

In the Supreme Court of the State of Alaska

Ronald T. West,

Appellant,

v.

State of Alaska, Board of Game, and McKie Cambell, Commissioner, Department of Fish and Game, Alaska Wildlife Alliance, Defenders of Wildlife, Sierra Club, Tom Classen, and Friends of Animals,

Appellees.

Supreme Court No.
S-13184/13343

Alaska Wildlife Alliance, Defenders of Wildlife,

Appellants,

v.

Ronald T. West, State of Alaska, Board of Game, and McKie Cambell, Commissioner, Department of Fish and Game, Sierra Club, Tom Classen, and Friends of Animals,

Appellees.

Trial Court Case # 3AN-06-13087CI consolidated with 3AN-06-10956 CI

APPEAL FROM THE SUPERIOR COURT,
THIRD JUDICIAL DISTRICT AT ANCHORAGE,
THE HONORABLE WILLIAM MORSE, PRESIDING

APPELLANTS DOW and AWA'S OPENING BRIEF

Filed in the Supreme Court of
The State of Alaska, this ____
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TABLE OF CONTENTS

TABLE OF CONTENTS.....	ii
TABLE OF AUTHORITIES	iii
AUTHORITIES RELIED ON	v
JURISDICTIONAL STATEMENT	2
PARTIES TO THE CASE.....	2
STATEMENT OF ISSUES PRESENTED FOR REVIEW	3
STATEMENT OF THE CASE.....	3
STANDARDS OF REVIEW	12
ARGUMENT	13
A. The Sustained Yield Requirement in AS 16.05.255	14
1. Standard of review	14
2. Meaning of the statute	14
B. The Alaska Constitution's Sustained Yield Requirement	18
1. Standard of review	18
2. Meaning of Article VIII, Section 4	18
C. Board of Game Actions	25
D. The Board Failed to Apply the Sustained Yield Principle.....	27
1. Applicable law.....	28
2. Record deficiency.....	29
3. The State’s Arguments to the Superior Court.....	31
CONCLUSION.....	35
CERTIFICATE OF TYPEFACE.....	38
CERTIFICATE OF SERVICE	39

TABLE OF AUTHORITIES

Constitutional Provisions

Alaska Constitution, Article VIII, Section 4..... 3, 13, 18, 24

State Statutes

ACLA § 39-6-1 (1948) 15
 Art. 1, § 2(g), ch.94, SLA 1959 15, 19
 AS 16.05.255..... passim
 AS 16.05.255 (f)..... 7
 AS 16.05.255(e) 6, 7
 AS 16.05.255(g)..... 6, 17
 AS 16.05.255(j)..... passim
 AS 16.05.783(a) 8
 AS 16.05.940(19) 6, 15
 AS 44.62.180..... 5
 AS 44.62.220..... 5
 AS 44.62.280..... 5

Federal Statutes

16 U.S.C. § 666b..... 19

Regulations

5 AAC 92.039 8
 5 AAC 92.085(8)..... 8
 5 AAC 92.115(g)..... 8
 5 AAC 92.125 passim
 5 AAC 92.125(a)..... 8
 5 AAC 92.125(b)..... 25, 26, 27, 34
 5 AAC 92.125(k)..... 11
 5 AAC 92.990(a)(5) 6

Cases

Alaska Fish Spotters Ass'n v. State, Dep't of Fish & Game, 838 P.2d 798 (Alaska 1992) 29
Alyeska Pipeline Service Co. v. State, Dept. of Environmental Conservation, 145 P.3d 561 (Alaska 2006)..... 13
Bagdonas v. Dep't of Treasury, 93 F.3d 422 (7th Cir. 1996) 29
Benavides v. State, 152 P.3d 332 (Alaska 2006) 13, 14
Duncan v. Retired Public Employees of Alaska, 71 P.3d 882 (Alaska 2003) 19
E. I. du Pont De Nemours v. Train, 541 F.2d 1018 (4th Cir. 1976) 29
Ellis v. State Dept. of Natural Resources, 944 P.2d 491 (Alaska 1997)..... 13, 28
Fed. Power Comm'n v. Transcontinental Gas Pipeline Corp., 423 U.S. 326 (1976) 36
Glover v. State, 175 P.3d 1240 (Alaska 2008)..... 23

<i>Government Employees Ins. Co. v. Graham-Gonzalez</i> , 107 P.3d 279 (Alaska 2005)	14
<i>Hammond v. North Slope Borough</i> , 645 P.2d 750 (Alaska 1982).....	13, 28
<i>Hickel v. Cowper</i> , 874 P.2d 922 (Alaska 1994).....	19
<i>Hickel v. Halford</i> , 872 P.2d 171 (Alaska 1994).....	19
<i>Indiana Forest Alliance, Inc. v. U.S.F.S.</i> , 2001 WL 912751 (S.D. Ind. 2001).....	29
<i>Interior Paint Co. v. Rodgers</i> , 522 P.2d 164 (Alaska 1974).....	13
<i>Matthews v. Quinton</i> , 362 P.2d 932 (Alaska 1961)	23
<i>Moore v. State</i> , 553 P.2d 8 (1976)	28
<i>Native Village of Elim v. State</i> , 990 P.2d 1 (Alaska 1999)	10, 24
<i>Nenana City School Dist. v. Coghill</i> , 898 P.2d 929 (Alaska 1995).....	12
<i>Occidental Eng'g Co. v. INS</i> , 753 F.2d 766 (9 th Cir. 1985)	28
<i>San Luis Obispo Mothers for Peace v. N.R.C.</i> , 751 F.2d 1287(D.C. Cir. 1984) ...	29
<i>State, Dep't of Fish & Game v. Manning</i> , 161 P.3d 1215 (Alaska 2007).....	12, 18
<i>Stepovak-Shumagin Set Net Ass'n v. State</i> , 886 P.2d 632 (Alaska 1994).....	29
<i>Tongass Sport Fishing Ass'n. v. State</i> , 866 P.2d 1314 (Alaska 1994)	28, 29, 36
<i>U.S. v. Dunkel</i> , 927 F.2d 955 (7th Cir.1991)	29
<i>Warren v. Boucher</i> , 543 P.2d 731 (Alaska 1975).....	23

Other Authorities

1 Willoughby, <i>Constitutional Law of the United States</i> § 32 (2d ed. 1929)	23
ADF&G Wildlife Notebook Series, Wolf	36
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Swift, Jonathan. <i>On Poetry: A Rhapsody</i> (1733).....	17
<i>Papers of Alaska Constitutional Convention, 1955-56, Folder 210</i>	30, 35
Regelin, Wayne L., Director, Division of Wildlife Conservation, ADF&G, Wolf Management in Alaska with an Historic Perspective - A Presentation to the Alaska Board of Game, March 2002	4
Robert J. Wolf, Alaska Dep't of Fish & Game, Trapping in Alaska Communities with Mixed Subsistence-Cash Economies at 17 (1991)	36
<i>Webster's New Encyclopedic Dictionary</i> (Merriam-Webster, 2002).....	19

AUTHORITIES RELIED ON

Alaska Constitution, Article VIII, Section 4

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 uses.

Alaska Statutes

AS 16.05.255. Regulations of the Board of Game; management requirements.

* * *

(e) The Board of Game shall adopt regulations to provide for intensive management programs to restore the abundance or productivity of identified big game prey populations as necessary to achieve human consumptive use goals of the board in an area where the board has determined that

(1) consumptive use of the big game prey population is a preferred use;

(2) depletion of the big game prey population or reduction of the productivity of the big game prey population has occurred and may result in a significant reduction in the allowable human harvest of the population; and

(3) enhancement of abundance or productivity of the big game prey population is feasibly achievable utilizing recognized and prudent active management techniques.

(f) The Board of Game may not significantly reduce the taking of an identified big game prey population by adopting regulations relating to restrictions on harvest or access to the population, or to management of the population by customary adjustments in seasons, bag limits, open and closed areas, methods and means, or by other customary means authorized under (a) of this section, unless the board has adopted regulations, or has scheduled for adoption at the next regularly-scheduled meeting of the board regulations, that provide for intensive management to increase the take of the population for human harvest consistent with (e) of this section. This subsection does not apply if the board

(1) determines that intensive management would be

(A) ineffective, based on scientific information;

(B) inappropriate due to land ownership patterns; or

(C) against the best interest of subsistence uses; or

(2) declares that a biological emergency exists and takes immediate action to protect or maintain the big game prey population in conjunction with the scheduling for adoption of those regulations that are necessary to implement (e) of this section.

