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

ORDER

Defenders of Wildlife's Motion for Partial Summary Judgment on Count VII-Payment of Bounties

Cross-Motion Regarding Defenders of Wildlife's Motion for Partial Summary Judgment on Court VII- Payment of Bounties

State's First Motion for Partial Summary Judgment

Friends of Animal's Cross Motion for Summary Judgment

Intervenor's Cross Motion for Partial Summary Judgment

Defender's of Wildlife Cross Motion for Summary Judgment

State's Cross-Motion Regarding Summary Judgment on Defenders of Wildlife, et al's , Counts IV, V and VI; on Friends of Animals, et al's Counts II, IV, and V and on Intervenor's Corresponding Counts

Motion to Compel

Intervenor's Motion to compel as to Friends of Animals

I. Introduction.

This case involves four advocacy groups and several individuals who have challenged various aspects of the State of Alaska's policies and practices concerning the management of certain animals that prey on other animals, in particular, the management of wolves that prey on moose. Defenders of Wildlife, Alaska Wildlife Alliance, and Sierra Club (collectively "Defenders") sued the State in 3AN-06-13087 CI. Ronald T. West (West) later intervened. Friends of Animals, Inc. and Thomas Classen (collectively "Friends") sued the State in 3AN-06-13087 CI. The two cases were consolidated. Many of the challenges made by the three sets of parties overlap. In West's case, he has adopted many of the other parties' challenges and added his own unique challenges. There are some challenges or arguments made by one party that another party disavows.

Defenders filed a motion for partial summary judgment on the counts of its complaint that involve the State's recent decision to pay a bounty for the killing of wolves. This motion followed an earlier motion for a temporary restraining order which the Court granted. The State filed a motion for partial summary judgment that addresses selected counts from the three complaints. All parties filed cross-motions addressing various counts and arguments. The private parties occasionally joined another party's motion or filed a response to another party's motion even though the original motion was directed at the State. The Court heard oral argument on 20 September 2007. Because of the number of motions and their overlapping assertions, the Court will address them by subject matter, rather than individual motion.

II. The Payment of Bounties.[1]

A. What entity, if any, may authorize a bounty?

On 30 March 2007 the Court issued a temporary restraining order (TRO) that set the context for Defenders' present motion for partial summary judgment. Defenders disagree with the Court's statutory interpretation en route to its determination of whether particular governmental entities are authorized to institute a bounty for the killing of wolves as part of a predator control program. In

[1] This topic was raised in Defenders' Motion for Partial Summary Judgment on Count VII--Payment of Bounties.

order to understand Defenders' current argument, the Court sets forth the pertinent portion of the TRO decision.[2]

> Prior to 1984 the Legislature allowed the State to pay bounties for the killing of wolves.[3] In 1984 those statutory provisions were repealed.[4] Friends and Defenders argue that the implication of this repeal is that the payment of bounties is now prohibited.[5] The Department denies that the repeal constitutes a prohibition as that would make the narrower prohibition of AS 16.05.210 superfluous.
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> The authority of the Board [of Game] 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."
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> 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
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> > would amend existing law to reflect the true function of the Board of Game. Despite the current language of

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2 The Court has omitted portions of the TRO decision and many footnotes.

3 Former AS 16.35.050-.130.

4 § 29, ch. 132, SLA 1984.

5 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.

> 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.[6]

Governor Sheffield transmitted a sponsor's substitute to the Legislature on 17 January 1984.[7] The only difference to the proposal for AS 16.05.255(a)(6) was the addition of the word "means."[8] 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[.]"[9] 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:

> 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.[10]

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6 1983 House Journal 1213.

7 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).

8 *Id.* at 1.

9 § 10, ch. 132, SLA 1984.

10 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.

With these legislative changes the respective authorities of the [Alaska] Department [of Fish and Game] 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;
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> ....
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> (5) to take, capture, propagate, transport, buy, sell, or exchange fish or game or eggs for propagating, scientific, public safety, or stocking purposes[.]

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.[11] 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 reasonable actions to notify permittees, applicants for the permit, and others that the incentive program has been ended.[12]

After the Court issued the TRO Defenders and the State have examined more fully the historical changes to various statutes concerning bounties since prior to statehood. They differ over the significance of this history for the construction of the current statutes. Defenders agree with the Court's conclusion that the Department cannot institute a bounty program, but argue that the Board lacks that authority as well. The State argues that both the Board and the Department have the authority to create programs that use bounties.[13] Finally, these two parties ask the Court to construe the meaning of the term "special

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[11] 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)."

[12] Order of 20 March 2007 at 4-6.

[13] The State continues to argue that this program did not utilize bounties, but instead financial incentives. The Court will not revisit that aspect of its TRO decision.

hunters" in AS 16.05.210, a task that the Court sidestepped when it issued the TRO.[14]

Prior to statehood Alaska's territorial statutes contained a detailed system for the payment of bounties on various animals, including wolves.[15] To suppress predatory animals the Governor could "employ not to exceed two expert hunters and trappers who ...will be hereafter be referred to as leaders."[16] The Governor could appoint up to four "assistants" for the leaders.[17] Leaders were to be paid a salary; the Governor had the discretion whether or not to pay the assistants.[18] Alaska residents were eligible for a bounty for each wolf killed for which proof was presented to an agent of the Alaska Game Commission.[19] However, no wolf bounty could be paid to any "salaried employee of the Alaska Game Commission, The National Park Service and the Forest Service."[20]

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14 *See* footnote 5, above.

15 *See* Alaska Compiled Laws Annotated (ACLA) § 33-3-101 through § 33-3-134 (1949) and ACLA Cumulative Supplement (1959). These are attached to Defenders' Memorandum of Law in Support of Motion for Partial Summary Judgment on Count VII-Payment of Bounties (Defenders Bounty Memo), Exhibit 41.

16 ACLA § 33-3-101.

17 ACLA § 33-3-102.

18 ACLA § 33-3-103.

19 ACLA §§ 33-3-111 and 33-3-115.

20 ACLA § 33-3-119.

In 1957 the Territory established the Alaska Department of Fish and Game and the office of the Alaska Fish and Game Commissioner.[21] The existing Alaska Game Commission was given authority to "exercise control measures where predators are found to be a menace to fish and game resources of the Territory."[22] The Commission could promulgate regulations to implement and complement the fish and game statutes.[23] But the 1957 Act made it "unlawful for any employee or special hunter of the Department to receive or attempt to receive any bounty for the killing of any predator, or to transfer the scalp or other part or any predator to another person for the purpose of collecting a bounty."[24]

Shortly after statehood the legislature created a Department of Fish and Game and replaced the Alaska Game Commission with a joint Board of Fish and Game (joint board).[25] The joint board was given "rule-making powers, as hereinafter provided, but shall not have administrative, budgeting, or fiscal powers, and such administrative, budgeting and fiscal powers shall reside in the

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21 L 1957, ch. 63, codified at §§ 39-1-1 through 39-9-22, ch. 9 ACLA (1958 Cum. Suppl.)). This codification is found at Defenders' Bounty Memo, Ex. 42.

22 ACLA § 39-9-10(5) (1958 Cum. Suppl.) (Defenders' Bounty Memo, Ex. 42 at 5).

23 ACLA § 39-9-10(9) (1958 Cum. Suppl.) (Defenders' Bounty Memo, Ex. 42 at 5).

24 ACLA (§ 39-9-17 ACLA (1958 Cum. Suppl.) (Defenders' Bounty Memo, Ex. 42 at 6).

25 Section 17 ch. 64, SLA 1959 (Defenders' Bounty Memo, Ex. 43 at 4).

Commissioner of Fish and Game."[26] Among the topics about which the joint board could issue regulations were:

> (3) establishing the means and methods employed in the pursuit, capture, and transport of fish and game; ... (5) classifying fish and game as ... predators...; (9) investigating and determining the extent and effect of predation and competition among fish and game in Alaska and exercise such control measures as are deemed necessary to the resources of the State....[27]

In the early 1960s Alaska's statutes were reorganized. The joint board's regulatory authority was moved to AS 16.05.250. The bounty system was recodified in AS 16.35.

