568 P.2d 996
Supreme Court of Alaska.

Richard J. **HERSCHER**, Appellant,
v.
STATE of Alaska, DEPARTMENT OF COMMERCE, Appellee.
STATE of Alaska, DEPARTMENT OF COMMERCE, Cross-Appellant,
v.
Richard J. **HERSCHER**, Cross-Appellee.

Nos. 2927, 2967.
|
Sept. 9, 1977.

The Superior Court, Third Judicial District, Anchorage, Eben H. Lewis, J., affirmed decision of Board of Fish and Game revoking hunter's license as a guide for violation of fish and game regulations. The Supreme Court, Dimond, J. pro tem., held that: (1) authority was vested in Board to revoke hunter's guide license for violations of regulations relating to transferring a bear from an unregistered camp and transporting a bear hide without a skull; (2) proprietary interest of hunter in his guide license was of sufficient importance to warrant protection under constitutional requirements relating to due process; (3) prohibited conduct was sufficiently set forth and determined according to objective standards where it was clearly alleged in accusation that hunter had violated specific regulations in a particular way; (4) regulation as to transporting bear by aircraft was a reasonable one and not an arbitrary requirement and, hence, was not violative of equal protection as it rested upon a ground of difference between two classes of hunters having a fair and substantial relation to object of regulation to protect game resources of State from becoming depleted or even extinct; (5) requiring Board to reconsider case against hunter without regard to his assertion of his Fifth Amendment rights was correct in that Board could not be allowed to draw an inference of guilt from that assertion, but where decision of Board to revoke hunter's license for a period of three years was based, not only upon two violations of fish and game regulations, but also upon finding that hunter's escape in his airplane from a state trooper constituted unsafe and unethical activity, and it could not be certain from record that decision of Board to revoke hunter's license would have been the same had there been no finding as to unsafe and unethical activity, case was subject to being remanded for purpose of making that determination.

Remanded.

West Headnotes (23)

[1] **Game**
Game wardens and other officers

Intent of Board of Fish and Game in enacting regulation prohibiting any person from possessing a skin or skull of a bear unless it has been sealed by an authorized representative of Department of Commerce is to have both skull and skin examined and sealed by a representative of Department before they may be transported for private purposes of hunter. AS 16.05.900.

Cases that cite this headnote

[2] **Game**
Game wardens and other officers

Purpose of regulation prohibiting a person from possessing a skin or skull of a bear unless it has been sealed by an authorized representative of Department of Commerce cannot be achieved when only skin is transported and skull is not made available. AS 16.05.900.

Cases that cite this headnote

[3] **Game**
Licenses

Actions of hunter in transporting, for his own purposes, a bearskin without a skull constituted a violation of regulations of Board of Fish and Game and, hence, were properly made the

subject of hearing to revoke or suspend hunter's license. AS 16.05.900.

Cases that cite this headnote

[4] **Statutes**
Retroactivity

Statutes generally operate prospectively and not retrospectively. AS 01.10.090.

Cases that cite this headnote

[5] **Statutes**
Amendatory statutes

Exception to general rule that statutes operate prospectively and not retrospectively is applicable when provisions of original act or section which are repeated in body of amendment, either in same or equivalent words, are considered a continuation of original law. AS 01.10.100.

1 Cases that cite this headnote

[6] **Game**
Licenses

Statute authorizing Board of Fish and Game to revoke, suspend, or deny renewal of a license for violations of a fish, game or guide statute or regulation revises, clarifies and expands its predecessor statute in some respects, but since it authorizes discipline in way of a revocation to be based on conduct which is unethical or unsafe or on violation of a fish, game or guide statute or regulation, it permits Board to revoke a license for transporting part of a bear from an unregistered camp. AS 08.54.200, 16.50.205.

Cases that cite this headnote

[7] **Constitutional Law**
Duration and timing of deprivation; pre- or post-deprivation remedies

Due process of law requires that before property rights can be taken directly or infringed upon by government action, there must be notice and opportunity to be heard. Const. art. 1, § 7; U.S.C.A.Const. Amend. 14, § 1.

3 Cases that cite this headnote

[8] **Constitutional Law**
Protections Provided and Deprivations Prohibited in General
Constitutional Law
Rights, Interests, Benefits, or Privileges Involved in General

Once due process claim is raised, it must be determined whether there is deprivation of an individual interest of sufficient importance to warrant constitutional protection. Const. art. 1, § 7; U.S.C.A.Const. Amend. 14, § 1.

5 Cases that cite this headnote

[9] **Constitutional Law**
Game and hunting

Proprietary interest of hunter in his guide license was of sufficient importance to warrant protection under constitutional requirements relating to due process of law. AS 08.54.200, 16.50.205; Const. art. 1, § 7; U.S.C.A.Const. Amend. 14, § 1.

11 Cases that cite this headnote

[10] **Constitutional Law**

Game and hunting

When State decides to permit harvesting of its fish and game, and in doing so permits issuance of hunting guide licenses, problems of due process arise when individual, rather than group as a whole, is affected. AS 08.54.200, 16.50.205; Const. art. 1, § 7; U.S.C.A.Const. Amend. 14, § 1.

3 Cases that cite this headnote

[11] **Constitutional Law**
Game and hunting

A hunting guide license is a sufficient property interest to qualify for protection of due process. AS 08.54.200, 16.50.205; Const. art. 1, § 7; U.S.C.A.Const. Amend. 14, § 1.

7 Cases that cite this headnote

[12] **Constitutional Law**
Game and hunting

Failure to place time limitations on forbidden conduct did not constitute a violation of due process in respect to revocation of hunter's guide license for transporting part of a bear from an unregistered camp where hunter failed to make any showing as to how he was prejudiced by lack of time limitations. AS 08.54.200(b); Const. art. 1, § 7; U.S.C.A.Const. Amend. 14, § 1.

Cases that cite this headnote

[13] **Game**
Game wardens and other officers

Statute requiring Board of Fish and Game to adopt regulations reasonably necessary for administration of its duties is violated if Board fails to act when regulations are reasonably necessary. AS 08.54.010 et seq., 08.54.050.

Cases that cite this headnote

[14] **Game**
Licenses

Prohibited conduct was sufficiently set forth and determined according to objective standards and, hence, further regulations by Board of Fish and Game were not required where it was clearly alleged in accusations that hunter, whose license was revoked, violated specific regulations of Board in a particular way and hunter was notified with particularity as to what prohibited conduct he was charged with. AS 08.54.010 et seq., 08.54.050.

Cases that cite this headnote

[15] **Constitutional Law**
Game and hunting

Failure of Board of Fish and Game to adopt regulations relating to hunting guides did not constitute a denial of due process with respect to revocation of hunter's license for transporting part of a bear from an unregistered camp where it was clearly alleged in accusation that hunter had violated specific regulations of Board of Fish and Game in a particular way and hunter was notified with particularity as to what prohibited conduct he was charged with. AS 08.54.010 et seq., 08.54.050; Const. art. 1, § 7; U.S.C.A.Const. Amend. 14, § 1.

Cases that cite this headnote

[16] **Game**
Licenses

Finding of Board of Fish and Game that hunter committed two violations of regulations relating to transferring a bear from an unregistered camp

and transporting a bear hide without a skull was supported by adequate evidence at administrative hearing and constituted grounds for license revocation. AS 08.54.200(b).

Cases that cite this headnote

[17] **Game**
Licenses

A valid basis existed for revocation of hunter's guide license, entirely apart from question of whether hunter had engaged in an unethical or unsafe activity, on finding that hunter had violated regulations of Board of Fish and Game by transferring a bear from an unregistered camp and by transporting a bear hide without a skull. AS 08.54.200(b).

Cases that cite this headnote

[18] **Game**
Licenses

Where decision of Board of Fish and Game to revoke hunter's guide license for a period of three years was based, not only upon two violations of fish and game regulations, but also upon finding that hunter's escape in his airplane from a state trooper constituted unsafe and unethical activity, and it could not be certain that decision of Board to revoke hunter's license for three years would have been the same had there been no finding as to unsafe and unethical activity, case was subject to being remanded for purpose of determining whether license should be so revoked. AS 08.54.110, 08.54.200(b)(2), 16.50.205(1).

Cases that cite this headnote

[19] **Constitutional Law**
Game and hunting

There is no requirement under due process that there must exist a rational connection between all of the several qualifications or standards one must meet to become a hunting guide and the various laws and regulations that must be obeyed if one is to retain his hunting guide license. AS 08.54.110(6); Const. art. 1, § 7; U.S.C.A.Const. Amend. 14, § 1.

