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

PLAINTIFF'S OPPOSITION TO MOTION FOR INTERVENTION BY ALASKA PROFESSIONAL HUNTERS ASSOCIATION

Robert Cassell opposes the Alaska Professional Hunters Association's ("APHA") Motion to Intervene. APHA's motion is founded on a misunderstanding of the nature of Cassell's Complaint and a misapplication of the controlling legal standards.

APHA's members—who are professional guides—have no direct interest in this proceeding, as they are not the actual recipients of nonresident hunting permits. APHA claims merely that it is the indirect, contingent economic beneficiary of the current allocation scheme and further speculates, without concrete evidence, that a change in the allocation system will cause its members potential economic harm. But private economic interests cannot trump the Constitution, and APHA has no constitutional right or entitlement that is at issue in this proceeding. Rather, it has only a speculative, indirect financial interest in maintaining a status quo where the State effectively

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subsidizes its members' businesses by guaranteeing them clients. APHA does not meet the criteria for intervention in this case, and its concerns could be more than adequately voiced in the role of *amicus curiae*.

I. BACKGROUND

Cassell filed suit to raise a constitutional challenge to the State of Alaska, Board of Game's ("Board") allocation of nearly 40% of Kodiak Brown Bear permits to non-residents.[1] The Complaint, filed on May 29, 2019, asserts that 5 AAC 92.061, the allocation regulation, is invalid because it is contrary to the Alaska Constitution. On July 15, 2019, the Board filed its Answer, denying Cassell's claims. On August 5, 2019, APHA moved to intervene.

Prior to filing suit, Cassell submitted a proposal ("Cassell Proposal") to the Board requesting that 5 AAC 92.061 be modified to mitigate the constitutionality concerns. Numerous members of the public commented on the Cassell Proposal, including resident hunter groups and APHA. The Board ultimately denied the proposal.

II. ARGUMENT

A. APHA Is Not an "Appellee."

APHA characterizes this suit as an appeal of the Board of Game's denial of the Cassell Proposal, and claims that APHA was a prevailing party in that proceeding, and

[1] Compl. ¶¶ 1-2

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therefore has a right to participate in this suit as an "appellee in substance."[2] This characterization of its status lacks any foundation in law or procedure. This is not an administrative appeal of the Board's decision. The Complaint does not seek to have the Cassell Proposal (which contained a specific proposed regulatory change to mitigate the constitutional issue) implemented. It is an original action that seeks a declaration that the allocation in 5 AAC 92.061(a)(1) is contrary to the Alaska Constitution. Indeed, even APHA acknowledges that it is not an appellee "in formal procedural terminology[.]"[3] Appeals are, however, formal proceedings; and the term "appellee" is a formal term that comes with specific rights.

The mere fact that APHA participated in a related action does not entitle it to party status here. This is reinforced by the Alaska Supreme Court's ruling in *Alaskans for a Common Language, Inc. v. Kritz*.[4] There, a group formed by the initial sponsors of a ballot initiative—which had even financed a campaign to promote and filed other litigation regarding the initiative—sought to intervene in a suit challenging the ballot initiative's constitutionality.[5] Despite the group's extensive involvement in the initiative, the Supreme Court affirmed the superior court's denial of its intervention motion.

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[2] APHA Mot. at 5.
[3] APHA Mot. at 5.
[4] 3 P.3d 906, 910 (Alaska 2000).
[5] *Id.*

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As in *Kritz*, this suit is merely related in subject to the prior proceeding involving APHA. But contrary to APHA's assertions, this suit is not an appeal of the Board's decision, and it is not a do-over of the Board proceeding. APHA's confusion over the nature of this action permeates its Motion. It repeatedly claims that if Cassell prevails, the percentage of permits allocated to nonresidents will drop "by 70%." While the Cassell Proposal did seek a reduction of the nonresident allocation from 40% to no more than 10%, that it is not the result sought in the litigation. APHA's entire Motion incorrectly assumes that if the case is decided in Cassell's favor, the Cassell Proposal will automatically be put in place. But this is not the result sought in the Complaint. If Cassell prevails, and 5 AAC 92.061(a)(1) is declared unconstitutional, the Board will presumably promulgate and seek public comment on a replacement regulation. At that point, APHA, and many others, will have the opportunity to weigh in and participate.

The Court should disregard APHA's attempt to style itself as an "appellee in substance" as well as its efforts to conflate the proceeding before the Board with this suit.