In 1968 the Legislature amended AS 16.05.250(8) to give the joint board power for "investigating and determining the extent and effect of predation and competition among fish and 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...*."[28]

In 1975 the legislature split the joint board, creating a Board of Fisheries and a Board of Game.[29] The regulatory powers over game were moved

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[26] Defenders' Bounty Memo, Ex. 44 at 2 (§ 6 ch. 94, SLA 1959). This provision is currently found in AS 16.05.241.

[27] *Id.*

[28] Defenders' Bounty Memo, Ex. 45 (§ 1 ch. 113, SLA 1968).

[29] Section 3 ch. 206 SLA 1975 (Defenders' Bounty Memo, Ex. 45 at 1-2.

from AS 16.05.250 to a new AS 16.05.255, applicable only to the Board of Game.[30] With respect to bounties, AS 16.05.250(8) was renumbered to become AS 16.05.250(a)(6).

In 1983 Governor Bill Sheffield proposed House Bill 404. In his 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.[31]

Governor Sheffield offered a sponsor's substitute to the legislature on 17 January 1984.[32] The only difference to the proposal for AS 16.05.255(a)(6) was the addition of the word "means."[33] The Governor's proposal passed the legislature.

The new (and still extant) AS 16.05.255(a)(6) allowed the joint board (and the Board) to adopt regulations for "methods, means, and harvest levels

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30 *Id.*

31 1983 House Journal 1213 (transmittal letter of 6 May 19830.

32 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).

33 *Id.* at 1.

necessary to control predation and competition among game in the state[.]"[34] In this 1984 transmittal letter Governor Sheffield reiterated the meaning of the change to this subsection that he had described in the 1983 transmittal letter. He also reiterated the impact of the repeal of the statutory section that authorized the payment of certain bounties:

> 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.[35]

Defenders reason that the history of the regulatory authority of the Alaska Game Commission and its successors, as well as the relationship of those bodies to the department of the executive branch with responsibility for the State's game resources, inform the interpretation of the authority the Board, if any, to issue regulations concerning bounties. They argue that the existence of a statutory bounty system at the end of Territorial days and the adoption of that scheme by the legislature in 1959 mean that "there was no need for the Alaska Game

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[34] Section 10 ch. 132, SLA 1984.

[35] 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.

Commission [or its successors, the joint board and the Board] to have the power to address bounties through the adoption of regulations."[36]

The State counters that courts should not construe related statutes in a manner that renders any section meaningless.[37] It reasons that the Defenders' position, that neither the Department nor the Board has the authority to implement a wolf bounty, then the prohibition of the payment of bounties to specific persons, found in AS 16.05.210, would be unnecessary and thus rendered meaningless.

The Court finds the Defenders' argument to be unconvincing. The fish and game statutes express various policies, some rather general, others quite specific. They assign different, albeit related, authority to the Board and Department. The Department is assigned the task of gathering and evaluating scientific data about the resources. The Board is the more politically attuned body, responsive to the appointment power of the governor and thus authorized to make broader policy choices and resource allocation decisions, based upon the Department's data and analysis. Each entity is given regulatory authority over its areas of primary responsibility in order to implement statutory mandates and to complement them where lacunae exist. The scope of each entity's regulatory authority is informed by the primary roles given that entity. The mere fact that the Territorial and early state statutes spelled out a rather detailed bounty system does

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36 Defenders' Bounty Memo at 8. *See also, id.*, at 11.

37 *See Municipality of Anchorage v. Suzuki*, 41 P.3d 147, 150-51 (Alaska 2002) (rules of statutory construction require that every word in a statutory scheme be given meaning).

not mean that additional regulations might not have been needed then. Now that the statutory bounty system has been repealed (as no doubt obsolete) the need for regulatory flexibility is even greater.

Among the topics of fish and game management that are better served by regulation rather than by statute are those relating to harvest levels and the timing of hunting and fishing in specific geographic areas around the state. A regulatory body is able to react to the constant changes in conditions in the field far more rapidly than the legislature. As interrelated game populations experience demographic variations, the harvesting of them should also change, and, to be effective, must do so in a timely, responsive and even anticipatory, manner. For example, openings and closings are announced with very short and sometimes almost no notice as authorities monitor the game populations and the human (and other predator) activities that affect them.

If the Defenders are correct, that no regulatory authority over bounties was needed before and shortly after statehood because of the detail of the statutes concerning bounties, then how would anyone know where and when to allow bounties; how many wolves from a population should be taken, if any; or when the bounty program should be suspended in order to save a wolf population? A bounty program needs the flexibility that comes from regulatory authority, even if the bounty program is the product of a statutory scheme as detailed as that in place before 1984.

The State takes its argument even farther. It contends that the Board and the Department each has independent authority to create a bounty program. It agrees with the Court's construction of AS 16.05.255(a), as informed by Governor Sheffield's 1983 transmittal letter such that the Board has the authority to create a bounty program.[38] The State contends that the Department has its own authority by virtue of AS 16.05.050, which lists the Departments' powers and duties, including:

> (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;
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> . . .
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> (5) *to* take, capture, propagate, transport, *buy*, sell, or exchange fish or *game* or eggs *for propagating, scientific*, public safety, *or stocking purposes*;
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> . . .
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> (7) *to exercise* administrative, budgeting, and *fiscal power*[.][39]

The State's argument that the Board and the Department have dual authority is also unconvincing. The long standing legislative intent of differentiating the authorities of the Board (or its predecessors) and the

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38 The State concedes that this is a change from the position it took at the TRO stage. It candidly explains that the fuller exploration of the issues and chronology of the statutes that was possible at the summary judgment stage lead to the revision. Opposition and Cross-Motion Regarding Defenders of Wildlife's Motion for Partial Summary Judgment (State Bounty Opp) at 7. n. 2. The Court finds that to be a reasonable explanation. It is appropriate that a party (as well as the Court) be willing to reevaluate a position taken or decision made under the exigency of a TRO motion.

39 AS 16.05.050(a) (italics supplied).

Department is significant and provides a consistent context for the construction of the statutes defining the respective authorities of the two entities. The Board has certainly been given the most express and detailed authority over the quotas applicable to game, the timing of hunting seasons, and the means and methods of hunting and the control of predation.[40] In contrast, the Department provides scientific expertise and retains fiscal responsibility.[41]

In the context of bounties, the Court construes the relevant statues to mean that the Board has the exclusive authority over the existence and timing of any bounty program, but that the Department retains the budgetary authority over the program. Thus the Board alone may authorize a bounty program, but the Department alone must decide how to fund it.

The Court rejects the State's argument that because the Department may buy supplies or other personal property, the Department may initiate a bounty program and purchase the body part of a wolf specified to be proof of the taking of a wolf and eligibility for the bounty. While it is true that the Department and Board have some overlapping authority, the Court finds it would be a fundamental

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[40] *See* AS 16.05.255(a).

[41] *See* AS 16.05.050(a). A noteworthy example of the respective roles of the two entities is found in AS 16.05.050(b), which provides, "The commissioner shall annually submit a report to the Board of Game regarding the department's implementation during the preceding three years of intensive management programs that have been established by the board under AS 16.05.255 for identified big game prey populations." Although this assignment of responsibilities is specifically directed at the management of ungulate populations, see As 16.05.255(g) and (j), it is typical of the roles of the two related entities.

blurring of the basic differentiation of the powers of the two bodies to let both initiate a bounty program. Only the Board may initiate a bounty program.

B. Who is a "special hunter of the department?"

The Defenders argue that if the Board were to allow bounties to be collected by persons who are given a permit to kill wolves for the bounty, then the permittees would become "special hunters of the department" within the meaning of the prohibition on the payment of bounties found in AS 16.05.210. If this were true, then the permittees would be prohibited from collecting a bounty.