(g) 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.

* * *

(j) In this section,

(1) "harvestable surplus" means the number of animals that is estimated to equal the number of offspring born in a game population during a year less the number of animals required for recruitment for population maintenance and enhancement, when necessary, and the number of animals in the population that die from all causes, other than predation or human harvest, during that year;

(2) "high level of human harvest" means the allocation of a sufficient portion of the harvestable surplus of a game population to achieve a high probability of success for human harvest of the game population based on biological capabilities of the population and considering hunter demand;

(3) "identified big game prey population" means 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;

(4) "intensive management" means 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;

(5) "sustained yield" means the achievement and maintenance in perpetuity of the ability to support a high level of human harvest of game, subject to preferences among beneficial uses, on an annual or periodic basis.

AS 16.05.783 Same-day airborne hunting.

(a) A person may not shoot or assist in shooting a free-ranging wolf or wolverine the same-day that a person has been airborne. However, 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; or

(2) that a disease or parasite of a predator population

(A) is threatening the normal biological condition of the predator population;
or

(B) if left untreated, would spread to other populations.

(b) This section does not apply to

(1) a person who was airborne the same-day if that person was airborne only on a regularly-scheduled commercial flight; or

(2) an employee of the department who, as part of a game management program, is authorized to shoot or to assist in shooting wolf, wolverine, fox, or lynx on the same-day that the employee has been airborne.

* * *

AS 16.05.940 Definitions.

* * *

(19) "game" means any species of bird, reptile, and mammal, including a feral domestic animal, found or introduced in the state, except domestic birds and mammals; and game may be classified by regulation as big game, small game, fur bearers or other categories considered essential for carrying out the intention and purposes of AS 16.05 - AS 16.40;

* * *

Alaska Administrative Code

5 AAC 92.125 –

5 AAC 92.125(b), (c), (d), (e) and (f) are the programs at issue in this litigation.

Those sections are attached as Appendix A to this brief

JURISDICTIONAL STATEMENT

The Superior Court entered a Final Judgment on October 13, 2008.¹ On November 12, 2008, Defenders of Wildlife and The Alaska Wildlife Alliance filed a notice of appeal with the Supreme Court as a matter of right.²

This Court has jurisdiction over the appeal under AS 22.05.010(c).

PARTIES TO THE CASE

The parties to the case in the Superior Court included plaintiffs Defenders of Wildlife, The Alaska Wildlife Alliance, and Sierra Club; plaintiffs Friends of the Animals, Inc. and Tom Classen; intervenor/plaintiff Ronald T. West; and defendants State of Alaska, Board of Game, Commissioner of Fish and Game, Department of Fish and Game, and John and Jane Does 1-50. In this Court, only Defenders of Wildlife, The Alaska Wildlife Alliance, and Ronald T. West are appellants.

¹ Exc. 78.

² Exc. 80.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Alaska Statute 16.05.255 requires the Board of Game to adopt "intensive management" programs in order to increase moose and caribou populations for hunters. "Intensive management" means management to increase a prey species consistent with "sustained yield." "Sustained yield" means the ability to support a high level of human harvest of "game." "Game" means "any species of ... mammal," including wolves and bears and other species that act as predators.

Given the above, does AS 16.05.255 authorize - and if so does the sustained yield principle in the Alaska Constitution, Article VIII, Section 4 allow - the Board of Game to enact regulations requiring the elimination of 60-80% of the wolves and bears in "predator control" areas without first consciously applying the sustained yield principle to those species?

STATEMENT OF THE CASE

This case poses the question whether the Board of Game may authorize precipitous reductions in wolf, brown bear, and black bear populations without first consciously applying the principle of sustained yield, which under AS 16.05.255 and 16.05.940 applies to all "game" and which under the Alaska Constitution applies to "wildlife" and "all replenishable resources" of the State.

Factual Background. Long before Statehood, humans harvested and relied on wildlife species throughout what would become Alaska.³ After World War II, when Alaska was still a U.S. territory, widespread use of poison and aerial control of wolves by the federal government had greatly reduced wolf numbers.⁴ Shortly after Statehood, the new Alaska Legislature banned the controversial use of poisons⁵ and aerial control was stopped in areas where wolf populations had been decimated.⁶ The Legislature also created a Board of Fisheries and Game, made up of citizen-members to be appointed by the Governor, subject to legislative approval.⁷

³ Norris, Frank. *Alaska Subsistence, A National Park Service Management History* (2002), available at http://www.nps.gov/history/history/online_books/norris1/contents.htm (last visited April 5, 2009).

⁴ Regelin, Wayne L., Director, Division of Wildlife Conservation, ADF&G, *Wolf Management in Alaska with an Historic Perspective - A Presentation to the Alaska Board of Game, March 2002*, available at http://www.wildlife.alaska.gov/index.cfm?adfg=wolf.wolf_mgt (last visited Jan. 21, 2009); *see also* Van Ballenberghe, Victor. *Biological Standards and Guidelines for Predator Control in Alaska: Application of the National Research Council's Recommendations* (2004), available at http://www.wolfsongalaska.org/predator_prey/biological_standards.pdf (last visited April 5, 2009).

⁵ *Id.* (Regelin, 2002); *see also* *Wolves, Bears, and Their Prey in Alaska: Biological and Social Challenges in Wildlife Management*, National Research Council (1997), at 30.

⁶ *Id.* (Regelin, 2002); *see also* *Wolf Management Report of Survey and Inventory Activities*, Alaska Department of Fish and Game, Patricia Harper (ed.) 2005, at 90, available at http://www.wildlife.alaska.gov/pubs/techpubs/mgt_rpts/06_wolf.pdf (last visited April 5, 2009).

⁷ Ch. 64, § 17, SLA 1959.

In 1975 the Legislature split the Board in two.⁸ The new Board of Game ("Board") was given the exclusive authority to manage the taking of game.⁹ The Board is assisted by the Commissioner of Fish and Game ("Commissioner") and the Department of Fish and Game ("ADF&G"). Most of the Board's decisions are formalized and codified through adoption of regulations under the procedural requirements of the Administrative Procedures Act.¹⁰

Through the first three decades of statehood, the Legislature largely left the Board free to make game management decisions and adopt corresponding regulations it thought appropriate. In the 1990s, however, that hands-off approach changed. The Legislature, reacting to opposition to large-scale predator control from both Governor Tony Knowles and the public, made major changes to Alaska's longstanding game management regime.¹¹

In 1994 and again in 1998, the Legislature amended AS 16.05.255 to require the Board to focus on enhancing the success rate of hunters of ungulate "prey" species, principally moose and caribou. Then in 2000, the Legislature amended the initiated law (which had been codified at AS 16.05.783) in order to permit same-day airborne hunting of wolves by members of the public and by

⁸ Ch. 206, § 3, SLA 1975 (codified at AS 16.05.255 (1975)).

⁹ See AS 16.05.255 (a)(2)-(4), (6), and (10).

¹⁰ See AS 44.62.180 – AS 44.62.220, AS 44.62.280 (rule-making procedures).

¹¹ In 1994 Governor Tony Knowles suspended ADF&G's operation of a wolf control program and asked the National Academy of Sciences to review it. About a year later Alaska voters enacted an initiative¹¹ banning the same-day airborne shooting of wolves, ADF&G's preferred method for eradicating wolves.

ADF&G employees.¹² Alaska voters immediately passed a referendum rejecting these amendments.¹³ In 2003, however, the Legislature again amended the initiated law (AS 16.05.783) in order to grant the Board authority to permit airborne or same-day airborne shooting of wolves.¹⁴

As a consequence, by 2003 the versions of AS 16.05.255 and 16.05.783 that permit the current widespread use of private hunters to conduct wolf control programs were in place, and at that time the Board began adopting the first of the so-called "predator control implementation plans" now codified in 5 AAC 92.125.

Under the law as it stands today, the Board is required to identify big game prey populations that the Board finds are important for human harvest and thereafter set "population goals" and "harvest goals" for those populations.¹⁵ After setting population and harvest goals, the Board must establish "intensive management programs" in order to achieve a "high level of human harvest."¹⁶ The

¹² 2000 Referendum #00Game, Ch. 20, SLA 2000.

