MEMORANDUM

State of Alaska
Department of Law

To: The Honorable Sean Parnell
Lieutenant Governor

Thru: Talis J. Colberg
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Subject: 05HUNT—Reconsideration of Initiative Application

You have asked us to reconsider our opinion of October 12, 2005, regarding this initiative. Specifically you inquire whether under *Pullen v. Ulmer,* 923 P.2d 54 (Alaska 1996) and *Alaska Action Center, Inc. v. Municipality of Anchorage,* 84 P.3d 989 (Alaska 2004), the initiative constitutes an appropriation and therefore is inappropriate for the ballot under art. XI, sec. 7, of the Alaska Constitution. Moreover, you inquire whether procedurally you may decertify an initiative at this time. We shall discuss each issue in turn.

I. Whether the 05Hunt Initiative is an Appropriation

A. Case Law

The Alaska Supreme Court has considered several cases involving the extent to which initiatives constituted an appropriation prohibited by art. XI, sec. 7 of the Alaska Constitution.[1] It is fair to say that the trend of the Court over the years and through the 1990s was to steadily expand the scope of what constitutes an appropriation—from money to property and finally to natural resource allocations.

The height of the court's expansion of the definition of appropriation in the initiative context was *Pullen v. Ulmer,* 923 P.2d 54 (Alaska 1996). There, the court concluded that an initiative that required the Board of Fisheries to reserve a

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[1] "The initiative shall not be used to dedicate revenues, make or repeal appropriations . . . ."

five percent salmon harvest priority for personal use and sport fisheries was an impermissible appropriation under art. XI, sec. 7 of the Alaska Constitution.

The Court first explained that it usually seeks to construe voter initiatives "so as to preserve them whenever possible." *Id.* at 58. Initiatives that seek to allocate public revenues and assets, however, "require careful consideration." *Id.*

The Court then considered the threshold issue of whether migratory salmon could be considered state assets subject only to legislative appropriation. The Court concluded that migratory salmon were indeed state assets and thus not subject to appropriation by initiative. *Id.* at 61. The Court based its holding in part on the fact that salmon is an important resource that attracts tourists and it forms the basis of an important sector of Alaska's economy. *Id.* at 59. The Court also relied on the state's public trust duty to manage natural resources under art. VIII of the Alaska Constitution. *Id.* at 60-61.

The Court then turned to the development of appropriation cases in the initiative context and explained that there are two basic reasons why art. XI, sec. 7 of the Alaska Constitution prohibits the use of the initiative to make an appropriation:

> From these [past] decisions two core objectives of the constitutional prohibition on the use of initiatives can be distilled. First, the prohibition was meant to prevent an electoral majority from bestowing state assets on itself. Second, the prohibition was designed to preserve to the legislature the power to make decisions concerning the allocation of state assets.

Id. at 63. The Court examined the salmon harvest priority initiative and concluded that it violated both objectives. The initiative violated the first objective because it was designed to appeal to the self-interest of personal and sport fishers. The initiative violated the second objective primarily because it reduced the discretion of the legislature to make allocation decisions among competing fishery demands. *Id.* at 63-64.

The next case of relevance is *Brooks v. Wright*, 971 P.2d 1025 (Alaska 1999). There, the Court considered a challenge to an initiative prohibiting wolf snares. The challengers did not contend, however, that the initiative constituted a prohibited appropriation. Rather, the challengers argued that the legislature has exclusive control

over wildlife management decisions under art. VII, secs. 2-4 of the Alaska Constitution.[2] The Court concluded that the legislature "does *not* have exclusive law-making powers over natural resources issues merely because of the state's management role over wildlife management set forth in article VIII of the Alaska Constitution. . . ." *Id.* at 1033. In so holding, the Court acknowledged that the appropriation argument was not before it. *Id.* at 1028 n. 12. Nevertheless, the Court suggested there is a distinction between the permissible management of wildlife resources and the impermissible allocation of wildlife resources. *Id.* at 1030 n. 31 and accompanying text.

The next case of relevance is *Alaska Action Center, Inc. v. Municipality of Anchorage,* 84 P.3d 989 (Alaska 2004). In this case, an initiative sought to dedicate a certain piece of land in Girdwood as parkland in order to prevent the Municipality of Anchorage from using it to develop as a golf course. The Court evaluated the initiative under the two objectives articulated in *Pullen*. It first concluded that there was nothing in the initiative that constituted a "give-away." *Id.* at 994. Thus, in that respect the initiative did not resemble an appropriation. But, the initiative did allocate a resource among competing demands—it took land away from the developers and allocated it for parkland. Voters are not permitted to make such decisions through the initiative. *Alaska Action Center* confirms that only one of the *Pullen* objectives must be violated in order for the initiative to be struck down as an appropriation.

