



THE STATE
of **ALASKA**
GOVERNOR MIKE DUNLEAVY

Department of Law

CIVIL DIVISION

P.O. Box 110300
Juneau, Alaska 99811
Main: 907.465.3600
Fax: 907.465.2520

June 23, 2023

The Honorable Nancy Dahlstrom
Lieutenant Governor
State of Alaska
P.O. Box 110015
Juneau, AK 99811-0015

Re: 5 AAC 84.270 - 5 AAC 92.550; Board of Game - Southcentral Region,
Board Meeting March 2023

Our file: 2022200301

Dear Lieutenant Governor Dahlstrom:

The Department of Law has reviewed regulations adopted by the Board of Game during its Southcentral Region meeting of March 17 - 22, 2023 against the statutory standards of the Administrative Procedure Act.

The regulations concern Title 5 of the Alaska Administrative Code, specifically 5 AAC 84.270 - 5 AAC 92.550, and relate to regulation of the use and taking of game including trapping seasons, hunting seasons, bag limits, methods and means, restricted areas, intensive management and predator control plans, and related departmental procedures.

The regulations are approved in part and disapproved in part under AS 44.62.060(b). The following regulation changes are disapproved as unconstitutional and lacking statutory authority and were therefore removed from the enclosed approved regulations:

1. Those portions of adopted changes to 5 AAC 85.045(a)(12) pertaining to establishment of an antlerless moose hunt in Unit 14(C), that portion known

as the Anchorage Management Area, in Kincaid Park, by drawing permit by bow and arrow, shotgun, or crossbow only; and

2. Adopted changes to 5 AAC 92.530(B)(i) that would limit moose hunting in Kincaid Park to persons with physical disabilities.

The disapproved sections were referred to in Board of Game proceedings as Proposal 203.¹ Through adoption of Proposal 203, the Board of Game sought to establish a moose hunt in Kincaid Park for persons with physical disabilities. Our conclusion is that the establishment of a hunt limited to persons with physical disabilities is unconstitutional because it violates the equal access clauses of Article VIII of the Alaska Constitution.² The equal access clauses prohibit the state from granting exclusive or special privileges to take fish and wildlife.³ Proposal 203 also violates the plain language of the common use clause⁴ and the attendant duty of the Board of Game to manage the wildlife resources of the state for all Alaskans.⁵ Additionally, the Board of Game lacks specific statutory authority to establish a moose hunt in Kincaid Park for persons with physical disabilities.⁶

The remainder of the adopted regulations are approved. This letter constitutes written approval under AS 44.62.060(b) and (c) that authorizes your office to file the enclosed regulations.

¹ See Alaska Board of Game, *Notice of Proposed Changes in the Regulations of the Alaska Board of Game*, Anchorage Daily News, December 19, 2022; Preliminary Actions on Proposals, Alaska Board of Game, Southcentral Region Meeting (March 17-22, 2023), https://www.adfg.alaska.gov/static/regulations/regprocess/gameboard/pdfs/2022-2023/sc/soa_3-24-23.pdf.

² *McDowell v. State*, 785 P.2d 1, 6 - 9 (Alaska 1989) (construing Article VIII, Section 3, 15, and 17 to prohibit the granting of exclusive or special privileges with respect to fish and game).

³ *Id.* at 6.

⁴ The common use clause provides: "Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use." Alaska Const. art. 8, § 3.

⁵ See *Owsichek v. State, Guide Licensing & Control Bd.*, 763 P.2d 488, 495 - 496 (Alaska 1988) (holding that common use clause prohibited grant of exclusive guide areas to hunting guides).

⁶ Compare AS 16.05.255(i) (allowing the Board of Game to establish annual big game hunts for Alaska resident children accompanied by resident family members).

We have made some technical corrections to conform the regulations in accordance with AS 44.62.125. The corrections are incorporated into the enclosed copy of the regulations, which are now 62 pages, rather than the 72 pages referred to in the adoption order.

The December 19, 2022 public notice and the May 18, 2023 adoption order both state that this action is not expected to require an increased appropriation. Therefore, a fiscal note under AS 44.62.195 is not required.

Sincerely,

TREG TAYLOR
ATTORNEY GENERAL

By: **Rebecca C. Polizzotto**
Rebecca C. Polizzotto
Chief Assistant Attorney General
Legislation, Regulations, and
Legislative Research Section

Digitally signed by
Rebecca C. Polizzotto
Date: 2023.06.23
09:31:12 -08'00'

CC w/enclosure: Doug Vincent-Lang, Commissioner
Department of Fish and Game

Benjamin Mulligan, Deputy Commissioner
Department of Fish and Game

Kristy Tibbles, Executive Director
Department of Fish and Game

Natalie Weber, Program Coordinator
Department of Fish and Game

Cheryl Brooking, Senior Assistant Attorney General
Department of Law