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SUPREME COURT
STATE OF WASHINGTON

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NO. 77891-4

SUPREME COURT OF THE STATE OF WASHINGTON

JERRIE L. VANDER HOUWEN, SR.,

Petitioner,

v.

STATE OF WASHINGTON

Respondent,

**AMICUS CURIAE BRIEF OF THE WASHINGTON STATE
DEPARTMENT OF FISH AND WILDLIFE**

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I. IDENTITY AND INTEREST OF AMICUS

The Washington Department of Fish and Wildlife (WDFW or Department) is charged by statute with the responsibility to “preserve, protect, perpetuate, and manage . . . wildlife in the state . . .” RCW 77.04.012. WDFW includes the director, the Fish and Wildlife Commission and the employees of the Department. RCW 77.04.020. The Fish and Wildlife Commission adopts rules governing the time, place, and manner of taking wildlife. RCW 77.12.047.

Elk are among the species of classified wild animals that are subject to the management of the Department. WAC 232-12-007. The legislature has enacted laws that generally govern, among other things, the manner in which wildlife, including elk, may be hunted, taken, or possessed. *See* RCW 77.15 (The Fish and Wildlife Enforcement Code). More specific management considerations are set forth in the management regulations adopted by the Commission. *See e.g.*, WAC 232.

In addition to general legislation governing the taking of public wildlife resources contained in RCW 77.15, the legislature has created a comprehensive statutory scheme to compensate property owners for wildlife damage done to their property and to regulate the killing or trapping of wild animals engaged in damaging private property. *See* RCW 77.36.

WDFW engages in comprehensive management practices to ensure the use and enjoyment of the State's wildlife resources while at the same time minimizing the impact of animal/human conflicts. A rule setting forth a *per se* right to kill any animal(s) causing property damage would have the potential to significantly impact WDFW's ability to manage the public's wildlife resources and upset the delicate balance of public and private interests contemplated by state law.

Management of Washington's wildlife resources is dependant upon effective enforcement of the statutes and rules enacted by the Washington Legislature and the Commission. As the primary state agency with expertise in wildlife management, WDFW wishes to provide input to the Court on issues which it believes are of importance in arriving at a reasoned decision.

II. ISSUES PRESENTED BY AMICUS

Whether a person has an absolute right to kill 10 elk he asserts were damaging his property, notwithstanding the comprehensive statutory provisions that limit such killing and which provide for compensation for damage done to private property by elk. Further, does the burden of establishing lack of reasonable necessity for the killing of the ten elk shift to the State by Petitioner merely raising the issue or, must he establish the

existence of necessity by a preponderance of the evidence as provided under 11 Washington Pattern Jury Instructions: Criminal 18.02.

III. STATEMENT OF THE CASE

Jerrie Vander Houwen had an orchard and for years complained of damage from elk migrating to his property from adjacent State lands which an elk herd was known to inhabit. After notifying WDFW that shooting over the heads of the migrating animals was no longer effective in driving them from his land and, after reporting his frustration in dealing with the animals to WDFW officers, 10 dead elk were found inside and outside of Mr. Vander Houwen's property. An investigation by WDFW found rifle slugs matching the caliber of Mr. Vander Houwen's hunting rifle in two of the 10 dead elk. Mr. Vander Houwen was subsequently charged with 10 counts of Killing Game Out of Season and 10 counts of Waste of Wildlife. After trial in the Superior Court of Yakima County a jury found Mr. Vander Houwen guilty of two counts of Killing Game Out of Season.

IV. ARGUMENT

WDFW is charged with the duty of managing the state's wildlife resources and fisheries for the benefit of all citizens. As a part of that effort, the legislature recognized the need to address the impact of human/animal conflicts and enacted RCW 77.36, establishing a

comprehensive system of problem animal control and compensation for landowners who suffer damage from deer and elk depredation. RCW 77.36 is a carefully drawn scheme that preserves wildlife, provides specific procedures for removing problem wildlife that damage private property, and provides compensation to property owners in many cases.

Allowing landowners to kill any wildlife whenever the landowner asserts that the animals are causing damage to their property, will unnecessarily disrupt the Department's overall program of deer and elk management and the legislature's statutory scheme under RCW 77.36 of protecting both private property and public wildlife. In addition, WDFW's ability to manage sensitive populations of animals will be significantly impacted and in some cases specific elk herds could be placed at risk.

Hunting in Washington is a highly regulated activity. Almost every part of the sport is controlled either by statute or by WAC. The open and closed seasons for each hunted species, WAC 232-28-352, numerical bag limits, *See e.g.*, WAC 232-28-352, limits on the age and sex of animals which can be harvested, *See e.g.*, WAC 232-28-271, what type of device (gun, trap, bow and arrow) may be used to harvest a particular species, *See e.g.*, WAC 232-12-242, what type of ammunition may be

used, at what time of day hunting may start and when it must cease, WAC 232-12-289, and, what type of license, tag or permit is required to engage in hunting, *See e.g.*, WAC 232-28-354, are but a few of the aspects which are tightly controlled by statute or rule. A *per se* rule granting landowners an absolute right to kill depredating animals would cast this entire statutory and administrative scheme into doubt, and would make WDFW's ability to enforce its wildlife code conditional on proving that an animal was not involved in damaging private property and that killing it was not reasonably necessary.