¹³ *Id.*

¹⁴ Am Ch. 124, §§ 1, 2, SLA 2003. In the August 2008 election, an initiative to amend AS 16.05.783 failed. *See* 05HUNT – An Act prohibiting the shooting of wolves and grizzly bears with the use of aircraft, available at <http://www.elections.alaska.gov/initbal.php> (last visited Jan. 20, 2009).

¹⁵ *See* AS 16.05.255(e), (g). In AS 16.05, "game" means "any species of bird, reptile, and mammal." AS 16.05.940(19).

Exercising a power granted by AS 16.05.940(19), the Board classified wolves, bears, caribou, moose, sheep and other species as "big" game. 5 AAC 92.990(a)(5). An "identified big game prey population means a population of ungulates" which the Board identifies in regulation as "important for human consumptive use." AS 16.05.255(j)(3) (emphasis added). Neither "prey" nor "predator" is otherwise defined by statute or regulation.

¹⁶ AS 16.05.255(e), AS 16.05.255(g).

Legislature defined "high level of human harvest" to mean the "allocation of a sufficient portion of the harvestable surplus of a game population to achieve a high probability of success for human harvest of the game population based on biological capabilities of the population considering hunter demand" ¹⁷ It defined "intensive management" to mean "controlling predators" and the use of fire and other habitat improvement techniques. ¹⁸ Except under certain very limited circumstances, the statute prohibits the Board from significantly reducing the hunting of an identified ungulate ("big game prey") population important for human harvest unless the Board has first adopted an intensive management program in an effort to increase the population. ¹⁹ The Board **must** undertake "intensive management" when there "may" be a "significant reduction in the allowable human harvest" regardless of the cause for any reduction in hunting. ²⁰

After making certain determinations, the Board may permit predator control wherever human harvest goals are not being met, regardless of the level of predation in that area. In other words, the existence of a predator control program generally does not mean that the Board has found that the wolves and bears are so predominant in an area that the moose and caribou populations are unnaturally small or otherwise unhealthy.

¹⁷ *Id.* at (j)(2).

¹⁸ *Id.* at (j)(4).

¹⁹ AS 16.05.255 (f)(1)-(2).

²⁰ *Id.* at (e)(2).

To date, implementation of the “intensive management” plans has mostly been accomplished using private hunters in airplanes. In ordinary circumstances a private person is prohibited from shooting or assisting in shooting wolves the same-day the person is airborne.²¹ The Board, however, "may authorize a predator control program as part of a game management plan that involves airborne or same-day airborne shooting" by private persons.²² Before doing so, the Board must first determine that "predation is an important cause for the failure to achieve the objectives" the Board has set for "identified big game prey populations under AS 16.05.255(g)."²³ If it makes that determination, the Board must then adopt a program that authorizes private persons to engage in airborne or same-day airborne shooting of wolves.²⁴ Private persons who wish to participate in the program must obtain a permit from the Commissioner.²⁵

Following the 2003 legislative changes to the land-and-shoot law (AS 16.05.783(a)), the Board began adopting regulations creating so-called "predator control implementation plans"²⁶ that authorized the sharp reduction of wolf and bear populations in a number of the State's 27 Game Management Units

²¹ AS 16.05.783(a). The statutory prohibition also applies to wolverines. *Id.* While there is no statute that prohibits airborne or same-day airborne shooting of bears, this practice is currently prohibited by regulation. 5 AAC 92.115(g) ("aerial shooting may not be used to take bears"); *see also* 5 AAC 92.085(8) (prohibiting same-day airborne shooting of "game").

²² AS 16.05.783(a).

²³ *Id.*

²⁴ *Id.* (a)(1)-(2).

²⁵ *See* 5 AAC 92.039.

²⁶ 5 AAC 92.125(a).

("GMU"). These regulations were struck down by the Superior Court in 2006.²⁷ The Board then amended the regulations at emergency and regularly-scheduled meetings, held in January and May 2006, respectively.²⁸

The Current Litigation. On August 25, 2006 Defenders of Wildlife, The Alaska Wildlife Alliance and Sierra Club ("Defenders") filed this case challenging the validity of the amended regulations.²⁹ Defenders' case was consolidated with a new case filed by Friends of Animals, Inc. and Tom Classen ("Friends of Animals").³⁰ Ronald T. West was allowed to intervene.³¹

In November 2006, Defenders filed a Motion for a Preliminary Injunction seeking to enjoin activities authorized by the regulations.³² This motion was denied on January 31, 2007 in an oral decision in 3AN-06-10956 CI.

In March, 2007 the Commissioner of Fish and Game initiated a bounty program for wolves.³³ Defenders amended its Complaint to challenge the bounty program and successfully sought a preliminary injunction against it.³⁴

The State filed a motion for partial summary judgment in May 2007.³⁵ In response, Defenders filed a cross motion for summary judgment on all its claims.³⁶

²⁷ R. 97-128.

²⁸ See 5 AAC 92.125 (am 9/1/2006, Register 179) at R. 53-96.

²⁹ R. 3667-3679 (Complaint).

³⁰ R. 3729 (consolidation order); R. 3764 (FOA Complaint).

³¹ R. 1577.

³² R. 2.

³³ Exc. 10.

³⁴ Exc. 1; R. 627-628; Exc. 15-21.

³⁵ R. 1920-1967.

The State responded with its own cross motion for summary judgment.³⁷ The other parties moved for summary judgment as well so that eventually all claims were put in issue on summary judgment.³⁸

The Superior Court granted in part Friends of Animals' summary judgment motion.³⁹ It granted the State's motion for summary judgment with respect to all the remaining claims, except for Defenders' summary judgment motion as to the State bounty program, which the Court granted.⁴⁰

With respect to Defenders' sustained yield claim,⁴¹ the Superior Court held, erroneously, that sustained yield is not defined in AS 16.05.255.⁴² The Superior Court went on to hold that the Alaska Constitution's sustained yield provision applied to wolves and bears, but that the Board had not violated that provision.⁴³ The Superior Court found that *Native Village of Elim v. State*⁴⁴ was "dispositive."⁴⁵ The Superior Court, however, overlooked the fact that in that case the Board of Fisheries had expressly adopted a sustained-yield policy in regulation and then

³⁶ R. 2227-2285.

³⁷ R. 2355.

³⁸ R. 2286-2322.

³⁹ Exc. 75.

⁴⁰ Exc. 74.

⁴¹ See Exc. 11(count VIII of the Second Amended Complaint).

⁴² Exc. 64; See also AS 16.05.255(j)(5) (defining sustained yield).

⁴³ Exc. 64 – 69.

⁴⁴ 990 P.2d 1 (Alaska 1999).

⁴⁵ Exc. 69.

applied it to the challenged fisheries, leading this Court to hold that the Board of Fisheries had not violated the Constitution's sustained yield provision.⁴⁶

Defenders timely filed a Motion for Reconsideration on this claim, but the Superior Court denied the motion without opinion.⁴⁷ Defenders now appeals only the Board's failure to consider statutory and constitutional sustained yield provisions.⁴⁸

Because the Superior Court partially granted Friends of Animals' summary judgment motion, the Board met and made decisions revising some of the existing predator control implementation plans in 5 AAC 92.125 in order to address the errors that the Court had found.⁴⁹ The Board also created a new predator control implementation plan, targeting wolves in GMU 9.⁵⁰ The Board's decisions were codified in amended regulations and authorize the Commissioner of ADF&G to permit private individuals to engage in the airborne shooting and the same-day airborne hunting of wolves and bears in large areas of Game Management Units 12, 13, 16, 19, 20, 25 or subunits thereof. The areas total in excess of 68,097

⁴⁶ *See id.* at 8-9 and Exc. 69.

⁴⁷ R. 3492-3499; Exc. 76 ("The Motions for Reconsideration are Denied")

⁴⁸ Exc. 80-82.

⁴⁹ *See* 5 AAC 92.125 (5/20/2008; Register 186).

