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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

ROBERT CASSELL, Plaintiff, v. STATE OF ALASKA, BOARD OF GAME, Defendant.	Case No. 3AN-19-07460 CI

REPLY IN SUPPORT OF MOTION FOR INTERVENTION BY ALASKA PROFESSIONAL HUNTERS ASSOCIATION

Plaintiff's Opposition glosses over the fundamental basis for APHA's Motion: it has a unique and crucial interest in the outcome of this litigation. Plaintiff seeks to re-allocate hunting permits in a way that benefits resident hunters, among whom Plaintiff is potentially included (he must first win a lottery). On the other side, the State seeks to uphold the law

by demonstrating that it comports with the Alaska Constitution. However, APHA is the only party with a financial interest—one that is not contingent on a lottery, concerned with constitutionality, or rooted in speculation. Without intervention, that interest is both unrepresented and in serious jeopardy.

I. FACTUAL POINTS

Although Plaintiff protests at the characterization of an *appeal*, this case is unquestionably an attempt to re-litigate a decision of the Game Board (the "Board"). Plaintiff concedes that he has brought suit solely because the Board has chosen not to adopt Plaintiff's proposal for a change in the Alaska Administrative Code and the resulting issuance of 90 percent of bear hunts to residents only (the "Cassell Proposal"). *See* Complaint ¶¶3 and 26. Following the Board's decision, Plaintiff says he had "no other option" but to sue. *See id.* at ¶30. Plaintiff knows that he cannot seek an injunction mandating that his proposal become the law, so he instead challenges the legal basis for the Board's March 19, 2019 decision. This is an appeal.

Plaintiff attempts to minimize the potential impact of a successful effort to enjoin the Board, noting that his proposal will not "automatically be put in place." *See* Opposition at 4. In fact, the result of an injunction would be worse for APHA than implementation of the Cassell Proposal. Instead of issuing 40 percent of drawing permits to non-residents, the Board will have to reduce the non-resident permit pool to zero (0%) of permits because the Board will be instructed by the Court that it is unconstitutional to create a permit pool reserved for non-residents. To be clear, Plaintiff seeks an opinion from this

Court that "allocating Alaska resources to non-residents" is unconstitutional. *See* Complaint ¶30.[1]

APHA is not some interloper. APHA took part in the Board action that precipitated this lawsuit. Both parties discuss *Alaskans for a Common Language, Inc. v. Kritz*, but it is APHA who gets it right. *See* 3 P.3d 906 (Alaska 2000). There, an Alaska-based organization involved in obtaining the administrative approval of the challenged ballot measure (Alaskans for a Common Language) was granted intervention as a matter of right by the Alaska Supreme Court to defend the measure. Plaintiff incorrectly states the Alaskan party seeking intervention was unsuccessful.[2] In fact, *Alaskans for a Common Language* stands for the salient principle that a party's prior involvement in the contested issue serves as basis for a grant of intervention as a matter of right.

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[1] If Plaintiff is arguing that the Board might respond to a Court ruling that outlaws the use of a dedicated pool of permits for non-residents by allocating a larger pool of permits open to both residents and non-residents ("shared pool") than the number Cassell advocated to the Board, that is speculation on the part of Plaintiff which would still leave APHA with a devastating injury. As noted, Cassell's Proposal asked that the Board dedicate 90% of permits to residents only, leaving 10% to be shared by residents and non-residents. Obviously, that outcome would be disastrous for APHA, as currently about 33% of permits are dedicated to non-residents. But any outcome without a significant dedicated non-resident permit pool would still be disastrous for APHA, and Cassell asks the Court to ban such pools. Moreover, shared pools don't allow the advance planning needed for a Kodiak guiding economy that depends on non-residents scheduling trips and putting down deposits well in advance of the hunt. Because non-residents only seek a permit if they have already hired a guide (they can't hunt without a guide), a system with a modest size pool dedicated to non-residents works and allow the guiding business to remain viable on Kodiak Island.

[2] A non-Alaska party (U.S. English) that was ideologically sympathetic to the Alaskan party, but had not participated in the administrative process leading up to approval of the measure for the ballot, was denied intervention, while the Alaskan party which had participated in the administrative process was granted intervention.

II. APHA'S ECONOMIC INTEREST IS NOT ATTENUATED

Turning to the factors for a determination of APHA's right to intervention, Plaintiff makes no argument that the request for intervention is untimely. Instead, Plaintiff moves directly to the second of four factors, and argues that APHA has no "interest in the subject matter of the action" because the APHA has demonstrated no financial interest in the outcome. Plaintiff asserts that APHA has not presented "any evidence" that their businesses depend on non-resident hunters. *See* Opposition at 5.