Cases that cite this headnote

[20] **Game**
Licenses

There is a rational connection between one's competence to continue as a hunting guide in a violation of fish and game regulations and statutes designed to conserve the resources of State. AS 08.54.110(6).

3 Cases that cite this headnote

[21] **Constitutional Law**
Game and hunting

A violation of fish and game regulations relating to obtaining a sealing certificate for a bear hide and skull and neglecting to register a camp is rationally related under due process to one's competence to obtain a hunting guide license and, hence, involves "moral turpitude" that may subject hunter to revocation of his license. AS 08.54.110(6); Const. art. 1, § 7; U.S.C.A.Const. Amend. 14, § 1.

4 Cases that cite this headnote

[22] **Constitutional Law**
Game regulations and hunting
Game
Constitutional and statutory provisions

Regulation as to transporting bear by aircraft is a reasonable and not an arbitrary requirement and,

hence, is not violative of equal protection as it rests upon a ground of difference between two classes of hunters having a fair and substantial relation to object of regulation to protect game resources of State from becoming depleted or even extinct. Const. art. 1, § 1.

Cases that cite this headnote

[23] **Game**
Licenses

Requiring Board of Fish and Game to reconsider case against hunter without regard to his assertion of his Fifth Amendment rights was correct since hunter, whose license was revoked, would otherwise have been penalized if Board was allowed to draw an inference of guilt from hunter's assertion of his right not to incriminate himself. AS 08.54.200(b); Const. art. 1, § 7; U.S.C.A.Const. Amends. 5, 14, § 1.

Cases that cite this headnote

Attorneys and Law Firms

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Before BOOCHEVER, C. J., and RABINOWITZ, CONNOR and BURKE, JJ., and DIMOND, J. Pro Tem.

OPINION

DIMOND, Justice Pro Tem.

Richard **Herscher** was a licensed hunting guide. He was convicted in court of having violated two regulations of the Board of Fish and Game.[1] One violation involved transporting a bear hide without the skull, in violation of a regulation designated in the Alaska Administrative Code as 5 AAC 81.180(d).[2] The other violation involved an attempt to transfer part of a brown bear by aircraft from a location in game management unit # 9, which was neither an airport nor a registered hunting camp. This act was in violation of 5 AAC 81.070(b).[3]

***1000** The State of Alaska, through its attorney general, filed with the Guide Licensing and Control Board (hereafter referred to as the board) an accusation against **Herscher**, based on the above mentioned violations of the fish and game regulations. In addition, the accusation charged **Herscher** with having violated a statute which authorized the board to discipline a licensed guide for having engaged in "unethical or unsafe activity".[4] This accusation was related to an incident that arose after State Trooper Rotermund had arrested **Herscher** for transporting part of a bear from an unregistered camp.[5]

An administrative hearing, adversary in nature, was held on these matters in accordance with the requirements of the Administrative Procedure Act.[6] **Herscher** was present in person and was represented by counsel. Witnesses were examined and cross-examined. At the conclusion of the hearing, it was found that the allegations made in the accusation were true, and that **Herscher's** activities, as recited in the accusation, were grounds for revocation of his license as a guide. Consequently, the board revoked his license for a period of three years. **Herscher** appealed to the superior court which affirmed the board's decision. He now appeals to this court.

Herscher claims that the accusation or charge that he unlawfully transported a brown bear hide without the skull accompanying the hide does not state an offense. He maintains that there is an offense only when one transports a skull without the skin, and that it is no offense to transport a skin without a skull.

The pertinent regulation on this point is 5 AAC 81.180 which reads in relevant part:
SEALING OF BEAR SKINS AND SKULLS.

(a) No person may possess in the state, transport or export from the state the skin or skull of a bear, whether taken inside or outside of the state, unless it has been sealed by an authorized representative of the department.

(b) Notwithstanding the provisions of (a) of this section, a person taking a bear may possess the unsealed skin or skull of the bear taken for a period not to exceed 30 days from the time of taking for the purpose of transporting the skin and skull to an authorized representative of the department for sealing. The skin and skull of a bear shall be sealed within 30 days from the time of taking or shall

be tendered immediately for sealing upon the request of an authorized representative of the department. . . .

(d) Until a bear skull has been examined, sealed, and had a rudimentary lower premolar tooth removed by the department it shall be accompanied by the skin of the bear from which the skull was taken.

[1] [2] [3] It is apparent upon consideration of the portions of the regulation, quoted above, and not simply subdivision (d) alone, that it was the intent of the Board of Fish and Game to have both the skull and skin ***1001** examined and sealed by a representative of the Department of Fish and Game before they could be transported for private purposes of the hunter. The purpose of the regulation cannot be achieved when only the skin is transported and the skull is not made available. Although the meaning of subdivision (d) may not be clear when read alone, regulations, like statutes,[7] should be read as a whole. When read as a whole, **Herscher's** actions in transporting, for his own purposes, the bear skin without the skull, were in violation of the regulation.

After the hearing, the board issued its order. The board concluded it had authority under AS 08.54.200 and AS 16.50.205 to revoke **Herscher's** guide license. **Herscher** contends that neither of these statutes may be properly employed by the board in this case. This argument centers on the following pertinent dates:

1. Date of incidents that form basis of accusations	5/10/72
2. Date first accusation was filed	12/19/73
3. Date amended accusation was filed	11/15/74
4. Date hearing was held	11/18/74
5. Date AS 16.50.205 was repealed	3/14/73
6. Date AS 08.54.200 became effective	3/14/73

Herscher argues the board was powerless to act on the accusation against him under AS 16.50.205 because it was repealed before the amended accusation was filed, and similarly, that it was powerless to act under AS 08.54.200 because this statute was enacted after the date of the violations and has only a prospective effect.

An examination of these two statutes shows that they are virtually identical to the extent they form the basis for the charges against **Herscher**.[8]

[4] **Herscher** is correct in stating the general rule to be that statutes operate prospectively and not retrospectively. This concept is embodied in statutory form in this state. AS 01.10.090 states that "no statute is retrospective unless expressly declared therein."

[5] But there are exceptions to this rule. As Professor Sutherland points out:

> Provisions of the original act or section which are repeated in the body of the amendment, either in the same or equivalent words, are considered a continuation of the original law. This rule of interpretation is applicable even though the original act or section is expressly declared to be repealed. In some states this rule of interpretation has been enacted into law. The provisions of the original act or section re-enacted by the amendment are held to have been the law since they were first enacted, and the provisions introduced by the amendment are considered to have been enacted at the same time the amendment took effect. Thus, rights and liabilities accrued under the provisions of the original act which are re-enacted are not affected by the amendment.[9]

***1002** This exception to the general rule, which embodies a sensible approach to statutory construction and is a recognized method of effectuating statutory continuity,[10] is embodied in a statute of this state. AS 01.10.100 provides:

> (a) The repeal or amendment of any law does not release or extinguish any penalty, forfeiture, or liability incurred or right accruing or accrued under such law, unless the repealing or amending act so provides expressly. The law shall be treated as remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of the right, penalty, forfeiture, or liability.

[6] In some respects AS 08.54.200 revises, clarifies and expands its predecessor statute, AS 16.50.205. But, in both statutes, discipline in the way of revocation of a guide's license may be based on (1) conduct which is unethical or unsafe, and (2) violation of a state sport fish, game or guide statute or regulation. We apply the rule of continuity to these statutes, and conclude that the board had the authority to revoke **Herscher's** license for violations of the pertinent provisions of AS 08.54.200.

Herscher contends that the effect of the revocation of his license was to deprive him of property without due process of law, contrary to the federal and state constitutions.[11] The state counters with the assertion that a guide license does not qualify as a property interest which would be protected by the requirements of due process.

[7] [8] Due process of law requires that before property rights can be taken directly or infringed upon by governmental action, there must be notice and opportunity to be heard. Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970). And once a due process claim is raised, it must be determined whether there is a "deprivation of an individual interest of sufficient importance to warrant constitutional protection." Nichols v. Eckert, 504 P.2d 1359, 1362 (Alaska 1963) (footnote omitted).