B. APHA Is Not Entitled to Intervention as of Right.

Alaska Rule of Civil Procedure 24(a) provides the standard for intervention as of right. An applicant is entitled to intervene as a matter of right when it satisfies four requirements: (1) the application must be timely, (2) the applicant must have an interest in the subject matter of the action, (3) the interest may be impaired as a consequence of

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the action, and (4) the applicant's interest is not adequately represented by another party.[6] Here, APHA has failed to satisfy requirements (2) and (4).

1. APHA has failed to demonstrate a qualifying interest in the subject matter of the action.

"To satisfy part (2) of the test, the requisite interest for intervention as a matter of right must be direct, substantial, and significantly protectable."[7] APHA does not meet this standard here.

APHA asserts that if Cassell is successful in this suit, this will reduce the number of nonresidents who obtain permits, which will in turn harm their ability to obtain clients given that nonresidents are required to hire local guides.[8] APHA is essentially arguing that its members are being guaranteed clients through the State's nonresident allocation system and that removing this government subsidy will cause economic harm. This claimed economic interest in the subject of this suit is not, however, direct; it is several levels removed from the subject matter of this action, and contingent on the outcomes of lotteries that have not been held. It also assumes, without any evidence, that residents will not utilize guide services, or that the guides are unwilling or unable to change their business model.

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[6] *State v. Weidner*, 684 P.2d 103, 113 (Alaska 1984) (citing *Foster v. Gueory*, 655 F.2d 1319, 1324–25 (D.C. Cir. 1981)).

[7] *Id.*

[8] APHA Mot. at 4-5.

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APHA's interest here is similar to the one at issue in *State v. Weidner*, which also dealt with an interest resulting from a state-run lottery.[9] There, the State of Alaska, Department of Natural Resources ("DNR") scheduled a lottery for the sale of land. Several local property owners filed suit, claiming the lottery was invalid. The superior court entered an interlocutory order allowing the lottery to proceed, but preventing DNR from conveying the lands to the winners pending resolution of the lawsuit. DNR held the lottery and identified the winners. The winners then sought to intervene in the lawsuit to protect their interest in actually having the lands conveyed to them. The superior court denied intervention, and its decision was later affirmed on appeal by the Alaska Supreme Court.[10]

The lottery winners in *Weidner* had a stronger claim than the guides here. If the lottery had been approved by the superior court, they would have received their parcels. When the lottery was invalidated, they lost all claim to the parcels. But even in that case, the Supreme Court found that intervention was not appropriate, because the lottery owners had only a contingent interest—*i.e.*, they were not, at that point in time, in possession of the parcels at issue.

APHA's interest here is similarly contingent and even less direct. Every year, approximately 40% of the available Kodiak Brown Bear permits are allocated to non-residents generally. APHA's members, who are predominantly Alaskan, are not even

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[9] 684 P.2d 103 (Alaska 1984).

[10] *Id.*

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the nonresidents who obtain these permits. Rather, the nonresident applicants are potential clients—should they receive a permit and should they choose to use a guide that is an APHA member. The actual number of Kodiak Brown Bear permits available for a given season is not set by regulation, but instead fluctuates from season to season based on a range of factors, such as the size of bear populations and the number of bears actually taken in prior hunts. APHA's members are not already the identified, certain winners of a lottery with definite rights to permits that will be vested if Cassell's challenge fails; rather, they are merely potential secondary beneficiaries of potential winners in potential future lotteries for unknown numbers of permits. Their interest is far less tangible than that of the lottery winners in *Weidner*.

The indirect nature of APHA's members' financial interest also distinguishes this case from *Anchorage Baptist Temple v. Coonrod*.[11] There, the Alaska Supreme Court found that the applicants—three churches in the Anchorage area—had a direct interest in the outcome of the litigation: if the statute at issue was adjudicated to be valid, they would receive a valuable property tax exemption.[12] The Supreme Court also found that the churches' interest was more than financial, as they were asserting significant equal protection arguments that were unique to them as religious institutions. Here, APHA's members' interest is purely economic, and—as explained above—it is only indirectly affected by the subject of this suit.

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[11] 166 P.3d 29 (Alaska 2007).

[12] *Id.* at 34.

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2. Any interest APHA has is adequately represented by the Board.

APHA's interest is also adequately represented by the Board. In Alaska, there is a "presumption of adequate representation when government entities are parties to a lawsuit because those entities are charged by law with representing the interests of the people."[13] To overcome this presumption, the intervenor must show "collusion, adversity of interest, possible nonfeasance, or incompetence[.]"[14] This presumption applies here to bar APHA's intervention.

