to adopt a permit program when the subsistence preference requires reductions in the harvest by nonsubsistence users. Such a reduction should only take place in case of a resource shortage compared to the number of users. When that situation exists, the Department and boards should have such a system in place so they can closely monitor the harvest and the demand on the resource.

The April 3, 1986 Senate CS for CS for HB 288 used the phrase "rural areas" in its proposed 330(c) language, not "areas, villages, communities, groups, or individuals" as was eventually enacted.

The 2006 Findings by the Board regarding customary and traditional subsistence uses in Unit 13 were largely supported by testimony from local and nearby residents during the Board meetings in 2009. Local subsistence needs in Unit 13 for moose and caribou are

important, indeed vital to many families. There is no doubt that traditional local hunting receives significant and arguably unfair competition from non-local hunters who are perceived to have, and may well actually have, more financial resources, alternative access to other subsistence game, and state-of-the-art hunting equipment. However, based on the legal analysis and precedent established by the Alaska Supreme Court in McDowell v. State, 785 P.2d 1 (Alaska 1989), this court concludes that despite the Board's attempts to characterize it otherwise, the Ahtna CHP is fundamentally a local-residency based CHP. As such the Ahtna CHP violates sections 3, 15, and 17 of article VIII of the Alaska Constitution.

F. The Board Exceeded Its Authority by Delegating Hunt Administration Authority for the Ahtna CHP to the Ahtna Tene Nené Subsistence Committee.

Under the public trust doctrine, the State may not delegate control over fish and game management to private individuals or entities. See McDowell v. State. See also Informal Attorney General Opinion No. 227, 1991 WL 542011; Informal Attorney General Opinion No. 663-86-0504, 1986 WL 81121; Attorney General Opinion No. 663-88-0521, May 12, 1988 WL 249437. Delegations of authority that are merely ministerial rather than discretionary in nature may be delegated. The breadth of the CHP hunt administration responsibilities go beyond ministerial into discretionary determinations.

The court finds that AS 16.05.330(c) does not authorize the Board to delegate hunt administration authority under a CHP to a private individual or entity. The Ahtna CHP for Unit 13 must be administered by the Department. The Department may establish one or more CHPs within Unit 13, consistent with Alaska constitutional and statutory requirements, but must retain the administration responsibilities to ensure that accurate, timely information is provided to the public regarding who, when, and how interested Alaskans may apply to

participate in the community hunt. Delegating CHP hunt administration to the Ahtna Tene Nené Subsistence Committee unduly compromised the Department's game management duties and responsibilities. The Department needs to maintain control of the determination of the lawful criteria for selecting who may hunt, for establishing any special restrictions for the hunt and for the handling of the game, and for establishing the terms and conditions for a meaningful communal sharing of caribou and moose taken under a CHP.

G. The Board Decision To Allocate 300 Caribou to Tier I Permit Hunters for Caribou in Unit 13 for the 2009 and 2010 Hunts:

Given the court's finding that the Board violated Alaska law by changing the Unit 13 caribou hunt from Tier II to Tier I, this issue is moot.

H. Board Decision To Allocate 300 Caribou to the Community Harvest Permit in Unit 13 for the 2009 Hunt:

Given the court's finding that the Board violated Alaska law by authorizing a residency-based CHP for the Unit 13 caribou hunt, this issue is moot.

I. The Special Restrictions on the Unit 13 Caribou Hunt:

The Board imposed restrictions and special requirements on the 2009/2010 Unit 13 caribou hunts. Those special restrictions and requirements do not present issues of constitutional dimension. The Board has discretion in fashioning special restrictions to achieve its overall game management objectives. Reasonable minds could differ over conditions such as the requirement to destroy and leave caribou antlers in the field. Caribou antlers have been used for centuries as toys and for pipes, art carvings, jewelry, snow goggles, rustic furniture components, and trade. However, the Board is vested with considerable discretion and authority in this regard. Given the annual potential for Board review and modification of these conditions, the challenge to these restrictions is denied.

CONCLUSION

For the reasons set forth above, summary judgment is granted as follows:

- The motion by AWFCF to invalidate the Ahtna CHP is granted;
- The public trust doctrine improper delegation challenge by Manning to the Board's authorization of the Ahtna CHP is granted;
- The open meetings act challenge by Manning is denied;
- The argument by Manning that his Tier II priority status is a right entitled to heightened constitutional scrutiny is denied;
- The challenge by Manning to the adequacy of the public notice of the 2009 Board meetings is granted with regard to the Board change from a Tier II to a Tier I hunt and with regard to the finding that subsistence users of Unit 13 caribou only need one caribou every four years;
- The challenge by Manning to the Board's experiment to change the Unit 13 caribou hunt from Tier II to Tier I is granted;
- The Manning/AWFCF challenge to the allocation of 300 caribou to the Ahtna CHP and 300 caribou to the Tier I permit drawing hunt is moot;
- The challenge by Manning to the Board's special conditions for the 2009/10 Unit 13 caribou hunt is denied.