[9] We find that **Herscher's** proprietary interest in the hunting guide license is of sufficient importance to warrant protection under constitutional requirements relating to due process of law. In Frontier Saloon, Inc. v. Alcoholic Beverage Control Board, 524 P.2d 657, 659-660 (Alaska 1974), we held:

> It has long been recognized that an interest in a lawful business is a species of property entitled to the protection of due process. . . . This

> interest may not be viewed as merely a privilege subject to withdrawal or denial at the whim of the state . . . . Neither may this interest be dismissed as de minimis. A license to engage in a business enterprise is of considerable value to one who holds it. (footnote and citations omitted)

In addition, in Alaska Board of Fish and Game v. Loesche, 537 P.2d 1122 (Alaska 1975), we considered a due process claim by Loesche relating to the suspension of his guide license. While we found it unnecessary to adjudicate the full scope of protections required by due process of law, by implication we found the requirements of adequate notice and opportunity for a hearing were required. 537 P.2d at 1125.

The state's argument against the application of due process is based on the assertion that it has complete control over the management of its natural resources, of which wild game is included. Accordingly, the state contends that because it could deny the right of **Herscher** to use these natural resources, due process of law need not be ***1003** complied with in taking away his right to these resources under a license granted by the state.

It is true that the state has the right to direct the use of its natural resources, including fish and game.[12] We recognize that there is a difference between the state's plenary control over the natural resources and the taking away of a formally granted state license. The state's power over natural resources is such that it could entirely eliminate the role of hunting guides, and no problem of due process would arise.

[10] However, when the state decides to permit the harvesting of its fish and game, and in doing so permits the issuance of hunting guide licenses, then problems of due process do arise when the individual, rather than the group as a whole, is affected. At that point the consideration is whether the state's procedures in taking the property right in the individual's guide license comported with due process requirements.

[11] In such a situation the state, as trustee of the natural resources for the benefit of its citizens, must obey the Fourteenth Amendment to the Federal Constitution, and Article I, s 7 of the State Constitution, where the obligations to afford due process are found. See Hicklin v. Orbeck, 565 P.2d 159 at 165 (n. 10) (Alaska 1977). In addition, art. I, s 1 of the Alaska Constitution provides that:

> . . . all persons have a natural right to life, liberty, the pursuit of happiness, and the enjoyment of the rewards of their own industry, . . .

It would be inconsistent with the spirit of this constitutional provision to take away **Herscher's** right to follow his chosen pursuit as a hunting guide without affording him due process of law. We conclude that a guide license is a sufficient property interest to qualify for the protection of due process.

[12] **Herscher** argues that the procedures and standards used by the board were not specific enough to satisfy the requirement of due process. A guide license is subject to revocation under AS 08.54.200(b) if:

(b) After a hearing . . . the board finds that the licensee

(1) engaged in unethical activity, unsafe activity, or activity which adversely affects the natural resources of the state when such activity is unrelated to the legal and legitimate purposes of the contract hunt; or

(2) violated a provision of a federal or state sport fish, game, or guide statute or regulation.

It is **Herscher's** contention that since no time limitations are placed on the forbidden conduct, the board has the power to revoke a license for a "petty paper infraction" several years after its occurrence. But **Herscher** fails to make any showing as to how he was prejudiced by the lack of time limitations, and therefore, does not make out a case for denial of any constitutional right.

Herscher asserts lack of due process in that the board failed to adopt regulations under AS 08.54.050 which provides:

> The board shall adopt procedural and substantive regulations, under the Administrative Procedure Act (AS 44.62), required by this chapter or reasonably necessary for its administration.

Herscher claims that by reason of the failure of the board to adopt regulations, he was subject to having his license revoked without adequate notice of the precise conduct which would call for such a penalty and was, therefore, subject to license revocation under a subjective standard which failed to give him the adequate type of notice of

forbidden conduct which due process requires.

[13] [14] [15] AS 08.54.050 requires the adoption of regulations when " reasonably necessary for . . . (the) administration" ***1004** of Chapter 54 which deals with guides. This legislative requirement would be violated if the board failed to act when regulations were "reasonably necessary." We have examined the statute, the accusations against **Herscher**, and the board's findings, and find that the prohibited conduct was sufficiently set forth and determined according to objective standards and, therefore, further regulations by the board were not required. It was clearly alleged in the accusation that **Herscher** had violated specific regulations of the Board of Fish and Game in a particular way. **Herscher** was thus notified with particularity what prohibited conduct he was charged with, which would constitute the basis for revocation of his license if the facts in the accusation were found to be true, as they were. There was no denial of due process because of the failure of the board to adopt regulations relating to guides.

Herscher argues that charging him with "unethical or unsafe" activity failed to give him adequate notice of prohibited conduct, because these words are unconstitutionally vague, and therefore, that the board's finding that he had engaged in "unethical and unsafe" activities was repugnant to the requirements of due process of law.

[16] [17] We need not, however, reach this question. The board found that **Herscher** had committed two violations of the Fish and Game Board regulations, relating to transferring a bear from an unregistered camp, and transporting a bear hide without the skull. These findings were supported by adequate evidence at the administrative hearing, and constituted grounds for license revocation under AS 08.54.200(b)(2). Therefore, a valid basis existed for revocation of **Herscher's** license, entirely apart from the question of whether he had engaged in an "unethical" or "unsafe" activity. Alaska Board of Fish and Game v. Loesche, 537 P.2d 1122, 1126-1127 (Alaska 1975).

[18] However, the Board's decision to revoke **Herscher's** license for a period of three years was based, not only upon the two violations of fish and game regulations, but also upon the Board's finding that **Herscher's** escape in his airplane from Trooper Rotermund constituted unsafe and unethical activity under AS 16.50.205(1). As we have stated, we do not pass upon the question raised by **Herscher** as to this matter. This means that we cannot be certain that the Board's decision to revoke **Herscher's** license for three years would have been the same had there been no finding as to unsafe and unethical activity. This case must be remanded to the Guide Licensing and Control Board for a determination of this question.

AS 08.54.110 sets out the qualifications for a registered guide, as follows:

Qualifications for registered guide license. A person is entitled to be licensed as a registered guide if he

(1) is 21 years of age or more;

(2) is a resident of the state and maintains a permanent place of abode in the state;

(3) has practical field experience in the handling of firearms, hunting, judging trophies, field preparation of trophies, first aid and photography;

(4) is familiar with the terrain and transportation problems in the district for which the license is requested;

(5) has passed the qualification examination prepared and administered by the board;

(6) has demonstrated to the board sufficient standards of competence and ethical conduct and has not been convicted of a crime involving moral turpitude;

(7) has legally hunted in the state for all or part of each of five years in a manner directly contributing to his experience and competency as a guide;

(8) has been licensed as and performed the services of an assistant guide in the state for a part of each of three years;

(9) submits a written recommendation to the board from a registered guide for whom the applicant has worked;

(10) is capable of performing the physical duties associated with guiding activities;

***1005** (11) has been favorably recommended in writing by two hunters that he has guided or assisted in guiding during each year of his three years as an assistant guide, whose recommendations have been solicited by the board from a list provided by the applicant;

(12) meets additional qualifications which the board may require.

Herscher points to subparagraph (6) of the above statute, which requires that an applicant for a guide license "has demonstrated to the board sufficient standards of competence and ethical conduct and has not been

convicted of a crime involving moral turpitude." He then argues that AS 08.54.200(b), which permits revocation of a license for engaging in unethical or unsafe activity or for violating fish, game or guide statutes or regulations, has no rational connection to the guide's competence as set forth in subparagraph (6) of AS 08.54.110 quoted above.

We believe that **Herscher** misconceives the "rational connection" requirement. He relies upon the case of Schware v. Board of Bar Examiners of the State of New Mexico, 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed.2d 796 (1957). In that case the Supreme Court of the United States held that high standards for admission such as good moral character and proficiency in the law required by the state before admitting one to practice law, must have a rational connection with the appellant's fitness to practice law.

We fail to understand how this can support **Herscher's** thesis. The question presented here by him is not whether the qualifications for becoming a registered guide have a rational connection with the applicant's fitness to engage in the occupation of guiding. Instead, he poses the question as to whether, once one has met all the qualifications to become a guide, and has been licensed, there then must be a rational connection between (a) the qualifications for becoming a guide, and (b) actions on the guide's part which may result in revocation of his license. **Herscher** argues that "infractions" involving violation of fish and game regulations relating, e. g., to obtaining a sealing certificate for a bear hide and skull and neglecting to register a camp, do not involve "moral turpitude" as that term is used in AS 08.54.110(6) relating to qualifications to be licensed as a guide, and therefore, in some way there is a violation of due process.