The agenda of the Board and APHA is the same: to maintain the current regulatory regime. APHA claims this is not the case because Cassell is seeking to have the Board ignore the interests of nonresidents. But the Board's comments at its March 2019 meeting—described in the Complaint and not denied in the Board's Answer[15]—demonstrate that the Board gives serious consideration to the guiding industry's well-being and economic needs. This, again, is similar to the situation in *Weidner*: there, the Court found that the lottery owners' interests were virtually identical to DNR's—despite the fact that the lottery owners were private citizens, and DNR was a state agency.[16]

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[13] *Alaskans for a Common Language, Inc. v. Kritz*, 3 P.3d 906, 913 (Alaska 2000).

[14] *Id.* at 913 (Alaska 2000) (citing *McCormick v. Smith*, 793 P.2d 1042, 1045 (Alaska 1990)).

[15] Complaint ¶¶ 27-28; Answer ¶¶ 27-28.

[16] *Weidner*, 684 P.2d at 113.

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APHA purports to rebut the presumption in three ways. None of them has merit. *First*, it claims that if Cassell is correct and the Board has no obligation to consider the interests of the nonresident hunters represented by proxy by APHA, then the Board will not adequately represent APHA's interest in providing guiding services to these nonresident hunters. This argument, by its own terms, moots the issue. If the Board is not legally or constitutionally obligated to consider nonresident hunters, then APHA has no legitimate interest in this action, and no right to participate as a party.

Second, APHA claims that there is adversity between it and the Board because APHA represents a narrow subset of society (guides who serve nonresident hunters), which the Board is not specifically charged with representing. But if this were adequate to meet the adversity requirement, the presumption of adequate representation by the State would have no meaning. Every individual person and entity within the State of Alaska has a unique identity separate from the State. Under APHA's proposed interpretation, there would always be adversity of interest between the State and an applicant.

APHA claims that *McCormick v. Smith* supports its argument, but that case merely recites the presumption's existence in federal practice.[17] The only *specific* examples cited by APHA are in federal cases, which do not control here. And even if

[17] *McCormick*, 793 P.2d at 1044 ("Because governmental entities are charged by law with representing the interests of the people, the federal courts have recognized a presumption of adequate representation when a governmental entity is a party to a lawsuit.").

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they did, they would be inapposite. The example most heavily relied on by APHA is *Morgan v. McDonough*, a case referenced in passing in *McCormick,* in which the First Circuit found that one specific local school board was not charged with representing the interests of students in another district.[18] That case depended on geography and dealt with hyper-local agencies. Here, the Board of Game is a statewide agency, charged with representing all Alaskans. APHA acknowledges that "the guides who make up APHA are mostly Alaska residents."[19] APHA's motion does not explain why the Board's statewide charge is inadequate to represent its interests.

Third, APHA claims that a variety of other reasons support intervention—ranging from the intensity of its economic interest (a term apparently pulled from federal cases, with no connection to Alaska precedent), to the economic evidence APHA's guide members could provide (which would dramatically increase the cost, duration, and complexity of this suit, which raises a legal, not a factual, challenge to the regulation), to the possibility that the Board may not raise all the legal arguments APHA could raise (a problem that is easily resolved by allowing APHA to participate as *amicus curiae*), to the Board's alleged lack of interest in protecting APHA's federal concession rights (which, as explained below, are entirely irrelevant to this suit).[20] None

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[18] 726 F.2d 11, 14 (1st Cir. 1984).

[19] APHA Mot. at 13 (citing Moore Aff. ¶ 5).

[20] APHA Mot. at 16-10.

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of these "kitchen sink" arguments has merit or provides a reason to grant APHA party status.

APHA has made no showing of actual "collusion, adversity of interest, possible nonfeasance, or incompetence," and there is no credible argument that the Board's participation will not adequately represent APHA's interests. Because APHA has failed to satisfy the requirements of Civil Rule 24(a), the Court should deny its request for intervention as of right.

