



February 2, 2004

Gale Norton
Secretary
Department of the Interior
1849 C Street NW
Washington, DC 20240

Re: Petition for Rulemaking – Amendments to the Airborne Hunting Act Regulations, 50 CFR Part 19

Dear Secretary Norton:

Pursuant to the Administrative Procedure Act, 5 U.S.C. § 553(e), and the Department of the Interior's Regulations, 43 C.F.R. § 14.2, Defenders of Wildlife hereby petitions the Department to immediately issue interpretative regulations under the Airborne Hunting Act ("AHA" or "Act"), 16 U.S.C. § 742j-1, which would make clear that the State of Alaska is in violation of the AHA if it reinstates aerial hunting of wolves. Such regulation should ensure that the State of Alaska does not violate the language and intent of the statute by allowing the use of aircraft to facilitate the hunting of these ecologically essential predators, which, except in a few states, have been virtually eliminated in the rest of the country. The regulation should also ensure that the State of Alaska does not kill or wound any wolves in this manner that live in the protected Denali National Park and Preserve.

National Headquarters
1130 Seventeenth Street, N.W.
Washington, D.C. 20036-4604
Telephone: 202-682-9400
Fax: 202-682-1331
www.defenders.org
www.kidsplanet.org

Introduction

Defenders of Wildlife is a national wildlife conservation organization with over 465,000 members and supporters. It has been involved in the Alaska wolf management controversy since 1975, and has actively sought to ensure that the State of Alaska's wolf management decisions are based on sound biological data and principles of responsible wildlife management. A brief history of our involvement follows.

After more than two decades of frustration over the practice of aerial killing of wolves, Defenders was a leading proponent of Ballot Measure 3, which voters in 1996 passed by an overwhelming 59% of the vote. The measure repealed an earlier regulation allowing private citizens to land and shoot wolves, and prohibited the state from using aircraft in government wolf control programs except in the case of a biological emergency.

State lawmakers passed legislation in 1999 gutting a major part of the 1996 citizen initiative by allowing the state to control wolves by the use of aircraft without first finding that a biological emergency exists. This effort to thwart the will of the public was followed in 2000 with a law to reinstate same-day airborne "land and shoot" wolf shooting in large sectors of central interior Alaska, the only surviving provision from the 1996 initiative.

In the fall of 2000, the citizens of Alaska passed Ballot Measure 6 to reinstate the ban on public same-day airborne wolf hunting. This referendum passed by a strong margin of 54% to 46%.

In June of 2003, the state legislature again overturned the will of the public and passed Senate Bill 155, which re-authorizes same-day airborne or airborne hunting of wolves by the public in wolf control areas. SB 155 explicitly authorizes the use of the public to kill wolves to

benefit game populations.

Using their new-found authority, the Alaska Board of Game approved predator control programs using same-day airborne or airborne wolf shooting for Game Management Units (GMU) 19D East and 13. The program for GMU 19D East alone is anticipated to result in the killing of at least 40 wolves shot from planes in that area. GMU 13, which borders Denali National Park and Preserve in some areas, hosts thousands of sport hunters from Anchorage yearly. Other areas identified by the Board for active wolf management programs include GMU 16, 19A and B, 20A and 20D. GMU 20, for example, includes the state lands bordering Denali National Park and Preserve and is heavily used by sport hunters from the Fairbanks area.

Because the programs are for the purpose of enhancing hunting and other recreational opportunities, unrelated to protecting wildlife, they violate the Airborne Hunting Act. To make this absolutely clear, we request that you issue necessary interpretative regulations on an expedited basis.¹

Proposed Regulations

Specifically, we request that you amend 50 C.F.R. § 19.31 – which implements the AHA’s exception for state permits – to insert the following new subparagraph:

(c) A state may not issue permits, or engage in any otherwise prohibited activity under the Airborne Hunting Act, for the purpose of manipulating any wildlife populations.

¹ Because the requested rules would be “interpretative” rather than substantive, they may be issued and made effective immediately. 5 U.S.C. § 553(b); see, e.g., National Family Planning & Reproductive Health Assoc., 979 F.2d 227, 236 (D.C. Cir. 1992) (an “interpretative rule” explains the meaning given by the agency to a statute or rule it administers).