[19] There is no requirement under due process that there must exist a rational connection between all of the several qualifications or standards one must meet to become a guide, and the various laws and regulations that must be obeyed if one is to retain his guide license. The "rational connection" is between the violations and one's competence, not to be licensed as a guide, but to continue in the occupation of guiding.

[20] **[21]** The fish and game resources are permitted to be harvested, but at the same time must be conserved to avoid depletion and extinction. A guide, more than any other game hunter, should be expected to realize this concept, and direct his actions and the actions of the hunters he guides so as to accomplish the balance the Board of Fish and Game is attempting to reach in harmonizing reasonable harvesting of the game resources and their conservation. If the guide violates the statute and regulations of the Board of Fish and Game, he has demonstrated his failure to accomplish these joint objectives, and, therefore, shows his incompetence to continue in the occupation of guiding hunters of Alaska's game resources. Certainly, there is a rational connection between one's competence to continue as a guide and a violation of fish and game regulations and statutes designed to conserve these resources of the state. **Herscher's** argument on the "rational connection" requirement is without merit.

Herscher's final argument is that regulation 5 AAC 81.070(b)(5) denies him the equal protection of the laws in contravention of the Fourteenth Amendment to the United States Constitution[13] and ***1006** art. I, s 1 of the Alaska Constitution.[14] That regulation provides:

(5) in Game Management Units 9 and 10, brown or grizzly bear or parts of brown or grizzly bear taken on guided hunts may not be transported by aircraft except between registered camps or between a registered camp and an airport or between airports; . . .

Herscher argues that there is no valid basis for placing such a restriction on hunting with aircraft, and not also placing the same restriction on hunters on foot or with land vehicles.

The standard to be applied in determining the equal protection issue in this case is what is termed the "rational basis test." The test is this:

Under the rational basis test, in order for a classification to survive judicial scrutiny, the classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.'[15]

A hunter of bear using an airplane is in a different class from the hunter on foot or one using a land vehicle. The great mobility of aircraft allows the hunter to spot, track, kill and transport the bear with such great efficiency that game violations in this class are extremely difficult to apprehend. It was for the purpose of enforcing game regulations and preventing an outright depletion of the bear population that the regulation in question was adopted.

[22] If a hunter by airplane is forbidden to transport his kill by aircraft except as between registered camps, or between a registered camp and an airport, or between airports, then the Department of Fish and Game law enforcement officials[16] have a much better opportunity of apprehending violators than if this regulation did not exist. Since the same problem in enforcement with respect to hunters on foot or using land vehicles is not nearly so

great as with hunters using aircraft, the regulation as to transporting bear by aircraft is a reasonable and not an arbitrary requirement. It rests upon a ground of difference between the two classes of hunters having a fair and substantial relation to the object of the regulation which is to protect the state's game resources from becoming depleted or even extinct. There is no violation of constitutional equal protection requirements here.

At the hearing before the board, **Herscher** invoked his Fifth Amendment rights and refused to answer certain questions. The hearing officer found that this action on **Herscher's** part discredited the testimony he did give. On appeal, the superior court remanded the case to the board to determine whether there was sufficient evidence on which the board's action could be based without drawing any inferences on **Herscher's** assertion of his Fifth Amendment rights. The hearing officer then determined that there was such evidence, and that the testimony given at the board hearing, reconsidered without regard to **Herscher's** statements, was sufficient to sustain the board's findings that **Herscher** was in violation of the statutes and regulations we have discussed.

By way of cross-appeal, the state alleges as error the action of the superior court in ordering the board to reconsider the case against **Herscher** without regard to his assertion of his right to remain silent. The state concedes that **Herscher** could invoke his Fifth Amendment rights in a disciplinary proceeding. But it argues, nevertheless, that in such a proceeding an inference of guilt may be drawn from the refusal to answer questions.

***1007** We noted in Loesche, that "substantial interests other than criminality" are involved in hearings conducted by the board under circumstances such as the ones presented here. But this does not necessarily control as to whether the imposition of a sanction as a penalty for remaining silent is permissible. This question is controlled by Spevack v. Klein, 385 U.S. 511, 87 S.Ct. 625, 17 L.Ed.2d 574 (1967). In that case Spevack, in the course of a disbarment proceeding, asserted his right to remain silent. The New York courts found the privilege against self-incrimination not to be applicable. The United States Supreme Court reversed, and stated:
We said in Malloy v. Hogan, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653:

> "The Fourteenth Amendment secures against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence."

In this context "penalty" is not restricted to fine or imprisonment. It means . . . the imposition of any sanction which makes assertion of the Fifth Amendment privilege "costly."[17]

[23] To allow the board to draw an inference of guilt from **Herscher's** assertion of his right not to incriminate himself would be to penalize him within the meaning of Spevack. Therefore, the superior court's order requiring the board to reconsider the case against **Herscher** without regard to his assertion of his Fifth Amendment rights was correct.

This case is remanded to the superior court for further remand to the Guide Licensing and Control Board. The Board shall make a determination of the question as to whether its decision to revoke **Herscher's** license for three years would have been the same had there been no finding that **Herscher's** activities regarding Trooper Rotermund constituted unethical and unsafe activity.

The Board shall certify its decision on this point to the superior court for further certification to this court. In the meantime, this court retains jurisdiction of this case.

All Citations

568 P.2d 996

Footnotes

1 A violation of a rule or regulation of the Board of Fish and Game constitutes a misdemeanor, punishable by a fine of not more than $1,000, or by imprisonment for not more than 6 months, or by both. AS 16.05.900.

2 5 AAC 81.180(d) provides:
(d) Until a bear skull has been examined, sealed, and had a rudimentary lower premolar tooth removed by the department it shall be accompanied by the skin of the bear from which the skull was taken.

3 5 AAC 81.070(b) provides:
(5) in Game Management Units 9 and 10, brown or grizzly bear or parts of brown or grizzly bear taken on guided hunts may not be transported by aircraft except between registered camps or between a registered camp and an airport or between airports; . . .

4 This conduct is made the proper basis of board action by virtue of AS 08.54.200(b) which provides:
After a hearing, the board may revoke, suspend, or deny renewal of a license if the board finds that the licensee (1) engaged in unethical activity, unsafe activity, or activity which adversely affects the natural resources of the state when such activity is unrelated to the legal and legitimate purposes of the contract hunt; or (2) violated a provision of a federal or state sport fish, game or guide statute or regulation.

5 After arresting **Herscher** for transporting part of a bear from an unregistered camp in violation of Fish and Game Board regulation 5 AAC 81.070(b) (supra, n. 3), State Trooper Rotermund got in **Herscher's** plane with him in order to fly to Port Heiden. The tail section of the aircraft was stuck on a gravel bar. Rotermund got out of the plane and grabbed the tail section on the right hand section of the fuselage with his back toward the front of the plane. At this point, **Herscher** accelerated the engine and proceeded to take off, leaving Trooper Rotermund behind. At that moment, Rotermund was unable to get away from the tail section of the aircraft, and was forced to do several feet of "back pedaling" in order to avoid being hit by the plane. The officer then found himself alone with only his uniform, weapon, parka and hip waders, and he was obliged to hike about five miles to the nearest known camp.

6 AS 44.62.

7 See 2A C. Sands, Sutherland Statutory Construction s 46.05 (4th ed. 1973).

8 AS 16.50.205 reads in pertinent part:
Grounds for disciplining a licensee. After a hearing, the board may revoke, suspend or deny renewal of a license if the board finds that the licensee
(2) engages in activities which are unsportsmanlike, unethical, unsafe or degrading to the outfitting and guiding profession or which adversely affect the natural resources or the principles of conservation;
(4) violates a provision of a federal or state sport fish, game or guide statute or regulation; or . . .
AS 08.54.200 reads in pertinent part:
(b) After a hearing, the board may revoke, suspend, or deny renewal of a license if the board finds that the licensee
(1) engaged in unethical activity, unsafe activity, or activity which adversely affects the natural resources of the state when such activity is unrelated to the legal and legitimate purposes of the contract hunt; or
(2) violated a provision of a federal or state sport fish, game or guide statute or regulation.