With these cases in mind, we turn to our analysis of the 05Hunt Initiative.

B. Analysis

As we set forth in our opinion of October 12, 2005, the initiative amends AS 16.05.783 to accomplish the following:

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[2] Sec. 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.

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

Sec. 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.

First, the initiative adds grizzly bears to the list of animals that may not be shot on the same day a shooter is airborne.

Second, the initiative changes the nature of the existing predator control program as follows:

(1) it limits the program to wolves and grizzly bears;

(2) it requires the Commissioner of the Department of Fish and Game to make written findings based on adequate data that a "biological emergency" exists and that there is no feasible solution other than airborne control to prevent the biological emergency. "Biological emergency" is defined to mean where a wolf or grizzly bear population in a specific area is depleting a prey population to such point that if not corrected will cause an irreversible decline in the prey population that it is not likely to recover without implementing wolf or grizzly bear control;

(3) participation in the predator program is limited only to employees of the Department of Fish and Game;

(4) the predator program must be limited to the specific area where the biological emergency exists;

(5) the predator program can only remove the minimum number of wolves or grizzly bears necessary to eliminate the biological emergency; and

(6) other than as set forth above, the bill repeals the Board of Game's powers relating to predator control programs that are currently set forth in AS 16.05.783.

Third, the initiative eliminates the exception that permitted an employee of the Department of Fish and Game to shoot a wolf, wolverine, fox or lynx on the same day the employee was airborne if done as part of a game management program. The initiative also deletes the definition of game management program.

The first issue to consider is whether the wildlife resources that are the subjects of the 05Hunt initiative are state assets subject to the prohibition against appropriations in initiatives. The initiative directly concerns wolves and grizzly bears (wolverines are also

a subject but to a lesser extent). Under *Pullen*, salmon was considered a state asset because salmon attract tourists to the state and form the basis of the fishing industry. Wolves and grizzly bears also attract tourists to the state. Wolves and grizzly bears also form the basis of the guiding industry, which is economically important in certain areas of the state. Moreover, wolves and grizzly bears are certainly subject to that public trust duty. In sum, wolves and grizzly bears are arguably state assets under *Pullen*.

We also observe that indirect subjects of the initiative include wildlife resources that are preyed upon by wolves and grizzly bears. These include moose, caribou and Dall sheep. We think the reasons set forth above regarding wolves and grizzly bears hold true for these other wildlife resources, and thus would also be considered state assets under *Pullen.*

The next issue is whether the initiative constitutes an appropriation. First, we must address whether the mere fact that the subject of an initiative is a wildlife form of state asset necessarily means that the initiative is an appropriation. We think the answer is no. Read together, the *Pullen* and *Brooks* cases must stand for the notion that wildlife management does not necessarily constitute an appropriation. Indeed, if the Court believed that *Pullen* stood for the notion that all wildlife management constitutes an allocation of wildlife resources, then its decision in *Brooks* would have essentially been pointless. Thus, since wildlife management is not a per se allocation, we must evaluate the 05 Hunt initiative under the objectives set forth in *Pullen.*

The first *Pullen* objective evaluates the extent to which the initiative is a "give-away" of state assets. In *Pullen*, the initiative gave a priority of the salmon harvest to certain types of fishers. In other words it tempted those fishers to vote for the initiative, and thus confer a benefit on them. The initiative in 05Hunt does not appear to be a give-away of state assets. No priority is reserved, and no class of persons appears to be given a state asset. Rather, the purpose of the initiative appears to be the management of wildlife resources.

The second *Pullen* objective evaluates the extent to which the initiative allocates state resources. Of importance is whether the initiative decreases the legislature's discretion to allocate resources among competing demands. The initiative in 05Hunt does not appear to make any allocation decision, let alone decrease the legislature's discretion to allocate wolf and grizzly bear resources. Its primary purpose appears to be related to the management of wolves and grizzly bears. The legislature retains full discretion to allocate such resources amongst the competing demands of various classes of persons.

The court's decision in *Alaska Action Center* does not change this analysis. There, the initiative took a resource (land) and allocated it between competing demands (parkland v. golf course). 05Hunt does not allocate a resource —it only manages a resource.

