

MEMORANDUM

State of Alaska Department of Law

TO: Hon. Carl L. Rosier
Commissioner
Dept. of Fish and Game

DATE: May 7, 1992

FILE NO: 663-92-0051

TELEPHONE NO: 269-5251

SUBJECT: Access fees for hunting on
agricultural lands

FROM: Brian D. Bjorkquist
Assistant Attorney General
Natural Resources, Anchorage

You requested our opinion regarding whether farmers who have obtained an agricultural interest in state land may limit or lease public access for hunting. Your chief concern relates to the increasing trend among farmers near Delta Junction to charge access fees to the public for hunting on their agricultural rights land. At the present rate, it may soon be impossible for the general public to hunt in this area without paying a surcharge to the holder of the agricultural rights. You also questioned whether the analysis would differ as to lands placed in the Conservation Reserve Program which are, by definition, not being actively farmed.¹

In our view, as discussed in more detail below, the owner of the agricultural interests in land acquired from the State may limit access to those lands for hunting and other purposes. The owner may allow public access, and charge a fee therefor, if the hunting use of the land is not inconsistent with or contrary to the agricultural use of the land. While subject to challenge by the owner, hunting uses where the land is not actively farmed may violate the agricultural use restrictions. Resolution of the issue will depend upon the facts involved in each case. An abatement action initiated by the Director of the Division of Land could determine whether such hunting use is a violation of the agricultural use restrictions.

¹ This opinion addresses the extent to which agricultural use restrictions prohibit or limit hunting activities. The owner of the agricultural interests in land must also comply with any other requirements or restrictions imposed by law, such as obtaining guild, transporter, and business licenses where appropriate.

I. The holder of agricultural rights to land may control access to the land for hunting and other purposes.

The owner of the agricultural interests in land obtained from the State of Alaska has complete possession and control over the surface estate. AS 38.05.321(a); 11 AAC 67.162(a). The owner, generally, may prohibit the public from entering onto the land for hunting or other purposes.

Statutes, regulations, and the land sale contract establish the farmer's rights to possession and control over the surface estate of agricultural rights lands. AS 38.05.321(a) provides:

The sale, lease or other disposal of state land classified as agricultural land transfers only rights for agricultural purposes, and all other interests in the land remain with the state unless otherwise required by law.

While all nonagricultural interests remain with the state, the right to possess and control access to the surface transfers to the farmer. 11 AAC 67.162 (a)² provides, in part, that the conveyance of the agricultural interests in land "includes the right to exclusive possession." The land sale contract utilized in the Delta I Project sales of agricultural rights land likewise provides that the state will convey the right to exclusive possession.³ "Possession of the land" has been defined by common law as the actual control by physical occupation, and the holding and exercise of dominion over it. 73 C.J.S. Property § 29 (1983). With this power of exclusive possession, control, and dominion, the owner of the agricultural interests in land generally may control and restrict access to the same extent as an owner of a fee simple estate.

The state, with limited exceptions,⁴ did not retain any contractual right to

² 11 AAC 67.162 was previously designated 11 AAC 57.020.

³ Paragraph (7) provides: "The conveyance to be issued shall include the right to exclusive possession."

⁴ The state retained the right to enter the land during reasonable business hours for the purpose of inspection. 11 AAC 67.190. Further, the state retained the right of re-entry in the event of breach and termination of the land sale contract. Delta I Project contract for sale of the agricultural interest in State land, ¶ 20, 21.

enter the agricultural rights land it sold in the Delta I project.⁵ Nor did it reserve rights for the general public to access these lands for hunting or other purposes.⁶ Because the state did not retain public access rights, the owner of the agricultural interest may, if he or she chooses, limit or prohibit public access for hunting.

II. The agricultural rights restrictions probably allow the farmer to permit public hunting, with or without a hunting access fees.

Hunting, within limitations, is probably a permitted use after the state conveys the agricultural interest in land. The scope of allowable uses of such state lands is primarily established by regulations adopted under the authority of AS 38.05.069 and AS 38.05.321.