9 Sutherland Statutory Construction, Vol. 1A, s 22.33 at 191 (4th ed. 1972) (footnotes omitted). See Kimbro v. Manson, 30 Conn.Sup. 20, 295 A.2d 569, 572-573 (1972); Bailey v. Tarr, 469 F.2d 409, 411 (9th Cir. 1972). See also, Great Northern Ry. Co. v. United States, 155 Fed. 945 (8th Cir. 1907).

10 See also McQuillin on Municipal Corporations, ss 22-23, page 232 (3d ed. 1969) which notes:
(t)he general rule is that when a former provision is included in the same words in a revised law, the purpose is to continue the existence of the former provision, and not to make it operate as an original act to take effect from the date of the revised law; the revision does not have the effect of breaking the continuity of those provisions which were in force before it was made.

11 Alaska Const. art. I, s 7 provides in part: "No person shall be deprived of life, liberty, or property, without due process of law."
U.S.Const. amend. XIV, s 1 provides in part: "No state shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."

12 "The legislature shall provide for the utilization, development, and conservation of all natural resources belonging to the State, including land and waters, for the maximum benefit of its people." Alaska Const. art. VIII, s 2.

13 U.S.Const. amend. XIV provides in part: "No state shall . . . deny to any person within its jurisdiction equal protection of the laws."

14 Alaska Const. art. I, s 1 provides in part: "This constitution is dedicated to the principles . . . that all persons are equal and entitled to equal rights, opportunities, and protection under the law . . . ."

15 Isakson v. Rickey, 550 P.2d 359, 362 (Alaska 1976) (footnote omitted).

16 The law enforcement officials of the Department of Fish and Game are now Alaska State Troopers under the Department of Public Safety.

17 385 U.S. at 514-515, 87 S.Ct. at 628, 17 L.Ed.2d at 577 (footnotes and citations omitted).

971 P.2d 1025
Supreme Court of Alaska.

James W. BROOKS, former Commissioner of the Alaska Department of Fish and Game, Joel Bennett, former member of the Alaska Board of Game, and Wolf Management Reform Coalition, Appellants,
v.
Patrick WRIGHT, Albert W. Franzmann, Alaska Fish and Wildlife Conservation Fund, and Scientific Management of Alaska's Resource Treasures, Appellees.
State of Alaska, Office of the Governor of the State of Alaska, Lieutenant Governor, Fran Ulmer, Appellant,
v.
Patrick Wright, Albert W. Franzmann, Alaska Fish and Wildlife Conservation Fund, and Scientific Management of Alaska's Resource Treasures, Appellees.

Nos. S–8676, S–8685.
|
Jan. 15, 1999.

Citizens and community organizations brought action against state seeking to remove from ballot an initiative prohibiting use of snares to trap wolves. The Superior Court, Fourth Judicial District, Fairbanks, Ralph R. Beistline, J., granted summary judgment for plaintiffs and enjoined placement of proposed initiative on ballot. State appealed. The Supreme Court, Fabe, J., held that common use clause of State Constitution did not grant legislature exclusive law-making powers over natural resources management and, thus, natural resource issues were not clearly inapplicable to initiative process.

Reversed and vacated.

West Headnotes (8)

[1] **Appeal and Error**
Cases Triable in Appellate Court

Supreme Court reviews questions of law de novo, applying court's independent judgment and adopting rule of law which is most persuasive in light of precedent, reason, and policy.

4 Cases that cite this headnote

[2] **Election Law**
Construction and operation in general

When reviewing initiative challenges, court liberally construes constitutional provisions that apply to initiative process and narrowly interprets subject matter limitations that State Constitution places on initiatives. Const. Art. 11, § 7; Art. 12, § 11.

10 Cases that cite this headnote

[3] **Election Law**
Pre-election challenges or review

Pre-election review of challenges to ballot initiatives is limited to ascertaining whether initiative complies with particular constitutional and statutory provisions regulating initiatives.

9 Cases that cite this headnote

[4] **Constitutional Law**
Justiciability

General contentions that provisions of an initiative are unconstitutional are justiciable only after initiative has been enacted by electorate.

8 Cases that cite this headnote

[5] **Statutes**
Matters subject to initiative

Proposed legislation prohibiting wolf snare traps was proper subject for initiative; wolf snare issue was not "clearly inapplicable" to initiative process. Const. Art. 11, § 7.

5 Cases that cite this headnote

[6] **Constitutional Law**
General Rules of Construction

Basic rules of statutory construction apply when interpreting State Constitution.

1 Cases that cite this headnote

[7] **Constitutional Law**
General Rules of Construction

When construing constitutional provisions, court uses its independent judgment, adopting reasonable practical interpretation in accordance with common sense based upon plain meaning and purpose of provisions and intent of framers, and also looks to meaning that voters would have placed on provision.

2 Cases that cite this headnote

[8] **Election Law**
Matters subject to initiative or submission

Constitutional grant of trust-like duties to legislature in matters of wildlife management did not preclude initiatives relating to wildlife management. Const. Art. 8, §§ 3, 4.

3 Cases that cite this headnote

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Before MATTHEWS, Chief Justice, COMPTON, EASTAUGH, FABE, and BRYNER, Justices.

OPINION

FABE, Justice.

I. *INTRODUCTION*
Various citizens and community organizations sought to remove from the ballot an initiative prohibiting use of snares to trap wolves. The superior court agreed to decertify the initiative, reasoning that the initiative process is "clearly inapplicable" to natural resource management under Article XII of the Alaska Constitution because the state's role as "trustee" over natural resources gives it exclusive law-making powers over natural resource issues. After concluding that the prohibition of wolf snare traps is an appropriate subject for initiative, we reversed the superior court's order and placed the initiative back on the November 1998 general election ballot, announcing that an opinion would follow. Voters rejected the initiative in the November 1998 general election.

II. *FACTS AND PROCEEDINGS*
In October 1997 Lieutenant Governor Fran Ulmer certified a ballot initiative which, if passed, would

criminalize both the use of snares to trap wolves and the possession, sale, or purchase of wolf pelts known to have been taken by snare. The initiative, titled "An Act Relating to the Use of Snares in Trapping Wolves," reads in full:

> BE IT ENACTED BY THE PEOPLE OF THE STATE OF ALASKA:
>
> AS 16.05 is amended by adding a new section to read:
>
> Section 16.05.784. PROHIBITED METHODS OF TRAPPING WOLVES.
>
> (a) A person may not use a snare with the intent of trapping a wolf.
>
> (b) A person may not possess, purchase, offer to purchase, sell, or offer to sell the skin of a wolf known by the person to have been caught with a snare.
>
> (c) A person who violates this section is guilty of a Class A misdemeanor.

One month later, a group of two citizens and two community organizations (Wright)[1] filed suit against the State challenging the constitutionality of the initiative. Wright argued that, by virtue of the state's role as trustee over Alaska's natural resources under Article VIII, the legislature has exclusive law-making power with respect to wildlife management issues.

Wright had filed a previous suit against the State challenging a separate initiative that prohibited same-day airborne hunting of certain wildlife. Several proponents of the airborne hunting initiative (Brooks)[2] intervened in that suit. Brooks also filed briefs in this appeal. In December 1997 Superior Court Judge Ralph R. Beistline consolidated the wolf snare suit with the airborne hunting suit.

Although Judge Beistline ruled that the challenge to the airborne hunting initiative was untimely because the initiative had already become law, he barred placement of the wolf snare initiative on the 1998 general election ballot. Relying on Justice Compton's concurrence in *Pullen v. Ulmer*,[3] Judge Beistline reasoned:

> ***1027** It would be inappropriate to dictate to the legislature the method or tool it should use to manage wildlife. The effect of such restrictions would be to infringe upon the legislature's exclusive right to manage wildlife resources and would compromise the legislature's ability to fulfill its trust obligation to preserve Alaska's fish and wildlife for the common use of all Alaskans.

The State appealed the superior court's ruling on the wolf snare initiative. On June 2, 1998, we issued an order to expedite the appeal. On August 17, 1998, after hearing oral arguments in the case, we reversed the superior court's ruling and vacated the injunction, thereby placing the wolf snare initiative back on the ballot. We stated in our order that an opinion of the court would follow. In the November general election the voters rejected the initiative.