Based on the foregoing rulings, the Board is enjoined from proceeding with a Tier I hunt for caribou in Unit 13 this year, is enjoined from delegating CHP hunt administration authority to private entities or individuals, and is enjoined from authorizing an Ahtna CHP that is fundamentally residency-based.

DATED this 9th day of July, 2010.

Carl Bauman
SUPERIOR COURT JUDGE

CERTIFICATION OF DISTRIBUTION
I hereby certify that a copy of the foregoing was mailed to each of the following at their addresses of record:
Manning, Saxby, Starkey, Kramer
7-9-10 Roberts
Date Clerk

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

ALASKA WILDLIFE ALLIANCE, and JOHN TOPPENBERG, Director, Alaska Wildlife Alliance,	)	
Plaintiffs,	)	
v.	)	
TED SPRAKER, Chairman, Alaska Board of Game, and ALASKA BOARD OF GAME,	)	
Defendants.	)	
	)	Case No. 3AN-13-05825CI

ORDER AND DECISION ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

I. INTRODUCTION

An interest group petitioned an Alaska State board for an emergency regulation. The board's executive director polled individual board members by email to ascertain whether they wished to summarily deny the petition, which they did. The email admonished members not to discuss the matter with one another to avoid application of Alaska's open meeting law. Did the serial email poll violate that law?

II. FACTS AND PROCEEDINGS

On September 16, 2012 the executive director of defendant Alaska Board of Game ("Board" or "State) received an emergency petition from plaintiff Alaska Wildlife Alliance and others. The petition alleged that the Board's elimination of a wolf-protection buffer zone around Denali National Park had resulted in an emergent threat to protected wolves within the park. The petition sought

enactment of an emergency regulation closing the eastern boundary of the park to the taking of wolves.[1]

The next day the Board's director sent separately to each of the seven Board members an email attaching a copy of the petition, and written comments thereon by the Alaska Division of Wildlife Conservation. The email invited the Board members to adopt one of two positions in response: either the petition failed to satisfy criteria for adoption of an emergency regulation, or a Board meeting was necessary to consider the petition.[2]

By letter dated September 19, 2012, the director informed the Wildlife Alliance of the Board's denial:

> After consideration of the petition, the Joint Board Petition Policy and the comments provided by the Department of Fish and Game, the Board denied the petition, finding that the request does not meet the criteria under the policy for adoption of emergency regulation, and decided not to schedule the matter for a public hearing.
>
> The Board's decision was not by a meeting, but by an e-mail poll consistent with long-standing practice on petitions for an emergency regulation when no Board meeting is otherwise scheduled within 30 days of receiving a petition.[3]

The Wildlife Alliance then pleaded additional facts and moved for reconsideration. The director indicated that the Board's administrative procedure made no provision for reconsideration, but that the Alliance could refile a second original petition. The Alliance did so. The Board's director again emailed the Board, this time adding a caution:

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[1] Pl's Mot. for Summ. J., Ex. 1.
[2] *Id.*, Ex. 7.
[3] *Id.*, Ex 2.

> Please e-mail your response back to me without cc'ing other Board members or anyone else. Because this vote is by e-mail rather than in a meeting or teleconference, Board members should refrain from communicating with each other before voting has been completed by the Board and announced by me.[4]

The Board again decided no emergency existed, thus denying the petition.

On March 15, 2013, the Wildlife Alliance filed a Complaint for Declaratory and Injunctive Relief, seeking a ruling that the Board's email polling procedure violated Alaska's Open Meeting Act ("OMA"), which reads in relevant part:

> (a) All meetings of a governmental body of a public entity of the state are open to the public except as otherwise provided by this section or another provision of law. Attendance and participation at meetings by members of the public or by members of a governmental body may be by teleconferencing. Agency materials that are to be considered at the meeting shall be made available at teleconference locations if practicable. Except when voice votes are authorized, the vote shall be conducted in such a manner that the public may know the vote of each person entitled to vote. The vote at a meeting held by teleconference shall be taken by roll call. This section does not apply to any votes required to be taken to organize a governmental body described in this subsection.
>
> . . . .
>
> (h) In this section,
>
> . . . .
>
> (2) "meeting" means a gathering of members of a governmental body when
>
> (A) more than three members or a majority of the members, whichever is less, are present, a matter upon which the governmental body is empowered to act is considered by the members collectively, and the governmental body has the authority to establish policies or make decisions for a public entity. . .