This is not a sensible construction of the term "special hunters of the department," even without reference to its historical development. It makes no sense to define the term in a way that places the very persons who are intended to be allowed (by virtue of the permit) to collect the bounty into a category of persons (special hunters of the department) who are prohibited from collecting the bounty. It is more rational to define the term to mean hunters who are receiving money from the Department other than the bounty itself. Such a construction is consistent with the origin of the prohibition, which began with the Territorial leader and assistant program.

III. 2006 Regulatory Modifications.

Defenders, Friends, and West (collectively "Plaintiffs") challenge certain regulatory changes made by the Board in January and May 2006. They allege the changes were procedurally defective because done in violation of the

Alaska Administrative Procedure Act (APA)[42] and substantively defective because in violation of statutory mandates.[43] In order to set the context of the present challenges, the Court will briefly review the genesis of the regulatory changes, some of which were in response to the rulings made by Judge Sharon Gleason in *Friends of Animals, et al v. State of Alaska, Dep't of Fish and Game et al.*[44]

A. The ruling in Friends of Animals.

The Board has long had statutory authority to adopt predator control plans. AS 16.05.255 provides, in part:

> (a) The Board of Game may adopt regulations it considers advisable in accordance with AS 44.63 (Administrative Procedure Act) for
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> ...
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> (3) establishing the means and methods employed in the pursuit, capture, taking, and transport of game,[45] including regulations, consistent with resource conservation and development goals, ... ;
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> ...
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> (5) classifying game as game birds, song birds, big game animals, fur bearing animals, predators,[46] or other categories;
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> (6) methods, means, and harvest levels necessary to control predation and competition among game in the state[.][47]

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42 AS 44.62.010 – 44.62.950.

43 Some Plaintiffs make additional constitutional challenges that will be addressed separately.

44 3AN-03-13489 CI.

45 "Game" is defined to include all mammals except domestic mammals. AS 16.05.940(19).

46 "Predators" are not defined by statute.

In 1994 the legislature amended § .255 to require the Board to adopt predator control and other intensive management techniques when certain conditions were met.[48] The bill's sponsor, Senator Bert Sharp, explained that his intent was to force the Board to adopt regulations and practices that would reallocate moose and caribou from consumption by predators (such as wolves) to consumption by humans.[49]

In 1998 the legislature imposed yet more requirements on the Board that were designed to revise harvest goals. The statutory amendments instructed the Board to "establish population and harvest goals" in order to "achieve a high level of human harvest."[50]

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[47] AS 16.05.255(a).

[48] AS 16.05.255(e), (f) and (j)(3) and (4) [formerly (e)-(g)]; *see* § 1, ch. 13 SLA 1994 ("The legislature finds that providing for high levels of harvest for human consumptive use in accordance with the sustained yield principle is the highest and best use of identified big game prey populations in most areas of the state and that the big game prey populations in these areas should be managed accordingly.").

[49] Memorandum of Points and Authorities in Support of State's First Motion for Partial Summary Judgment (State's First), Exhibit B at 9-10.

[50] AS 16.05.255(g) [formerly (h)]; *see* § 1, ch. 76 SLA 1998 ("The legislature finds that providing for high levels of harvest for human consumptive use, consistent with the sustained yield principle, is the highest and best use of big game prey populations in most areas of the state and that the big game prey populations should be biologically managed for abundance.").

The Board had regulations in place, last modified in 1993, that described the criteria for programs to control predation of moose by wolves.[51] In 2003 the legislature amended AS 16.05.783 to grant the Board authority to permit airborne or same day airborne shooting of wolves under certain circumstances.[52] In 2003 the Board adopted predator control programs that allowed the taking of wolves by hunters using aircraft for certain game management units.[53] The *Friends of Animals* challengers argued that the predator control programs were deficient for various reasons, including the Board's alleged failure to meet its own criteria, those found in 5 AAC 92.110.

In *Friends of Animals,* on 17 January 2006, Judge Gleason issued summary judgment for the State in most regards.[54] She concluded that the predator control programs complied with state and federal statutes, but that the plans were invalid because they failed to comply with the requirements of 5 AAC 92.110.[55]

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51 5AAC 92.110 and .125 (1993); *see* Defenders PI, Ex. 7.

52 Am. §§ 1,2 ch. 124 SLA 2003.

53 The programs for the various game management units were contained in 5 AAC 92.125(1), (5), (6), (7), and (8).

54 State's First, Ex. D.

55 State's First, Ex. D at 28.

B. The January 2006 response to the Friends of Animals *ruling.*

The Board meets several times each year. It is required to solicit regulatory proposals at least twice a year.[56] The proposals, including those made by the Department, are made available to the public in a proposal book.[57]

The Board was tentatively scheduled to meet 27 January 2006. It circulated a notice of potential actions, including that it "may adopt, amend, repeal or take no action on the subject matters listed below…E. PREDATOR CONTROL IMPLEMENTATION PLANS including: control of predation by wolves and bears."[58] There was no further description of what action the Board might contemplate on those topics. The proposal book included two proposals from the public (and none from the Department) pertaining to 5 AAC 92.110 or .115.[59]

On 17 January 2006, the same day that Judge Gleason issued her decision, the Board gave notice of an emergency meeting to be held by

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[56] 5 AAC 96.600(b).

[57] 5 AAC 96.600(c).

[58] State's First, Ex. P. at 1.

[59] Plaintiffs Defenders of Wildlife et al.'s Memorandum in Opposition to State's Motion for Summary Judgment and in Support of Cross Motion for Summary Judgment (Defenders Memo) (filed 28 June 2007), Exhibit 50 at 4 (Proposal 32) and 4-5 (Proposal 33). Defenders have submitted various exhibits during this case. They have numbered the exhibits sequentially, sometimes resubmitting the same exhibit with a new number. Exhibits 1-48 were filed with the Plaintiffs' [Defenders] Memorandum in Support of Motion for Preliminary Injunction (Defenders PI) (filed 20 November 2006). Exhibits 50-64 were submitted with the memorandum on summary judgment referenced above (Defenders Memo).

teleconference on 25 January 2006.[60] The purpose of the meeting was to consider emergency changes to 5 AAC.92 .110, .115, and .125.[61] Declaring there to be an emergency, the Board repealed various portions of 5AAC 92.110, the regulation that Judge Gleason had just ruled the Board had failed to comply with when it had adopted certain predator control programs.

At the subsequent regular January 2006 meeting the Board considered proposal 32, a revision of 5 AAC 92.110 that would permit limited hunting of wolves and bears by snow machine.[62] The Board immediately substituted proposal 32A,[63] drafted by the Department and distributed earlier that day to the Board and the public.[64] The Board adopted this proposal, thus repealing significant portions of 5 AAC 92.110 and .115.[65]

The *Friends of Animals* plaintiffs returned to Judge Gleason seeking a preliminary injunction that would vacate the emergency regulations. Judge

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60 Defender PI, Ex. 3.

61 *Id.*

62 Defender Memo, Ex. 50 at 4.

63 Defender Memo, Ex. 52.

64 Defender Memo, Ex. 51 at 2-3, 4-6.

65 Defender Memo, Ex. 51 at 10-22.

Gleason denied that request, finding that the emergency regulations were properly promulgated.[66]

C. The March-May 2006 regulatory revisions.

The Board was next to meet 10-20 March 2006. Its notice of the meeting identified various agenda topics, including the following:

> E. INTENSINVE MANAGEMENT: Population and harvest objectives, control of predation by wolves and bears, and predation control implementation plans for units 12, 13, 14, 16(A), 16(B), 19, 20, 21, 24, 25, 26(B) and 26(C)[.][67]

The Board was unable to complete its business at the March meeting and gave notice of the extension of the meeting until May 2006. The supplemental notice identified wolf predation programs as a topic.[68] During the March-May 2006 meeting the Board adopted numerous wolf predation control programs which are contained in 5AAC 92.125.

