

more killing and thereby increase the likelihood of reaching the Board of Game's ("Board") "annual objective" of killing 383 - 600 wolves. Id.

Later that day, a "State News Release" was issued from the Office of the Governor and the Alaska Department of Fish and Game ("ADF&G") that confirmed the Anchorage Daily News story. Exhibit 32 (State of Alaska News Release, "ADF&G Enhances Predator Control Efforts," March 21, 2007). The release stated that ADF&G would immediately institute four new "management actions." Id. Although the release labeled it a "State Incentive Program," the second of these four actions is really a poorly disguised bounty program. The release described the program as one designed to "motivate permittees to redouble their efforts" at the aerial killing of wolves. Id. The release further stated that

to help offset the high cost of aviation fuel, ADF&G will offer cash payments to those who return biological specimens to the department. Permittees will be paid \$150 when they bring in the left forelegs of wolves taken from any of several designated control areas.

Id. On March 21, 2007, plaintiffs' Defenders of Wildlife, Alaska Wildlife Alliance, and Sierra Club ("Defenders"), through counsel, requested information from the defendants that might explain the details of this program, but so far such information has not been forthcoming. Exhibit 33 (Affidavit of Valerie Brown).

Defenders now requests that this Court immediately enjoin the defendants from making any payments under the so-called State Incentive Program. Such a program is clearly illegal. Over two decades ago the Legislature revoked any authority the defendants had to pay bounties to hunters. Even if defendants still had authority to adopt such a program, AS 16.05.210 expressly prohibits payment of bounties to the individuals permitted to participate in airborne or same day airborne shooting of wolves and bears under 5 AAC 92.125. In any event, even if such

payments to these permittees were not expressly prohibited by AS 16.05.210, the defendants must first promulgate regulations allowing for such payments, and the Legislature must appropriate funds for them, and neither of these two actions has occurred.

Thus, if the defendants are not immediately enjoined from making payments under the State Incentive Program, many more wolves are likely be killed in the next few days and weeks, and public monies will be spent illegally, disbursed to an exclusive group of private permittees.

A. There is No Statutory Authority for the Payment of Bounties.

The laws of the Territory of Alaska granted authority to game managers to establish a bounty program for wolves and coyotes. Exhibit 34 (Alaska Compiled Laws Annotated, §§ 33-3-101 – 33-3-120). After Statehood, these territorial laws were codified in AS 16.35.110 – 16.05.130. In 1984, however, the Alaska Legislature repealed all of AS 16.35. § 29, ch. 132 SLA 1984.¹ After the repeal of AS 16.35, only AS 16.05.255(a)(6) authorized the Board to permit the payment of bounties. Exhibit 35 (1983 version of AS 16.05.255(a)(6), authorizing the Board to “designat[e] game management units or parts of game management units in which bounties for predatory animals shall be paid”). But in 1984 the Legislature also deleted the authority for bounties that was previously contained in AS 16.05.255(a)(6) by passing House Bill 404, which read:

(6) methods, means, and harvest levels necessary to control predation and competition among game in the state [INVESTIGATING AND DETERMINING THE EXTENT AND EFFECT OF PREDATION AND COMPETITION AMONG GAME IN THE STATE, EXERCISING CONTROL MEASURES

¹ Today, the only provision remaining in State law that concerns bounties is in AS 16.05.210, a statute that originated in Territorial law. See Exhibit 34 at 6 (ACLA 33-3-119). It prohibits the payments of bounties to ADF&G’s employees and “special hunters.” When AS 16.35 was repealed and AS 16.05.255(a)(6) was amended, AS 16.05.210 was left in place. Alaska Statute 16.05.210 is discussed further in Section D, below.

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]

Exhibit 36 at 4 (§ 10, ch. 132, SLA 1984) (bracketed and capitalized material indicate deletions).

Since the repeal of AS 16.35 and the amendment of AS 16.05.255(a)(6) in 1984, the Legislature has not passed a statute authorizing an agency of the Executive Branch to pay bounties or authorizing the Board to adopt regulations permitting the payment of bounties.

