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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT KENAI

KENNETH MANNING

Plaintiff,

and

THE ALASKA FISH AND WILDLIFE CONSERVATION FUND,

Intervener,

vs.

STATE OF ALASKA, DEPARTMENT OF FISH AND GAME,

Defendant,

and

AHTNA TENE NENE'

Intervener.

Case No.: 3KN-09-178CI

ORDER DENYING AHTNA'S MOTION TO STAY DECISION ON SUMMARY JUDGMENT AND GRANTING PARTIAL STAY AS OUTLINED IN THE STIPULATION BETWEEN THE STATE AND AFWCF

JUL 27 2010

Having considered AHTNA's Motion to Stay Decision on Summary Judgment, and the partial stay as outlined in the Stipulation between the State and AFWCF, and any opposition thereto;

1) IT IS HEREBY ORDERED that AFWCF's Motion to Stay Decision on Summary Judgment is DENIED, and 2) a partial stay under the terms of the State and AFWCF's stipulation is GRANTED. This partial stay will expire October 20, 2010. The State is ordered to implement a Tier II hunt for caribou starting October 21, and to create moose hunting regulations consistent with the Court's order on Summary Judgment.

DATED this 28th day of July, 2010.

Carl Bauman
SUPERIOR COURT JUDGE

CERTIFICATION OF DISTRIBUTION
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AHTNA TENE NENE'
Intervenor Defendant.

Case No. 3KN-09-178CI

DECISION ON MOTIONS AND PARTIAL STIPULATION TO PARTIAL STAY

Ahtna Tene Nené and the State each moved for a stay of the July 9, 2010, Decision on Summary Judgment. AFWCF and the State signed a stipulation for a partial, temporary stay to enable certain Tier I permits to be issued. AFWCF opposes a longer term stay of the CHP and other aspects of the July 9 Decision. Manning opposes a stay in any respect. The State presents new information in its July 28 reply, including an increase in the Nelchina Caribou Herd population to nearly 45,000, which is 5,000 above the high end of the Department's population objective for sustained yield. The Department is said to have recently determined that a minimum of 1,500 bulls and 800 cows should be taken during the pending hunting seasons. The Department reports that it needs to issue more hunting permits

forthwith.[1] The State notes that it must also respond to a remand ruling by Judge Smith in Ahtna Tene Nené Subsistence Committee v. State of Alaska Board of Game, 3AN-07-8072 CI for "compliance with AS 16.05.258(b)(1)." The State is concerned that completely eliminating the CHP moose hunt per the July 9 Decision would put the Board in jeopardy of violating the mandate in the Anchorage case. The July 9 Decision does not preclude the Board from providing a subsistence use preference regarding moose in Unit 13, but the subsistence use preference may not be a residency-based exclusive privilege as in the current Ahtna CHP, nor may the Department delegate hunt administration to a private entity.

In its reply to the oppositions to its motion for a stay, Ahtna proposes a modification to the stay it previously proposed. The modification is a temporary stay only through September 20, 2010. Ahtna does not join the State/AFWCF stipulation for a temporary, partial stay. Ahtna seeks to maintain the CHP hunts for moose and caribou through September 20. Ahtna points out that without the "any bull" component of the CHP moose hunt, there will be no subsistence moose hunting opportunity in August and no any-bull subsistence moose hunting opportunity at all. Ahtna includes information regarding two moose populations and moose management in Unit 13.

The Alaska Supreme Court has provided the following guidance for trial courts exercising discretion under Civil Rule 63(c) whether to stay a decision pending appeal:

> Judgments in actions for injunctions are not stayable as of right. Under Alaska Rule of Civil Procedure 62(c) the superior court is empowered to "suspend, modify,

[1] Manning responds that the new herd size information be stricken and that harvest tickets could be issued for the winter hunt to increase the harvest if necessary. AFWCF suggests the court direct the Board to remove the one-caribou-every-four-years limitation, remove the antler destruction condition, and remove the restriction on a Unit 13 caribou Tier I permit holder from participating in the harvest of moose or caribou elsewhere in the State. The court is not well positioned to react instantly to new, last minute information. The Board has statutory authority to make game management adjustments as are lawful and appropriate.

restore or grant" an injunction pending an appeal from a final judgment granting or denying an injunction. Whether a stay of an injunction pending appeal will be granted is a question directed to the sound discretion of the court.[FN1] In considering whether to grant such an injunction, the lower court must consider criteria much the same as it would in determining whether to grant a preliminary injunction.[FN2]

FN1. Shinholt v. Angle, 90 F.2d 297 (5th Cir. 1937); Kim v. Chinn, 20 Cal.2d 12, 123 P.2d 438 (Cal.1942).