⁵⁰ *See* 5 AAC 92.125(k) (5/20/2008; Register 186) (adding "Unit 9 Predation Control Area"). The predator control implementation plan for GMU 9 was adopted after this litigation was nearly completed in the Superior Court. For this reason, and because the plan is very limited in geographic scope and allows only ADF&G staff to kill wolves, Defenders has not challenged it.

square miles.⁵¹ The goal, expressly stated in the regulations, is to eradicate up to 60-80% of the wolves and 60% of the bears in some areas.⁵²

During its decision-making process, the Board failed to discuss or consider whether these severe reductions in the wolf and bear populations in the particular GMUs in which predator control areas have been created would be consistent with the applicable statutory and Constitutional sustained yield requirements. In fact, the overwhelming evidence in the administrative record demonstrates that the Board does not believe that sustained yield applies to predators and that the relevant wolf and bear populations are not being managed in accordance with the sustained yield principle.

STANDARDS OF REVIEW

The Court "review[s] a grant of summary judgment *de novo*," that is, it gives no deference to the Superior Court's decision.⁵³

The Court assesses the validity of the Board's decisions based on the record before the Board at the time it made its decisions.⁵⁴

⁵¹ 5 AAC 92.125 provides a square mile estimate for each control area, except for the areas created by 5 AAC 92.125(g) (GMU 20(A)) and 5 AAC 92.125(i) (GMU 20(D)).

⁵² Some plans target only wolves and some target both wolves and bears.

⁵³ *State, Dep't of Fish & Game v. Manning*, 161 P.3d 1215, 1219 (Alaska 2007) (internal footnote and citation omitted); *see also Nenana City School Dist. v. Coghill*, 898 P.2d 929, 932 (Alaska 1995) ("In general, a court's grant of summary judgment is reviewed *de novo*" and "[i]ssues of law arising from a superior court determination are reviewed *de novo*.").

In turn, the Board's record must adequately reflect the basis of its decisions so that the Court can determine if they are consistent with applicable law.⁵⁵

When it considers matters of statutory construction, the Court ordinarily applies its independent judgment.⁵⁶

ARGUMENT

Both AS 16.05.255 and Section 4, Article VIII of the Alaska Constitution require that the Board manage wolf and bear populations in accordance with sustained yield. It is undisputed that these species are an important wildlife

⁵⁴ *Ellis v. State Department of Natural Resources*, 944 P.2d 491, 494 n.1 (Alaska 1997) (citation in footnote omitted) ("[h]owever denominated, a claim is functionally an administrative appeal if it requires the court to consider the propriety of an agency determination" and "the court's inquiry is limited to a review of the administrative record which was before the ... [agency] when it made its decision," citing *Interior Paint Co. v. Rodgers*, 522 P.2d 164, 169 n.7 (Alaska 1974)).

⁵⁵ *Hammond v. North Slope Borough*, 645 P.2d 750, 762 n.7 (Alaska 1982) (DNR "must at a minimum establish a record which reflects the basis for ... [its] decision"); *Moore v. State*, 553 P.2d 8, 36 and n.20 (Alaska 1976) (" [Director] must at a minimum establish a record which reflects the basis for his decision" because "a limited review of the ... decision would be available to ensure that it was not arbitrary, capricious A record is necessary to facilitate this check" and to determine if there is a "reasonable basis of support" for the decision).

⁵⁶ *Benavides v. State*, 152 P.3d 332, 335 (Alaska 2006) (internal footnotes and citation omitted) ("We apply our independent judgment to questions of statutory interpretation if a decision does not involve an agency's special expertise, adopting 'the rule of law that is most persuasive in light of precedent, reason, and policy.' "); *Alyeska Pipeline Service Co. v. State, Dept. of Environmental Conservation*, 145 P.3d 561, 564 (Alaska 2006) (internal footnote omitted) ("When reviewing an agency decision that raises questions of statutory interpretation involving legislative intent ... [the Court] reviews the questions independently, applying the substitution-of- judgment standard.").

resource for Alaskans, and that these species are a replenishable resource harvested for human benefit in all of the current “predator control” areas.⁵⁷

In defending the Board of Game's decisions to drastically reduce these important wildlife populations, in the Superior Court the State denied that the statute and Section 4 apply to any "predator" species, including wolves and bears. Thus, this section of the brief will first address the nature of Alaska law's sustained yield requirements and how the provisions apply to wolf and bear populations before showing how the Board violated them.

A. The Sustained Yield Requirement in AS 16.05.255

1. Standard of review

The Court applies its independent judgment to questions of statutory interpretation.⁵⁸ In interpreting AS 16.05.255, the Court must look "to the meaning of the language, the legislative history, and the purpose of the statute ... to give effect to the legislature's intent, with due regard for the meaning the statutory language conveys to others."⁵⁹

2. Meaning of the statute

In the 1990s the Legislature twice amended AS 16.05.255 in order to require the Board to adopt intensive management programs for human harvest of

⁵⁷ See 5 AAC 92.125(b)(2)(D), (c)(1)D, (d)(1)D, (e)(1)(D) and (f)(2)(D)-(E) (Appendix A at 9, 19, 29, 41-42 and 50-51) and text at footnotes 121-123 below.

⁵⁸ *Benavides v. State*, 152 P.3d at 335.

⁵⁹ *Government Employees Ins. Co. v. Graham-Gonzalez*, 107 P.3d 279, 284 (Alaska 2005) (internal quotation marks and citations omitted).

ungulate populations. It defined "intensive management" to mean "management" of an identified big game prey population "consistent with sustained yield through active management measures... ." ⁶⁰ The State argued below, and the Superior Court held, that this language requires the Board to apply sustained yield only to the "prey" population being managed. But the Superior Court's conclusion does not take into account the statutory definition of "sustained yield."

"Sustained yield" is defined, in pertinent part, as the "achievement and maintenance in perpetuity of the ability to support a high level of human harvest of *game*... ." ⁶¹ The use of the word "game" rather than "big game prey population" is important to note because for the purposes of AS 16.05 – 16.40, "game" is defined to include "any species of ... mammal" without regard to the species' ability to act as a predator. ⁶²

This definition is longstanding. Territorial laws defined bears as "game animals" and wolves as "fur animals," ⁶³ but shortly after Statehood the Legislature adopted the new 1959 Fish and Game Code of Alaska and in it redefined "game" to mean "all species of birds and mammals." ⁶⁴ Thus, for nearly fifty years "game" has had a settled meaning in Alaska statutes so as to include wolf and bear species. The word "game" is not used elsewhere in Alaska statutes or regulations, or in

⁶⁰ AS 16.05.255(j)(4).

⁶¹ AS 16.05.255(j)(5) (emphasis added).

⁶² See AS 16.05.940(19); AS 16.05.940 (opening line: "In AS 16.05 – 16.40").

⁶³ See ACLA § 39-6-1 (1948).

⁶⁴ Art. 1, § 2(g), ch.94, SLA 1959.

ADF&G publications, to suggest a different meaning, that is, suggest a meaning that excludes any species of game which may act as predators.

In addition to ignoring the fact that "game" applies to all mammal species, the Superior Court also overlooked the definition of intensive management. That definition directs that all management of prey be done "consistent with sustained yield through active management measures."⁶⁵ The statute does not direct that **only** prey be managed for sustained yield; instead, it directs that intensive management of prey be consistent with sustained yield of all of the **game** being managed. A different construction of the statute might conflict with the Constitution's all-encompassing sustained yield requirement.⁶⁶

While the language of AS 16.05.255 is clear enough in applying the sustained yield mandate to all game species without exception, the legislative history of the statute also supports an inclusive interpretation of the definition of sustained yield. When Senator Bert Sharp introduced Senate Bill ("SB") 250⁶⁷ in 1998, he purposely sought to amend AS 16.05.255 in order to include a definition of sustained yield. Sustained yield had not previously been defined in the game management statutes. SB 250 would have defined sustained yield as the "achievement and maintenance in perpetuity of a high level of human harvest of

⁶⁵ AS 16.05.255(j)(4).

⁶⁶ See Section B.II below.

⁶⁷ SB 250 is available at

http://www.legis.state.ak.us/basis/get_fulltext.asp?session=20&bill=SB250 (last visited Jan. 20, 2009).

game, *other than mammalian predators*, on an annual or periodic basis."⁶⁸

Ultimately the phrase "other than mammalian predators" was deleted from the definition of sustained yield before a version of SB 250 passed and became law.⁶⁹ Consequently, the definition of sustained yield now codified in AS 16.05.255(j)(5) includes within its purview all "game," making no distinction between species that may act as predators or prey.⁷⁰

Thus, when managing a big game prey population like moose or caribou, AS 16.05.255 requires that the Board ensure that its decisions will achieve and maintain in perpetuity the ability to support a high level of human harvest of all "game," not just so-called big game "prey" species like moose and caribou.