At the time of the adoption of the new § .125, the recently repealed portions of 5AAC.110 and .115 were not in existence, however, the Department's proposal 32A was intended to comply with the provisions of the repealed regulations. The Department and Board adopted this strategy in order to comply with Judge Gleason's order that wolf predation control programs must comply with those regulations (at least before they were repealed).

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66 State's First, Ex. E at 33-42 (transcript of oral ruling) (31 January 2006)..

67 State's First, Ex. F at 1.

68 State's First, Ex. J at 1.

Before the March- May 2006 meeting the Board gave notice of its intent to enact a version of 5AAC 92.125 that would replace the emergency regulation that was adopted in January 2006.[69] The current version of § .125 was enacted. The Plaintiffs do not challenge the quality of the notice given about the non-emergency version of § .125. Instead, they argue that partial repeal of § .110 and § .115 was invalid and thus, at the time of the enactment of the regular § .125 in March-May 2006, the public was deprived of notice of what standards the Board was applying to the proposed § .125. They argue that the fact that the Board purported to apply the criteria of the recently repealed portions of § .110 to the proposed § .125 does not cure anything, but instead made things procedurally worse. They assert that by applying the repealed § .110 the Board was applying a "secret" standard and violating the rule of *Noey v. Dept. of Env. Cons.*[70]

D. The standard of review.

The Alaska Supreme Court has recently articulated the role of a court when evaluating a regulation adopted by a regulatory body such as the Board

> [W]e consider first whether the board exceeded its statutory mandate in promulgating the regulation, either by pursuing impermissible objectives or by employing means outside its powers. Determining the extent of an agency's authority involves the interpretation of statutory language, a function uniquely within the competence of the courts and a question to which we apply our independent judgment. Second, we consider whether the regulation is reasonable and not arbitrary. Where highly specialized agency expertise is involved, we

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69 State's First, Exs. F and J.

70 737 P.2d 796 (Alaska 1987).

> will not substitute our own judgment for the board's. Our role is to ensure only that the agency has taken a hard look at the salient problems and has genuinely engaged in reasoned decision making. And third, we consider whether the regulation conflicts with any other state statutes or constitutional provisions.[71]

The reviewing court must presume the validity of the regulation. The supreme court has explained:

> We presume that a regulation promulgated under the Alaska Administrative Procedures Act (APA) is both procedurally and substantively valid and place the burden of proving otherwise on the challenging party.[72]

E. Discussion.

The Plaintiffs base their challenges to the procedures that the Board used in adopting the current version of § .125 on the general polices of transparency and public participation in the regulatory processes that are set forth in the APA. They contend that the Board bypassed the public by eliminating the guidelines of § .110 (while purporting to comply with them), by giving virtually no notice of the significant modification to predator control programs contained in proposal 32A, and disregarding the views of opponents to predator control. They contend the Board knew the result it wanted in response to Judge Gleason's ruling and made a mockery of the public's right to participate in the consideration of alternative regulations in order to achieve the predetermined result.

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[71] *Grunert v. State* (*Grunert I*), 109 P.3d 924, 929 (Alaska 2005) (internal quotation marks and citations omitted).

[72] *State Board of Fisheries v. Grunert* (*Grunert II*), 139 P.3d 1226, 1232 (Alaska 2006) (footnote omitted).

The Court does not disagree with the Plaintiffs' general articulation of the values behind the APA. There is some merit in the Plaintiffs' distaste at the hasty process the Board followed in January 2006. But a closer analysis reveals that the Plaintiffs have overstated their objections. The Board may have stumbled as it adopted the predator control programs embodied in § .125, but ultimately it afforded the public adequate notice of and participation in a process that should be evaluated in light of the exigencies the Board faced.

Whatever the flaws, if any, in the adoption of the emergency regulations, they were corrected by the notices provided about the permanent regulations that replaced them and hearings held concerning them in March-May 2006.[73] The interested public could understand that the emergency regulations of January 2006 were the operative proposals for permanent adoption in March-May 2006. Certainly Defenders, Friends, and their allies were aware of what was being proposed and were able to voice substantive objections. That their concerns were rejected by the Board is not a basis for overturning the adopted regulations.

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[73] The Court observes that there is a tension between the Board's occasional need to act quickly and the public's right to notice of possible regulatory change. Not all regulatory amendments need be proposed in advance of a meeting, as long as the public has notice of the substance of the possible changes. Yet the Board cannot be so coy as to merely announce that there will be changes to specific regulations without giving the public some information about what may be adopted. The substitution of proposal 32A for proposal 32 came very close to the boundary of procedural propriety. Had § .125 not been revisited in March-May 2006, the Court may well have concluded that the Board had not provided the notice required by the APA of proposed regulatory changes. However, the Board's subsequent actions provided adequate notice of the ultimate modifications and programs that were adopted.

The Plaintiffs allege that insofar as the Board tried to comply with the repealed criteria of § .110, it used "secret" criteria, unknown to the public, when it considered the programs adopted in § .125. At the outset the Court must note its agreement with the State's observation that this contention is somewhat disingenuous. Plaintiffs object to the repeal of § .110 and object to the Board's attempt to comply with § .110. These objections are contradictory. They smack of advocacy that starts with the proposition that any process or decision thing that produces a result that is opposed must be attacked.

The Plaintiffs argue that the use of the repealed criteria left the public with no understanding of what the proponents of other outcomes would have to present to the Board in order to have a realistic chance of having their proposals adopted or defeating those of the advocates of predator control. They base this argument on *Noey*. However, the holding of that case is not applicable to the context in which the Board acted.

Noey was a developer who sought to subdivide a remote parcel into fifteen lots for recreational buildings.[74] He recognized that the soil conditions on the property precluded certain waste water treatment and disposal systems.[75] He proposed several alternative treatment and disposal systems to the Department of

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74 737 P.2d at 799.

75 *Id.*

Environmental Conservation (DEC).[76] Noey exercised his right to an adjudicatory hearing.[77] He presented evidence that his proposal met the applicable DEC standards for treatment and disposal systems. The hearing officer denied the application finding that the proposals did not meet various criteria.[78] Noey appealed arguing that the criteria that the hearing officer applied were not the criteria set forth in the DEC regulations and he had no prior notice that they were to be applied to his application. The supreme court agreed with Noey that the use of new criteria was arbitrary and capricious.[79]

The supreme court evaluated the reasons the hearing officer gave for the rejections of Noey's proposals. It concluded that the officer had established and applied criteria to Noey's applications that had no basis in the DEC regulations applicable to the proposals. The supreme court held that "DEC employed inconsistent and unarticulated subjective standards in reviewing Noey's second, third, and fourth subdivision waste disposal plans."[80]

Critical to the holding in Noey is the fact that DEC was acting in its adjudicative capacity rather than in its rule making capacity. DEC had previously

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76 *Id.*

77 *Id.*

78 *Id.* at 802-03, 803-04 and 806.

79 *Id.* at 803, 805 and 807.

80 *Id.* at 806.

adopted criteria for treatment and disposal systems that a developer had to meet. It was arbitrary and capricious for DEC to deviate from its announced criteria and substitute new, previously unannounced criteria. In contrast, the Board was acting in a very different capacity as it tried to adopt the criteria for and components of a predator control program. It was creating standards, not comparing an application to existing standards.

It is true that in adopting §§ .115 and .125 the Board claimed to satisfy the criteria in § .110 it had just repealed. But that has to be recognized as a cautionary response to Judge Gleason's ruling that the earlier adoptions of the programs had not complied with § .110. While it had the authority to repeal § .110, the Board was anticipating a claim that it must meet those criteria and thus attempted to do so. The adoption of §§ .115 and .125 did not have to comply with § .110 once that regulation was repealed. The new program only had to comply with statutory and constitutional mandates. It was not arbitrary and capricious for the Board to try to comply with the repealed § .110 as well.