The parties cross-moved for summary judgment on the open-meeting issue. The Wildlife Alliance also sought to clarify that the Board possesses inherent

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[4] *Id.*, Ex. 11 at 5.

power to reconsider its initial petition decisions. The court put a decision on record, finding that the Board's longstanding procedure was entitled to deference and was a reasonable way to summarily dispose of emergency petitions. But once the court learned that the Wildlife Alliance sought oral argument, it vacated its oral findings and heard argument.

III. APPLICABLE LAW

In cases requiring judicial interpretation of statutes, courts consider whether the statute has a plain and practical meaning, but flexibly interpret the statute to the degree legislative history supports some degree of divergence from the literal text:

> We interpret statutes "according to reason, practicality, and common sense, taking into account the plain meaning and purpose of the law as well as the intent of the drafters." We decide questions of statutory interpretation on a sliding scale: "[T]he plainer the language of the statute, the more convincing contrary legislative history must be."[5]

But a court reviewing an administrative agency's interpretation of statute may defer to an agency's reasonable interpretation thereof if the agency possesses relevant expertise or engages in fundamental policy-making:

> We use one of two standards to review agency interpretations of statutes. We apply the reasonable basis standard, under which we give deference to the agency's interpretation so long as it is reasonable, when the interpretation at issue implicates agency expertise or the determination of fundamental policies within the scope of the agency's statutory functions. We apply the independent judgment standard, under which "the court makes its own interpretation of the statute at issue, ... where the agency's specialized knowledge and experience would not be particularly

[5] *Marathon Oil Co. v. State, Dept. of Natural Resources*, 254 P.3d 1078, 1082 (Alaska 2011) (citations omitted).

probative on the meaning of the statute." We give more deference to agency interpretations that are "longstanding and continuous."[6]

IV. DISCUSSION

The court in its now withdrawn initial ruling credited the state's argument that no meeting occurred, and the Board had merely made something akin to a screening decision that the petition did not merit the calling of a meeting. Certainly there was no literal "gathering" of a quorum of the board; the email poll was explicitly designed to avoid that potential pitfall.

But a 1985 decision of the Alaska Supreme Court declined to interpret the OMA quite so mechanistically. Members of the Anchorage Assembly considering a project met with the proposed contractor on-site. The Court held that this preliminary on-site consultation constituted a meeting subject to the OMA:

> [T]he [on-site] meeting could have been held as a scheduled work session of the Anchorage Assembly open to the public. Without public access to the Quadrant meeting, the "people's right to be informed" under the OMA was severely limited. In *State ex rel. Lynch v. Conta,* 71 Wis.2d 662, 239 N.W.2d 313, 330–331 (1976), the court stated:
>
> > The likelihood that the public and those members of the governmental body excluded from the private conference may never be exposed to the actual controlling rationale of a government decision thus defines such private quorum conferences as normally an evasion of the law. The possibility that a decision could be *influenced* dictates that compliance with the law be met. (Emphasis in original.)
>
> The trial court erred in ruling that the [on-site] presentation was not a meeting under the OMA. We reverse its ruling and

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[6] *Id.*

> hold that a "meeting" includes every step of the deliberative and decision-making process when a governmental unit meets to transact public business.[7]

Even though the facts of the case fit comfortably within the OMA's definition of a meeting as a "gathering", the Court explicitly untethered its holding from that datum:

> Given the strong statement of public policy in [AS 44.62.312, State Policy Regarding Meetings], the question is not whether a quorum of a governmental unit was present at a private meeting. Rather, the question is whether activities of public officials have the effect of circumventing the OMA.[8]

In 1994 the Court extended its OMA jurisprudence to expressly include off-record conversations between individual board members, culminating in a merely *pro forma* public meeting:

> The superior court found that Board members had one-on-one conversations with each other, in which they discussed reapportionment affairs and districting preferences, and solicited each other's advice. It also found that the "dearth of [substantive] discussion on the record, combined with the manner of some Board members at trial, as well as other evidence presented at trial, convinces this court that important decision making and substantive discussion took place outside the public eye." Our review of the record indicates support for the factual finding that the Board conducted some of its reapportionment business outside scheduled public meetings. Based on this finding, we agree with the superior court that the Board violated the Open Meetings Act.[9]

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[7] *Brookwood Area Homeowners Ass'n, Inc. v. Municipality of Anchorage*, 702 P.2d 1317, 1323 (Alaska 1985).