C. APHA Should Not Be Granted Permissive Intervention.

Civil Rule 24(b) allows, as an alternative, permissive intervention where a proposed intervenor is not entitled to intervene as a matter of right. A court may, but is not required to, allow a timely request for permissive intervention "when the applicant's claim or defense and the main action have a common question of law or fact[.]"[21] In making its decision, "the court must also determine whether intervention would impair the rights of the original parties by causing undue delay or prejudice."[22]

In *Kritz*, the Alaska Supreme Court summarized the standard as follows: "We recognize that 'additional parties are always the source of additional questions, briefs, objections, arguments and motions, [and] where no new issues are presented, the most

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[21] *Alaskans for a Common Language, Inc. v. Kritz*, 3 P.3d 906, 916 (Alaska 2000).
[22] *Id.*

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effective and expeditious way to participate is by a brief amicus curiae and not by intervention.'"[23]

Here, APHA has not raised any new substantive issues. Its proposed answer asserts two affirmative defenses, which are legal theories (not factual defenses): one under the Alaska Constitution, and one under federal preemption. Neither is a defense that is required at the pleading stage, and there is no indication that the Board would be unable to assert them competently.

APHA does not claim that the Board will fail to make all arguments possible under the Alaska Constitution. It does, however, suggest that the Board is unlikely to make the federal preemption argument. But the preemption argument is clearly meritless. APHA claims that the U.S. government's issuance of Supplemental Use Permits ("SUP") to its members, for guiding hunts within Kodiak National Wildlife Refuge, preempts the Board's ability to limit the number of hunting permits allocated to nonresidents. This argument has no basis in the law. APHA is essentially arguing these permits can force a state agency to allocate state resources in a certain matter, even where there is no federal jurisdiction. This argument is entirely untenable.

A similar claim was addressed in *Totemoff v. State*,[24] where an individual asserted that he was not subject to state hunting laws while subsistence hunting on federal land, pursuant to the Alaska National Interest Lands Conservation Act

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[23] *Id.* (quoting *Weidner*, 684 P.2d at 114).

[24] 905 P.2d 954, 958 (Alaska 1995).

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("ANILCA").[25] The Alaska Supreme Court rejected the argument, holding that there was no express preemption, field preemption, or actual conflict between state and federal law.

With regard to express preemption, the Court found no express statement in ANILCA that it intended to take precedence over state law. With regard to field preemption, the Court held that "[r]egulation of hunting is an area that has been traditionally occupied by the states."[26] It went on to say that the regulation of hunting "is part of the historic police power of states" and that it could not be preempted by federal law unless Congress stated a "clear and manifest" purpose to do so. The Court found that even ANILCA, which contained specific direction regarding subsistence hunting, did "not create a scheme of federal regulation so pervasive" that the state hunting laws were preempted.[27] It also found no actual conflict between the state and federal laws, because the hunting method prohibited by state law was not expressly protected in ANILCA.

A party cannot use an obviously frivolous argument to bolster its intervention application. APHA cites to no federal law, in either its motion or proposed answer, that purportedly preempts Alaska's ability to decide how many permits to allocate to nonresidents. It attaches a conservation plan created by the U.S. Fish and Wildlife

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[25] *Totemoff v. State*, 905 P.2d 954, 957 (Alaska 1995).
[26] *Id.* at 958.
[27] *Id.* at 959.

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Service to its motion,[28] but an agency opinion is not a stand-in for an explicit statement from Congress. Indeed, it is absurd to argue that the federal government, merely by issuing SUPs, obligates the State of Alaska to issue a corresponding number of hunting permits. This would make the State powerless to manage its own resources, which is a crucial component of statehood.

The superior court in *Kritz* denied intervention under Civil Rule 24(a), and also denied permissive intervention under Civil Rule 24(b), "holding that [the applicant] could more effectively and expeditiously participate as amici curiae."[29] This holding was affirmed by the Alaska Supreme Court. As APHA has not demonstrated that it has raised any new claims or defenses that would render permissive intervention appropriate. Cassell requests that the Court here take the same approach.

III. CONCLUSION

For the foregoing reasons, Cassell requests that the Court deny APHA's request to intervene, and limit its role to that of an *amicus curiae*.

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DATED: 9/3/19

By: _____
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[28] APHA Mot., Ex. A.
[29] *Kritz*, 3 P.3d at 910.

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was ☐ hand delivered ☐ faxed ☒ mailed on the 3rd day of September 2019, with a copy via e-mail, to:

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[PROPOSED] ORDER DENYING ALASKA PROFESSIONAL HUNTERS ASSOCIATION'S MOTION FOR INTERVENTION

This Court, having considered the Alaska Professional Hunters Association's Motion for Intervention, and any opposition thereto, DENIES the motion.

IT IS SO ORDERED.

DATE: _____

_____
Honorable Eric A. Aarseth
Alaska Superior Court

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