FN2. See 7 J. Moore, Federal Practice 62.05, at 62-24 (2d ed. 1972). Professor Moore suggests a four factor test: (1) the likelihood that the petitioner will prevail on the merits of the appeal, (2) irreparable injury to the petitioner unless the stay is granted, (3) no substantial harm to other interested persons, and (4) no harm to the public interest. 7 J. Moore, supra 62.05, at 62-25. See also Perry v. Perry, 88 U.S.App.D.C. 337, 190 F.2d 601 (1951); A. J. Industries, Inc. v. Alaska Public Service Commission, 470 P.2d 537 (Alaska 1970). Professor Moore observes that it may be the unusual case in which the trial judge would arrive at the conclusion that appellant is likely to prevail on appeal. But, that may occur in areas of the law where doubt clouds the correctness of the decision; and, there the court may stay an injunctive order. ....

Powell v. City of Anchorage, 536 P.2d 1228, 1229 (Alaska 1975). Each factor is addressed in turn.

(1) The Likelihood that the State and Ahtna Will Prevail on the Merits on Appeal.

The issues resolved against the State and Ahtna in the July 9 Decision center on the CHP permit and the change of the Unit 13 caribou hunt from a long-time Tier II hunt to a Tier I hunt. The July 9 Decision invalidated the Community Harvest Permit which the Board authorized the Department to issue to the Ahtna Tene Nené Subsistence Committee to administer a CHP hunt for caribou and moose by eight Ahtna villages in the Nelchina area. The Ahtna CHP presents issues of first impression. The parties submitted little on the legislative history and intent regarding AS 16.05.330(c). That statute contains the CHP concept enacted by the Legislature in 1986 as part of the response by the Governor and the Legislature to the then recent Alaska Supreme Court decision in Madison v. Alaska Dep't of Fish & Game, 696 P.2d 168 (Alaska 1985). In the Madison case the Alaska Supreme Court

struck down subsistence fishing regulations that imposed a rural residency requirement on Tier I subsistence users as violating the 1978 statute on subsistence. Before invalidating the Board action, the court observed,

> The board argues that the legislature intended to narrow the scope of subsistence fishing to mean fishing by individuals residing in those rural communities that have historically depended on subsistence hunting and fishing.

Madison, 696 P.2d at 174. After the Madison decision, the Secretary of the Interior notified the State that state law was no longer consistent with ANILCA and that federal management would begin unless consistency was achieved by June 1, 1986. The Legislature amended the subsistence statute in 1986 to provide a rural residency requirement for subsistence. The Secretary then found consistency. However, in McDowell v. State, 785 P.2d 1 (Alaska 1989), the Alaska Supreme Court held the 1986 subsistence statute's rural residency requirement unconstitutional. The court held,

> We therefore conclude that the requirement contained in the 1986 subsistence statute, that one must reside in a rural area in order to participate in subsistence hunting and fishing, violates sections 3, 15, and 17 of article VIII of the Alaska Constitution.

McDowell v. State, 785 P.2d at 9. For the Ahtna CHP the State and Ahtna argue that residency in one of the eight Ahtna villages is not required because one can reside elsewhere and still meet the definition of community member and a non-community member could be selected as a designated hunter or participate in the sharing hunt to which Ahtna has allocated 30 of its 300 caribou entitlement under the CHP. Those exceptions do not change the fundamental character of the local community residency restrictions in the Ahtna CHP.

Given the doubt associated with a trial court interpretation of a subsistence-related statute in general, let alone this case of first impression regarding a CHP permit, and given the tension between Congress, the Legislature, the Department, and the Board on one side

and Alaska Supreme Court decisions and the Constitution of the State of Alaska on the other, it is "possible" that the State and Ahtna will prevail on the merits of an appeal on the CHP issue. Given the July 9 Decision, this court cannot find that it is "probable" that the State and Ahtna will prevail.