B. The Defendants’ “State Incentive Program” Is Really A Bounty Program.

Apparently recognizing they lack statutory authority to authorize or pay bounties, the defendants characterize their State Incentive Program as one not only to encourage the killing of predators but also to provide data about the wolf populations in predator control areas. The State News Release quotes ADF&G Director of Wildlife Conservation, Matt Robus, as describing the payment as “cash payments [that] are additional incentives to aerial control permittees, and are not bounties” and as a “management action . . . yielding scientific information”. Exhibit 32 at 1-2. Mr. Robus's all-too-facile characterization of the State Incentive Program does not change what is in fact a bounty program into something else.

The term “bounty” was not defined in territorial law or in AS 16.05 or AS 16.35. It apparently has never been defined in a regulation in the Alaska Administrative Code (“AAC”). Under settled principles of statutory construction, unless words have acquired a peculiar meaning by statutory definition or judicial construction, they are to be construed in accordance with their common usage. Benavides v. State, 151 P.3d 332, 335- 336 (Alaska 2006). Consequently, in deciding whether or not the defendants have authority to authorize a bounty program, the Court must apply the commonly understood meaning of the word bounty.

Black's Law Dictionary defines "bounty" as "a premium or benefit offered or given, esp. by a government, to induce someone to take action or perform a service." Black's Law Dictionary, 8th Edition, Bryan Garner, editor (2004). The version of Webster's dictionary current in the 1960s, around the time the territorial bounty law was codified in AS 16.35, defined it as "a payment to encourage the destruction of noxious animals" and "a reward, premium, or subsidy, especially when offered or given by a government." Webster's Third New International Dictionary, Philip Babcock Gove ed. (1966), at 260. A similar definition of bounty has been applied in other states' case law. See Exhibit 37 (West Publishing, Words and Phrases, "Bounty").

Under those definitions, Mr. Robus's own characterization of the payments as an "additional inducement" to the aerial hunters proves the payment is a bounty. Exhibit 32. The State News Release also proves it, as it indicates that the State Incentive Program is designed "to motivate permittees to redouble their efforts and to help offset the high cost of aviation fuel." Exhibit 31 at 1. Both ADF&G's name of the program --- "Incentive" --- and the description of the purpose of the payment fit the definitions of a "bounty" in common usage perfectly.

Furthermore, according to the Anchorage Daily News story, Governor Sarah Palin's spokesman, Mr. Leighow, explained that the payment program was being implemented in preference to other methods because "the income helps families where the wolf killing occurs." Exhibit 31. In other words, one purpose of the payments is to serve as a "subsidy." This purpose also matches the definition of a bounty perfectly. See Webster's Third New International Dictionary, *supra*, at 260 (defining bounty as "a reward, premium, or subsidy, especially when offered or given by a government").

ADF&G's Director Robus's assertion that the State Incentive Program is really just a “management action . . . yielding scientific information” should be seen for what it is. Exhibit 32 at 1-2. Over 600 wolves have already been killed in the predator control areas. Exhibit 31. ADF&G has not previously required that the forelegs of killed wolves be delivered to ADF&G, either by the aerial control permittees or other hunters and trappers of wolves operating in the predator control areas. ADF&G did not identify to the Board any studies that would utilize data from wolf body parts during the Board's discussion and authorization of the control programs in May 2006.

ADF&G's suddenly-invented, scientific motivation to see the left foreleg of each dead wolf is transparent, an attempt to shroud the defendants' real motive and thereby circumvent the prohibition on the payment of bounties, using funds that might otherwise have been designated for scientific research to pay them. On this point it is worth noting that the Commissioner could have included as a condition in the permits issued under 5 AAC 92.125 (which allow airborne or same day airborne hunting of wolves) that the permittee deliver each dead wolf's left foreleg to ADF&G. He could also impose such a condition today. That the defendants instead want to reward the permittees for doing what the permit could require is irrefutable evidence that no matter how creative the defendants are in characterizing it differently, the State Incentive Program is intended to induce the killing of wolves through the illegal payment of bounties.