[8] *Id.*, at 1323 n.6.

[9] *Hickel v. Southeast Conference*, 868 P 2d 919, 929-930 (Alaska 1994).

A 1985 California appellate case held that the use of serial telephonic conversations between staff and board members to poll the board violated that state's OMA.[10] The Nevada Supreme Court more recently applied similar logic to email polls:

> [I]f a quorum is present, or is gathered by serial electronic communications, the body must deliberate and actually vote on the matter in a public meeting.[11]

This conclusion appears to be the majority position of American jurisdictions ruling on the matter of serial telephonic or email polls.[12]

At first blush, the Board of Game's decision not to convene appeared largely procedural to this court. But it was in effect a denial of the Wildlife Alliance's petition on the merits. Had the board convened it would obviously have been required to meet publicly. The Board's director expressly directed members not to confer to avoid the appearance of a meeting. This stratagem falls within our Supreme Court's definition of impermissible avoidance of the strictures of the OMA. There is no principled way to distinguish between what a board might consider to be a matter for summary resolution via an email poll and a matter apt for public scrutiny under the OMA. The OMA protects

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[10] *Stockton Newspapers, Inc. v. Members of Redevelopment Agency*, 171 Cal.App.3d 95, 214 Cal.Rptr. 561 (Cal. Ct. App. 1985).

[11] *Del Papa v. Bd. of Regents of Univ. and Cmty. Coll. Sys. of Nev.*, 956 P.2d 770, 778 (Nev. 1998).

[12] *See Rehab Hosp. Services Corp. v. Delta-Hills Health Sys. Agency, Inc.*, S.W.2d 840, 842 (Ark. 1985); *Hitt v. Mabry*, 687 S.W.2d 791, 796 (Tex. Ct. App. 1985); *Bd. of Trustees of State Insts. of Higher Learning v. Miss. Publishers Corp.*, 478 So.2d 269, 278 (Miss. 1985); *State ex rel. Cincinnati Post v. Cincinnati*, 668 N.E.2d 903, 906 (Ohio 1996).

robust public disclosure by simply depriving boards of the power to make such an arbitrary distinction. While the obvious alternative procedure of convening a noticed teleconference of the Board involves a certain measure of time and expense, that is simply how boards must conduct business in order to comply with the OMA.

The Wildlife Alliance did not meaningfully brief the issue of whether due process requires an administrative entity to provide a mechanism for petition reconsideration. It instead argued that the Board should have exercised its inherent power to reconsider. Here the Board provided *de facto* reconsideration by reviewing a second petition with added facts. It effectively accorded reconsideration. The court declines to issue a declaratory judgment on that matter.

V. ORDER

The court concludes that it erred in its initial decision, and that the Board must consider the Alaska Wildlife Alliance's petition compliantly with the OMA. The court enjoins the Board from utilizing serial postal, telephonic, or electronic polling of individual board members to approve or deny the holding of a Board meeting to consider emergency petitions.

DATED at Anchorage, Alaska this 16th day of December, 2014.

I certify that on 12-17-14
A copy of the above was mailed to each of the following at their addresses of record: Meacham, Nabors, Barnett
Judicial Assistant/Deputy Clerk

John Suddock
Superior Court Judge

Understanding the Advisory Committee Process

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543-2433

It comes as a surprise to many Alaskans to learn that the state's hunting, trapping, and fishing regulations are NOT made by the Alaska Department of Fish and Game (ADF&G).

This job falls to the Board of Game and the Board of Fisheries. Each board is a group of seven people appointed by the governor and approved by the legislature.

Advisory committees play a key role in the regulatory process. While the Boards of Game and Fisheries make the final decisions on proposed regulations, they rely on advisory committees to offer their local perspective on fish and wildlife issues that are of interest to the committee by submitting proposals and providing comments on proposals.

What are Advisory Committees?

Advisory committees are local groups authorized by Alaska Statute 16.05.260. This statute gives the Joint Board of Fisheries and Game direction to establish advisory committees for the purpose of providing a local forum for the collection and expression of opinions and recommendations on matters related to the management of fish and wildlife resources. Currently there are 84 advisory committees that represent communities across the state. Each advisory committee is comprised of up to 15 locally elected members with expertise in local fish and game issues.