III. *STANDARD OF REVIEW*

[1] This appeal centers around the constitutionality of using the initiative process to prohibit wolf snare traps. We review such questions of law de novo, applying our independent judgment and "adopt[ing] the rule of law which is most persuasive in light of precedent, reason, and policy."[4]

[2] When reviewing initiative challenges, we liberally construe constitutional provisions that apply to the initiative process.[5] Specifically, we narrowly interpret the subject matter limitations that the Alaska Constitution places on initiatives.[6] Still, we have a duty to give questions involving the propriety of an initiative's subject matter "careful consideration because the constitutional right of direct legislation is [also] limited by the Alaska Constitution."[7]

[3] [4] Pre-election review of challenges to ballot initiatives is limited to ascertaining "whether [the initiative] complies with the particular constitutional and statutory provisions regulating initiatives."[8] But "[g]eneral contentions that the provisions of an initiative are unconstitutional are justiciable only after the initiative has been enacted by the electorate."[9] Hence, our review of the initiative at this stage is limited to whether the subject matter is constitutionally permissible.

IV. *DISCUSSION*

[5] Articles XI and XII are the only provisions of the Alaska Constitution that explicitly mention the initiative process. Article XII describes when the people of Alaska may use the initiative to propose and pass legislation:

> LAW–MAKING POWER.... Unless *clearly inapplicable,* the law-making powers assigned to the legislature may be exercised by the people through the initiative, subject to the limitations of Article

XI.[10]

In turn, Article XI imposes certain subject matter restrictions on initiatives:

> SECTION 7. RESTRICTIONS. The initiative shall not be used to dedicate revenues, make or repeal appropriations, create courts, define the jurisdiction of courts or prescribe their rules, or enact local or special legislation.[11]

Wright does not claim on appeal that the wolf snare initiative falls within one of the ***1028** enumerated Article XI limitations.[12] Rather, he only argues that, under Article XII, the initiative process is "clearly inapplicable" to natural resource management decisions because of the state's role as trustee over wildlife and other natural resources. We first discuss whether wildlife management is "clearly inapplicable" to the initiative process based on the language and framers' understanding of Articles XI and XII. We then address whether the state's trustee-like duty set forth in Article VIII implies that the public may not propose initiatives relating to wildlife management.

A. *Whether Wildlife Management Is "Clearly Inapplicable" to the Initiative Process Based on the Language and History of Articles XI and XII*

To determine whether the subject matter of wildlife management is clearly inapplicable to the initiative process, we look first to the language and history of the constitutional provisions regarding the initiative process.

[6] [7] We apply basic rules of statutory construction when interpreting the Alaska Constitution.[13] When construing constitutional provisions, we use our independent judgment, "adopting a reasonable practical interpretation in accordance with common sense based upon the plain meaning and purpose of the provision[s] and the intent of the framers."[14] We also "look to the meaning that the voters would have placed on [the] provision."[15] Although the restrictions included in Article XI are relatively straightforward and easy to decipher, the meaning of the phrase "clearly inapplicable" in Article XII is less obvious. We therefore look to the intent of the framers for guidance in interpreting the provision.

The debates about the initiative process at the Alaska Constitutional Convention make clear the framers' understanding of the phrase "clearly inapplicable" in Article XII. During the discussion of what is now Article XII, § 11, Delegate George McLaughlin, chair of the Judiciary Committee and author of the proposed language, explained that use of the phrase "the legislature" in an article marked the delegates' intent to make the article subject to the initiative process as well:

> What do I mean here by "unless clearly inapplicable"? ... Certainly we wouldn't intend, where you read in the article on the judiciary that the supreme court may adopt rules which may be, in substance, disapproved by two-thirds of each house of the legislature, because it was obviously meant from that context that that couldn't be subject to the initiative, and so we are clearly indicating here that *where we use the expression "by the legislature" or the expression "the legislature" we mean completely, thoroughly, and wholeheartedly know that it is subject not only to the initiative but to the referendum, and where it is clearly inapplicable, even 55 idiots would agree that it was inapplicable.*[16]

The convention adopted McLaughlin's proposed language shortly after he gave this speech.[17]

***1029** Delegate Victor Fischer, in response to a motion to make "the legislature" signify *exclusively* the legislature, argued that such an interpretation would leave "hidden meanings" in the constitution that would limit the people's legitimate use of the initiative:

> I don't think it is right for us as an afterthought to start going through the whole constitution and add additional items that are not subject to the initiative.... If you believe that certain items should be exempted let's put them into Section 5 of Article 3 [later renumbered as art. XI, § 7] and specifically exempt them from the initiative instead of going through each article, section by section, and *by hidden meanings prevent the people from exercising the initiative.*[18]

Shortly after Fischer's speech, the motion to narrow the intended meaning of the term "the legislature" was defeated by a 2–1 margin.[19]

The framers chose to use the phrase "the legislature" in

Article VIII, which concerns natural resource management:

> GENERAL AUTHORITY. *The legislature* shall provide for the utilization, development, and conservation of all natural resources belonging to the State, including land and waters, for the maximum benefit of its people.[20]

Such language evidences the delegates' intent that natural resource issues would be subject to the initiative. Indeed, unlike the Judiciary Committee,[21] the Resources Committee made no effort to have the subject matter of Article VIII excluded from the initiative process. If we were to grant the legislature an exclusive right to propose wildlife legislation based on the state's role as "trustee" over wildlife under Article VIII, we would be relying on the very hidden meanings against which Fischer warned and that the delegates at the constitutional convention squarely rejected.

Even if Article VIII had not contained the words "the legislature," the subject of wildlife management is not so clearly inapplicable to the initiative process as to pass Delegate McLaughlin's "55 idiot" test. The convention debates suggest the framers added "clearly inapplicable" to Article XII so that the initiative would not replace the legislature where the legislature's power serves as a check on other branches of government, such as legislative power to define courts' jurisdiction or override judicial rules.[22] This separation-of-powers concern does not exist with respect to natural resource issues under Article VIII. Hence, the debates do not support an interpretation of Article XII that would grant the legislature *exclusive* law-making powers over natural resource management on the grounds that such subject matter is "clearly inapplicable" to the initiative process.

Wright argues that natural resources issues are "sensitive and sophisticated" in Alaska, and therefore should be free from the "impulsive enactment of laws by the general public." He points to resolutions passed by the legislature and Game Board endorsing snare trapping as evidence that the initiative is ill-conceived. We agree with Wright that such issues are sensitive and complex; indeed, "public policy stakes are usually high" in initiative law.[23] But the framers of the constitution chose to include the initiative process as a law-making tool with full knowledge of the risks inherent to direct democracy.[24] And the public's disagreement with ***1030** legislative and administrative officials can just as easily be taken as evidence of the appropriate use of the initiative process. Additionally, safeguards exist in the process, allowing the legislature to repeal initiated legislation after two years and to amend such legislation at any time.[25] Concerned parties can also bring a post-election substantive challenge to what they may believe is an ill-advised law. As the Alaska Wildlife Alliance (AWA) points out, if any specific initiated law is "constitutionally infirm," it can be invalidated on that basis.[26]

Finally, the delegates' decision to submit Ordinance 3, which banned commercial salmon traps, for voter ratification along with the rest of the constitution evidences the delegates' and voters' understanding that wildlife management issues would be subject to direct democracy. The wording of the referendum submitted to the people emphasized the public's role in the decision to abolish fish traps:

> As a matter of immediate public necessity, to relieve economic distress among individual fishermen and those dependent upon them for a livelihood, to conserve the rapidly dwindling supply of salmon in Alaska, to insure fair competition among those engaged in commercial fishing, and *to make manifest the will of the people of Alaska,* the use of fish traps for the taking of salmon for commercial purposes is hereby prohibited in all the coastal waters of the State.[27]

Those delegates opposed to submitting the ordinance to the voters argued that the matter should be resolved by future state legislative action rather than by popular vote.[28] A motion to this effect was defeated by a 42–12 vote.[29] After ratification, we held that Ordinance 3 was a valid modification of the territorial laws.[30] We viewed Ordinance 3, and by implication the process through which it was adopted, as being consistent with the state's management responsibilities for wildlife and other "property of the state, held in trust."[31]

Thus the language and framers' understanding of Articles XI and XII, along with the chosen wording of Article VIII and the inclusion of Ordinance 3 for ratification, suggest that natural resource management is not, as Wright contends, "clearly inapplicable" to the initiative process.

