

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

DEFENDERS OF WILDLIFE and)
ALASKA WILDLIFE ALLIANCE,)

Plaintiffs,)

RONALD T. WEST,)

Intervenor/Plaintiff,)

v.)

STATE OF ALASKA, BOARD OF)
GAME, and COMMISSIONER, STATE)
OF ALASKA DEPARTMENT OF FISH)
AND GAME,)

Defendants.)

Case No. 3AN-06-10956 CI

FRIENDS OF ANIMALS, INC. and)
THOMAS CLASSEN,)

Plaintiffs,)

v.)

STATE OF ALASKA, DEPARTMENT)
OF FISH AND GAME, BOARD OF)
GAME AND John and Jane Does 1-50,)

Defendants.)

Case No. 3AN-06-13087 CI

TEMPORARY RESTRAINING ORDER

The Court heard oral argument of the two motions for a temporary
restraining order on 30 March 2007. Friends of Animals, Inc. ("Friends") clarified
that it was not seeking a TRO that would suspend the entire predator control

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program. It sought a preliminary injunction regarding that program which will be addressed at a later time. Thus, Friends only sought a TRO that would require the State of Alaska, Alaska Department of Fish and Game ("Department") and the Board of Game ("Board") "to desist from using radio frequencies from radio-collared wolves for the purposes of any wolf control program, and to desist from implementing any bounty program for purposes of wolf control."¹ Defenders of Wildlife and Alaska Wildlife Alliance (collectively "Defenders") sought a TRO that would prohibit the State from making any payments to persons engaged in the wolf control program pursuant to a recently announced program described by the Commissioner of the Department as an "incentive program."²

The Court finds that Friends has not shown that use of radio telemetry to locate wolves in order to kill them as part of a wolf control program is a violation of any law or regulation. Furthermore, there is little if any evidence that the State or its agents or participants in the wolf control program are actually using radio telemetry in this way. To the contrary, the Department pointed to a protocol that prohibits such use.³ *The request for the TRO on this topic is DENIED.*

¹ Friends' Motion and Memorandum for a Temporary Restraining Order and Preliminary Injunction at 5.

² The Commissioner described the incentive program in his news release of 21 March 2007. Defenders' Exhibit 32 at 1-2.

³ Affidavit of Matthew H. Robus (29 March 2007), Exhibit 2 (Wolf Control Protocol for the Upper Yukon/Tanana Predation Control Area (March 23 2007)).

Prior to 1984 the Legislature allowed the State to pay bounties for the killing of wolves.⁴ In 1984 those statutory provisions were repealed.⁵ Friends and Defenders argue that the implication of this repeal is that the payment of bounties is now prohibited.⁶ The Department denies that the repeal constitutes a prohibition as that would make the narrower prohibition of AS 16.05.210 superfluous.

The authority of the Board to issue regulations is set forth in AS 16.05.255. Prior to 1984, subsection .255(a)(6) allowed the Board to issue regulations for "investigating and determining the extent and effect of predation and competition among game in the state, exercising control measures considered necessary to the resources of the state and designating game management units or parts of game management units in which bounties for predatory animals shall be paid."

⁴ Former AS 16.35.050-.130.

⁵ § 29, ch. 132, SLA 1984.

⁶ They make a second argument as well. They point to the narrow prohibition of the payments of bounties to "[a]n employee or special hunter of the department" contained in AS 16.05.210. This statute was enacted in 1959 and was not repealed in 1984. The Court's finding that the Department exceeded its authority by the creation of the incentive program means the Court need not address the question of whether the permittees authorized to kill wolves and receive the cash payment from the incentive program were "special hunters" and as such are barred from the receipt of a bounty.

In 1983 Governor Bill Sheffield proposed House Bill 404. In his 6 May 1983 transmittal letter the governor explained that section 10 of the proposed bill

would amend existing law to reflect the true function of the Board of Game. Despite the current language of AS 16.05.255(a)(6), the board does not adopt regulations regarding investigation of predators, which is an administrative function of the department. The board does, however establish methods and means and harvest levels for the taking of predators or other competitors through regulations.⁷

Governor Sheffield transmitted a sponsor's substitute to the Legislature on 17 January 1984.⁸ The only difference to the proposal for AS 16.05.255(a)(6) was the addition of the word "means."⁹ The Governor's proposal passed the legislature. The new and current AS 16.05.255(a)(6) allows the Board to adopt regulations for "methods, means, and harvest levels necessary to control predation and competition among game in the state[.]"¹⁰ In this transmittal letter Governor Sheffield reiterated the meaning of the change to this subsection that he had described in the May transmittal letter. He also reiterated the impact of the repeal of the statutory section that authorized the payment of certain bounties:

⁷ 1983 House Journal 1213.