A. The Legislature Has Enacted A Comprehensive Scheme To Regulate When And How Wildlife Causing Damage May Be Killed

All wildlife is the property of the state, and the Wildlife Code RCW 77, as an exercise of the police power, is not inherently an encroachment upon an owner's property rights in the land. *State v. Quigley*, 52 Wn.2d. 234, 236, 324 P.2d 827 (1958). The state's right to regulate wildlife is superior to the landowner's. *State v. Long*, 98 Wn. App. 669, 676, 991 P.2d 102 (2000).

At the same time, this Court has recognized a limited ability to kill wildlife for the protection of private property. Longstanding case law has established that such action must be based upon a demonstrable showing

of reasonable necessity. *State v. Burk*, 114 Wash. 370, 376, 195 P. 16 (1921).

Subsequent to the decision in *Burk*, the legislature recognized that there are conflicting values at stake when human activities encroach on the traditional habitat of wild animals and enacted the provisions of RCW 77.36. The legislature acknowledged these conflicting interests in its statement of policy regarding the control of damaging wildlife and the compensation that may be provided to landowners who suffer wildlife damage. RCW 77.36.005.

The legislature, in RCW 77.36, established the financial remedies available to a landowner whose property is damaged by problem wildlife, and the steps WDFW and the landowner may take to prevent further damage by those wild animals. RCW 77.36 allow landowners to kill damaging animals with the exception of threatened or endangered species, deer, elk or other protected species without the necessity of seeking WDFW's prior issuance of a permit to do so. RCW 77.36.030(1)(a)(b). However, in emergency situations landowners may kill problem elk or deer after verbal authorization by WDFW. RCW 77.36.030. RCW 77.36.020 directs WDFW to work with landowners to control damage using non lethal means. That section also provides for increased

harvest limits and/or special hunts to reduce problem animal populations when no other practical means of control is available. In addition, WDFW grants wildlife damage control permits under RCW 77.12.150(2) (damage control permit hunts) and RCW 77.12.240 (director issued permits to kill depredating animals). RCW 77.36.040-080 set forth in detail the method by which landowners can be compensated in whole or in part by the state for damage done to their crops by elk and deer.

Other states are in accord with Washington's statutory limitations on the killing of depredating wildlife. Most notably, Idaho and Oregon have found such limitations reasonable and constitutional. *State v. Thompson*, 136 Idaho 322, 33 P.3d 213 (Ct. App. 2001) (where the state provides for alternative means of controlling damaging animals without resorting to killing of the animal the statutes reasonable limitations on a constitutional right to protect private property); *State v. Webber*, 85 Or. App. 347, 736 P.2d 220 (1987) (requirement that property owner obtain depredation permit before killing deer eating his forage was reasonable limitations on his right to protect property); *South Carolina v. Thompson*, 349 S.C. 346, 563 SE 2d 325 (2002) (requirement that property owner obtain depredation permit before trapping beaver responsible for damage was reasonable limitation on right to protect property).

The State's interest in managing and protecting its wildlife are interests this Court has previously found to be "clearly within the legislative police power", and are interests which reasonably promote the public welfare. *WA Kelpers Ass'n v. State*, 81 Wn.2d 410, 416-17, 502 P.2d 1170 (1972) (Department allowed to prohibit use of sport fishing gear in commercial salmon fishing when its use interfered with proper management of the resource). As this Court has stated in the context of the power of the state to manage its fisheries, "we believe each of these objectives to be fairly within the legitimate scope of the police power, as part of the comprehensive conservation and management program carried on by the state." *WA Kelpers Ass'n v. State*, 81 Wn.2d at 417-18. The statutory scheme contained in RCW 77.36 is both narrowly drawn to accomplish its goal of protecting the state's wildlife and also expansively drawn in protecting the property interests of the State's citizens. The statutes in question allow a number of techniques to prevent damage including trapping, and, as a last resort, killing after obtaining WDFW's permission. The Department also allows other means of problem animal control, such as hazing (harassing) and fencing. In addition landowners may recoup all or part of their loss from the State¹. RCW 77.36.040-080.

¹ The legislature has made certain types of property damage ineligible for compensation and has limited the amount payable on any one claim.

Here the legislature, in a valid exercise of its police powers, has laid out a comprehensive scheme in RCW 77.36 which allows remedial action, first by WDFW and then, in emergency situations, by the landowner to prevent further damage, and it has provided additional protection by compensating the landowners in whole or in part for damage to crops caused by wildlife. An absolute rule that does not require a defendant to prove reasonable necessity would effectively abrogate this comprehensive scheme.