With respect to the issues regarding lack of adequate public notice in 2009 prior to the Board's decision to change the long-standing Tier II status of the Unit 13 caribou hunt to Tier I and the challenge to the merits of that decision and related findings, in the absence of information or evidence in the administrative record to support the change in Unit 13 to a Tier I caribou hunt and in the presence of the unsupported finding by the Board that subsistence users of Unit 13 caribou only need one caribou every four years, it is "possible" that the State and Ahtna will prevail on appeal. The positions of Manning and AFWCF are not aligned on the Tier II versus Tier I dispute. It is not clear whether AFWCF will appeal the Tier II-related aspects of the July 9 Decision. Given the July 9 Decision, this court cannot find that it is "probable" that the State and Ahtna, or AFWCF if it appeals, will prevail on the Tier I versus Tier II issues.

With regard to this factor the court finds that the possible but not probable chance of a reversal on appeal tips toward not staying the July 9 Decision.

(2) Irreparable Injury to the State, Ahtna, and AFWCF Unless a Stay Is Granted?

Ahtna presents the affidavits of Linda Tyone and Nicholas Jackson and refers to the Board's 2006 Findings regarding subsistence uses in this area, including the Board findings referenced in the July 9 Decision. In her affidavit Ms. Tyone explains that she was the chief hunt administrator for the CHP for 2009 and is also involved in administering the CHP this year. Adjustments had to be made last year, which was the first year for the CHP,

due to the preliminary injunction in this case. There was a learning curve for coordination with the Department on hunt reporting and data collection. The Ahtna hunt administrators have worked with the Department on changes for this year. Ms. Tyone reports that any Alaskan resident living anywhere in the State "can participate in the community hunt if they are a member of the community." Community membership is defined to include participation over at least a year with community members in the customary and traditional subsistence patterns and practices of the community. In addition, the CHP allows any Alaska resident to participate as a "designated hunter" for an Elder, widow, or other community member. A designated hunter must give the meat and other parts to the community member. Also there is an opportunity for "sharing hunters," regardless of residency, to hunt for one of the 30 caribou set aside by the hunt administrator for a sharing hunt. Sharing hunters must deliver half of the meat. Attached letters from sharing hunters James Sheridan and Troy Bowler of Anchorage reflect appreciation for the experience and values associated with the sharing hunt portion of the CHP. Ms. Tyone further reports that many Ahtna communities did not meet their traditional subsistence needs under the Tier II regulations. She also informs the court that many of the young people who would participate in the CHP hunt will not be able to do so if the hunt is delayed until after August 10 as they will have returned to school. The letter by Willard Hand confirms the involvement of young people in the 2009 hunt through the CHP, which he characterizes as a "huge success."

Ms. Tyone expresses concern that unless the CHP hunt is permitted this year, many community members will not be able to meet their subsistence sustenance needs. She makes the point that participation in the Ahtna CHP hunt prohibits participation in other

moose or caribou hunts elsewhere. It is too late for those who made the decision to participate in the 2010 CHP to change plans and apply for other caribou and moose hunts.

The second affidavit of Nicholas Jackson reiterates his history as a member of the Board of Game, the local state fish and game advisory community, and as a 10-year employee of the Department. As an Elder and leader in the Ahtna region and as a subsistence hunter and provider Mr. Jackson indicates that the 2009 CHP hunt had a very positive influence on the hunters and communities that participated. Enough wild meat, particularly moose, was harvested to provide for families, elders, and kin with a broad sharing in the local customary and traditional manner. Many local youth were able to participate for the first time. Starting the hunt on August 10 is important because the caribou are fat and the meat is good. In mid-September when the rut begins the taste of the meat goes bad. The caribou tend to be thinner in the winter and move far toward Canada. Mr. Jackson details practical problems with the alternative hunts and serious harm to the Ahtna communities if the July 9 Decision precludes a CHP hunt in 2010.