⁶⁸ Sec. 3(5) of SB 250 (emphasis added).

⁶⁹ The bill the Legislature passed is House Committee Substitute, Committee Substitute for SB 250(Finance) and is available at http://www.legis.state.ak.us/basis/get_fulltext.asp?session=20&bill=SB250 (last visited Jan.6, 2009). The enacted law is chapter 76 Session Laws of Alaska 1998, which in its Sec. 5 amended AS 16.05.255(g) to add a paragraph 5 defining sustained yield. The definition is now found at AS 16.05.255(j)(5).

⁷⁰ Since many species can be predators and prey, categorizing species as one or the other can be misleading. As Jonathan Swift observed

So, naturalists observe, a flea
Hath smaller fleas that on him prey;
And these have smaller still to bite 'em;
And so proceed *ad infinitum*.

On Poetry: A Rhapsody (1733). The Board itself has acknowledged that "Because bears can be both prey and predator, their relationship with people is complex." *Findings of the Alaska Board of Game, 2006-164-BOG, Board of Game Bear Conservation and Management Policy – May 14, 2006*, at 3, available at <http://www.boards.adfg.state.ak.us/gameinfo/regs/pfindx.php> (last visited Jan. 20, 2009).

In other words, when engaging in "predator control" so as to "manage" moose and caribou populations in order to achieve a "high level of human harvest," the Board must ensure that all affected "game" populations, including wolf and bear populations, are managed in accordance with sustained yield. This obligation is clear from the language of the statute, its legislative history, and the longstanding definition, understanding, and use of the word "game" in AS 16.05. This statutory obligation mirrors the sustained yield requirement found in the Alaska Constitution.

B. The Alaska Constitution's Sustained Yield Requirement

1. Standard of review

The Court "review[s] constitutional questions using our independent judgment."⁷¹

2. Meaning of Article VIII, Section 4

Article VIII, Section 4 of the Alaska Constitution imposes a sustained yield requirement on management of all fish and wildlife. It states that "[f]ish, 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 uses."⁷² Read literally, Section 4 does not exempt wolves or bears or any other game species from its coverage. The

⁷¹ *State, Dep't of Fish & Game v. Manning*, 161 P.3d at 1219.

⁷² *Id.* In addition to its appearance in Section 4, the word "wildlife" appears in Article VIII, Sections 3 (common use clause), 5 (legislative authority over wildlife), and 13 (water reservation for wildlife). The Constitution contains no definition of "wildlife" and there is no evidence that the framers intended that it would have more than one meaning in the Constitution.

longstanding and commonplace dictionary definition of "wildlife" includes all mammals.⁷³ Thus, the Court should assume that in considering the meaning of the Constitution, voters in 1956⁷⁴ anticipated that for the purposes of Section 4 and in other Sections of the Constitution where the word appears, "wildlife" would have an inclusive meaning, a meaning that would at least include all the game and fur animals as defined in Territorial laws.⁷⁵ In fact, prior to the vote on the Constitution, the framers advised the voters that Article VIII's "primary purpose is

⁷³ See *Webster's New Encyclopedic Dictionary* (Merriam-Webster, 2002), at 2116, § 13a (defining "wildlife" as "living things and especially mammals, birds, and fishes that are neither human nor domesticated" and indicating that the earliest recorded use of wildlife to mean all living things was 1879).

Although there was no definition of "wildlife" in Alaska's Territorial game laws at the time of the Constitutional Convention, one definition of "wildlife" that applied to the Territory included all wild animals. See federal Fish and Wildlife Coordination Act of 1934, Act of Mar. 10, 1934, c. 55, § 8, as amended by the Act of Aug. 14, 1946, c. 965, 60 Stat. 1082 (codified at 16 U.S.C. § 666b) (" 'wildlife' ... as used herein include[s] birds, fishes, mammals, and all other classes of wild animals").

⁷⁴ The Constitution was adopted by the Constitutional Convention on February 5, 1956, was ratified by public vote on April 24, 1956, and became operative with the formal proclamation of Statehood on January 3, 1959. Shortly thereafter, the Legislature passed the Alaska Fish and Game Code containing the definition of "game." See Art. 1, § 2(g), ch. 94, SLA 1959.

⁷⁵ The general rule is that words used in the Alaska Constitution are given their "natural, obvious and ordinary" meaning. *Duncan v. Retired Public Employees of Alaska, Inc.*, 71 P.3d 882, 887 (Alaska 2003). "Adherence to the common understanding of words is especially important in construing provisions of the Alaska Constitution, because the court must look to the meaning that the voters would have placed on its provisions." *Hickel v. Halford*, 872 P.2d 171, 177 (Alaska 1994); see also *Hickel v. Cowper*, 874 P.2d 922, 926 (Alaska 1994) (internal citation and quotation marks omitted) ("[A]bsent some signs that the term at issue has acquired a peculiar meaning by statutory definition or judicial construction, we defer to the meaning the people themselves probably placed on the provision.").

to balance maximum use of natural resources with their continued availability to future generations" and to that purpose "all replenishable resources are to be administered, insofar as practicable, on the sustained yield principle."⁷⁶ In this pamphlet the framers did not indicate that some species would not be covered by the sustained yield requirement. Given that so many species of wildlife act as predators,⁷⁷ it is highly unlikely that the framers would not have mentioned that predator species would not be covered by Section 4 if that is the way the framers intended Section 4 to operate.

In its argument below, the State did not dispute the literal meaning of "wildlife." It did not claim that the ordinary meaning of the word did not include wolves and bears. Ignoring "wildlife" entirely, the State argued instead that the "framers did not intend for predators to be maintained on a sustained yield basis."⁷⁸ The State cited to testimony and commentary from within the Constitutional Convention as supporting its argument.

The testimony the State cited was from a non-delegate, Dr. Ira N. Gabrielson.⁷⁹ According to the State, his testimony that "predator control ... can be a very effective game management tool ... undoubtedly colored the delegates'

⁷⁶ R. 2564-65 (*A Report to the People of Alaska from The Alaska Constitutional Convention* (February 1956) (emphasis added).

⁷⁷ For example, virtually all species of fish and marine mammals, as well as wolf, bear, wolverine, fox, coyote, lynx, marten, mink, and river otter act as predators, and can be prey as well.

⁷⁸ R. 1930.

⁷⁹ R. 1929-1930.

view of proper game management."⁸⁰ His testimony on that point, however, is best described as equivocal.⁸¹ Moreover, he did not suggest that "predator control" and application of the sustained yield principle to predators are necessarily inconsistent; in fact, his testimony did not include any discussion of sustained yield. On the other hand, he explained in his testimony that he used the word "wildlife in a very broad way, including all of the living creatures that we put under the term of fish and game and fur and various other restrictive terms."⁸² Along with the voter pamphlet, this is additional evidence that the framers expected "wildlife" to be given an inclusive meaning when used in Section 4 and elsewhere in the Constitution.

⁸⁰ R. 1930.

⁸¹ See Alaska Legislative Council, *Alaska Constitutional Convention Part 2 Proceedings December 13, 1955 – January 9, 1956*, at 847 – 859. About predator control Dr. Gabrielson stated:

We developed a philosophy that if we could kill off enough predators we would have the deers [sic] or quail or pheasants nine feet deep all over the landscape. It did not work. Predator control is a useful tool where predators are a limiting factor on game. Twenty years of my field experience were spent in that type of work. I can tell you honestly in many cases our predator control programs resulted in direct and immediate increases in the game population. I can also tell you with equal honesty that for every case of that kind we had many dozens where it showed no appreciable results in better game population. The answer is of course that predators were not always the limiting factor on the number of other wild creatures that were there. Where they were, the reduction of predator population brought very quick response.

Id. at 854.

⁸² *Id.* at 850-51.