This assertion is easily disproven. APHA has submitted four affidavits, each explaining a financial dependency on non-resident bear hunts. APHA member Paul Chervenak testified that, if Plaintiff prevails, "I am looking at the loss of more than half my income." Affidavit of Paul Chervenak ¶9. Deborah Moore testified:

> To summarize their affidavits, those three APHA members earn their living primarily from guiding brown bear hunts on Kodiak Island for non-residents, and thus are utterly dependent on the Board of Game retaining a reasonable number of permits for non-residents.

Affidavit of Deborah Moore ¶7. Plaintiff describes the business owners as only "potential secondary beneficiaries" of the hunt lottery. *See* Opposition at 7. The Affidavits demonstrate that the affiants' businesses would not exist without an *actual* benefit from the current regime. It is Plaintiff, who chooses to enter the lottery only as a matter of recreation, whose benefit is only "potential."

Plaintiff states that the economic interest is "several levels removed from the subject matter of the action," because the interest is only theoretical, depending on the success of non-resident hunters in a permit lottery. *See* Opposition at 5. Of course, Plaintiff's own interest is equally theoretical and depends on the same lottery. More importantly, Plaintiff seeks to distinguish the rights of guides from that of recreational

hunters in the context of the lottery. It is a false distinction. In *Owsichek v. State, Guide Licensing*, the Alaska Supreme Court noted the significant economic interests of hunting guides in the context of a challenge to geographical restrictions on guide activity. 763 P.2d 488 (Alaska 1988). The Court brushed aside an argument by the State that the guide had no unique interest in the application of the "common use" clause to the Alaska Constitution. The Court noted that "there is no meaningful basis for distinguishing between the rights of a guide and the rights of a hunter" under the Alaska Constitution. *See Id.* at 497 n.15.

In order to draw a false distinction, Plaintiff relies instead on *State v. Weidner*, which has a much more attenuated factual background. 684 P.2d 103 (Alaska 1984); *see* Opposition pp. 5-8. *Weidner* concerned intervention by winners in a land lottery. *Weidner*, 684 P.2d at 106. Their economic interest was not the result of any kind of investment. *See id.* By contrast, the members of the APHA have invested substantial time, energy, and money into the development of their businesses. Unlike lottery winners, they will not simply return to a prior *status quo* following an unfavorable outcome in this action. They will, as explained in the Motion, experience devastating harm to their businesses.

III. APHA IS NOT ADEQUATELY REPRESENTED

The only other challenge made by Plaintiff to APHA's intervention as a matter of right is Plaintiff's argument that APHA is adequately represented by the State. Plaintiff overlooks a crucial difference of alignment and objectives between the Board and APHA. The purpose of the Board of Game is "the conservation and development of the game resources of the state." AS 16.05.221. Protecting the financial interests of professional

hunting guides is not a priority for the Board. Moreover, the Board's economic stake in game management that properly allocates hunts to professional guides is *de minimis* (the Board collects fees, but that is not its purpose). By comparison, the economic stake for APHA is essential—there is no reason to operate the business without the financial incentive.

Cassell makes the odd argument that members of the APHA must be prepared to "change their business model." The testimony attached to APHA's Motion demonstrates the impossibility of this proposal. Even if APHA members could realistically take such drastic action, a protectable financial interest exists in the context of intervenor, notwithstanding the ability to simply make changes to a business. *See Municipality of Anchorage v. Uber Technologies, Inc.*, 2014 WL 8764781 (Alaska Super. 2014) ("Uber Technologies"). It is telling that Plaintiff's Opposition does not address the precedent of Uber Technologies, in which the financial interests of taxi drivers gave them grounds for intervention, even when the Municipality of Anchorage purported to represent those same drivers. In this case, the Board does not purport to represent APHA members at all, and instead takes a role of impartial rulemaking in matters of state wildlife management. Here, the financial interest and misalignment with the objectives of the defendant are enormous—something Plaintiff passes over in cursory fashion.

To be sure, the Board is aware that its decisions potentially impact APHA members. Plaintiff's Complaint alleges that one member of the Board, at its March 2019 meeting, expressed concern about the plight of hunt guides. *See* Opposition at 8. But that remark, assuming the context fits Plaintiff's argument, demonstrates only that at least one member of the Board is aware of a potential adverse impact. It does not demonstrate

that the Board is actively representing the interests of Alaska guides. Plaintiff overlooks the fundamental difference between: (a) a State agency being charged with *representing* the interests of a group of persons, as a school board is charged with representing the interests of its students; and (b) a State agency impartially adjudicating a dispute and ruling in favor of that group on a particular occasion. The Rule 24(a)(2) adequate *representation* standard goes to whether the former situation exists, not the later. Only if the former situation exists must the State agency take into account APHA's interests in the litigation decisions the State will need to make (settle or not settle, pursue issue X or instead pursue issue Y, appeal or not appeal, etc.)