Finally the Plaintiffs argue that the Board's purported efforts to comply with the APA were all a sham in that the Board was adamant that it would adopt a predator control program despite the widespread opposition in the public at large and the interested participants. They claim the Board's process was only window dressing designed to disguise the result that it intended to achieve by any manner possible.

The Court cannot ignore the political war that has been raging for a decade between those who favor wolf control programs and those who oppose them. The public ahs passed two initiatives to stop certain wolf control programs; the legislature has twice reauthorized the Board to implement the programs. But the Board's recent actions have to be evaluated on a narrow stage.

There was no secret that the Board acted to create predator control programs in 2003. The Board was clearly responding to legislative directives. Its members were clearly in favor of such programs. But the fact that the Board was generally in favor of the programs does not make the Board's actions violate the APA. There is no doubt that the Board acted in early 2006 to revive those aspects of the predator control programs that Judge Gleason determined had been created without compliance with the Board's own regulations. Trying to achieve (correctly this time) a result that had already been approved (albeit in a procedurally flawed manner) is not a violation of the APA as long as the proper process was utilized. The Board did not fail to look at the merits of the predator control programs over the course of the earlier flawed adoption and the later readoption in 2006.

The Court concludes that the Board did not violate the APA when it adopted §§ .115 and .125.

IV. The Predator Control Program and the Game Management Plan.[81]

Defenders allege that the Board violated AS 16.05.783(a) when it authorized predator control programs. That statute provides, in part, that:

> the Board of Game may authorize *a predator control program* **as part of a game management plan** that involves airborne or same day airborne shooting if the board has determined based on information provided by the department
>
> (1) in regard to an identified big game prey population under AS 16.05.255(g) that objectives set by the board for the population have not been achieved and that predation is an important cause for the failure to achieve the objectives set by the board, and that a reduction of predation can reasonably be expected to aid in the achievement of the objectives[.][82]

Defenders go to great lengths to distinguish the "predator control program," authorized by 5 AAC 92.125 in May 2006 for all or part of certain game units, from the "game management plan," referred to in AS 16.05.783(a). Defenders argue the game management plan for each units or subunits was entirely lacking. Defenders rely upon what it claims is a common sense reading of the statute as informed by comments by various legislators and interested parties during the consideration of the bill that became AS 16.05.783(a).[83]

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81 Defenders raise this argument in count III of its complaint.

82 AS 16.05.783(a) (italics and bold supplied).

83 Defenders' Memorandum in Support of Cross Motion for Summary Judgment at 25-27.

The State argues that both the predator control program and the game management plan are all of one coherent piece. Both are laid out in the various parts of 5AAC 92.125.

The Court does not read section .783(a) as literally as Defenders demand. The Court construes the section to permit the Board to utilize airborne and same day airborne shooting of predators to achieve the big game population objectives that the Board has set, pursuant to the criteria of AS 16.05.255(g), for "intensive management" of big game.[84] The predator control program must be a component of and consistent with a game management plan. The management plan has to comply with the intensive management criteria of AS 16.05.255(g) and (j). The intent of the interrelated statutes is that all predator control, including the techniques of airborne shooting, has to be part of the broader management plan for the various populations of game.

The Court does not construe § .783(a) to mandate that the predator control program has to be described in a document that is separate and different from the relevant management plan. Nor does the program document have to be generated after the management plan. A single document may describe and

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[84] AS 16.05.255(g) requires the Board to "establish population and harvest goals and seasons for intensive management of identified big game prey populations to achieve a high level of human harvest." "Intensive management" is defined in AS 16.05.255(j)(4). A "high level of human harvest" is defined in AS 16.05.255(j)(2).

authorize both the management plan and the techniques (including airborne shooting) of the predator control program.

Section .783 does not contain any substantive criteria for the predator control program or the game management plan, except that the two have to be consistent with each other and must meet the criteria of AS 16.05.255(g) and (j). Predation control cannot be used if it is not tailored to the more comprehensive objectives for the big game prey populations set by the Board and articulated in the relevant game management plans. Predation control, the population objectives, and the management plans must all further the statutory goal of a "high level of human harvest," as opposed to the implicit alternate of non-human or predator harvest of big game prey.

The Court agrees with the State, and for the reasons it articulated in its various memoranda, that 5 AAC 92.125, as adopted in May 2006, constitutes predator control programs and game management plans that are sufficiently interrelated and consistent. The programs and plans of 5AAC 92.125 meet the requirements of AS 16.05.783(a).

V. Harvestable Surplus.[85]

Defenders allege that the Board has not complied with the statutory criteria for the management of moose populations when it adopted 5 AAC 92.125. The Board is mandated to manage "identified big game prey populations to

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[85] Defenders raise these issued in counts IV and V of its complaint.

achieve a high level of human harvest."[86] A "high level of human harvest" is roughly defined to mean "the allocation of a sufficient portion of the harvestable surplus" to give humans a "high probability of success" of the game population.[87] The "harvestable surplus" is defined to be an estimated number of annual newborn minus the number of animals needed for "population recruitment and enhancement" and the number that die annually but not because of predation or human harvest.[88]

Defenders argue that the Board must identify the harvestable surplus first and only then set goals for the populations and harvests by humans and predators.[89] The State argues that the harvestable surplus can only be identified at the conclusion of the management process.[90]

The Court concludes that the State has the better argument. Both sides agree that the intensive management provisions of AS 16.05.255 were enacted to force the Board to manage those ungulate populations that it identified

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86 AS 16.05.255(g). An "identified big game prey population" is "a population of ungulates that is identified by the Board of Game and that is important for providing high levels of harvest for human consumption." AS 16.05.255(j)(3).

87 AS 16.05.255(j)(2).

88 AS 16.05.255(j)(1).

89 Defenders' Memorandum in Support of Cross Motion for Summary Judgment at 38.

90 State's Opposition and Cross-Motion Regarding Summary Judgment on Defenders of Wildlife, et al's, Counts IV, V and VI at 9-10.

so that humans could harvest a larger share of the animals than had been the case under the Board's prior practices. The larger human harvest was to come at the expense of the non-human predators of the population. Among the management tools that were permitted to achieve this shift in the allocation of the harvest were predator control programs in general and airborne shooting in particular. The shifted allocation from predator harvest to human harvest had to take place in the larger context of management of the prey populations so that they met population goals.

The Court does not construe these statutes to require a specific sequence of analysis of the interrelated components of the management goals and techniques. The legislature was not particularly interested in how the Board (and Department) achieved the new goal of a shifted harvest. It was primarily interested that the shift occur, consistent with the attainment of the chosen sizes of the various ungulate populations. The Court does not construe the new legislative goal to dictate how the Board and Department exercised their respective expertise and authority, as long as the human harvest of the ungulate populations increased.

The various terms and definitions in AS 16.05.255 (g) and (j) contain words that acknowledge the imprecise nature of game management. The harvestable surplus is an "estimate"[91] that in turn depends upon the managers' evaluation of the dynamics of various populations. Those dynamics, by definition,

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[91] AS 16.05.255(j)(1).

change over time, sometimes slowly, sometimes precipitously. The changes are not usually detectable in real time by the managers. The optimal or desirable size of populations can only be determined by the balancing of variable data and the application of shifting values. The "allocation of a sufficient portion" of the surplus so as to "achieve a high probability" of human harvest requires the managers to make predictions based upon available data and imprecise modeling.[92] This process cannot be reduced to a linear analysis. There are feedback loops built into the goals that the intensive management statutes identify.

The Court is also guided by its recognition of its own limitations. It may be that courts are the primary construers of statutory language. But when the subject matter that the statute addresses is a specialized field of science, courts must defer to the interpretation of the statute by the agency with the relevant expertise.[93] This does not mean that the Board and Department can ignore the legislative directive that more game is to be harvested by humans than by predators. But it does mean that when the Board and Department determine that the achievement of that goal cannot be attained by the analysis proffered by the challengers and only may be achieved by another sequence of analysis, the Court has to take that input seriously.