The State also cited commentary on one of the drafts of Section 4 which came from within the Convention's Committee on Natural Resources. This commentary states:

Sustained yield is recognized as a principle applicable to the administration of plant and animal life subject to the immediate authority of the State. This provision applies generally to wildlife and fisheries anywhere in the state and to the forests and other replenishable resources including grass which occurs on lands in the state public domain. This principle is qualified in terms of "the highest beneficial public use" in recognition of its not being in the public interest to preserve certain parasitic or predatory organisms destructive of more beneficial plant and animal life. The reference of this section is to the State of Alaska, and not to any particular parcel of land or any particular body of water.⁸³

The use of the phrase "parasitic or predatory organisms" when coupled with the use of the contrasting phrase "plant and animal life" at the end of the sentence does not suggest that there would be some game animals that should not be preserved in the public interest; "organism" more likely suggests insect life.

Again, given that Dr. Gabrielson gave "wildlife" such an inclusive definition in his earlier testimony to the Convention, its use here suggests that fish and game animals that act as predators were not intended to be exempted from Section 4.

Moreover, the framers ultimately did not include the phrase "highest beneficial public use" in Section 4. This suggests that there is no hierarchy built into Section 4 that would require greater protection for prey than for predators.

⁸³ Alaska Legislative Council, *Alaska Constitutional Convention, Part 6*, Appendix V, X/Resources/8, December 16, 1955, Commentary on Article on State Lands and Natural Resources, at 83.

The State also cited a comment from Burke Riley, who was the Convention's Natural Resources Committee's Secretary.⁸⁴ Mr. Riley asserted that "predators would not be maintained on a sustained yield basis," but did not say what he meant by "predators."⁸⁵ His comment was made just a day after the date of the commentary from the Committee, quoted above, and therefore should be interpreted as a mere paraphrase of the written commentary the Committee had already submitted to the Convention. Since he did not further explain what he meant by "predators," and since ultimately the delegates enacted a differently worded version of Section 4, his comment does not provide a reliable guide to what the Convention as a whole intended.⁸⁶

In the end, the State's argument that the framers did not intend Section 4 to be read literally is unsupported. The State's argument notwithstanding, it is

⁸⁴ R. 1930.

⁸⁵ Alaska Legislative Council, *Alaska Constitutional Convention, Part 4 Proceedings: January 17 – 25, 1956*, at 2451.

⁸⁶ See *Glover v. State, Dept. of Transp., Alaska Marine Highway System*, 175 P.3d 1240, 1248-49 (Alaska 2008) (internal footnote and citation omitted) ("The sum total of the constitutional convention discussion thus paints a muddled picture. As we have noted in the past, individual comments from delegates do not necessarily reflect constitutional intent."); *Warren v. Boucher*, 543 P.2d 731, 735 (Alaska 1975) ("Many views were expressed by individual delegates, but these expressions do not in this instance provide a reliable guide to what the constitutional convention as a whole intended by the adoption of the phrase in question, or what it meant to the voters who ratified the constitution."); *Matthews v. Quinton*, 362 P.2d 932, 944 (Alaska 1961) ("Every member of such a convention acts upon such motives and reasons as influence him personally, and the motions and debates do not necessarily indicate the purpose of a majority of a convention in adopting a particular clause." (quoting with approval 1 *Willoughby, Constitutional Law of the United States* § 32 (2d ed. 1929))).

apparent that the framers intended that Section 4's sustained yield principle would apply in the management of all fish and wildlife, including wolves and bears and other game species that may act as predators. The "framers of Alaska's constitution intended the sustained yield clause to play a meaningful role in resource management," and this would not be possible if whole categories of species that act as predators but can also be prey were excluded from Section 4's coverage.⁸⁷

While Article VIII, Section 4 requires that all wildlife, including predators, be managed for sustained yield, that does not mean the sustained yield principle precludes "predator control" in appropriate circumstances. Nor does it mean the Board must apply an exact predetermined or qualitative formula when applying the principle.⁸⁸ But at a minimum, it means that the Board must consider and apply it when it makes game management decisions so as to ensure sustained yield of all wildlife.

As the following shows, however, the Board did not consider and apply the sustained yield principle to wolves and bears before making its decisions adopting the predator control implementation plans that are challenged in this case.

⁸⁷ *Native Village of Elim*, 990 P.2d at 7.

⁸⁸ *See Native Village of Elim*, 990 P.2d at 8 ("[The framers] believed that calculating a specific numerical yield for fisheries would be impossible... . [T]he primary emphasis of the framers' discussions and the glossary's definition of sustained yield is on the flexibility of the sustained yield requirement and its status as a guiding principle rather than a concrete, predefined process.").

C. Board of Game Actions

The Board has created eight different predator control areas. For each predation control area and corresponding predator control implementation plan the Board has adopted, 5 AAC 92.125 contains an estimate of the pre-control population of wolves or bears (or both). For wolves, the regulation states the goal of reducing wolf populations by 60 to 80%, and bears 60%. It establishes the maximum wolf or bear population number that will be allowed to exist in the GMU after this goal is met and states that once the goal is reached, this wolf or bear population number will be maintained at or near that level for an indeterminate period.

For example, in the Upper Yukon/Tanana predation control area in GMUs 12, 20(B), 20(D), 20(E), and 25(C), the regulation states that the "pre-control wolf population during fall 2004 within the wolf control area was 350 - 410 wolves (18 - 22 wolves per 1,000 square miles) in 50 - 70 packs" ⁸⁹ It then states that in order to increase the ungulate populations,

a reduction of about 60 - 80 percent of the pre-control wolf population may be necessary to achieve prey population objectives; once the wolf population has been reduced to the population control objective, annual reductions of less than 60 percent will regulate the wolf population at the control objective; the wolf population control objective for the wolf control area is 88 - 103 wolves, in order to achieve a reduction of between 60 - 80 percent of the pre-control minimum estimated wolf population of 350 wolves; the minimum wolf population control objective will achieve the desired reduction

⁸⁹ 5 AAC 92.125(b)(2)(C)(i), Appendix A at 7.

in wolf predation, and also ensure that wolves persist within the control area⁹⁰

It states that in prior years, the "total reported annual harvest of wolves in the wolf control area by both hunters and trappers during 1994- 2004 averaged 74 wolves annually (range 39 - 141)."⁹¹ It further states that the

objective of this plan is to reduce the pre-control wolf population within the control area by 60 - 80 percent; this plan also has as a goal to maintain wolves as part of the natural ecosystem within the control area; to achieve the desired reduction in wolf predation, but ensure that wolves persist within the control area, the wolf population in the control area will be reduced to no fewer than 88 - 103 wolves⁹²

For brown bears, the regulation states that

pre-control brown bear population within the brown bear predation control area was estimated to be 170 bears in June 2004; it was based on extrapolation of a density estimate obtained in central Unit 20(E), including the entire 4,050 square mile bear predation control area, during 1986 and on intensive research studies conducted in similar habitats with similar bear food resources during 1981 - 1998 in Unit 20(A), 100 miles to the west; this estimate very nearly reflects the habitat limitations for brown bears within the brown bear predation control area, because the brown bear population is only lightly harvested; a research project in 2006 will develop an updated estimate of the brown bear population; the resulting information will be used to readjust, if necessary, the pre-control population estimate as well as the minimum population level⁹³

⁹⁰ *Id.* at (b)(2)(C)(vi), Appendix A at 8.

⁹¹ *Id.* at (b)(2)(D)(i), Appendix A at 9.

⁹² *Id.* at (b)(3)(C), Appendix A at 10.

⁹³ *Id.* at (b)(2)(C)(viii), Appendix A at 8.

It goes on to state that "during 1995 - 2004, the average brown bear harvest" was "eight bears (range 2 -12)," and that during 2005, the first year of the control program, it was nine.⁹⁴ It then asserts that a

60 percent reduction in the brown bear population within the 4,050 square mile brown bear predation control area specified in this program is expected to result in an increase in moose survival; to achieve the desired reduction in brown bear predation, but ensure that brown bears persist within the predation control area, the minimum brown bear population objective for the predation control area is 68 bears, which represents a 60 percent reduction from the pre-control minimum estimated brown bear population of 170 bears; if brown bear predation control efforts are successful and the brown bear population is reduced according to the objectives, the brown bear population will be maintained near the minimum population objective of 68 bears for several years⁹⁵

Finally, the regulation states the objective of the plan is

to reduce pre-control brown bear numbers by approximately 60 percent to diminish bear population levels and predation by bears on their prey; this plan includes a goal to maintain brown bears as part of the natural ecosystem within the predation control area; to achieve the desired reduction in brown bear predation, and ensure that brown bears persist predation control area will be reduced to no fewer than 68 bears⁹⁶

Similar statements are made for the other predation control areas and plans in 5 AAC 92.125.