A final point must be considered, however, before we may conclude that the initiative is not an appropriation. We understand that an argument has been made that a consequence of limitations on the manner in which predatory species are harvested, as the initiative requires, is that non-consumptive use of both predatory and non-predatory species will be favored. This view contends that such favoritism rises to the level of an appropriation of consumptive uses (i.e., hunting) of both predatory and non-predatory species to non-consumptive uses (such as tourism viewing of wildlife). But, this consequence is only an indirect result of the initiative. We do not believe that a court will find that an indirect consequence of an initiative can rise to the level of an appropriation—though we recognize that such arguments can be made.

Accordingly, we conclude that the initiative is not an appropriation.

II. Whether the Lieutenant Governor May Decertify an Initiative After Signatures Have Been Collected

Upon submission of an application for an initiative, the lieutenant governor is required to review the application to ensure, among other things, that the application is "substantially in the required form." AS 15.45.080. This office typically provides advice to the lieutenant governor's office, upon request, regarding the form of the application.

While there are exceptions to the rule, we usually limit our review of the constitutional issues in an initiative to the prohibited subjects identified in art. XI, sec. 7 of the Alaska Constitution. This is because the Alaska Supreme Court has held that it will not review any other constitutional issue until after the initiative has been approved

by the voters. *Brooks,* 971 P.2d at 1027.[3] Thus, we are of the view that at the application stage, the lieutenant governor's statutory authority to reject an initiative application on constitutional grounds is essentially limited to the prohibited subjects identified in art. XI, sec. 7.

The next question is whether the lieutenant governor has the authority to reject an initiative application on constitutional grounds following the collection of signatures. We believe the answer is no. As noted, the Alaska Supreme Court has held that the courts have only limited power to consider constitutional issues in initiatives prior to election. Thus, the mere fact that an initiative may have a constitutional issue in it is not dispositive.

The specific question though is whether, upon further review, if it is determined that a previously certified initiative violates a prohibited subject in art. XI, sec. 7, may the lieutenant governor decertify the initiative. We think the answer is no.

First, under the Alaska Constitution, the lieutenant governor is conferred only limited powers, as opposed to the governor in whom the executive power of the State of Alaska is vested. art. III, sec. 1, Alaska Constitution. The lieutenant governor's powers are principally prescribed in statute: "He shall perform such duties as may be prescribed by law and as may be delegated to him by the governor." art. III, sec. 7. The office of the lieutenant governor is similar then to other state agencies whose powers and duties are described by and limited by state statute.

With respect to the initiative process, the Alaska Constitution does confer certain duties upon the lieutenant governor. The lieutenant governor accepts filings in art. XI, secs. 2 and 3. The lieutenant governor determines whether initiative applications are in the proper form in art. XI, sec. 2. The lieutenant governor prepares ballot titles and initiative summaries in art. XI, sec. 4. The Alaska Supreme Court has characterized these

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[3] The Court has also said that an initiative application may be rejected on grounds other than the prohibited subjects in art. XI, sec. 7, if it is utterly unconstitutional, such as an initiative that mandates racial segregation in schools. *Alaska Action Center v. Municipality of Anchorage,* 84 P.3d 989 (Alaska 2004). Such an initiative would be extraordinary and 05Hunt does not come close to resembling such an initiative. Additionally, the Court has held that an initiative application may be rejected on grounds that it seeks to amend the constitution. *Starr v. Hagglund,* 374 P.2d 316, 317 n.2 (Alaska 1962).

duties as "extensive ministerial functions." *Warren v. Boucher*, 543 P.2d 731, 734 (Alaska 1975). The legislature has implemented these duties through AS 15.45.

Second, neither the Alaska Constitution nor AS 15.45 provides a mechanism for the lieutenant governor to reject the filing of a petition on constitutional grounds following the collection of signatures. Under both the constitution and AS 15.45, a determination as to whether an initiative is in the proper form can happen only at the application stage. Art. XI, sec. 2, Alaska Constitution; AS 15.45.080(2). Once an application is certified there is no basis either in constitution or statute to decertify. Following the collection of signatures, the lieutenant governor may only review the petition to determine whether it was properly filed. AS 15.45.150, AS 15.45.160.

As discussed above, we do not believe that 05Hunt was improperly certified. This view naturally influences our review of the procedural question posed here. While we do not think there is either a constitutional or a statutory basis to decertify at this stage in the procedure, we nevertheless cannot categorically rule out the possibility that some situation could arise post-certification where it may be necessary to consider decertification of a petition on constitutional or other grounds. But we do not believe this situation presents that circumstance.

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