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92 AS 16.05.255(j)(2).

93 *Native Village of Elim v. State*, 990 P.2d 1, 10 (Alaska 1999) ("This court reviews the Board's interpretation of its own regulation under the reasonable basis standard.") (citation omitted).

The Court concludes that the Board did not violate the mandate of AS 16.05.255(g) and (j) in the manner by which it established a harvestable surplus or set numerical goals for human and predator harvest of the populations of ungulates addressed by the plans and programs of 5AAC 92.125 or the implementation of predator control programs in the game units and subunits covered by that regulation.

VI. The Evidence in Support of 5 AAC 92.125.

Friends claim that when the Board adopted 5 AAC 92.125, it failed to make the findings required by AS 16.05.783(a)(1) before airborne hunting may be authorized.[94] Furthermore, Friends claim that the Board both failed to present sufficient evidence to justify the § .125 programs and ignored evidence and testimony on opposition to the proposed programs, thus the Board failed to take "a hard look at the salient problems" and did not genuinely engage[e] in reasoned decision making."[95] Friends base its argument upon the opinions of Dr. Gordon Haber as summarized in an affidavit[96] submitted with the summary judgment pleadings and his submissions to the Board in March and May 2006.

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94 The Board must find that "in regard to an identified big game prey population under AS 16.05.255(g) that objectives set by the board for the population have not been achieved and that predation is an important cause for the failure to achieve the objectives set by the board, and that a reduction of predation can reasonably be expected to aid in the achievement of the objectives[.]"

95 *Grunert I*, 109 P.3d at 929.

96 Friends of Animals, Inc. Cross-Motion for Summary Judgment, Affidavit of Dr. Gordon Haber (26 March 2007) ("Haber Aff.").

The State points to specific findings that addressed the section .783(a) thresholds and to the entire record that was before the Board. The State denies Friends' claim that the Board must at least acknowledge, if not expressly discuss and refute, testimony and evidence presented to the Board by opponents of a particular proposal.

The predator control programs authorized by 5 AAC 92.125 applied to various game management units and subunits. The subsections of § .125, the game units, and the .783(a)(1) findings are correlated in the following table.

92.125 subsection	**Game Unit**	**§ .783(a) Finding**
(b)	12, 20(E)	Ex. W
(b)	20(B) & (C), 25(C)	
(c)	13	Ex. X
(d)	16(A) & (B)	Ex. Y (16(B))
(e)	19(A)	Ex. Z
(f)	19(D)-East	Ex. AA
(g)	20(A)	
(i)	20(D)	

The Board made the requisite findings for some, but not all of the units wherein predator programs were authorized by 5AAC 92.125.[97] The findings are entitled to deference.[98] The Court concludes that the section .783(a)(1) findings

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[97] The Court is open to the possibility that in the vast quantity of material submitted by the parties it has overlooked § .783(a)(1) findings for the remaining units. It is also possible that the findings were made by the Board, but not submitted to the Court.

[98] *Koyukuk River Basin Moose Co-Management Team v. Board of Game*, 76 P.3d 383, 390-91 (Alaska 2003) ("We review the board's population

for subunits 12, 13, 16(B), 19(A) & (D) East, and 20(E) are sufficient. The Board did not make the requisite section .783(a)(1) findings for subunits 16(A), 20 (A)-(D), and 25(C). *Therefore, to the extent that 5 AAC 92.125 authorizes airborne or same day airborne shooting of wolves in subunits 16(A), 20 (A)-(D), and 25(C), that authorization is invalid.*

The Court concludes that the challengers have not shown that the evidentiary basis for the section .783(a)(1) findings that the Board did make regarding the substance of the predator control programs were not supported by the facts before it and were not reasonably based in law.

The transcript of the Board's meetings shows that the Board considered opposition to the various proposals, including the one that was ultimately adopted as 5 AAC 92.125.[99] Among other critiques were articles and references provided by Dr. Haber.[100] The fact that the Board implicitly rejected the opinions of Dr. Haber and other opponents to the predator control programs does not mean that the Board exceeded its authority or adopted invalid programs. What Friends asks the Court to do is to accept Dr. Haber's interpretation of the interaction of moose and predators rather than the interpretation of the Department and the Board. This goes far beyond what a court is permitted to do when

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determinations under the same deferential standard we apply to population determinations under the subsistence statute.").

99 Ex. 4 at 419-72, 723-65; Ex. 5 at 33; Ex. 7 at 332-74, 652-75.

100 Haber Aff. ¶¶ 7& 10.

reviewing the Board's decision. A court can "not substitute [its] judgment for that of the board or alter its policy choice when the board's decision is based upon its expertise."[101]

The types of decisions that this Board made, as well as the factual and evidentiary challenges to them, are nearly the same that were discussed in *Native Village of Elim* and *Koyukuk River Basin*. Both cases involved the decisions of the Board of Game or Fish concerning the qualities and quantities of populations of animals under its authority and the management of those populations for human harvest. The challengers opposed the allocations that each board made to those entities that wanted to harvest the populations. The Alaska Supreme Court rejected those challenges. In doing so it articulated its role in reviewing the Board's decisions:

> We give the Board's identification of fish stocks under the subsistence law considerable deference for two reasons. First, identifying a "fish stock" requires fisheries knowledge and experience and thus falls within the Board's expertise. Second, the subsistence law defines "fish stocks" broadly, allowing the Board to identify any category of fish "manageable as a unit" as a "stock." This broad definition provides the Board with the flexibility it needs to accommodate the biological and ecological concerns that accompany multi-species fisheries management. This flexibility is even more important where, as here, management issues are clouded by scientific uncertainty.
>
> Of course, the Board's discretion is not unlimited. The Board's ultimate decisions must be reasonably related to the purposes of the subsistence law; in other words, the Board may not manipulate the identification of a "stock"-whether because that

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101 *Koyukuk River Basin*, 76 P.3d at 386.

"stock" is not "manageable as a unit" or otherwise-simply to achieve a predetermined outcome. While the Board may and should weigh a variety of factors in making stock identifications-including practical factors such as administrative resources as well as scientific, cultural, economic, and ecological variables-the Board's primary goal is to ensure that "subsistence uses of Alaska's fish and game resources are given the highest preference, in order to accommodate and perpetuate those uses."

As a general rule, the Board should analyze individual fish stocks for "customary and traditional" subsistence use. In some circumstances, however, it may be appropriate for the Board to group stocks together in applying the subsistence preference. We review the record to determine whether the Board's decision to group stocks together here was based on careful consideration of relevant facts, and thus is reasonable.[102]

The supreme court confirmed this judicial deference for administrative game management in *Koyukuk River Basin*:

Under this deferential standard, the Board of Game was properly within its discretion in not managing moose in the KCUA as a distinct game population. We are satisfied with the board's rationale and will not second-guess its assessment of the manageability of moose in the KCUA. Such a determination falls within the purview of agency expertise and discretion. The team failed to show that the board's population determinations were not reasonably related to the purposes of the subsistence law, or that they were somehow manipulated to achieve a predetermined outcome. Given the planning effort undertaken by the state, this case strikes us as similar to *Native Village of Elim* and *Interior Alaska Airboat Association v. State,* in which we held that we will not overturn a resource management regulation simply because one group of resource users believes that a different outcome is more desirable.[103]

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102 *Native Village of Elim*, 990 P.2d at 11 (footnotes omitted).

103 76 P.3d at 390 (citations omitted).

The Court concludes that the challengers have not shown that the Board acted improperly or outside of its authority when it based it decisions upon the evidence before it and failed to give the opponents' evidence greater weight.

VII. Statutory Sustained Yield.

Defenders allege that AS 16.05.255 imposes a sustained yield concept onto the management of predators and that the Board's predator control programs fail to comply with that statutory mandate. The State denies that AS 16.05.255 applies the sustained yield principle to predators. The State contends that even if the statute does impose that principle, the Board complied with it.