Because they actually go into the field to lead hunters seeking bears on Kodiak Island, the APHA members are uniquely well-suited to address the conservation benefit to the bears of maintaining guiding as a viable business. As explained in the Affidavits, APHA has a strong interest in the Kodiak bear sow population, because maintaining a healthy number of sows is the only way to sustain a bear population that allows for a long-term guiding business on Kodiak. Plaintiff's proposal impacts that population. The APHA members explain: "Guides have the expertise at spotting and viewing bears to help both non-resident and resident hunters avoid harvesting sows." *See* Affidavit of Samuel Rohrer ¶6. No one asserts the State's biologist have that same expertise.

IV. FEDERAL PREEMPTION ISSUE

As APHA explained in its opening Motion, this case presents a unique problem of federal preemption. *See* Motion at pp. 19 and 21. Cassell seeks a State Court judgment that would create a conflict between the State and the United States where none presently exists, by making it far harder for citizens of the other 49 States to hunt on Kodiak National

Wildlife Refuge (the "Refuge"). Concessions awarded by the federal government give APHA members the exclusive right to guide hunts within the Refuge. The Federal Government awarded those concessions for the express purpose of enabling non-residents to come to Alaska and safely hunt on the Refuge. Motion at 18 and at Ex. A, Appx. E, pp. 14-15. Non-residents need guides due to their unfamiliarity with the terrain, animals, and logistics (and State law bars them from hunting without one). Motion at 4.

If Plaintiff succeeds, non-residents will have a much tougher time hunting on the Refuge, if they can hunt at all, thereby preventing achievement of the Refuge's stated purpose of facilitating hunting by non-residents (citizens of the other 49 States) on this federal land unit. Motion at 18. Cassell wants this State Court to tell the Federal Government: "*Sorry, even though your federal land unit is funded by taxpayers from all 50 States, the State Constitution mandates far greater preferences for Alaska residents; so there is going to be more hunting by Alaska residents and less hunting (if any) by citizens of the other 49 States on your unit.*" Frustration-of-purpose preemption would likely follow. See APHA Motion at 19, n.4 (citing *Saridakis v. United Airlines*, 166 F.3d 1272, 1276 (9th Cir. 1999)). At the very least, the doctrine of avoidance of constitutional issues will weigh in favor of construing the Alaska Constitution in a way that does not yield the preemption concerns that Plaintiff's construction would yield. *See State v. Planned Parenthood of the Great Northwest*, 436 P.3d 984, 992 & n.84 (Alaska 2019). Why spark Federal / State conflict when more restrained readings of the State Constitution are available? Contrary to Plaintiff's argument, it is not APHA's burden to show that preemption will inevitably follow. Because the State currently accommodates reasonable Federal interests on this issue (citizens from the other 49 States can hunt on the Refuge),

there has been no need to litigate the preemption issue that a ruling for Plaintiff would create.

APHA is prepared to demonstrate that Plaintiff's efforts to enjoin the current regime will be preempted by federal law because they potentially destroy the objectives of the federal concessions program. The State of Alaska is not expected to make a preemption argument. It has no incentive to do so.

Plaintiff attempts to debunk even the idea of federal preemption, demanding some case or statute demonstrating preemption of a state's limitation of access. In other words, Plaintiff wants to litigate the issue here and now. But the issue at hand is the uniqueness of the interest, not a likelihood of success on the merits. Plaintiff does not (and cannot) demonstrate that preemption concerns will be fairly addressed in APHA's absence. Meanwhile, APHA members, as holders of those valuable federal concessions, are very much the party potentially injured by a disregard for the possibility of federal preemption. If Plaintiff wants to argue the issue, APHA is prepared to do so, once it is an established party.

V. PERMISSIVE INTERVENTION

Finally, Plaintiff's primary argument against permissive intervention by APHA is that APHA's presence is too burdensome. But Plaintiff does not explain how intervention would result in "undue delay or prejudice" to the original parties—the test used by the Alaska Supreme Court. *See Alaskans for a Common Language, Inc. v. Kritz*, 3 P.3d 906 (Alaska 2000). There is no foreseeable delay or prejudice to anyone due to APHA's presence, as that presence in no way complicates or expands the narrow remedy sought by Plaintiff.

Plaintiff relies on *Alaskans for a Common Language* for the maxim that absence of new substantive issues raised by the party seeking intervenor make *amicus curiae* the more suitable option. However, as explained above, APHA's interests do indeed raise substantive issues beyond the constitutional argument presented by Plaintiff and responded to by the State. Moreover, if it is limited to an *amicus curiae*, APHA will have no right of appeal following an unfavorable result.

VI. CONCLUSION

The relief Plaintiff seeks triggers more than just constitutional issues. It throws into question the financial viability of an entire industry. It also raises issues of federal preemption due to concessions awarded on the basis of the existing law—issues the State has no interest in. APHA has already advocated these interests at the adjudication which prompted this lawsuit. Its continued representation of those interests is appropriate.

DATED this 19th day of September, 2019.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 19th day of September, 2019, a true and correct copy of the foregoing was served on the following in the manner indicated:

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