

LEGAL SERVICES

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MEMORANDUM

March 28, 2014

SUBJECT: Does CSHB 161(RES) raise constitutional issues relating to equal protection or common use? (Work Order No. 28-LS0530\R)

TO: Senator John Coghill
Attn: Rynniva Moss

FROM: Alpheus Bullard *AB*
Legislative Counsel

Rynniva Moss inquired whether CSHB 161(RES) raises constitutional issues.¹ The bill could be interpreted to raise two related constitutional issues.

Uniform application and equal protection

The bill provides in part:

Notwithstanding any other provision of law, a [A] person who is issued a big game harvest permit under this subsection shall receive upon the person's request a complimentary hunting license and a big game tag for the big game species for which the big game harvest permit is issued. A hunting license issued under this subsection must bear the inscription "Governor's license" or a similar designation. A person who receives a big

¹ Ms. Moss originally requested a legal opinion as to whether a constitutional issue is raised by (1) permitting a nonprofit organization to determine who may bid on a big game harvest permit received from the Department of Fish and Game and auctioned or raffled by that organization under the provisions of the bill, or (2) "appropriating" big game harvest permits to these organizations. In a March 27, 2014 telephone call, Ms. Moss clarified that the memorandum should address all constitutional issues the bill might raise.

In reference to the first question above, permitting a nonprofit to determine who may participate in its raffle or auction for a big game harvest permit should not pose an issue because a nonprofit cannot maintain its nonprofit status under federal tax law if the organization acts illegally or in ways contrary to public policy. *See Bob Jones University v. United States*, 461 U.S. 574 (1983) (tax exemption denied for University that engaged in racial discrimination). In reference to the second question, I do not find that the bill raises constitutional appropriation issues.

game harvest permit, hunting license, or big game tag under this subsection may exercise the privileges conveyed by the permit, license, or tag only in accordance with conditions set by the commissioner [APPLICABLE LAW].^[2]

This language may be interpreted to exempt a person who receives a big game harvest permit, hunting license, or big game tag under subsection AS 16.05.343(c) from the laws and regulations applicable to other persons who receive big game harvest permits, hunting licenses, or big game tags under other provisions of AS 16 (unless the commissioner's conditions include compliance with all applicable laws and regulations). Exempting raffle or lottery winners from "applicable law" could potentially raise problems under the uniform application clause and equal protection clause of the Constitution of the State of Alaska.

The uniform application clause in art. VIII, sec. 17 states: "Laws and regulations governing the use or disposal of natural resources shall apply equally to all persons similarly situated with reference to the subject matter and purpose to be served by the law or regulation."

Similarly, art. I, sec. 1 states, in part, that "all persons are equal and entitled to equal rights, opportunities, and protection under the law." In analyzing an equal protection claim, the Alaska Supreme Court uses a "sliding scale" test. First, the court determines what weight should be afforded the constitutional interest impaired by the challenged enactment. Second, it examines the purposes served by a challenged statute. Third, the court evaluates the state's interest in the particular means employed to further its goals.³

In this instance, the nature of the interest may only require the legislature to show that a legitimate state interest is served by donating permits, but the Alaska Supreme Court has stated that "an analysis under the uniform application clause may invoke 'more stringent review' of a regulation than standard equal protection under article I, section 1."⁴ Accordingly, if a program passes the uniform application clause test, then it would also pass the equal protection clause test. The uniform application clause test is as follows:

To satisfy the uniform application clause of article VIII, state fish and game regulations creating non-uniform classifications must (1) have a legitimate purpose. (2) The individual interest in equal access to fish and game resources is a "highly important interest running to each person within the state." (3) Accordingly, once a legitimate purpose has been

² See sec. 2 of the bill, amending AS 16.05.343(c).

³ *Ross v. State, Dep't of Revenue*, 286 P.3d 495 (Alaska 2012).

⁴ *Gilbert v. State, Dep't of Fish & Game, Bd. of Fisheries*, 803 P.2d 391, 398 (Alaska 1990) (quoting *McDowell v. State*, 785 P.2d 1, 10 (Alaska 1989)).

established by the state, the weight of that interest must be "important" to countervail the important individual interest implicated. (4) The means used to further the important state purpose must be carefully drawn and designed for the "least possible infringement on article VIII's open access values."^[5]

The first step is to determine whether people who are similarly situated would be treated differently under the changes made by the bill. In this case, raffle or lottery winners could be treated differently from other big game hunters. To justify this different treatment, there must be some legitimate state interest in exempting raffle or lottery winners from those laws and regulations that apply to other hunters. It is not clear to me what this interest might be.

Common use and equal protection

The bill increases the number of big game harvest permits to be auctioned or raffled and increases the percentage of proceeds an organization holding the raffle or auction may retain. While the organization may only use the net proceeds it retains to (1) promote "education in outdoor traditions and conservation and wildlife protection programs in partnership with the department,"⁶ or (2) "support outdoor tradition education projects and conservation and wildlife protection programs approved by the department[,]" the proceeds still benefit the nonprofit.⁷ The bill could face a legal challenge that this benefit to the nonprofit violates the common use clause, which provides that, "Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use."⁸

The existing statute may avoid this constitutional problem because the number of harvest permits made available for raffle or auction is limited and because an organization is permitted to retain only 10 percent of the net proceeds of a raffle or auction (in addition to administrative costs). But because the bill increases the number of harvest permits to be raffled or auctioned and increases the percentage of the net proceeds an organization may retain, this argument may be less convincing if the bill is enacted.⁹

⁵ *Gilbert*, 803 P.2d at 399 (internal citations omitted).

⁶ See the bill's sec. 1, amending AS 16.05.343(a).

⁷ See the bill's sec. 2, amending AS 16.05.343(c).

⁸ Art. VIII, sec. 3, Constitution of the State of Alaska.

⁹ To avoid the prohibition on the use of state revenue for private purposes, it may be important that the percentage be reasonably characterized as compensation for the service of conducting raffles and auctions.

Senator John Coghill

March 28, 2014

Page 4

Under AS 16.05.343, a person who is financially able to place a high bid in an auction or buy a large number of tickets in a raffle will have an advantage in acquiring a big game harvest permit. This also could be challenged as a violation of equal protection under the state and federal constitutions or under the Alaska common use clause.

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

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