

LEGAL SERVICES

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MEMORANDUM

March 18, 2015

SUBJECT: Constitutionality of different fees for resident and nonresident hunters and sport-fishers
(CSHB 137(); Work Order No. 29-LS0625\N)

TO: Representative David Talerico
Attn: Joshua Banks

FROM: Alpheus Bullard *TAB*
Legislative Counsel

You asked whether CSHB 137(), a bill raising certain sport-fishing, hunting, and trapping related fees, is subject to challenge under the Alaska Supreme Court's decision in *State v. Carlson (Carlson III)*, 65 P.3d 851 (Alaska 2003). The *Carlson III* case is not applicable to CSHB 137().

In *Carlson III*, the Alaska Supreme Court held that commercial fishing license fees which discriminate against nonresidents are a *prima facie* violation of the Privileges and Immunities clause of the federal constitution.¹ 65 P.3d at 855, citing *Carlson v. State, Commercial Fisheries Entry Commission (Carlson I)*, 798 P.2d 1269, 1274 (Alaska 1990).

The Privileges and Immunities clause is not an absolute bar to discrimination. It only protects individuals against interference with "fundamental rights." Unlike commercial fishing which is considered an occupation, sport-fishing and hunting are not fundamental rights or privileges protected by the Privileges and Immunities clause. In *Baldwin v. Montana Fish and Game Commission*, 436 U.S. 371 (1978), the United States Supreme Court held that recreational hunting is not an activity protected under the Privileges and Immunities clause of the federal constitution. *Id.* at 379 - 388. Accordingly, a state may charge nonresident sport-fishers and hunters substantially higher fees than resident sport-

¹ During the 1980s, Alaska had a differential fee structure for commercial fishing licenses, charging residents \$30 and nonresidents \$90. A class of nonresidents sued. While the Court (in *Carlson III*) recognized that discrimination against nonresidents is generally prohibited, the Court found it acceptable to charge nonresidents "a differential which would merely compensate the State for any added enforcement burden they may impose or for any conservation expenditures from taxes which only residents pay." *State v. Carlson*, 65 P.3d 851, 855 quoting *Carlson v. State*, 798 P.2d 1269, 1274 - 1275 (Alaska 1990).

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fishers and hunters. However, under the equal protection provisions of the federal and state constitutions nonresident sport-fishers and hunters are entitled to protection from unreasonable discrimination.²

Under the equal protection provisions of the federal constitution, a state must treat similarly situated individuals the same unless there is a valid reason for making the distinction. In *Baldwin*, the U.S. Supreme Court upheld a sport hunting licensing scheme that required nonresidents to pay as much as 25 times a resident fee to take elk. Applying a rational basis test, the Court found that the difference in fees charged to nonresidents and residents was sufficiently related to the state's goal of preserving a finite resource that the differential did not offend the equal protection provisions of the federal constitution. *See also Montana Outfitters Action Group v. Fish and Game Commission*, 417 F.Supp. 1005 (D.Mont. 1976); *Terk v. Gordon*, 436 U.S. 850 (1978).

The *Baldwin*, *Montana Outfitters*, and *Terk* cases, *supra*, suggest that the state has wide latitude in setting nonresident to resident differentials for sport-fishing and hunting licenses and tags, provided that the state can tie the differentials to a valid public purpose. *Montana Outfitters*, *supra*, and other cases, that approved the authority of the state to make specific allocations of hunting licenses between residents and nonresidents, suggest that the state may set the differential for licensing and tag fees at the level sufficient to achieve an optimal allocation of the harvest of sport fish between residents and nonresidents. *Terk v. Ruch*, 655 F.Supp. 205 (D.Colo. 1987); *DeMasters v. State of Montana*, 656 F.Supp. 21 (D.Mont. 1986).

State v. Kemp (44 N.W.2d 214 (N.D. 1950); app. dism'd 340 U.S. 923 (1951)) provides some support for the proposition that the state may set nonresident differentials for sport-fishing and hunting licenses so high as to discourage nonresident sport-fishers and hunters in order to reduce nonresident fishing and hunting pressure on state resources. In *Kemp*, the North Dakota Supreme Court found that the state could exclude all nonresident hunters of migratory waterfowl when it was necessary to protect waterfowl resources from over hunting.

The Alaska Supreme Court has upheld the authority of the state to provide preferences for residents where moose populations are not sufficient to tolerate unlimited recreational hunting by both resident and nonresident recreational hunters, particularly under AS 16.05.255(d).³ *Shepard v. State, Department of Fish and Game*, 897 P.2d 33

² Under art. 1, sec. 23 of the Constitution of the State of Alaska, the state constitution defers to the federal constitution for the determination of what preferences the state may accord to residents over nonresidents.

³ AS 16.05.255(d) provides:

(d) Regulations adopted under (a) of this section must provide that, consistent with the provisions of AS 16.05.258, the taking of moose, deer,

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(Alaska 1995). The Court found that state's constitutionally mandated role as trustee of the state's wildlife for the benefit of residents provided additional support for the state's authority to discriminate against nonresidents in regard to allocation of limited moose populations. *Id.* In *Shepard*, the Court held that preferences granted to residents to take moose did not violate the equal protection, commerce, or privileges and immunities provisions of the federal constitution.

Conclusion

There may exist some limit beyond which a state may not proceed in setting discriminatory nonresident (and nonresident alien) fee differentials for sport-fishing and hunting privileges. However, the Alaska Supreme Court's decision in *Carlson III* and the applicable case law on the subject do not provide guidance as to what that limit might be.

If you have questions, please do not hesitate to contact me.

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elk, and caribou by residents for personal or family consumption has preference over taking by nonresidents.