AS 16.05.255(g) provides: "The Board of Game shall establish population and harvest goals and seasons for intensive management of identified big game prey populations to achieve a high level of human harvest." An "identified big game prey population" is defined to be "a population of ungulates that is identified by the Board of Game and that is important for providing high levels of harvest for human consumptive use."[104] "Intensive management" is defined to mean

> management of an identified big game prey population consistent with *sustained yield* through active management measures to enhance, extend, and develop the population to maintain high levels or provide for higher levels of human harvest, including control of predation and prescribed or planned use of fire and other habitat improvement techniques.[105]

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104 AS 16.05.255(j)(3). An "ungulate" is an animal with hooves.

105 AS 16.05.255(j)(4) (italics supplied).

The term "sustained yield" is not used in any other section of AS 16.05.255 or AS 16.05. It is not defined. The definitions of "identified big game prey population" and "intensive management" are applicable only to AS 16.05.255.[106]

The Court finds AS 16.05.255(j)(4) to be unambiguous. The subject of the management being defined is any particular identified big game prey population. Any such population may only include ungulates. Bears and wolves are not ungulates. Furthermore, the reference to management "consistent with sustained yield" applies only to an "identified big game prey population." Thus the Board, when managing these populations of ungulates (such as moose), must do so in a manner that is consistent with sustained yield. AS 16.05.255 doe not mandate the use of a sustained yield principle to the management of predators, in general, or of bears and wolves, in particular. That being so, the Board's predator control programs aimed at bears and wolves need not be consistent with any sustained yield principle as set forth by AS 16.05.255. The Board's predator control programs are not in violation of any statutory invocation of the sustained yield principle.

VIII. Article VIII, § 4 of the Alaska Constitution.

West and Defenders allege that the Department's predator control programs violate the sustained yield clause of the Alaska constitution.[107] It provides:

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106 AS 16.05.255(j).

> **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.[108]

West argues that the sustained yield clause applies to all wildlife, including predators such as bears and wolves. The State argues that the clause does not apply to predators, relying upon the comment of one member of the constitutional convention. Even if it does apply to predators, the State argues that the predator control programs are consistent with the clause.

The constitution itself does not define "the sustained yield principle," but the framers did include the term in a glossary that was used during the constitutional convention. In *Native Village of Elim v. State,*[109] the supreme court considered the meaning of this term as it is used in the clause. It observed:

> We acknowledge that the framers of Alaska's constitution intended the sustained yield clause to play a meaningful role in resource management. But at the same time, they believed that calculating a specific numerical yield for fisheries would be impossible. The framers underscored this belief in the glossary that they prepared for use during the constitutional convention, which includes the following discussion of the sustained yield principle:
>
> > As to forests, timber volume, rate of growth, and acreage of timber type can be determined with some degree of accuracy. For fish, for wildlife,

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[107] Since West more forcefully asserts the constitutional sustained yield argument, the Court, for the sake of convenience, will refer, in this section, to both parties collectively as West.

[108] Alaska Const. art. VIII, § 4.

[109] 990 P.2d 1 (Alaska 1999).

> and for some other replenishable resources such as huckleberries, as an example, it is difficult or even impossible to measure accurately the factors by which a calculated sustained yield could be determined. Yet the term "sustained yield principle" is used in connection with management of such resources. When so used it denotes conscious application insofar as practicable of principles of management intended to sustain the yield of the resource being managed. That broad meaning is the meaning of the term as used in the Article.[110]

The State points to the comments to the convention of its Natural Resources Committee's Secretary Burke Riley, regarding the proposed clause. Riley explained:

> We have in mind no narrow definition of "sustained yield" as is used, for example in forestry, but the broad premise that insofar as possible a principle of sustained yield shall be used with respect t administration of those resources which are susceptible of sustained yield, and where it is desirable. For example, predators would not be maintained on a sustained yield basis.[111]

West discounts this comment as referring to an earlier draft.[112]

The Court finds the comments of the individual convention delegates to be of little use. The supreme court has cautioned in general that "individual

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110 990 P.2d at 7 (footnote omitted). The definition in the glossary may be found in *Papers of Alaska Constitutional Convention, 1955-1956*, Folder 210, Terms.

111 4 Proceedings of the Alaska Constitutional Convention (PACC) 2451 (17 January 1956).

112 West has submitted an affidavit of Dr. Vincent Ostrom who was an advisor to the Natural Resources Committee during the convention. He provides his opinion of the meaning of article VIII, § 4. The Court gives that affidavit and opinion no weight.

comments from delegates do not necessarily indicate constitutional intent."[113] Even if individual comments were certain to reflect the view of the majority of the convention, this comment is ambiguous. One cannot tell if the speaker means that all predators are excluded from the application of the sustained yield principle or whether any interest in managing for the benefit of a predator is overridden by "preferences among beneficial uses."[114]

At oral argument a party made a simple but significant point--nearly all animals are predators of other animals. Thus to construe article VIII, § 4 to exclude all predators would leave only a few animals subject to it. The more reasonable construction reflects the section's extremely broad list of categories of resources that are subject to sustained yield (fish, forests, wildlife, grasslands, and all other replenishable resources).[115] There is no express exclusion of a subset of wildlife (predators or wolves and bears). Nor would an implicit exclusion be

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113 *Glover v. State,* No. 6222, slip op. at 12 (Alaska 18 January 2008) (citing *Matthews v. Quinton,* 362 P.2d 932, 944 (Alaska 1961) for the proposition that "every delegate in the convention has his or her own reasons for voting and the debate may not reflect the reasons held by the majority").

114 Alaska Const. art. VIII, § 4.

115 When construing constitutional provisions the Court is to use its "independent judgment, 'adopting a reasonable practical interpretation in accordance with common sense based upon the plain meaning and purpose of the provision[s] and the intent of the framers.'" *Brooks v. Wright*, 971 P.2d 1025, 1028, (Alaska 1999) (quoting *Cissna v. Stout*, 931 P.2d 363, 366 (Alaska 1996)). The Court should also "look to the meaning that the voters would have placed on [the] provision." Brooks, at 1028 (quoting *Division of Elections v. Johnstone*, 669 P.2d 537, 539 (Alaska 1983).

consistent with the allocation decisions authorized by the section. In the analogous field of fish allocation the supreme court has noted the broad power of the Board of Fish authorized by §4. Allocation decisions are within the power of the Board "so long as they are not arbitrary and unreasonable and are 'consistent with and reasonably necessary to the conservation and development of Alaska fishery resources.'"[116] Principles of conservation are not limited to non-predators. No one would argue that the conservation of bears is not a valid purpose, even though they kill other wildlife and fish, including moose, resources that humans would prefer to use for themselves.

The Court construes article VIII, § 4 to apply to predators, including bears and wolves. This does not mean that the Board cannot decide to manage a predator population in a manner that gives preference to its prey. Article VIII, § 4 allows there to be a preference among beneficial uses. Thus the Board may opt to manage the interaction between particular predators and prey in a manner that reflects a determination that the relative survival of the prey is a more beneficial use than the survival of predators.

The Court finds that the management of wildlife resources may constitutionally include a selection between predator and prey populations, just as the management of fisheries may include the selection between fish stock.[117] The

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116 *Gilbert v. State Dep't of Fish and Game*, 803 P.2d 391, 399 (Alaska 1990) (quoting *Meier v. State, Board of Fisheries*, 739 P.2d 172, 175 (Alaska 1987).

117 *Native Village of Elim*, 990 P.2d at 7-9.