Advisory Committee Meetings & Roles

Advisory committee meetings are open to the public and provide a local forum for the public, advisory committee members, ADF&G and other agency staff to discuss fish and wildlife issues. Meetings focus on developing and evaluating regulatory proposals and consulting with individuals, organizations, and agencies on fish, wildlife, and habitat issues. Advisory committee membership, uniform rules and responsibilities are defined in regulation in 5 AAC Chapter 96, and their functions are supported by ADF&G Boards Support Section through local regional coordinators.

How to Get Involved

For more information about advisory committee meetings and membership, please visit **www.boards.adfg.state.ak.us** or contact an ADF&G regional coordinator (see list at left).

The Value of Working Together

Advisory committees serve as a forum to bring individuals, agencies, and interested organizations together to review important fish and game resource matters. These forums not only provide an opportunity for collaboration and communication, keystones to forging regulatory change with the boards, but serve to strengthen relationships among each of these parties in their work to improve Alaska's fish and game resource.

October 2014

How Regulations are Made

The Public

People bring concerns to their local advisory committee, submit their own proposals directly to the boards, and provide written comments and oral testimony to the boards.

Local Advisory Committees

Advisory committees discuss local wildlife observations and issues, seek information from ADF&G, submit proposals to the boards, review submitted proposals, and provide written comments and oral testimony to the boards.

ADF&G

ADF&G submits proposals to the boards and provides biological information to the boards and advisory committees.

Board of Game

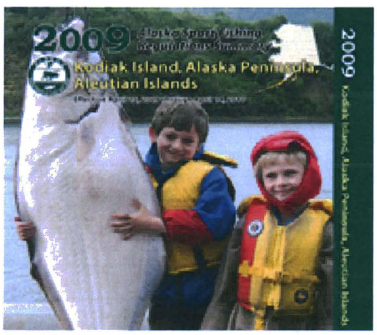
Board of Fisheries

The Boards consider advisory committee and public comments, and information from ADF&G regarding proposals. Decisions on proposals are reached by a majority vote of the Board and written as regulations.

The regulations are given legal review and made official by the Lt. Governor.

Want to know more?

www.boards.adfg.state.ak.us



After regulations are approved, the **Hunting, Trapping, and Fishing Regulations** books are produced by ADF&G. Regulations are enforced by the Alaska Wildlife Troopers.

History of Alaska's Fish and Game Board Process

The state of Alaska constitution is unique, in that it contains an article that exclusively addresses the management of natural resources within state lands and waters. Article VIII of the Alaska Constitution is the result of historic achievement in which the state of Alaska established the chief principle that all resources should be managed under a public trust doctrine for the citizens of Alaska. Under section two of Article VIII, the Alaska "legislature shall provide for the utilization, development, and conservation of all natural resources belonging to the state, including land and waters, for the maximum benefit of the people." From the humble beginnings of statehood, the Alaskan people desired a transparent regulation process for natural resources management in the state of Alaska.

Under the Alaska Constitution the Board of Fish and Game was founded in 1960 to provide for public discussion on the in the state's fish and wildlife management. The mission of the Fish and Game Board was for the conservation and development of the fisheries and game resources of the state. This was accomplished through the promulgation of regulations affecting use and development of Alaska's fish and game resources. Under the Alaska Department of Fish and Game, the board conduct one public meeting annually. Board members were appointed by the Governor and confirmed by the legislature to four-year terms. Requirements for board membership was state residency and selection was conducted without regard to political affiliation or location of residence. The commissioner of Alaska Department of Fish and Game served as an ex-officio secretary of the board to cast tie breaking votes during deadlock. The boards possess regulatory powers as set forth by their respective statutes, but the boards did not have administrative, budgeting or fiscal powers, which were reserved to the governor and state legislature.

In 1975, the Alaska State Legislature splint the Board of Fish and Game into two separate boards: the Board of Game and the Board of Fisheries to reduce the regulatory proposal load while providing for more effective public meetings and discussions. The Board of Fisheries and the Board of Game each consists of seven members appointed by the Governor and confirmed by the legislature to three-year terms.

The boards established a system of local fish and game advisory committees around the state to provide a local forum for the collection and expression of regional opinions on fish and game issues. The advisory committees provide the boards with recommendations for regulatory changes and resource allocations. The boards review the proposals submitted by the advisory committees and can adopt or reject the proposal, but the board must provide the advisory committees reason for the rejection of the proposal.