B. *Whether the Legislature Has Exclusive Law–Making Powers over Wildlife Management by Virtue of the State's Trustee–Like Duties under Article VIII*

Article VIII of the Alaska Constitution concerns the

management of natural resources:

> SECTION 3. COMMON USE. Wherever occurring in their natural state, fish, wildlife, ***1031** and waters are reserved to the people for common use.
> SECTION 4. SUSTAINED YIELD. Fish, forests, wildlife, grasslands, and all other replenishable resources belonging to the State shall be utilized, developed, and maintained on the sustained yield principle, subject to preferences among beneficial uses.[32]

Wright argues that these clauses establish a "public trust" for management of the state's wildlife, with the State of Alaska as "trustee" and the people of Alaska as the intended beneficiaries. From this premise, Wright further claims that the state, as part of its fiduciary duty, retains exclusive law-making authority over natural resource issues. We disagree.

We have frequently compared the state's duties as set forth in Article VIII to a trust-like relationship in which the state holds natural resources such as fish, wildlife, and water in "trust" for the benefit of all Alaskans.[33] Instead of recognizing the creation of a public trust in these clauses per se, we have noted that "the common use clause was intended to engraft in our constitution certain trust principles guaranteeing access to the fish, wildlife and water resources of the state."[34]

We have applied the public trust doctrine to cases involving exclusive grants of natural resources by the state. In *CWC Fisheries, Inc. v. Bunker*,[35] we held that a holder of a state-granted fee interest in tidelands takes the land subject to a public easement.[36] We based our holding in part on the state's public trust responsibilities with respect to tideland conveyance,[37] but did not address whether Article VIII creates a public trust per se or whether such responsibilities preclude public participation in natural resource management decisions. Furthermore, we suggested that expansion of the public trust doctrine to include all or most public uses merely because it has been applied to a particular public use would be inappropriate.[38]

A few months after *CWC Fisheries*, we clarified in *Owsichek v. State, Guide Licensing & Control Board* that the purpose of the public trust doctrine was not to *grant* the legislature ultimate authority over natural resource management, but rather to *prevent* the state from giving out "exclusive grants or special privilege as was so frequently the case in ancient royal tradition."[39] Hence, the State of Alaska acts as "trustee" over wolves and other wildlife not so much to avoid *public* misuse of these resources as to avoid the *state's* improvident use or conveyance of them.

Indeed, in *Owsichek*, after a discussion of the holding in *CWC Fisheries*, we emphasized that the state's duties with respect to natural resource management under Article VIII "[are] to be exercised like all other powers of government, ... and not as a prerogative for the advantage of the government as distinct from the people."[40]

Wright relies on a recent case, *Baxley v. State*,[41] to argue that we should apply basic principles of private trust law to the trust-like relationship described in Article VIII. In *Baxley*, we referred to the public trust doctrine in examining the propriety of four state oil leases in the Beaufort Sea:

> The public trust doctrine provides that the State holds certain resources (such as wildlife, minerals, and water rights) in trust for public use and that government owes a fiduciary duty to manage such resources ***1032** for the common good of the public as beneficiary.[42]

Although we declined to address in *Baxley* whether the state had breached its fiduciary duty, we relied on another case, *State v. Weiss* (*Weiss I*), in noting that we should apply "basic principles of trust law to public land trusts."[43]

But, unlike this case, *Weiss I* involved the state's duty as trustee over *expressly created* special purpose public land grants and leases.[44] In that case we stated:

> Our reliance upon basic trust law principles finds ample support in the precedents of this court and the United States Supreme Court. *See Lassen v. Arizona*, 385 U.S. 458, 87 S.Ct. 584, 17 L.Ed.2d 515 (1967); *State v. University of Alaska*, 624 P.2d 807 (Alaska 1981). Both *Lassen* and *University of Alaska* involved *federal grants to be used by states for school purposes.* Those cases stand for the proposition "that the same private trust law principles are to apply to *federal land granted to the states for school purposes.*"[45]

We have since emphasized that the applicability of private trust law depends greatly on both the type of trust created and the intent of those creating the trust. In *Weiss v. State* (*Weiss II*),[46] involving the same grant lands as in *Weiss I*, we cautioned that "reliance [on principles of private trust law] does not imply that application of such principles yields the same result regardless of the nature of the trust at issue."[47]

Baxley, unlike *Weiss I*, did not involve an expressly created public land grant. Rather, *Baxley* simply relied on *Weiss I* to show that, if Baxley had timely raised his public trust argument in the trial court, then questions of fact and law might exist as to whether the state breached its fiduciary duty. Wright relies on dicta in *Baxley* to

argue that private trust law should be applied wholesale to the public trust doctrine. This result, however, would be an overbroad interpretation of our holdings in *Baxley* and *Weiss I*.

Moreover, application of private trust principles may be counterproductive to the goals of the trust relationship in the context of natural resources. For instance, private trusts generally require the trustee to maximize economic yield from the trust property, using reasonable care and skill.[48] But Article VIII requires that natural resources be managed for the benefit of all people, under the assumption that both development and preservation may be necessary to provide for future generations, and that income generation is not the sole purpose of the trust relationship.[49] And although trust law dictates that the acts of a trustee should be reviewed for abuse of discretion, we have held that grants of exclusive rights to harvest natural resources listed in the common use clause are subject to close scrutiny.[50] Private trust law principles also provide no guidance as to when the public's right to common use of resources can be limited through means such as licensing requirements.[51] Finally, exceptions do exist to the general principle that beneficiaries cannot dictate how to manage the trust property. For example, in some circumstances, the creator may provide for the beneficiary's participation in trust management,[52] and the beneficiary ***1033** of a trust may act as trustee.[53]

Other jurisdictions have held that, while general principles of trust law do provide some guidance, they do not supercede the plain language of statutory and constitutional provisions when determining the scope of the state's fiduciary duty or authority.[54] One commentator notes that general trust law should not be applied to the public trust doctrine in a way that limits or destroys the democratic process: "It would be a strict violation of democratic principle for the original voters and legislators of a state to limit, through a trust, the choices of the voters and legislators of today."[55]

We most recently visited the public trust doctrine in the natural resource context in *Pullen v. Ulmer*.[56] In that case, we decertified an initiative allowing subsistence, personal use, and sport fisheries to have preference over other fisheries with respect to the harvestable salmon surplus.[57] We concluded that salmon should be considered "assets" of the state for purposes of carrying out the state's trust duties with respect to wildlife.[58] Because state assets may not be appropriated by initiative pursuant to Article XI,[59] and because we viewed the preferential treatment of certain fisheries over others as an appropriation,[60] we removed the initiative from the ballot. We left open the question of whether the state's trust responsibilities under Article VIII give the legislature exclusive law-making control over wildlife management.[61]

We find little support in the public trust line of cases for the proposition that the common use clause of Article VIII grants the legislature exclusive power to make laws dealing with natural resource management. Article VIII does not explicitly create a public trust; rather, we have used the analogy of a public trust to describe the nature of the state's duties with respect to wildlife and other natural resources meant for common use. Additionally, the wholesale application of private trust law principles to the trust-like relationship described in Article VIII is inappropriate and potentially antithetical to the goals of conservation and universal use. And in *Pullen*, the only case in which we discussed the initiative process, we declined to hold that the public trust doctrine gives the legislature exclusive law-making authority over the subject matter of Article VIII. We therefore reject Wright's argument to the contrary and decline to decertify the initiative on public trust grounds.

[8] For these reasons, we conclude that the legislature does *not* have exclusive law-making powers over natural resources issues merely because of the state's management role over wildlife set forth in Article VIII of the Alaska Constitution, and therefore the wolf snare issue is *not* "clearly inapplicable" to the initiative process under Article XII.

V. *CONCLUSION*

Pursuant to this court's August 17, 1998 order, the superior court's order on summary judgment is REVERSED and its injunction against placement of the proposed ballot measure, "An Act Relating to the Use of ***1034** Snares in Trapping Wolves," on the general election ballot is VACATED.

All Citations

971 P.2d 1025

Footnotes

1 The four plaintiff-appellees in this case are: Patrick Wright, a member of the Anchorage Fish and Game Advisory Committee; Albert Franzmann, a past member of the Alaska Board of Game; the Alaska Fish and Wildlife

Conservation Fund; and Scientific Management of Alaska's Resource Treasures (SMART).

2 Intervenor-appellants include James Brooks, a former commissioner of the Alaska Department of Fish and Game; Joel Bennett, a former member of the Alaska Board of Game; and the Wolf Management Reform Coalition.

3 923 P.2d 54, 65–66 (Alaska 1996) (Compton, J., concurring).