C. If the Defendants Have Authority to Create a Bounty Program, the Board First Must Enact a Regulation Permitting It.

Currently there is no regulation in the AAC that permits the payment of bounties. As noted previously, the regulatory authority under the old bounty laws was expressly repealed in 1978. Exhibit 38.

But suppose this Court were to determine that that the Board still retains the power to authorize a bounty program. Such a power could only be exercised through rule making in accordance with the Alaska Administrative Procedure Act, because that is the only way that the Board can act. See AS 16.05.255(a). The Board has not exercised that hypothesized power; it has not adopted a regulation approving the State Incentive Program, or approving any other bounty program. Accordingly, absent the existence of such a regulation duly authorized by law, it would violate both AS 16.05.255(a) and the APA were the defendants allowed to make bounty payments under the State Incentive Program.

D. Even If Bounties May Be Paid, AS 16.05.210 Prohibits Their Payment To The Permittees.

As noted above, the one remaining Alaska Statute that mentions bounties in the context of wildlife is AS 16.05.210. This statute prohibits payments of bounties to certain individuals:

An employee or special hunter of the department may not receive or attempt to receive a bounty for the killing of a predator, or transfer the scalp or other part of a predator to another person for the purpose of collecting a bounty.

Id. (emphasis added). A “special hunter” is not defined by statute or in the AAC. The dictionary definition of “special” --- the meaning of “special” in common usage --- is “one appointed or used for a special service or occasion” and “one designated or selected for a particular purpose, occasion, or other end: limited in range.” Webster’s Third New International Dictionary, Philip Babcock Gove ed. (1966).

The only individuals apparently eligible for the bounty payments under the State Incentive Program are the aerial permittees approved by the ADF&G Commissioner under 5 AAC 92.125. In enacting 5 AAC 92.125, the Board authorized the ADF&G Commissioner to grant permits to private individuals to engage in airborne and same day airborne hunting of wolves and bears in certain Game Management Units. Since May 2006, the Commissioner has issued a number of aerial hunting permits for wolves and bears.

The permits issued under 5 AAC 92.125 protect the state's aerial wolf hunters from a charge that they are operating in violation of the federal airborne hunting act. See 16 U.S.C. § 742j-1.² The federal act prohibits aerial hunting or using a plane in the act of hunting except when a person is "employed by, or is an authorized agent of, or is operating under a license or permit of, any State or the United States to administer or protect or aid in the administration or protection of land, water, wildlife, livestock." Id. at (b). In other words, absent permission received in a permit issued under 5 AAC 92.125, an individual engaged in aerial or same day airborne hunting would violate not only AS 16.05.783 but also federal law.

Thus, the permittees are individuals selected by the state for a special purpose, to conduct a state-authorized wolf control program using airplanes. The individuals holding these exclusive 5 AAC 92.125 permits are plainly "special hunters" for the purposes of AS 16.05.210's prohibition on the payment of bounties. Indeed, the State has argued previously that the individuals granted permits under 5 AAC 92.125 are not sport hunters, but are in fact special designees carrying out a predator control program. See Friends of the Animals et al. v. State,

² Defenders does not concede that the predator control permittees are legally operating under the Federal Airborne Hunting Act. However, it has not challenged the defendants' actions under federal law in this proceeding.

3AN-03-13489, Anch. Sup. Ct., Third Jud. Dist., State's Motion for Summary Judgment, at 11-12 (Feb. 22, 2005).

Because the individuals with permits under 5 AAC 92.125 and to whom the defendants propose to make payments are special hunters for the purposes of AS 16.05.210, any payments under the State Incentive Program to them would be illegal under that statute and thus should be enjoined.

E. Even If the Defendants Have Authority to Pay Bounties or Rewards, the Legislature Has Not Appropriated Monies For Such Payments.

Alaska law prohibits a State agency from disbursing public monies without authorization from the Legislature. See AS 37.07.080(d) - (e) (restrictions on expenditures), 37.07.120(3) (defining "appropriation"); see also, AS 37.07.110 ("This chapter shall be construed as supplemental to all other state laws not in conflict with it."). As explained above, over two decades ago the Legislature revoked the Board's and ADF&G's authority to grant bounties. But even if the Court were to find that not to be the case, the Legislature has not appropriated any monies for the payment of bounties. The defendants cannot identify language in any legislative appropriation, or legislative history for any such enactment, indicating otherwise. Thus, the defendants' use of public monies for the payment of bounties would violate Title 37 of the Alaska Statutes.