Purpose of the Boards

The state of Alaska utilizes a board process to review and enact fish and wildlife regulations in the state. The purpose of the Board of Game and Board of Fisheries is to provide an open public process in which the public can voice a diverse range of values and needs while providing high public scrutiny and involvement in the state's fish and wildlife management.

It is the mission of the Board Support Section under the Alaska Department of Fish and Game is to facilitate an effective board and public process for the state's fish and wildlife regulatory system. To accomplish this mission the core services provided by the Board Support Section include ensuring citizen's participation in the fish and game regulatory process and to provide support to the board members to make effective decisions.

Public involvement is one of the most essential aspects of the board process. Local advisory committees and regional councils provide a local forum to discuss fish and wildlife issues and provide recommendations to the boards. Currently there are 84 committees throughout the state of Alaska that provide regional expertise concerning local fish and wildlife issues. The purpose of these advisory committees as established by the Joint Boards of Fisheries and Game include: the development of regulatory proposals, evaluating and developing proposals and recommendations to the boards, providing a public forum for fish and wildlife conservation.

The boards can delegate it's authority to the Commissioner of the Alaska Department of Fish and Game to act on behalf of the board. During the conflict between the boards and the commissioner on proposed regulations, public hearings are conducted to provide public involvement concerning the issue in question. If an agreement between the board and the commissioner cannot be made, the governor will decide the matter.

The Role of the Advisory Committees

The advisory committees shall discuss fish and wildlife issues concerning regulatory changes and resource allocations. The recommendations and proposals from the advisory committees are forwarded to the appropriate board for their consideration. If the board chooses not to follow the recommendations of the local advisory committee, the board must inform the local advisory committee of its action and provide the reasons for not following the local advisory committee recommendations.

The commissioner of the Alaska Department of Fish and Game shall delegate the authority to the advisory committees for emergency closures during established seasons. The commissioner is empowered to set aside and make null and void only opening of seasons set by the advisory committees. The Board of Fish and Board of Game has the authority to adopt regulations governing emergency closures during established seasons.

Resident Hunters of Alaska
601 East 57th Place, Suite 101
Anchorage AK 99518
www.residenthuntersofalaska.org

March 23, 1016

Comments on HB 266
Board of Game Regulation Proposals

Resident Hunters of Alaska (RHAK) **supports** HB 266 to clarify how Board of Game-generated proposals can be introduced and how the public process of wildlife management should work.

In January of 2015 at a Work Session meeting the Board of Game out of the blue (BOG) generated two proposals related to sheep hunting (Proposals 207 & 208) that mystified and angered the public. Both Board-generated proposals were broad and contained proposal ideas that had never before been expressed by the public. What made these Board-generated proposals so troubling was that the Board had before it nearly 30 sheep proposals from the public at the upcoming February 2015 Region IV Meeting, that had been deferred from the 2014 Region III Meeting a year earlier.

RHAK believes firmly that these two BOG-generated proposals did not meet the Joint Boards criteria for Board-generated proposals and purposely circumvented the public process.

These are remarks made by Board member Teresa Sager-Albaugh at the January 2015 Work Session after the Chairman introduced Board-generated proposals 207 and 208 (our emphasis):
"*I do think that it's important that we do go ahead and make some decisions with regard to the sheep issues. I guess I don't see the same sense of urgency to necessarily adopt a board generated proposal and put some of these concepts out for public comment at this point. Simply because we've got a backlog of proposals and current proposals that are gonna be before us in February and March that we need to act on.* ***All of those proposals came to us through the regular anticipated process by the public.*** *And I think there is close to thirty on sheep alone if you combine the two meetings and the deferred proposals.*

I guess I didn't ever look at the survey process or the gathering, just pulling from the Department's records to gather the data that you've provided, as something that was going to take on a life of its own and become, you know, that we were ***gonna put forth new concepts*** *for resolution to the sheep issues and the sheep problems that the public has brought before us. If you look at the lion's share of the proposals that have been submitted, most of them suggest limitations on nonresidents, limitations on the commercial aspect of sheep hunting and sheep hunters. Whether or not that is the appropriate resolution to crowding, you know that's for us to debate when we get into the deliberations portion of the meeting. But in my view, those were the proposals we really needed more information on in order to make informed, good decisions. So I'm really not compelled* ***to put forth new ideas***."

Several of the criteria for generating Board proposals that is listed in the Joint Boards document 2013-34-JB were clearly not followed. For example:

- These Board-generated proposals were not in the public's best interest
- There was no "urgency" in considering this issue; the Board has had public proposals before it on sheep issues for nearly a decade that came in via the regular proposal process.
- The current processes were clearly sufficient to bring the issues and concerns revolving around sheep hunting to the Board's attention.