Any use or development “which is inconsistent with or contrary to [11 AAC 67.162(b)] is a violation of the terms of conveyance.” 11 AAC 67.165(a).⁷ This violation would constitute (1) a breach of a condition subsequent, (2) a breach of a covenant, and (3) a breach in the form of a trespass upon the remaining nonagricultural interest of the state in the land. 11 AAC 67.165(a).

11 AAC 67.162(b) allows the grantee of agricultural interests to:

(3) use land only for

(A) the production of plants and animals useful to man, including, without limitation, forage and sod crops; grains and feed crops; fruits, trees, and vegetables; dairy animals and products; and livestock; all such production must be consistent with the farm conservation plan, but without the right to construct fixed, permanent, or immovable structures except as specified in (C) of this

⁵ State officers and agents may still enter onto agricultural rights lands under state police powers to the same extent that entry is permitted onto other privately owned land.

⁶ A conveyance of the agricultural interest in State land should include a reservation of a public easement to and along navigable waterways pursuant to AS 38.05.127, or other specifically reserved rights for public access. These possible reserved public rights to access can be discovered through review of individual sale contracts, patents, or plats. We assume your opinion request does not relate to possible enforcement of such public easements.

⁷ 11 AAC 67.165 was previously designated 11 AAC 57.030.

paragraph;

(B) the maintenance of the land conveyed in its existing natural or undeveloped state, unless otherwise required by a farm development plan;

(C) the construction of fixed, permanent, or immovable structures reasonably required for or related to agricultural production, including that farmstead normally required for yards, driveways, parking, barns, and outbuildings, and similar uses, to the extent permitted by the director under sec. 187 of this chapter and authorized and depicted in the farm conservation plan;

(D) the subdivision, for agricultural purposes only, of the land under the farm conservation plan and the requirements of this chapter;

(E) the use of gravel reasonably required for agricultural production only on the parcel conveyed, as authorized and depicted in the farm conservation plan;

(F) removal and disposition of timber by sale, gift, or other means in order to bring agricultural land into production, as authorized and depicted in the farm conservation plan and in accordance with accepted principles of land management and conservation.

There are several issues to consider in determining whether a hunting activity is permitted.

a. Does charging a hunting access fee violate agricultural use restrictions? Your primary concern relates to land owners charging hunting access fees to the public. Whether the owner charges a fee for public access to the land is not a relevant factor in determining allowable agricultural uses. Restrictions on the use of the land extend to both profit and nonprofit activities. To the extent hunting might be an improper use of the agricultural interest in land, the land could be closed to all hunting by both the owner and his or her invitees.

b. Is making land suitable for hunting a permissible agricultural use? In our view, the permissible use of land for “the production of . . . animals useful to man” does not extend to making land useful for hunting. Although wildlife may benefit from

consumption of agricultural products, the wildlife is not “produced” by the use of the land, but rather is lured to the land by the agricultural use (e.g., crops on the land) or by the land remaining or returning to its natural state. Inactivity that encourages wildlife to enter the land to be hunted is not an agricultural use of the land. Bower v. Edwards County Appraisal Dist., 697 S.W.2d 528, 529 Tex. Civ App. 1985) (interpreting a constitutional tax exemption for land under agricultural use).⁸

On the other hand, the permissible use of agricultural land extends to “the maintenance of the land conveyed in its existing natural or undeveloped state, unless otherwise required by a farm development plan.” 11 AAC 67.162(b)(3)(B). To the extent the farm development plan allows, the owner may retain the land in its natural condition, which may make it conducive to hunting activities.

c. Is hunting inconsistent with or contrary to agricultural uses?

Hunting or other uses are permitted if they are not “inconsistent with or contrary to” the agricultural uses.⁹ 11 AAC 67.165 (a). “Inconsistent” is defined as “mutually repugnant or contradictory; contrary, the one to the other, so that both cannot stand, but the acceptance or establishment of the one implies the abrogation or abandonment of the other.” Black’s Law Dictionary 689 (5th ed. 1979). “Contrary” is defined as “against, opposed or in opposition to; in conflict with.” Black’s Law Dictionary 296 (5th ed. 1979). Thus, activities that are compatible with agricultural uses can be permitted.