Even if the Court was willing to accept the defendants' characterization of the State Incentive Program as one designed to assist ADF&G in collecting scientific data, the defendants can identify no legislative appropriation that authorizes ADF&G to pay public monies to private parties for such data. In fact, it would be strange if the Legislature authorized a state agency to pay a permittee for performance under a permit without that possibility first being discussed

beforehand in legislative committees or on the floor of the House or Senate. A legislative authorization of payments of public monies to a permittee would surely have generated vocal controversy from some quarters in the Legislature. After all, a permit applicant generally pays the State a fee for the permit, not the other way around; a permittee is *allowed* and *required* to do certain things, and ordinarily it is not paid to do them.

There being no appropriation designated to fund the State Incentive Program, the defendants may not use public monies to make payments under it and thus should be enjoined from doing so.

F. The Standards for an Injunction Are Met.

Defenders set out the applicable legal standards for the grant of interim injunctive relief in their earlier Memorandum In Support of Motion for Preliminary Injunction ("Defenders' Memo in Support of PI", filed November 17, 2007), at 36-46.³ For brevity's sake, rather than repeating that argument and briefing, it is incorporated by reference here. Suffice it to say that under the well-recognized injunction test, Defenders is entitled to injunctive relief because there is such a high probability of success on the merits of their bounty argument that it outweighs any possible countervailing considerations.

In any event, in addition to the procedural and environmental harms that Defenders claimed in Defenders' PI Memo., the State Incentive Program also causes additional irreparable harms to Defenders. The first kind of irreparable harm is procedural. Even if the defendants are able to persuade the Court that they have some source of statutory authority to adopt a bounty program, the only way that can be done is through a regulation adopted in accordance with the APA. Here the defendants have embarked on a program without first complying with the APA,

³ See also, Defenders' Reply at 26 - 36, filed December 5, 2006.

causing irreparable procedural harm to the public and to the plaintiffs who are entitled to notice and a right to comment on such a regulation and program before it is adopted. See Turpin v. North Slope Borough, 879 P.2d 1009, 1013 (Alaska 1994) (TRO upheld where executive branch attempted to circumvent APA procedures in opening the haul road); see also Coghill v. Boucher, 511 P.2d 1297, 1304-05 (Alaska 1973).

Another kind of irreparable harm arises from the fact that the State Incentive Program purports to authorize, without legislative approval, the direct giveaway of public monies to private parties. Once these illegal expenditures are made, the only way the monies can be recovered, if at all, is if the Attorney General brings a successful action for their recovery. Given the amount of monies involved, it is highly unlikely the Attorney General would spend state resources to recover these monies. Thus, the monies paid to hunters will be lost forever, causing irreparable injury to the public treasury.

In sum, Defenders has shown a high probability of success on the merits concerning the legality of bounty payments, as well as irreparable harm. The defendants will not be harmed if it they are not permitted to inaugurate a payment program, one of highly dubious legality, at this juncture. As an option, the Commissioner of ADF&G already has the authority, and may clearly exercise it, to require the permittees to produce the left foreleg of each wolf killed if, in fact, ADF&G truly has some scientific reason for collecting and examining them.

CONCLUSION

Because the State Incentive Program would allow the payment of bounties and because this program has neither been authorized nor been funded by the Legislature, Defenders requests that the Court immediately enter an injunction prohibiting implementation of the program, in the form of the Order submitted herewith.

Respectfully submitted this 27th day of March, 2007 in Anchorage, Alaska.

Attorneys for the plaintiffs

TRUSTEES FOR ALASKA

By: _____
Michael J. Frank, Alaska Bar No. 7410076

LAW OFFICE OF VALERIE BROWN, LLC

By: _____
Valerie L. Brown, Alaska Bar No. 9712099