There was not reasonable opportunity for the public to comment, even though the Board met the 30-day public notice requirement. Please note that Fish & Game Advisory Committees (ACs) meet on set schedules, and these sudden Board-generated proposals caused special meetings to be held, as well as hardship on the public to have to travel to testify on these proposals that were not in the already-published proposal book.

BOG member Sager-Albaugh rightly brought these issues up to the Board but her concerns were not sufficient to prevent the Board from voting to include these Board-generated proposals along with all the other public proposals on sheep issues before the Board in February.

Furthermore, at the subsequent BOG meeting in Wasilla in February 2015 the Board held an informal Sheep Town Hall meeting where 167 members of the public were present. BOG Chairman Spraker told the public that they were all free to come up and speak publicly to the audience and express their concerns, but he wanted them to focus their opinions on the two Board-generated proposals.

In March 2015 at the Region II Meeting in Anchorage, the Board passed Board-generated proposal 207 that restricts the way aircraft can be used during sheep hunting. The Board passed this never-before-heard-of restriction even though the vast majority of ACs, the public, Airmen's Association and Alaska Wildlife Troopers opposed it. The resulting backlash from the public ended up in efforts to repeal this new regulation and a special Board meeting was held in May 2015 to decide the matter. The Board again voted to keep this new regulation in place even though the vast majority of the comments were opposed.

In a newspaper article after the meeting, Vice-chairman Turner said: "*The board had a lot of comments in opposition. But something that's tempered my view on that a little bit -- the disproportionate comments against the proposal -- is that I believe any time someone is losing something through board actions, you're going to hear mostly from the affected group.*"[1]

It's telling Mr. Turner said that hunter pilots were "losing" something. Everything about the direction the current Board of Game is going is one in which the Alaskan public is being disenfranchised. Adequate oversight is not happening with Department of Law

[1] http://www.adn.com/article/20150529/state-game-board-upholds-aerial-sheep-spotting-ban

staff. It's one thing to technically meet the definition of the law or policy, but quite another when it's clear the actual intent was not followed.

On March 23rd, 2016, the Board again chose not to rescind Board-generated Proposal 207 at its Statewide meeting after it was reconsidered, and again voted to keep it in place. And on top of that, Board member Nate Turner, a licensed guide and pilot who claims he has guided for sheep for fifteen years as an assistant guide, and whose website currently falsely claims he holds an exclusive guide use area in the Arctic National Wildlife Refuge and lists sheep hunts and prices for 2016, did not recuse himself from voting on 207 or any of the sheep proposals before the Board, even though he has a clear conflict of interest in whether or not nonresidents sheep hunters are limited and resident pilots are limited in how they can use aircraft for sheep hunting.

The entire Board of Game process is broken. The Advisory Committees are only listened to when the Board agrees with their positions. This is affecting resident hunters and pilots in a negative way. Proposal 207 clearly went against the guidelines and the subsequent regulation spawned from it should be repealed by the legislature.

We hope the legislature will adequately scrutinize the Board of Game and dig deeper into these matters. We also hope the legislature will not confirm Nate Turner's reappointment to the BOG next month.

Thank you for your consideration of this bill and these matters.

Sincerely,
Mark Richards
Executive Director - Resident Hunters of Alaska
info@residenthuntersofalaska.org

The Fairbanks Advisory Committee had summited basically the same proposal to the BOG. That this bill is about.

2013 the Joint BOG and BOF created a policy on BGR, after public outcry, mainly stemming from some BOF actions that public was felt they were disinfancied with how they were achieved.

The straw the broke the camel's back for the FAC , happen last year.

Proposal 207 was generated by the BOG

It was put on the record that the need for this proposal was needed because a few public members reached out to the Chair of the BOG that using aircraft were being used to look for sheep during hunting season. Also there could be interrupted that the Brinkmen Study should some of the same concern.

These were the two main reason for the BGP.

If the Chair would have followed the criteria set out in their own joint board findings that Chairman Spraker singed.

He could have told those individuals to summit an ACR(Agenda Change Request) or put a statewide proposal in the upcoming meeting year which was accepting changes that use of a aircraft for hunting would be on the ajenda.

This BGP was not an emergency, or urgent, the normal process was adequate for that cycle, and would have giving public more than enough time to comment.

BGP 207 clearly never met any of the four criteria in the findings.

Furthermore since the passage of not being able to use an aircraft for spotting sheep From 10 aug. to 20 sept. Last year. There are already some loop holes in this regulation that was not vetted enough.