Court finds that the Board has not acted arbitrarily or abused its discretion in its decision to institute the particular predator control programs at issue here. The supreme court's resolution of a similar challenge to fishery allocations is dispositive. In *Native Village* the supreme court concluded:

> The Board must balance economic, ecological, cultural, international, and other policy concerns when it makes decisions about Alaska's fisheries. It must accommodate all of these legitimate interests in the face of substantial scientific uncertainty. Moreover, it is the Board's role to reach this accommodation. Courts are singularly ill-equipped to make natural resource management decisions. Consequently, we do not substitute our judgment for that of the Board. Our review of the record does not persuade us that the Board has abused its considerable discretion in developing a sustained yield policy for the False Pass fishery as promulgated in the Board's regulation, 5 AAC 09.365. In the absence of evidence that the Board reached its conclusions arbitrarily, we must defer to the Board's decision.[118]

The Court finds that the Board's adoption of the predator control programs did not violate the sustained yield principle of article VIII, § 4.[119]

IX. West's Count X.

In his Count X West alleges that the Department "did not conduct accurate, scientific studies of prey and predator populations"[120] and that it "violated their constitutional duty to manage game populations for the benefits of

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118 *Id.* at 8-9.

119 The Court is making no decision concerning the actual conduct of these or any other predator control programs.

120 West First Amended Complaint at 3, ¶ 62.

all citizens."[121] West asks "that the Court find defendant's methodology and/or manner of determining predator and prey populations be declared invalid[.]"[122]

The State argues that this challenge is precluded by the holding of *Mesiar v. Heckman*.[123] It reasons that the State does not owe West (or any other member of the public) an actionable duty of care applicable to the manner by which the State collects data that it may use in resource (including game) management.[124] The Court agrees with the State's reading of *Mesiar* and its application to West's Count X.

The *Mesiar* plaintiffs were commercial or subsistence fishers on the Yukon River drainage.[125] They sued the Department for allegedly negligently using a sonar fish counter, such that it and the Department undercounted the number of fish passing a certain point on the river.[126] As a result, the Department

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121 *Id.* at 3, ¶ 64.

122 *Id.* at 3.

123 964 P.2d 445 (Alaska 1998).

124 The Court appreciates that West states that he "does not claim a private cause of action over negligent data[.]" Intervenor's Supplemental Brief (1 October 2007) at 5. Despite that disclaimer West is claiming that the Department is gathering inadequate information with which to manage game resources.

125 *Id.* at 447.

126 *Id.*

issued numerous closures and restrictions that affected fishers throughout the drainage.[127]

To determine what duty might be owed the plaintiffs, the *Mesiar* court first analyzed the relationship between the parties. The court rejected the plaintiffs' narrow characterization of the relationship--that the Department and its agent were counting salmon for the benefit of those participating in the Yukon River salmon run.[128] Instead, the court accepted the Department's description of that relationship: "Fisheries management and population sampling are inexact processes and for every season and for every fishery closure (or opening) there will be disappointed users."[129] It concluded the relationship was that of a "resource user to a resource manager,"[130] even while it acknowledged that the plaintiffs "did stand to gain or lose from [the Department's] efforts more immediately and directly than other Alaskans."[131]

That broader relationship provided the context for the analysis of the existence of any duty that might be owed the plaintiffs and others similarly situated. West has alleged no direct interest in game management or the

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127 *Id.* at 447-48.

128 *Id.* at 449.

129 *Id.*

130 *Id.*

131 *Id.*

consequences thereof in any of the specific game management units that are the subject of the challenged regulations. He identifies himself as "a resident of the State of Alaska since 1971 and has an abiding interest in the conservation of all wildlife and believes defendants' methodology in determining populations of game animals in the relevant GMUs is flawed."[132] The Court does not doubt the sincerity or depth of West's views about particular predator control programs. But, unlike the *Mesiar* plaintiffs, who used the fish resources in question, West has demonstrated no more than an aesthetic interest in the wolves that the Department and Board seek to kill.

The *Mesiar* court evaluated the public policy considerations relevant to a determination of whether an actionable duty of care exists between two persons or groups.[133] The court concluded that it was aware of no cases "holding that mere negligence by an agency charged with a general public duty of resource management supports a claim for damages by an affected resource user."[134] Were it to impose such a duty, the *Mesiar* court foresaw unacceptable consequences.

> As [the Department] correctly asserts, fisheries management, much like academic management, is an area fraught with controversy of the kind that invites litigation. We would greatly compound the volatility surrounding fisheries issues by allowing a cause of action for negligent resource-management decisions. Holding [the

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132 West First Amended Complaint at 2, ¶ 4.

133 These factors are identified in *D.S.W. v. Fairbanks North Star Borough School District*, 628 P.2d 554, 555 (Alaska 1981).

134 *Mesiar*, 964 P.2d at 452.

> Department] to an actionable duty of care, ... would expose [it] to the tort claims--real or imagined--of disaffected [resource users] in countless numbers.[135]

The allegations that West raises are exactly the type that the *Mesiar* court feared would be brought had it held there to be an actionable duty of care owed by the State game managers to users of managed resources. To expand such a duty even further--to nonusers and thus to virtually any member of the public--would be to invite endless litigation about nearly every decision made and action taken by the Department and/or the Board.

The Court concludes that the State does not owe West an actionable duty of care and therefore he has no cause of action. *The motion for summary judgment against his Count X is GRANTED.*[136]

X. Conclusion.

A. Rulings.

1. The Plaintiffs' challenges to the Department's wolf bounty program are denied.

2. Only the Board and not the Department has statutory authority to initiate bounty programs.

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135 *Id.* (internal quotations and citation omitted).

136 This conclusion resolves the discovery disputes between West and the State and between West and Friends. All pending discovery motions between these parties are DENIED as moot.

3. The Plaintiffs' challenges to 5 AAC 92.125 that are based upon the Alaska Administrative Procedures Act are denied.

4. The Plaintiffs' challenges to 5 AAC 92.115 that are based upon AS 16.05.783(a) are denied, except that the programs authorized by 5AAC 92.125(b), (g), and (i) are invalid, as the Board did not make the findings required by subsection .783(a) for those programs.

5. Article VIII, § 4 of the Alaska constitution is construed to require that the sustained yield principle be applied to the management of all game, including predators. However, the State's existing management of the predator populations (to the extent that the management was challenged by any Plaintiff) does not violate this constitutional mandate.

6. Count X of West's amended complaint is dismissed. The State does not owe him an actionable duty of care concerning the manner in which the State gathers data for it management of game resources.

B. Motions.

1. Defenders of Wildlife's Motion for Partial Summary Judgment on Count VII-Payment of Bounties is DENIED.

2. Cross-Motion Regarding Defenders of Wildlife's Motion for Partial Summary Judgment on Court VII- Payment of Bounties is GRANTED IN PART and DENIED IN PART.

3. State's First Motion for Partial Summary Judgment is GRANTED IN PART and DENIED IN PART.

4. Friends of Animal's Cross Motion for Summary Judgment is DENIED.

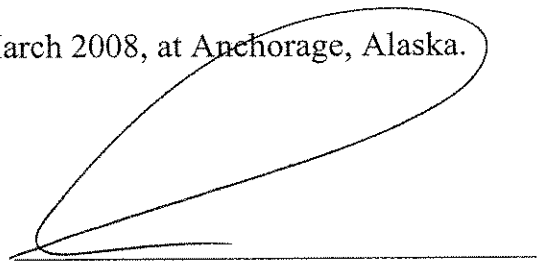
5. Intervenor's Cross Motion for Partial Summary Judgment is GRANTED IN PART and DENIED IN PART.

6. Defender's of Wildlife Cross Motion for Summary Judgment is DENIED.

7. State's Cross-Motion Regarding Summary Judgment on Defenders of Wildlife, et al's , Counts IV, V and VI; on Friends of Animals, et al's Counts II, IV, and V and on Intervenor's Corresponding Counts is GRANTED IN PART and DENIED IN PART.

8. The Motion to Compel and Intervenor's Motion to Compel as to Friends of Animals are DENIED.

DONE this 13th day of March 2008, at Anchorage, Alaska.



William F. Morse
Superior Court Judge

I certify that on 13 March 2008
a copy of the above was mailed to
each of the following at their
addresses of record:

M. Frank
M. Grisham
R. West
K. Saxby

Ellen Bozzini
Judicial Assistant