Background

A. The Airborne Hunting Act (AHA)

The AHA makes it unlawful for “[a]ny person” to use aircraft to “shoot[] or attempt[] to shoot for the purpose of capturing or killing any bird, fish, or other animal,” and it also prohibits the use of aircraft “to harass any bird, fish, or other animal.” 16 U.S.C. § 742j-1. The statute was enacted principally to curtail the airborne hunting of wolves in Alaska. As the House Committee on Merchant Marine and Fisheries explained:

Testimony presented at the hearings indicated that in the State of Alaska alone, over 1,000 wolves have been killed in each of the past 4 years. In the last year for which statistics are available, 1968, over one-third of them were killed by airborne bounty hunters.

Your committee feels it is most unsportsmanlike to hunt from aircraft and that the reported bill . . . would . . . hopefully put an end to this abominable practice.

H.R. Rep. 92-202, 93rd Cong., 1st Sess. 4 (1971) (“House Report”) (emphasis added).

The Act provides a limited exception for persons operating under the authority of a state “to administer or protect or aid in the administration or protection of land, water, wildlife, livestock, domesticated animals, human life or crops.” 16 U.S.C. § 742j-1(b). The legislative history makes it clear that this exception was intended to preserve the states’ traditional police powers to protect their land and wildlife, and that it was not intended to authorize the states to engage in airborne hunting of animals to manipulate the natural wildlife populations. Thus, the House Report explains:

Your committee is most hopeful that the States will utilize the permit authority cautiously when issuing permits in order that the objectives of this legislation can be

successfully accomplished. And further, that no attempt will be made on the part of the States to utilize aircraft or permit the utilization of aircraft to achieve a balance in wildlife, which should be left to nature or to other more sportsmanlike hunting practices.

House Report, *supra*, at 5 (emphasis added).

In keeping with the overall intent of the statute, the Department of Interior's implementing regulations also expressly provide that "States may not issue permits for the purpose of sport hunting." 50 C.F.R. § 19.31(a) (emphasis added).

The Constitutionality of the statute – and particularly its limitation of the states' authority to allow airborne hunting on state land – has been upheld as a permissible exercise of Congress's authority under the Commerce Clause. United States v. Helsely, 615 F.2d 784, 786 (9th Cir. 1979), cited with approval in Hodel v. Va. Surface Mining & Reclamation Assn., 452 U.S. 264, 289 n.30 (1981); accord United States v. Blair, 488 F.Supp. 22 (D.Neb. 1979). As the Court explained in United States v. Helsely, "[t]he Airborne Hunting Act is a statute . . . well within the congressional power to regulate interstate commerce." 615 F.2d at 786. In light of Congress's authority to enact the legislation under the Commerce Clause, the Court further observed that where a state law conflicts with the AHA, "we doubt that [the] state legislation could stand." *Id.* at 788. Therefore, there can be no doubt that the Secretary has the authority to issue interpretative regulations that clarify the circumstances under which a state may issue permits that allow for the airborne shooting of wildlife – as long as such regulations do not transgress the Act's exception to allow such activities by the state "to administer or protect . . .

land, water, wildlife, livestock, domesticated animals, human life, or crops.”²

B. Facts Supporting the Proposed Regulations

For many years, Alaska’s Board of Game has engaged in efforts to allow hunters and trappers opportunities that involve the use of aircraft to shoot wolves. In November 1992, the Alaska Board of Game approved a massive five-year aerial wolf control program for approximately 19,400 square miles of the State in interior Alaska (specifically the Nelchina Basin, Tanana Flats/Alaska Range foothills, and Fortymile areas). The principal purpose of the program was to increase the moose and caribou populations in those areas for the benefit of sport hunters, by reducing the wolf as a predator. See Draft 1992 Department of Fish & Game Regulations at 8 (Exhibit 1) (“the program objectives for this area are . . . to produce high yields of moose and caribou for humans and to provide the maximum opportunity to participate in hunting for these species”); see also New York Times at A16 (Nov. 19, 1992) (Exhibit 2) (comments by Bruce Bartley, spokesman for the Alaska Department of Fish and Game, stating, “[w]hat’s happening is some hunters feel they are being shortchanged. They think a few more moose and caribou ought to die by bullets instead of by teeth.”). The State did not claim or substantiate – nor could it – that the program was necessary to ensure adequate numbers of caribou and moose for subsistence purposes.