The State explains that it will take 2 months to convert the Unit 13 hunt back to Tier II. If the court does not stay the July 9 Decision, the State writes on page 2 of its motion that "the State will have to close the hunt." 850 individual Tier I caribou permit holders and their family members plus the residents of the eight Ahtna villages subscribing to the CHP are said to be relying on the hunt to put meat in their freezers for the winter. Closing the hunt will work a hardship on them. The State presents a second affidavit by Kurt Kamletz, the Permit Hunt Administrator for the Department. Mr. Kamletz goes over the details of the Tier II and Tier I application system. Because no Tier II hunt for Unit 13 caribou was

contemplated for 2010, the Department cannot rely on the Tier II applications received by December 31, 2009, for this year.

The State also presents the affidavit of Bruce Dale, the Department Regional Supervisor for the region that includes Unit 13. Mr. Dale reports that 850 Tier I permits for the Unit 13 caribou for the 2010/11 hunting season have already been awarded and mailed. Some live in remote locations and may not receive timely notice that their permits are null and void. Mr. Dale also reports that many of the normal Tier II applicants are at remote fish camps, out commercial fishing, or otherwise occupied such that they may well not learn of the changes and be able to apply on short notice for a Tier II hunt. One problem for the 850 who were awarded Tier I permits is that they and their household members (said to be nearly 1,700 hunters) were systematically denied any and all other moose and caribou drawing permits, which have now been issued to other applicants. Most of the permit holders have already planned their hunts, arranged time off work, made logistical plans, etc. Other problems include the disruption and effect on normal Department duties if extraordinary time has to be devoted to deal with the effect of the July 9 Decision.

AFWCF entered a stipulation with the State to a partial stay for certain Tier I permits to be issued for caribou in Unit 13. AFWCF made it clear that it intervened in this case on behalf of its Tier I members to challenge the Ahtna CHP. AFWCF did not challenge the Board decision to change the Unit 13 caribou hunt to a Tier I hunt. As an entity AFWCF does not face irreparable harm. Some of the AFWCF members have drawn Tier I permits for Unit 13 caribou. Those individuals will suffer harm if at least a partial stay is not granted. AFWCF joins some but not all of the Manning arguments against a stay. AFWCF contends that the State and Ahtna knew from the preliminary injunction in this case last year that grave

doubt was cast on the legality of the hunt, but the Department did not make contingent plans to hold a non-discriminatory hunt in 2010. AFWCF argues that with 400 of the harvestable surplus of Unit 13 caribou allocated to rural residents under the federal portion of the hunt, the Ahtna residents took 126 caribou under the 2008 Tier II hunt but only 96 under the 2009 hunt. AFWCF notes that Ahtna owns "thousands of acres of land" along the Glenn and Richardson highways which are closed to all other Alaskans, absent a land use permit from Ahtna.

Manning presents information regarding the availability of alternative caribou and moose hunts nearby. He argues that those who were awarded Tier I caribou permits face only temporary voluntary harm, not irreparable injury. Mr. Manning is reported to be one of the 850 successful applicants for a Tier I caribou permit this year.

For some, if not many, of the 850 individuals who were awarded and have received a Tier I permit for a Unit 13 caribou, this caribou hunt is a once-in-a-lifetime opportunity. The probable adverse consequences to the Ahtna communities are particularly troublesome.

The court finds that the foregoing harms are substantial and irreparable to some degree, which tips toward approving the State/AFWCF stipulation for a temporary, partial stay of the July 9 Decision.

(3) Any Substantial Harm to Other Interested Persons?

Manning contends that he and 10,000 other Tier II hunters would be substantially harmed by a stay of the July 9 Decision. As previously noted, this case was neither brought nor perfected as a class action by or for Tier II hunters. Manning legally represents and speaks solely for himself in this case, not for any other Tier II hunters. No group or

association has intervened on behalf of the Tier II hunters. AFWCF represents only its Tier I membership. The interests of Manning and AFWCF are not aligned on some of the rulings in the July 9 Decision.