4 *Ford v. Municipality of Anchorage,* 813 P.2d 654, 655 (Alaska 1991) (citing *Guin v. Ha,* 591 P.2d 1281, 1284 n. 6 (Alaska 1979)).

5 *See Interior Taxpayers Ass'n, Inc. v. Fairbanks North Star Borough,* 742 P.2d 781, 782 (Alaska 1987).

6 *See Citizens' Coalition for Tort Reform v. McAlpine,* 810 P.2d 162, 168 (Alaska 1991) ("[T]he law-making powers *assigned to the legislature* are to be liberally construed as within the people's right to legislate by initiative.").

7 *Pullen v. Ulmer,* 923 P.2d 54, 58 (Alaska 1996) (quoting *Fairbanks v. Convention & Visitors Bureau,* 818 P.2d 1153, 1155 (Alaska 1991)).

8 *Boucher v. Engstrom,* 528 P.2d 456, 460 (Alaska 1974), *overruled in part on other grounds, McAlpine v. University of Alaska,* 762 P.2d 81 (Alaska 1988).

9 *Id.* at 460 n. 13.

10 Alaska Const. art. XII, § 11 (emphasis added).

11 Alaska Const. art. XI, § 7.

12 At no stage of this case has any party argued that the wolf snare initiative makes or repeals an appropriation in violation of Article XI, § 7. As Judge Beistline wrote:

> [N]or did [the parties] address the issue of whether or not an initiative addressing methods of wildlife management or harvest, such as the use of snares, would constitute an appropriation of state assets....

Indeed, Wright himself acknowledges that:

> While an argument can be made that the establishment of laws involving means and methods of game harvest may effectively result in an appropriation of state assets, ... Wright argues here, as he did in the superior court, that the subject of the wolf snare initiative is clearly inapplicable....

The question is therefore not properly before us, and we do not address it here.

13 *See Thomas v. Bailey,* 595 P.2d 1, 4 (Alaska 1979).

14 *Cissna v. Stout,* 931 P.2d 363, 366 (Alaska 1996) (citation omitted).

15 *Division of Elections v. Johnstone,* 669 P.2d 537, 539 (Alaska 1983) (citation omitted).

16 *See* 4 Proceedings of the Alaska Constitutional Convention (PACC) 2849 (January 21, 1956) (emphasis added).

17 *See id.* at 2850–51.

18 *Id.* at 2837 (emphasis added).

19 *See id.* at 2841.

20 Alaska Const. art. VIII, § 2 (emphasis added).

21 *See* 4 PACC at 2843–46 (January 21, 1956).

22 *See, e.g.,* PACC at 2848–49 (January 21, 1956) (statement of Del. McLaughlin) (stating that initiative should not be used to override judicial rules); *id.* at 2821 (statement of Del. Davis) (defining the jurisdiction of courts); *id.* at 2836–37 (statement of Del. Rivers) (changing fundamental aspects of the judiciary as defined in the constitution). *See also Citizens' Coalition for Tort Reform v. McAlpine,* 810 P.2d 162, 168 (Alaska 1991) (invalidating an initiative to limit attorney contingency fees because "[o]nly the law-making powers *assigned to the legislature* " are within the right to legislate by initiative).

23 M. Katheryn Bradley & Deborah L. Williams, "*Be It Enacted by the People of the State of Alaska ..."—A Practitioner's Guide to Alaska's Initiative Law,* 9 Alaska L.Rev. 279, 302 (1992).

24 *See Thomas v. Bailey,* 595 P.2d 1, 8 (Alaska 1979) ("The restrictions on permissible subjects for direct legislation represent a recognition ... that certain particularly sensitive or sophisticated areas of legislation should not be exposed to emotional electoral dialogue and impulsive enactment by the general public.") (internal citation omitted).

25 *See* Alaska Const. art. XI, § 6.

26 *See also Owsichek v. State, Guide Licensing & Control Bd.,* 763 P.2d 488, 494–96 (Alaska 1988) (invalidating board's establishment of guide areas for hunting as violative of Article VIII's public use clause).

27 Alaska Const. ord. III, § 2 (emphasis added).

28 *See* 5 PACC at 3564–3752 (January 30, 1956).

29 *See id.* at 3572.

30 *See Metlakatla Indian Community, Annette Island Reserve v. Egan,* 362 P.2d 901, 922–23 (Alaska 1961), *vacated on other grounds,* 369 U.S. 45, 82 S.Ct. 552, 7 L.Ed.2d 562 (1962), *aff'd sub nom. Organized Village of Kake v. Egan on other grounds,* 369 U.S. 60, 82 S.Ct. 562, 7 L.Ed.2d 573 (1962).

31 *Id.* at 915. One could argue that regulation of salmon traps is an allocation of resources, given that the purpose of the ordinance was to give individual commercial Alaska fishermen greater access to the salmon population. *See* 5 PACC at 3564–71 (January 30, 1956); Alaska Const. ord. III, § 2. This argument was not made by opponents of Ordinance 3, nor was it made by Wright in this case with respect to the wolf snare initiative. Moreover, the wolf snare initiative, the main purpose of which is presumably to prevent cruelty to animals, does not present the same opportunity or motive for self-dealing as did Ordinance 3. In any event, such an argument does not diminish the persuasiveness of the Ordinance 3 example in countering Wright's public trust argument.

32 Alaska Const. art. VIII, §§ 3, 4.

33 *See, e.g., McDowell v. State,* 785 P.2d 1, 18 (Alaska 1989); *Herscher v. State, Dep't of Commerce,* 568 P.2d 996, 1002–03 (Alaska 1977).

34 *Owsichek v. State, Guide Licensing & Control Bd.,* 763 P.2d 488, 496 (Alaska 1988).

35 755 P.2d 1115 (Alaska 1988).

36 *See id.* at 1121.

37 *See id.* at 1118–19.

38 *See id.* at 1118 nn. 7–8.

39 *Owsichek v. State, Guide Licensing & Control Bd.,* 763 P.2d 488, 493 (Alaska 1988) (citing constitutional convention papers).

40 *Owsichek,* 763 P.2d at 494 (citation omitted).

41 958 P.2d 422 (Alaska 1998).

42 *Id.* at 434 (citation and internal quotation marks omitted).

43 *Id.* (citing *State v. Weiss* (*Weiss I*), 706 P.2d 681, 683 n. 3 (Alaska 1985)).

44 *See Weiss I,* 706 P.2d at 681–82.

45 706 P.2d at 683 n. 3 (emphases added) (quoting *University of Alaska,* 624 P.2d at 813).

46 939 P.2d 380 (Alaska 1997), *cert. denied,* 522 U.S. 948, 118 S.Ct. 366, 139 L.Ed.2d 285 (1997).

47 *Id.* at 389.

48 *See* Restatement (Second) of Trusts §§ 174, 176, 181 (1959).

49 *See* Alaska Const. art. VIII, §§ 1, 4.

50 *See Owsichek v. State,* 763 P.2d 488, 494 (Alaska 1988).

51 *See id.* at 492 (noting that the common use clause does not prohibit all regulation of use of listed resources).

52 *See* Restatement (Second) of Trusts at § 37 cmt. b (1959) (creator may reserve for beneficiary the power to administer, revoke, or modify trust).

53 *See id.* at §§ 99, 100.

54 *See, e.g., Evans v. City of Johnstown,* 96 Misc.2d 755, 410 N.Y.S.2d 199, 207–08 (N.Y.App.Div.1978) ("While the use of the name 'public trust' may suggest duties similar to those under a private trust, that interpretation is not feasible."); *City of Coronado v. San Diego Unified Port Dist.,* 227 Cal.App.2d 455, 38 Cal.Rptr. 834, 844 (Cal.Dist.App.1964) ("[P]rivate trust principles cannot be called upon to nullify an act of the legislature or modify its duty....").

55 James L. Huffman, *A Fish Out of Water: The Public Trust Doctrine in a Constitutional Democracy,* 19 Envtl. L. 527, 544 (1989).

56 923 P.2d 54 (Alaska 1996).

57 *See id.* at 55, 64–65.

58 *Id.* at 61.

59 *See id.* at 58.

60 *See id.* at 64.

61 *See id.* at 64 n. 18. Justice Compton concurred with our result in *Pullen,* disagreeing with our conclusion that salmon was a state "asset" and basing his decision instead on the Article VIII public trust argument. *See Pullen,* 923 P.2d at 65–66 (Compton, J., concurring).