In response to an enormous public outcry against the program, and an announced boycott of tourism in the State orchestrated by several environmental and animal protection

² The Department of the Interior and the Bureau of Land Management have additional authority under the Alaska National Interest Lands Conservation Act, 16 U.S.C. § 3101, and the Federal Land Policy Management Act (“FLPMA”), 43 U.S.C. §§ 1701 et seq., to issue regulations necessary to protect and preserve wildlife on federal lands.

organizations, in December 1992, then Governor Hickel directed the Commissioner of Fish and Game to suspend the implementation of aerial wolf control measures adopted by the Board of Game. See, e.g., Letter from Governor Hickel to Dr. Manville (Dec. 10, 1992) (Exhibit 3); Alaska Department of Fish & Game Press Release (Dec. 22, 1992) (Exhibit 4). Instead, Governor Hickel convened a “Wolf Summit” and announced that following the summit, “the Board of Game will reconsider its decisions regarding wolf management” (Exhibit 3).

The current actions by the legislature and Board of Game to reinstate aerial wolf killing to enhance game populations are merely a continuation of past policy. SB 155, the law enacted in 2003, reinstates public airborne or same-day airborne wolf shooting as part of a specific predator control program. In addition, it removes the Commissioner of Fish and Game from the approval process. Finally, SB 155 requires that the Board make several findings before issuance of a permit, namely, that the objectives set by the Board for game populations have not been achieved; that predation is an important factor in the lack of achievement of the objectives; and that a reduction in predation will benefit the game population.

The new regulation, 5 AAC 92.039, “Permit for Taking Wolves Using Aircraft,” is designed “to establish a wolf population reduction or regulation program for purposes of aiding in the administration of wildlife management.” (Exhibit 5).

In March of 2003, the Board issued findings regarding the aerial killing of wolves in the GMU 19D East area, and approved the program in July and November, 2003. Under the plan, up to 45 wolves, constituting the entire wolf population of this area, will be shot from planes. Additional aerial wolf killing programs will allow hunters to kill hundreds of wolves in other areas, with killing in GMU 13, the Nelchina Basin, slated to begin in mid-January of 2004.

The aerial wolf killing now authorized for GMU 19D East is expressly designed to kill wolves in an attempt to artificially augment moose populations. In 1995, the Board of Game established moose population objectives of 6,300, despite the fact that there were less than 2,100 moose in the area, with an annual harvest of about 80 moose (Exhibit 6). It was understood at that time that the only way to meet the significantly higher objectives was to implement a wolf control program.

In 2000, the Commissioner himself made a statement that the Board's population and harvest objectives were "not realistic" (Exhibit 7). The Board lowered the objectives to between 3,000 and 3,500 moose, and a November 2001 survey found that the objectives had been met. (Exhibit 8). Despite the survey data indicating that the population objectives were met, in 2003, the Board adopted findings and made a determination that "human consumptive use is the preferred use of moose in Unit 19D...and that predation control in the McGrath area is necessary to restore the abundance of the moose population to provide for human harvest" (Exhibit 9).

In addition to having already met the prey population objectives for the area, there is no sound evidence that wolf predation is an important cause of any past failure to meet the prey objectives. Instead, the former unrealistic quota and the inability of the area to support such a population, were the likely causes.

Violations of the Airborne Hunting Act

For the reasons discussed below, we believe the State of Alaska's new regulation and programs violate the Airborne Hunting Act and the Department of Interior's existing regulations. However, to make this absolutely clear, we urge that you immediately promulgate the requested

interpretive regulation.

A. The Aerial Wolf Control Regulation

1. *The Regulation Authorizes an Aerial Wolf Control Program that is Unlawful under the AHA.*

The Board's aerial wolf control regulation violates both the letter and the spirit of the AHA. The regulation allows permittees to land ski planes and other aircraft near wolves, and then to open fire on the animals, or to shoot them from the air. Because this killing is being done to enhance game populations, it is prohibited by the Act and the Department's implementing regulations.