⁸ Governor Bill Sheffield's 17 Jan. 1984 letter to Speaker of the House Joe Hayes (found in House Judiciary Committee file on H.B. 404, 1983-84, microfiche no. 2450).

⁹ *Id.* at 1.

¹⁰ § 10, ch. 132, SLA 1984.

AS 16.35.010—16.35.180. These sections relate to bounties which are no longer paid. The bounties on seals are in conflict with the Marine Mammal Protection Act of 1972, which preempted these state laws. In addition, AS 16.05.255 provides that the Board of Game may establish bounties through the adoption of regulations. The remainder [of] these sections pertain to employment of trappers and hunters for predator control, and have become obsolete.¹¹

With these legislative changes the respective authorities of the Department and the Board concerning predator control programs in general, and bounties in particular, were delineated. The Board, and not the Department, has the authority to issue regulations concerning bounties.

The Department argues that the incentive program is not a bounty.

Furthermore, it argues it is authorized (through its commissioner) to create the incentive program for predator control by virtue of AS 16.05.050(a)(1) and (5).

Those provisions permit the commissioner

(1) through the appropriate state agency and under the provisions of AS 36.30 (State Procurement Code), to acquire by gift, purchase, or lease, or other lawful means, land, buildings, water, rights-of-way, or other necessary or proper real or personal property when the acquisition is in the interest of furthering an objective or purpose of the department and the state;

....

(5) to take, capture, propagate, transport, buy, sell, or exchange fish or game or eggs for propagating, scientific, public safety, or stocking purposes[.]

¹¹ Sponsor Substitute for House Bill 404, Section-by-Section Analysis at 5, accompanying Governor Bill Sheffield's 17 Jan. 1984 letter to Speaker of the House Joe Hayes (found in House Judiciary Committee file on H.B. 404, 1983-84, microfiche no. 2450). 1983 House Journal 1217.

The Court disagrees with this argument. These general authorizations cannot be used to thwart the intent of the Legislature that the authority of the Department and Board, when it comes to predator control programs, do not overlap. The payment of money for each wolf killed by a permittee is a bounty pure and simple. The fact that a limited set of individuals is eligible for the payment does not mean it is not a bounty. The fact that a smaller set of individuals than had been eligible under the statutes repealed in 1984 does not mean the payment is not a bounty. The fact that the payment is described as a partial reimbursement for the higher than normal cost of airplane fuel this season does not change the fact that the payment has all the earmarks of what is commonly understood to be a bounty—a payment made to persons who perform a desired service.¹² It certainly shares the attributes of what had been described as a bounty by the pre-1984 statutory provisions. The Department of Fish and Game exceeded its statutory authority when it commenced the incentive program announced 21 March 2007.

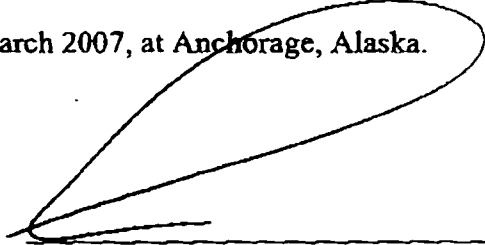
IT IS HEREBY ORDERED THAT the Department of Fish and Game shall cease the payment of money, whether described as an incentive or a bounty, to permittees of its wolf control program. The Department shall take all

¹² Black's Law Dictionary (5th ed. 1979) defines bounty in part as "A gratuity, or an unusual or additional benefit conferred upon, or compensation paid to, a class of persons. A premium given or offered to enlisted men to induce enlistment into public service. Bounty is the appropriate term where services or action of many persons are desired, and each who acts upon the offer may entitle himself to the promised gratuity (e.g. killing of dangerous animals)."

reasonable actions to notify permittees, applicants for the permit, and others that the incentive program has been ended.

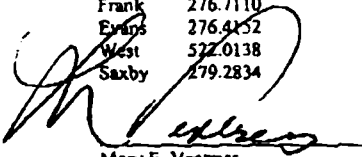
This temporary restraining order is effective at noon on 30 March 2007. It shall remain in effect until further order of the Court. By 6 April 2007 the parties shall provide the Court with status reports indicating the need for further evidentiary hearings concerning the TRO or the motions for a preliminary injunction.

DONE this 30th day of March 2007, at Anchorage, Alaska.


William F. Morse
Superior Court Judge

I certify that on 30 March 2007
a copy of the above was faxed to
each of the following at their
addresses of record:

Frank 276.7110
Evans 276.4152
West 522.0138
Saxby 279.2834


Mary E. Ventress
Judicial Assistant

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