An agricultural use restriction has been interpreted to allow secondary and incidental use of land for hunting where such hunting does not conflict with the agricultural use of the land. San Marcos Consol. Indep. Sch. Dist. v. Nance, 505 S.W.2d 694, 695 (Tex. 1973). In our view, a similar rule should apply to determine the allowable uses of the agricultural interests in land obtained from the state. One of the state’s purposes in selling the agricultural interests in land is to prevent the land from being transformed into other development or commercial uses, such as residential subdivisions, shopping centers, commercial warehouses, etc. 1978 Inf. Op. Att’y Gen. (Dec. 13; Meacham). Secondary or incidental uses of land that do not substantially impair such agricultural use should be permitted.

⁸ A permissible use for “the production of . . . animals useful to man” is more likely to be found if the owner undertakes game ranching activities wherein domestic wildlife is raised for public viewing, hunting, meat production, or other purposes.

⁹ The farm conservation plan is one primary source in determining whether an owner’s actions are contrary to the agricultural use of the land.

For example, the owner of the agricultural interest, and his or her guests, should be permitted to use the land for recreational purposes such as hunting, hiking, skiing, fishing, and other uses so long as substantial impairment of the agricultural use does not arise. These uses are traditionally undertaken in conjunction with American farming operations. The owner, however, should be prohibited from constructing hunting lodges or cabins, or hunting and fishing facilities, or from undertaking other uses that would impair the agricultural use of the land.

The degree to which a nonagricultural use affects possible agricultural uses also determines whether a violation of the agricultural use occurs. For example, a temporary, nonconforming use is less “inconsistent with or contrary to” the agricultural uses of the land than is a permanent, nonconforming use. A temporary, incidental use allows for a quick return to agricultural uses whereas a permanent, exclusive use does not.

In our view, hunting uses in conjunction with active farming operations generally should be permitted. The ongoing, active farming operation evidences that the hunting activity is compatible with the farming operation. Hunting uses where no active farming is undertaken, however, may be inconsistent with the agricultural use restrictions. The determination of this question will depend upon the facts involved in each individual case (e.g., What actions is the owner undertaking to promote the hunting use? Will the land be temporarily or permanently removed from an active agricultural use? Will the activity make it more difficult to return to an agricultural use?)

If a hunting or other use is deemed inconsistent with or contrary to the agricultural use and the farm development plan, the Director of the Division of Land could initiate an enforcement action to abate the improper use under 11 AAC 67.165(b), (c), and (d).

Your memo does not describe the hunting uses of concern in the Delta area or whether they constitute the primary use of the land to the exclusion of agricultural uses. You do mention that certain farmers participate in the Conservation Reserve Program (“CRP”), and question whether this alters the analysis.

d. Is participation in the Conservation Reserve Program inconsistent with or contrary to agricultural uses? A strong case can be made that participation in CRP is inconsistent with and contrary to agricultural uses. CRP provides federal incentives to keep land out of production. 7 C.F.R. S 704.01—7 C.F.R. S 704.29 (1987); In re George L. Way, 120 B.R. 81, 82 (Bankr. S. D. Tex. 1990). Participation in CRP

precludes those lands subject to the CRP contract from being used for the production of plants or animals useful to man. 7 C.F.R. § 704.11(a) (1987). CRP also prohibits the owner from increasing the acreage of cropland on the land during the term of the CRP contract. *Id.* On the other hand, land owners could argue that participation in CRP is compatible with agricultural uses because it promotes soil conservation and is temporary in duration. Land owners could also argue that participation in CRP is similar to the use, permissible under 11 AAC 67.162(b) (2), of maintaining the land in its existing natural or undeveloped state. Resolution of whether participation in CRP violates agricultural use restrictions is uncertain and could be tested by the Director of the Division of Lands taking action to abate the activity under 11 AAC 67.165.

SUMMARY

The owner of the agricultural interests to land acquired from the state may limit access to those lands for hunting and other purposes. The owner may allow public access, and charge a fee therefor, if the hunting use of the land is not inconsistent with or contrary to the agricultural use of the land. Hunting uses where the land is not otherwise actively used for agricultural purposes and participation in the Conservation Reserve Program ("CRP") may violate the agricultural use restrictions. Resolution of the issue will depend upon the facts involved in each case. An abatement action initiated by the Director of the Division of Land could determine whether such hunting uses or participation in CRP violate the agricultural use restrictions.

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