As noted above, 850 Tier I hunters have been awarded permits for the 2010 Unit 13 caribou hunt. They and their household members who are hunters will be harmed unless a stay of the July 9 Decision is granted. If the July 9 Decision stands, there will be no financial restitution to the Tier I permit holders for the costs associated with planning their hunts, getting vacation for those who are employees, gearing up, or with regard to their expectations and the expectations of their families and hunting companions. Even though this case is not a class action on behalf of Tier II hunters, the court may consider their interests under this factor in the Powell case. The interests of the Tier II hunters may be substantially harmed if the July 9 Decision is stayed.

There are rural, non-Ahtna-village-resident subsistence users of Unit 13 caribou who may be affected, depending upon their relative Tier II status, their Tier I interest under the applicable restrictions, and other factors. It is not clear that substantial harm would occur to such interests.

The court finds that this factor tips toward not staying the July 9 Decision, but approving the State/AFWCF stipulation for a temporary, partial stay.

(4) Any Harm to the Public Interest?

The public interest includes all of the residents of Alaska. The public has an interest recognized by Congress, the Legislature, and others to support and enable subsistence users, particularly traditional and customary subsistence users, and particularly subsistence users in rural areas grounded on centuries of family and cultural use of

subsistence resources. The public also has an interest embedded in Alaska Constitution in equal access and common use of public resources regardless of rural or urban residency, without establishing exclusive access or use privileges.

The tension between these competing public interests has been the subject of debate in the halls of Congress, in the Alaska Legislature, in litigation, in Board of Fish and Game hearings, in public forums, and in other contexts. "Harm" could be said to occur to one aspect of the public interest from a decision to stay the July 9 Decision. Harm could also be said to occur to the other aspect of the public interest from a decision not to stay the July 9 Decision.

Both sides of the public interest are motivated to maintain a sustained yield from the Unit 13 Nelchina Caribou Herd. The Department reports that it will take 57 days to convert the Unit 13 caribou hunt back to a Tier II hunt. Doing so will delay the start of the hunt and thereby result in the caribou being in more vulnerable locations for Tier II hunters. That situation could result in the taking of more caribou than appropriate for maintaining the herd. On the other hand, maintaining the status quo from the 2009 caribou hunt, given the private administration of the CHP hunt and related caribou-take reporting problems, would also present the possibility of more caribou being taken than appropriate. Moreover, the recently recognized increase in the caribou herd population to nearly 45,000 requires the Department to increase the take of bulls and cows from that herd this year to enhance herd sustainability.

The court finds that this factor slightly tips toward not staying the July 9 Decision, but approving the State/AFWCF stipulation for a partial, temporary stay.

CLARIFICATION AND CONCLUSION

The State/AFWCF stipulation for a partial, temporary stay of the July 9 Decision contains a sentence to order the State "to create moose hunting regulations consistent with the Court's order on Summary Judgment." This case primarily focused on caribou. Mr. Manning challenged the moose component of the CHP in his amended complaint. The July 9 Decision addressed Unit 13 moose only in the context of the CHP. The court was not presented, and the July 9 Decision, does not address facts or arguments regarding moose populations in Unit 13 or any Tier I versus Tier II or other dispute regarding moose in Unit 13 except as embedded in the residency and delegation challenges to the Ahtna CHP.

The modified stay proposed by Ahtna with regard to a CHP moose hunt for 2010 presents a close question under a Rule 63(c) analysis. There is a subsistence need for moose in Unit 13. Losing the any-bull subsistence hunt is a substantial harm.

On balance, taking the pleadings, arguments, and information presented by the parties into account, applying Civil Rule 63(c) in accord with the Powell case as discussed and considered above, the court denies the Ahtna and State motions to stay the July 9 Decision, denies the modified stay requested by Ahtna, but approves the State State/AFWCF stipulation for a partial, temporary stay.[2]

DATED this 28th day of July, 2010.

Carl Bauman
SUPERIOR COURT JUDGE

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I certify that a copy of the foregoing was mailed to the following at their addresses of record: faxed Sandy, Starkey, Kramer/Manning - email
7-28-10 Date
Clerk

[2] Under Civil Rule 63(e) the State is not required to post a bond, obligation, or other security for a stay. The court notes the Manning request for a bond by Ahtna. The denial of the Ahtna stay renders moot the issue of an appropriate bond from Ahtna for the security of the rights of an adverse party.