There are at least 7 resident sheep hunts that start before 10 aug. or end after 20 sept. That you can use an aircraft to spot sheep. Also the BOG just passed a sheep youth hunt that will occur before 10 aug. and those hunters who choose to, would not be in violation of using an aircraft for spotting sheep.

And finally no A/C, group, or any public member ever summited a proposal to banned the use of aircraft for spotting sheep.

Alaskan's need this law, and in no way will this harm the BOG or the BOF from using BGP. They just have to meet the critearia set forth, since they do not want to follow their own very interpretive policy.

AL Barrette

452-6047

2013-34-JB

ALASKA JOINT BOARDS OF FISHERIES AND GAME

CRITERIA FOR DEVELOPMENT OF BOARD-GENERATED PROPOSAL

It has been suggested that criteria need to be established to guide the Alaska Joint Boards of Fisheries and Game, Board of Fisheries, and Board of Game (boards) members when deliberating on whether or not to develop a board-generated proposal. The boards will consider the following criteria when deliberating the proposed development and scheduling of a board-generated proposal:

1. Is it in the public's best interest (e.g., access to resource, consistent intent, public process)?

2. Is there urgency in considering the issue (e.g., potential for fish and wildlife objectives not being met or sustainability in question)?

3. Are current processes insufficient to bring the subject to the board's attention (e.g., reconsideration policy, normal cycle proposal submittal, ACRs, petitions)?

4. Will there be reasonable and adequate opportunity for public comment (e.g., how far do affected users have to travel to participate, amount of time for affected users to respond)?

Findings adopted this 16th day of October 2013.

Ted Spraker, Chairman
Alaska Board of Game
Vote: 6-0

Karl Johnstone, Chairman
Alaska Board of Fisheries
Vote: 7-0

Submitted By
AC Barnette
452-6047

Talking Points on HB266

Ted Spraker

Soldotna, AK

Dear Co-Chairman and Members of the House Resources Committee,

I appreciate the opportunity to submit this comment concerning HB266, today I am **representing myself.**

As a member and current chairman of Board of Game (Board), I as well as other members have stated how proud we are of our open public process, there is not a better system in the world of wildlife management. I have been involved in this process for approximately 42 years as a State Wildlife Biologist and five term member of the Board. During our last meeting in Fairbanks, we had 121 people sign up to testify, lasting three full days.

I have concerns from last Friday's testimony on HB266 given to your committee addressing the Board and our public process.

The Board has offered Board Generated Proposals since its inception, over 4 decades, and not until 207 was offered did this issue arise. Proposal 207 addresses hunter ethics, fair chase and helps "level the playing field" in the highly competitive hunting of Dall sheep. 207 cannot be successfully argued against on its merits, so some people have chosen to attack the process. "A Dall sheep can get away from a hunter but cannot get away from a super cub".

Fourteen percent of resident sheep hunters and 60-70 percent of guides accompanying non-resident sheep hunters own and use aircraft to spot sheep during the season, compared to 86 percent of resident sheep hunters that do not. The issue of aircraft abuse to spot sheep has been discussed since the 60s. The Boone and Crockett Club, Big Game Commercial Services Board and many members of the public support this regulation on its merits.

In my opinion, the Board followed all four criteria in the Joint Board Policy:

1. **Is it in the public's best interest**.... Yes. Since it benefits the majority of resident sheep hunters.
2. **Is there urgency in considering the issue**....yes. The Board has been under extreme pressure for about a decade to take a leadership role in addressing the competition between resident sheep hunters and guided non-resident hunters.
3. **Are current processes insufficient to bring the subject to the Board's attention**....This criterion can be debated but after a decade of the same narrowly focused proposals from the same few individuals, the Board was acting in the public's best interest by bringing these issues forward. We also convened the Sheep Working Group made up of all interested Advisory Committees from the 84 committees, the 10 Rural Advisory Councils, Alaska Sheep Foundation, Alaska Wildlife Alliance, APHA, AOC, SCI, AK Airman and five at large public members, 41 members in total. They met for six days over three weekends, and did not reach consensus on any significant

issue, including proposal 207. This was the largest public process ever convened by the Board or Department to address a wildlife issue.

4. **Will there be reasonable and adequate opportunity for the public to comment**....yes. Under the Joint Policy we are mandated to provide a minimum of 30 days' notice, and we always have.

In conclusion: I do not support this bill because the Joint Board Policy is adequate to protect the public process.

Thank you.