D. The Board Failed to Apply the Sustained Yield Principle.

In none of the meetings at which it decided to adopt the predator control implementation plans challenged here is there any indication that the Board

⁹⁴ *Id.* at (b)(3)(C)(ix), Appendix A at 9.

⁹⁵ *Id.* at (b)(3)(C)(x), Appendix A at 9.

⁹⁶ *Id.* at (b)(3)(D), Appendix A at 10.

mentioned, much less discussed or otherwise considered in any way the application of sustained yield to the wolf and bear populations at issue. Thus, given the administrative record, it is impossible for the Court to determine if the Board's decisions adhere to the sustained yield principle. Moreover, there is overwhelming evidence that the Board had no intention of maintaining these wolf and bear populations in accordance with sustained yield.

1. Applicable law

Because the Court assesses the validity of the Board's decisions based on the record before the Board at the time it made the decisions⁹⁷ the Board must "establish a record which reflects the basis for ... [its] decision[s]."⁹⁸ Judicial review of a Board decision must be "available to ensure that it is not arbitrary [or]capricious" and to determine if there is a "reasonable basis of support" for the decision.⁹⁹ Thus, "it is vital that the agency clearly voice the grounds upon which the regulation[] was based in its discussions of the regulations or in a document articulating its decision."¹⁰⁰ "Effective judicial review requires that an agency adequately discuss the basis of a regulation... ." ¹⁰¹

⁹⁷ *Ellis*, 944 P.2d at 494 and n.1.

⁹⁸ *Hammond v. North Slope Borough*, 645 P.2d at 762 n.7.

⁹⁹ *Moore v. State*, 553 P.2d 8, 36 and n. 20 (1976); *see also*, *Occidental Eng'g Co. v. INS*, 753 F.2d 766, 769-70 (9th Cir. 1985)("[T]he function of the district court is to determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did").

¹⁰⁰ *Tongass Sport Fishing Ass'n. v. State of Alaska*, 866 P.2d 1314, 1319 (Alaska 1994) (quoting *Alaska Fish Spotters Ass'n v. State, Dep't of Fish & Game*, 838

2. Record deficiency

In the administrative records for the Board's decisions, there are three categories of material that are relevant. The first category consists of the public and agency testimony, the Board's internal deliberations, and its voting, which occurred at the Board meetings at which the predator control implementation plans were considered. The relevant Board meetings occurred January 29, 2006, May 12-14, 2006, and March 10-19, 2006. Partial transcripts of the recordings of these

P.2d 798, 801 (Alaska 1992)); *cf. Stepovak-Shumagin Set Net Ass'n v. State Bd. of Fisheries*, 886 P.2d 632, 646-47 (Alaska 1994) ("It appears that the Board [of Fisheries] adequately voiced the grounds upon which the regulation was based in its deliberations").

¹⁰¹ *Tongass Sport Fishing Ass'n.*, 866 P.2d at 1319; *see also Indiana Forest Alliance, Inc. v. U.S. Forest Service*, 2001 WL 912751 *5 (S.D. Ind. 2001) ("It is not the function of the court to conduct an unguided search of the record in search of evidence to support or refute any party's position"); *U.S. v. Dunkel*, 927 F.2d 955, 956 (7th Cir.1991) ("Judges are not like pigs, hunting for truffles buried in briefs. "); *San Luis Obispo Mothers for Peace v. N.R.C.*, 751 F.2d 1287, 1325 - 26 (D.C. Cir. 1984) ("Judges are not historians charged with isolating the 'true' basis for an agency's decision when its ostensible justification proves unconvincing."); *E. I. du Pont De Nemours & Co. v. Train*, 541 F.2d 1018, 1037 - 38 (4th Cir. 1976) ("The strained effort in the EPA brief to justify the agency [rule making] actions leaves us in a state of extreme confusion. We have examined every record reference made by EPA. They are cryptic, mystic, and enigmatic. If there is to be any worthwhile judicial review of agency action, that action must be presented and supported in a manner capable of judicial understanding."). Put another way, a "court has no power to 'cure' the agency's failure to fulfill its responsibilities by combing the record on its own in search of a theory that might support the agency's decision" *Bagdonas v. Dep't of Treasury*, 93 F.3d 422, 426 (7th Cir. 1996).

meetings are in the record.¹⁰² The second category comprises any written documents (including from ADF&G) submitted for the Board's review and consideration at those meetings.¹⁰³ The third category consists of any written findings the Board makes. In this case these are the regulations codified in 5 AAC 92.125.

For the purposes of Section 4, sustained yield means the "conscious" application of principles of management designed to achieve the sustained yield goal for the resource being managed.¹⁰⁴ Yet in none of the foregoing material in the administrative records for the Board's decisions is there any indication that the Board consciously applied the principles of sustained yield management to wolves and bears. There is no evidence in these records that the Board was briefed on, received testimony about, reviewed documents concerning, considered, debated or otherwise applied any notion of sustained yield for the wolf and bear populations targeted for reduction. In fact, when Defenders made exactly that point in its

¹⁰² R. 2123-2155 (January 29, 2006); R. 5740-5779 (March 12, 2006); R. 5790-5827 (March 13, 2006); R. 1304-1343 (May 12, 2006); R. 2782-2802 (May 14, 2006).

¹⁰³ R. 4477-4498; R. 4688-5734; R. 5828-6724.

¹⁰⁴ *Papers of Alaska Constitutional Convention, 1955-56*, Folder 210, Terms (Committee on Natural Resources defining "sustained yield" as the "conscious application insofar as practicable of principles of management intended to sustain the yield of the resource being managed.").

motion for summary judgment,¹⁰⁵ in response the State did not cite to any material in the Board's administrative records demonstrating otherwise.¹⁰⁶

Because the Board did not consider sustained yield of predators when enacting regulations providing for a 60-80% reduction of predator populations, it has not established a record that reflects the basis for its decision and the record does not show that the Board has complied with the constitutional mandate for sustained yield.

3. The State's Arguments to the Superior Court

Before the Superior Court, the State did not argue that the record of the Board reflected a discussion and consideration of sustained yield for wolves and bears. Instead, after denying that the word "game" in the sustained yield definition in AS 16.05.255(j)(5) applied to predators and after denying that Section 4 applied to predators, the State claimed that nonetheless the Board's "current, tightly-controlled predator control programs are consistent with this clause," just as if the Board had in fact consciously applied the sustained yield principle to wolves and bears.¹⁰⁷ The State's claim is a *post hoc* rationalization for the Board's failure to consider and apply the sustained yield management principle to wolves and bears.

The Board's own actions show that it **intentionally** failed to apply sustained yield to wolves and bears. In January 2006 the Board deleted references in 5 AAC

¹⁰⁵ See R. 2274-2280.

¹⁰⁶ See R. 1930-31, 1933, 2118-2121. See also cases cited at R. 2508, n.2.

¹⁰⁷ R. 1930.

92.110 to sustained yield and the use of best available science in the Wolf Conservation and Management Policy for Alaska. That policy expressly required the application of sustained yield to wolves. After taking the Policy out of the regulations, the Board was no longer bound by it.¹⁰⁸ Then in May 2006 the Board completed the circle by adopting Findings expressly disavowing the application of sustained yield to bears in predator control areas.¹⁰⁹ These acts show the Board consciously chose not to apply sustained yield to wolves and bears.

Nonetheless, the State claimed that "during the meetings at which the current predator control plans were formed, deliberated and adopted, the long-term viability and sustainability of the subject bear and wolf populations was repeatedly

¹⁰⁸ See 5 AAC 92.110 at R. 135. The Wolf Conservation and Management Policy for Alaska stated that "Consumptive uses of wolf and prey populations will be provided for on a sustained yield basis." *Id.* at § A.2. The Policy had been available at <http://www.wildlife.alaska.gov/management/fur/wolf-pol.cfm> (7/8/2004) but it has since been deleted from ADF&G's website. The policy is a public document and is attached as Appendix B to this brief. According to ADF&G, the policy, including the reference to sustained yield for wolves, had been in place since 1993. Regelin, Wayne L., Director, Division of Wildlife Conservation, ADF&G, Wolf Management in Alaska with an Historic Perspective - A Presentation to the Alaska Board of Game, March 2002, available at http://www.wildlife.alaska.gov/index.cfm?adfg=wolf.wolf_mgt (last visited Jan. 21, 2009) ("In June 1993, the board held a special meeting on wolf management. It revised the strategic plan and changed the title to The Wolf Conservation and Management Policy for Alaska. This is still the board's guiding policy.").