B. WDFW Manages Wildlife Throughout The State And Must Plan For Wildlife In Different Habitats And Environmental Conditions.

There are ten elk herds in Washington. *Game Management Plan* 2003 p.29, Washington Department of Fish and Wildlife². WDFW manages this elk population in order to enhance the public's access to hunting, viewing, education, scientific study, and the preservation of the native animals (including elk) that have cultural significance for Native Americans. In order to fulfill its management mandate, WDFW published a comprehensive Game Management Plan in 2003 for all of the significant hunted species it manages. *Id.* The *Game Management Plan* includes specific recommendations regarding elk. In addition, WDFW has nearly

² The 2003 Game Management Plan is available at: http://wdfw.wa.gov/wlm/game/management/final_gmp_o1jan03.pdf.

completed the process of developing and publishing plans for the management of each of the ten elk herds in the state.³ Both the comprehensive *Game Management Plan* and the individual elk herd plans are meant to provide for ways to: (1) preserve, protect, perpetuate, manage, and enhance elk habitat to ensure healthy productive populations; (2) to manage elk for a variety of recreational, educational, and aesthetic purposes, including hunting, scientific study, and photography; and (3) to manage harvest of the elk herd for a sustained yield. *Game Management Plan p. 31 (2003)*.

Each elk herd has different characteristics, including population, habitat, cultural carrying capacity, and potential for human/animal conflicts. These factors drive the type of management tools WDFW uses to ensure resource sustainability, preservation of the herd for important public purposes, and minimization of human/animal conflict. In addition, WDFW manages herds based on their history of damage to agricultural property and the probability of future human/animal conflicts, with significant consideration given to the target herd's census.

³ Eight elk herd plans have been completed, published and are available in their final form. Two plans are available in draft form. All plans are retrievable at: <http://wdfw.wa.gov/wildlife.htm>

Within elk herds, WDFW sets allowable harvest for discrete geographical areas known as game management units (GMU). WAC 232-28-272. The allowable harvests within GMUs are based on population numbers and other complex factors having to do with the ratios of sexes, ages, and habitat type. In certain situations, such as when elk herds are large, lethal control of problem animals is permitted. In other situations, where herd size is small or other factors militate against killing problem animals, trapping, hazing or fencing may be preferred as control measures.

C. An Absolute Right To Kill Animals Causing Damage Would Impair WDFW's Ability To Manage the State's Resources

A *per se* rule allowing a private property owner the right to destroy a wild animal when the property owner asserts the wildlife is damaging property would significantly jeopardize WDFW efforts to manage elk herds for several reasons. Statewide applicability of an absolute rule would affect wildlife in such diverse locales as the Yakima Valley and the North Cascades. However, the impact of killing elk in Yakima, where the herd size is measured in the thousands, has different consequences from that of killing elk from the North Cascades herd, which consists of less than 450 animals and from which the Department has allowed no elk to be harvested since 1996. In the latter case, the effect of the *per se* rule, if followed by multiple landowners each killing several depredating elk,

could result in a level of animal destruction that could jeopardize the sustainability of that herd.

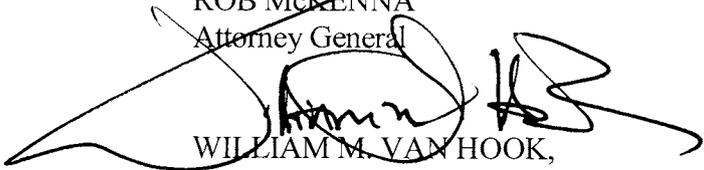
The import of petitioner's argument allowing unrestricted destruction of depredating animals by landowners, without the landowner first obtaining permission from the Department, would be to impair the effective planning by the Department to preserve, protect, perpetuate and manage the state's animal resource for sustainable harvests and other public purposes. The Department would never know with any certainty the number of animals taken from any herd during any year, or, if the projected harvest from a herd for any subsequent year would be excessive. Without the ability to control harvests, even of depredating animals, the Department cannot fulfill its mission of preserving, protecting, perpetuating and managing the state's wildlife.

V. CONCLUSION

For the foregoing reasons, WDFW believes that the Court of Appeals has correctly balanced the rights of property owners with the interests of the State in protecting its wildlife and its decision should be upheld.

RESPECTFULLY SUBMITTED this 20th day of December, 2006.

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CERTIFICATE OF SERVICE

I hereby certify that on December 22, 2006, I served counsel of record with a true and correct copy of **Motion to File Amicus Curiae Brief; and Amicus Curiae Brief** by causing same to be delivered via U.S. Mail, postage prepaid, as follows:

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Yakima, WA 98901-2639	Yakima, WA 98901

I further certify that all parties required to be served have been served. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

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