The legislative history of the AHA makes it clear that the Act prohibits the adoption of the regulation issued by the Board of Game. The aircraft-aided killing of wolves to augment game populations falls outside the bounds of the Act's state-authorized activities exception. The legislative history of the Act indicates that the statutory exception for state-authorized activities should not be read to include the manipulation of public, non-endangered game populations through aircraft-aided killing of predators. Indeed, the history is replete with testimony that the exception for state-authorized activities to protect or aid in the protection of wildlife was not intended to include the use of aircraft to kill a predator species to artificially inflate populations of non-endangered game. Alaska's program to kill wolves to augment moose populations, a non-endangered species whose individuals are thriving in many areas, does not constitute protection of wildlife as that term is used in the AHA.

Representative Pelly, co-sponsor of the bill that became law, reported that the exception was drafted to meet "the feelings of those who were concerned that the effect of the bill would

adversely affect range management and control programs.” 117 Cong. Rec. 15195 (1971). The management of a range does not involve the manipulation of public game herds, but wildlife and livestock that are privately owned and managed. Representative Saylor specifically stated that the law provided “for the legitimate use of aircraft in the proper management of livestock, domesticated animals, or privately owned and managed wildlife.” *Id.* at 15196.

In addition, the Congressional Committee on Merchant Marine and Fisheries noted in a 1971 House report that it “is most hopeful that...no attempt will be made on the part of the States to utilize aircraft or permit the utilization of aircraft to achieve a balance in wildlife which should be left to nature or to other more sportsmanlike hunting practices.” HR. Rep. No. 202, 92d Cong., 1st Sess. 5 (1971).

In light of this legislative history, the State of Alaska simply may not rely on the AHA’s state exception for the purpose of increasing the number of moose and other wildlife to be made available for hunters and trappers. Such manipulation of predator-prey relationships, through the use of aircraft assisted “wolf control,” would clearly constitute “utilization of aircraft to achieve a balance in wildlife” – precisely the kind of practice Congress intended to prohibit under the statute. Thus, the State’s program of killing wolves to build up a moose population does not fall under the state-authorized activities exception as an activity aiding in the administration or protection of wildlife.

For a number of additional reasons, we do not believe that the State has adequately demonstrated that the GMU 19D East program is necessary “to protect . . . wildlife” in the State. First, the State’s principal assumption upon which the wolf control program is based - that the moose population in GMU 19D East is in need of bolstering - is at odds with the most current

moose survey for the area (November 2001), demonstrating that moose population objectives have been met (Exhibit 8).

Second, there is no evidence that wolf predation, as opposed to other factors, is the cause of any past declines in the moose population. The Department of Fish and Game's former Record of Decision concedes that "evidence suggests that short-term weather-induced nutritional stress . . . is the dominant factor affecting productivity." Record of Decision at 11 (emphasis added). The State's own former regulations acknowledge this point. They state that "wolf predation may not be a significant factor initiating declines in prey abundance or productivity . . ." 5 AAC 92.125(b)(3) (Exhibit 10). In other words, the State has not only met its current prey population objectives, but has no current or past biological basis for concluding that wolf predation was to blame for any declines in the moose herd.

For all of these reasons, we believe that the State of Alaska simply cannot demonstrate that permitting the killing of wolves in GMU 19D East with the use of aircraft is necessary "to protect . . . wildlife" within the meaning of the limited state exception in the AHA, and that interpretive regulations would ensure that the State could not rely on this exception to justify any portion of its "wolf control program."

In addition, the new state regulation will allow hunters to conduct the killings, which violates the provision prohibiting the issuance of permits for the purpose of sport hunting. See, 50 C.F.R. § 19.31(a) ("States may not issue permits for the purpose of sport hunting"). Indeed, increasing game populations throughout the state was the primary reason for the enactment of SB 155, which re-instituted public aerial wolf killing (Exhibit 11). The reason for such increase is to provide more opportunities for hunters to kill these animals for sport and subsistence

purposes. Therefore, such “wolf control” is clearly primarily for the “purpose of sport hunting,” i.e., to increase opportunities for sport hunting in GMU 13 and other areas.

The Fish and Wildlife Service’s Regional Director stated these concerns in a letter to the Alaska Department of Fish and Game dated October 30, 1992. He stated that:

The Airborne Hunting Act . . . offers very limited conditions under which wildlife may be hunted or harassed with aircraft States may not issue permits for the purpose of sport hunting.