¹⁰⁹ See Findings of the Alaska Board of Game, 2006-164-BOG, Board of Game Bear Conservation and Management Policy May 14, 2006 at 4, available at <http://www.boards.adfg.state.ak.us/gameinfo/regs/06164bog.pdf> (last visited Jan. 21, 2009) ("Generally, bear hunting will be conducted on a sustained yield basis, except in areas where a bear predation control program is authorized").

addressed."¹¹⁰ It did not, however, cite to anything in the records of the Board meetings supporting that assertion. Instead, it claimed that "[e]ach plan [5 AAC 92.125] explicitly states as a goal the preservation of viable predator populations."¹¹¹

The phrase "sustained yield" however, is not used in 5 AAC 92.125 with regard to predators, and "viable" is used only once, in the recently-adopted GMU 9 plan that is not challenged here.¹¹² In its briefing to the Superior Court, the State did not indicate what it meant by "viable" or "sustainable" and it cited to nothing in the Board's administrative records demonstrating that the Board defined and discussed application of these concepts.

That the Board expressed its intention that small, residual populations of wolves and bears be left alive within each predator control area does not mean that the populations will be large enough to permit a yield, sustained or otherwise, now or in the future. Nothing in the Board's administrative records reflects when a

¹¹⁰ R. 1931.

¹¹¹ R. 1931.

¹¹² The predator control implementation plans, *see* 5 AAC 92.125, contain the phrase "sustained yield" just once, with reference to annual yields of the delta caribou herd in an inactive plan. 5 AAC 92.125(g)(5)(A). The word "sustained" appears once in another inactive plan, in reference to the moose harvest. 5 AAC 92.125 (i)(5)(A)("annual sustained harvest of moose in 20D"). The newer section of 5 AAC 92.125 that is not challenged in this litigation uses the word "sustained" four times, referring to caribou populations, not sustained yield of predators. 5 AAC 92.125(k)(4)(A) and (D)(ii) and (iii). The word "sustained" appears only one time in the five regulations at issue in this litigation, in a discussion of moose populations and annual harvest in Unit 16. 5 AAC 92.125 (d)(3)(A)("annual sustained harvest of moose" in unit 16B). Appendix A at 31.

yield will be possible from these residual populations, or what the yield might be. A minimal, or even "viable" population, is not the same thing as a population that is managed for sustained yield. For example, there are about 300 beluga whales left in Cook Inlet, but this number is so far below the historic estimated population of about 1300 that the population has been listed as endangered under the federal Endangered Species Act and because of that the whales may not be hunted (i.e., no yield is allowed) until the population recovers.¹¹³

The State also claimed in the Superior Court that the "Board incorporated very specific sustained yield findings and directives into each plan."¹¹⁴ But the parts of 5 AAC 92.125 which the State cited do not indicate "very specific sustained yield findings and directives" for wolves and bears. Instead, they only give estimated population numbers and assert that the populations would "persist" or be "maintain[ed]" in the areas.¹¹⁵ This provides no information concerning when there will be any "yield" in the future, or what its estimated rate might be.¹¹⁶

¹¹³ See 73 Fed. Reg. 62919 (Oct. 22, 2008).

¹¹⁴ R. 1932.

¹¹⁵ See 5 AAC 92.125(b)(3)(C) and (D) (cited by the State at R. 1932).

¹¹⁶ While the State claimed that the wolf and bear populations in each predator control area were being managed in accordance with Section 4's sustained yield principle, it did not separately address the issue whether the Board complied with AS 16.05.255's sustained yield requirement. With regard to that requirement, neither 5 AAC 92.125 nor any thing else in the Board's administrative records indicates what the "annual or periodic basis" is under which the wolves and bears are to be managed in any predator control area. AS 16.05.255(j)(5). Under each predator control implementation plan, once the relevant wolf or bear population is drastically reduced it will be "maintained" at that level for some unspecified period.

The State also claimed that the Board "mandated that the commissioner halt all predator control activities and bear and wolf hunting and trapping as appropriate to ensure that the minimum predator population objectives are met," citing the parts of 5 AAC 92.125 where that mandate is stated.¹¹⁷ But the existence of such a mandate does not substitute for a record showing that the "minimum predator population objective" was set consistent with the "conscious application" of principles of management designed to achieve the sustained yield goal for the "resource being managed."¹¹⁸

Finally, the State claimed in its reply brief on its motion for summary judgment that the "Board's predator control implementation plans are rife with references to, and directions for, sustained yield management for both wolves and bears."¹¹⁹ None of the references to "sustained yield" in 5 AAC 92.125, however, refer to wolves and bears.

CONCLUSION

Operating under the erroneous assumption that it was not required to apply the principle of sustained yield management to wolves or bears because they act as predators, the Board adopted regulations authorizing private parties to remove 60-80% of the wolves and bears on tens of thousands of square miles of state-owned lands and federal lands managed by the Bureau of Land Management. On their

¹¹⁷ R. 1932.

¹¹⁸ *Papers of Alaska Constitutional Convention, 1955-56, Folder 210, Terms.*

¹¹⁹ R. 2121.

face, these dramatic reductions raise the question whether the Board's action reflects a conscious application of accepted principles of sustained yield. On the record made by the Board, the Board's decisions lack adequate support. The Court should reject these determinations by the Board and the regulations that codify them.¹²⁰

Application of sustained yield to all wildlife is not an abstract exercise. Wolves and bears are valuable species that have been harvested by trappers and hunters for centuries. Wolves are valuable to rural subsistence users for fur ruffs, wind guards, and linings.¹²¹ In communities where there have been studies, researchers indicate most of the wolf and wolverine pelts are not sold commercially but used in the home and shared among households.¹²² Predators also provide important ecological functions by regulating prey, and protecting the

¹²⁰ See *Tongass Sport Fishing Ass'n.*, 866 P.2d at 1319 ("Effective judicial review requires that an agency adequately discuss the basis of a regulation: For a court to determine that an agency acted within its authority in adopting a regulation, it is vital that the agency clearly voice the grounds upon which the regulations was [sic] based in its discussions of the regulations or in a document articulating its decision."); *Fed. Power Comm'n v. Transcontinental Gas Pipeline Corp.*, 423 U.S. 326, 331 (1976) (if an administrative decision is not sustainable on the agency's record, the court must vacate and remand the decision).

¹²¹ Robert J. Wolf, *Alaska Dep't of Fish & Game, Trapping in Alaska Communities with Mixed Subsistence-Cash Economies* at 17 (1991) available at <http://www.subsistence.adfg.state.ak.us/techpap/tp217.pdf> (last visited March 29, 2009)

¹²² *Id.*

habitat and biodiversity of an area.¹²³ It is for these reasons that the Alaska Constitution compels the consideration of sustained yield for all wildlife, including predators, and all other renewable resources, to ensure that these resources remain capable of providing a yield. The Board's current predator control implementation plans were adopted without adequate consideration of that Constitutional mandate.

Defenders requests that the Court (1) find and declare that the Board's decisions are without support in the record and therefore the predator control implementation plans in 5 AAC 92.125 are invalid, and (2) reverse the Superior Court's Final Judgment and remand the case for further proceedings consistent with this Court's opinion.

Respectfully submitted on April __, 2009.

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¹²³ ADF&G Wildlife Notebook Series, Wolf, available at <http://www.adfg.state.ak.us/pubs/notebook/furbear/wolf.php> (last visited March 29, 2009).

CERTIFICATE OF TYPEFACE

I certify that the font in the text of the Opening Brief of Appellants
Defenders of Wildlife and The Alaska Wildlife Alliance is 13 point, Times New
Roman.

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I certify that a true and accurate copy of the foregoing were served on April __, 2009 to:

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Defenders' Opening Brief

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