Letter to Carl Rosier from Walt Steiglitz (Oct. 30, 1992) (Exhibit 12) (emphasis in the original). Accordingly, such taking of wolves violates the AHA if the purpose of the program is to assist “sport hunting,” unless the State can demonstrate that the program is necessary to protect “wildlife.”³

For all of the above reasons, we submit that the State of Alaska’s aerial wolf control regulation violates the Airborne Hunting Act and its implementing regulations. However, to clarify that the regulations do not permit such activity – for the purpose of managing game populations or for “sport hunting” – we urge the Secretary to issue the interpretative regulation discussed below.

2. Proposed Amendment

To eliminate any doubt that the State of Alaska’s aerial wolf control regulation violates the AHA, we propose that the Secretary amend 50 C.F.R. § 19.31, the portion of the implementing regulations that deals with the state exception under the AHA, to add the

³ The State has not claimed that the program is necessary to protect “land, water . . . livestock, domesticated animals, human life, or crops.” 16 U.S.C. § 742j.

following language:

(c) A state may not issue permits, or engage in any otherwise prohibited activity under the Airborne Hunting Act, for the purpose of manipulating any wildlife populations.

This language would codify Congress's intent, in making it clear that a state may not permit the otherwise prohibited use of aircraft to hunt animals "for the purpose of manipulating wildlife populations to increase sport hunting opportunities." House Report at 5 (a state may not issue permits under AHA "to achieve a balance in wildlife").

C. Impacts of the State's Activities on Wolves Living in the Denali National Park and Preserve

The Department of the Interior should be particularly diligent in ensuring that the State of Alaska's "wolf control program" is not used as a ruse to increase sport hunting opportunities in light of the fact that at least part of the GMU 19D East program is taking place on land that has in the past been frequented by some wolves who live in the adjacent Denali National Park and Preserve. Those wolves living in the designated wilderness area of the Park and Preserve are currently protected from sport hunting and trapping. 16 U.S.C. §§ 1, 351-352.

Since 1942, when Adolph Murie published his now-famous study on the Wolves of McKinley National Park, wolf packs in that Park, since renamed Denali National Park and Preserve, have become the most studied in the world. Since the National Park Service funded Dr. L. David Mech to conduct a detailed study of the movements, dispersion, territories and feeding habits of all wolf packs in the Park in 1986, members of all packs have been radio-instrumented. Moreover, several packs of wolves in Denali National Park and Preserve are often the most-viewed of any in North America, and, for that reason, have become habituated to the

presence of, and lack of threats posed by, humans. Those packs whose territories encompass habitat outside the Park, especially those which make forays into areas where intensive wolf control will be carried out - are at risk of being killed as a result of the State's new program.

At least one pack could be in jeopardy when it ventures into the 19D East control area. While some members are radio-collared, unless monitoring by the State is nearly continuous, the wolves will clearly be vulnerable to being killed as part of the State's wolf control program. Thus, as soon as these wolves step outside Denali National Park and Preserve boundaries, they become susceptible to the new aerial wolf control practices.

In fact, in recognition of the unique and important nature of the wolf research being conducted in the Park, as well as the importance of these wolves to the viewing public that observes and photographs them, Alaska's Board of Game passed and implemented a 10-mile no-hunting and trapping buffer zone around Denali National Park and Preserve specifically to protect wolves whose territories extended outside the Park and Preserve and thus are vulnerable to hunting and trapping (Exhibit 13).

Because the State's GMU 19D East program authorizes members of the public to take wolves, there can be no guarantee that wolves from Denali National Park and Preserve will not be killed as a result of this new program. Particularly in light of the fact that the sole purpose of the State's "wolf control program" is to increase the number of moose that may be hunted, the federal government should exercise its authority under the AHA to ensure that no use of aircraft is employed to kill any of those animals.

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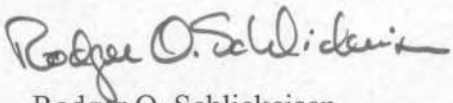
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Conclusion

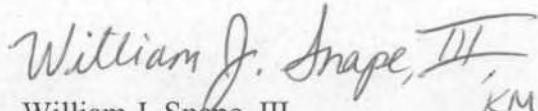
Conclusion

For all of the foregoing reasons, Defenders of Wildlife respectfully requests that the Department of the Interior grant this petition and immediately issue the proposed interpretative regulation.

Sincerely,



Rodger O. Schlickeisen
President



William J. Snape, III
Vice-President for Law and Litigation