HB
409

Bill –
Ramona
wants you
to read
this – + make
comments. Dave

12-17-81

RAMONA,

GOOD MORNING! ATTACHED IS A PARTIAL TRANSCRIPT OF THE ATTORNEY GENERALS REPORT TO THE JOINT BOARDS OF FISH & GAME REGARDING ANILCA.

HIS OPINIONS REGARING THE INITIATIVE BEGIN ON PAGE 4.

IF I CAN BE OF FURTHER ASSISTANCE PLEASE DON'T HESITATE TO CONTACT ME.

Chris Goll

Joint Board of Fisheries

Anchorage Westward Hilton

December 1, 1981

Portion of Transcription Tape 3A

Clint Buckmaster: This morning we are going to have a report from the Attorney General's office in regards to current status of the State and ANILCA. I believe Mr. Condon that you are giving that report to us this morning.

Wilson Condon: Mr. Chairman and members of the Boards my name is Wil Condon and I am the Attorney General. With me is Larri Spengler and hopefully, soon to join me will be Liza McCracken. I am going to make some brief introductory remarks about ANILCA and then go into some detail on a number of topics relating to that piece of legislation. My introductory remarks are going to be essential the same as the remarks we made when we disucssed ANILCA yesterday in the Executive Session relating to possible legal problems and litigation. Although the Department of Interior is going to be very sympathetic to the positions that the State wants to take and that the Boards want to take with respect to Fish and Game management they are going to view the Law as they correctly have to as something that mandates that they do certain things and they will be generous in their applications of the Law with respect to the State of Alaska I believe. But they are going to insist on a number of things and any perceptions that we have that they are our friends, which they are, any perceptions that that friendship will lead

to our aggravation of the Law should simply be discarded because they are not going to throw the Law away, they are going to enforce it one way or another. A number of the points that I think are important to know as you begin to make your own policy decisions about what you are going to do about State policy as it interfaces with ANILCA are that first its clear that the Department of the Interior, the Solicitor's office and the Secretary's office are going to insist on the State looking at subsistence on a community by community basis. They are going to be happy and prove what we do if we do what the Board of Fish has done with respect to the Cook Inlet fishery and they are going to be very unhappy and they are not going to approve our plan if the Boards do something along the lines of what the Board of Game has done with respect to the Nelchina caribou herd. You are going to have to figure out some boundaries, have to set up definite boundaries for the Regional Advisory Boards and again I could go on and on, but the point I really want to make is that the Department of Interior will go as far as they think they can go and in the two areas that I think are critical, I've told you how far I think they will go and there is one last item that needs to be brouht up. Today is December 1, tomorrow is December 2 and if we do not have regulations in place, and statutes in place and so on tomorrow, what are they going to do. I do not think they are going to charter a 747 and fly around and pick up people from the Fish and Wildlife Service all over the country and bring them up here and put them into the fisheries management and the game management business tomorrow, but they are going to do something if the Boards do not take

action in this meeting. If they wait until the March or April meetings they will do something and so if the Boards carefully deliberate on wh[illegible] they want to do and how they want to do between now and December 20 I do not think we will be in any trouble as long as we get the pieces of paper submitted that we will have to submit tomorrow which says we are working on it, but if we wait until March or April then I think we will have problems and thats what I have to say by way of introduction. Perhaps members of the Boards have specific questions they want to ask me and if so I will answer them otherwise I will let Larri go on and talk about specifically what the State's submission is going to be.

Jim Beaton: All this thing as far as the law itself, I just familiarize myself. You may have talked about this yesterday but like the Board of Fisheries did I am certainly happy to see that the Department of Interior recognized how
direct the Board of Fisheries was over the Board of Game. But with that in place if you go ahead and do this--you know-- like village by village it really doesn't matter then--you know-- as far as our relationship with the Department of Interior what happens to the Law really. And you know thats what Mr. Katz told us I think, two years ago or three years ago is that we really don't have, you know we banter about this law there for years, we used to sit in these joint sessions and the press and everybody else would quote everything out of context even when you explored an idea about it. But if indeed the law either stays or goes down or is amended or modified as long as the Board of Fisheries or

the Board of Game comes up with a system that addresses their concerns then it really doesn't matter what happens to the Law, am I correct in that?

X Condon: Well let me, we talked a bit about this yesterday and I had to clarify what I said yesterday. If the law, if the subsistence law were just flat repealed and the Board of Fisheries and the Board of Game, both those boards were to adopt management policies they could adopt management policies which fit with ANILCA and we wouldn't have any problems. On the other hand if the initiative passes which prohibits and thats the way the initiative thats probably going to go on the ballet is worded, if that passes and it prohibits preferences among uses then we do have a problem. Or if the legislature were to pass something like that then we would have a problem because you couldn't implement cause it would take that discretion away from the Boards.

Jim Beaton: In other words we couldn't do business as usual we would actually have our hands tied?

Condon: Thats Right:

Jim Beaton:: We couldn't function then. We be in a catch-22 we'd be in the opposite extreme of what we are now?

Condon: That's my view yes.

Sam Harbo: Well I'd like to ask you to explain a little bit why you feel subsistence can only be implemented on a community-by-community basis. In an acceptable way and not on an individual-by-individual basis.

Condon: Well. I've agonized for a couple days over the respective definitions in Federal and State law that relate to subsistence uses and I believe you could make a good honest argument that would be intellectually sound that you could interpret the law so that you could..so that subsistence could be implemented on and individual-by-individual basis but the Department of Interior is going to take the position, I'm convinced, that you must do it on a community-by-community basis and it centers and what are the magic words, in Alaska, is what the State statutes says and in rural is what the Federal Statutes says and their taking the positions, and its you know got a great big long definition of subsistence uses and you've got just a very few, we've got a semi-colon thats different between the Federal and State law and that creates one problem and another problem is the insertion of the rural as opposed to just in Alaska and the Department of interior is taking the position and their, and I'm convinced their very firm in it that specifacally means that Anchorage, Fairbanks, Juneau and Ketchikan as named communities are exclu[illegible] and that other communities which are of an urban character [illegible] excluded and that the insertion of those words ment that subsistence was to be implemented as a matter of Federal law on a community-by-community basis

even though an argument could be made and so what I am saying is that although I can make an argument that an individual-by-individual basis will fit with what they did, they are going to [illegible] [illegible]. So if we want to go individual-by-individual we are into a fight and we have, they have the power to interpret their own statute we have a considerably less than 50% chance of winning that fight because we are going to be fighting their interpretation of their own statute. Long winded answer but thats the best I can do.

Mr. Chairman?

Jim Reardon: Just a comment I, if the majority of Alaskans a year from November decide that they do not want a priority subsistence law in Alaska and repeal, in essence, the State law we would then be left with the Federal law hanging over us, but we're supposed to be a democracy and if the majority of Alaskans make clear, that they do not accept and do not believe in that, I personally can't believe that Congress would sit there and allow the State of Alaska to have forced upon it a priority subsistence law after the people have said no way. That's my view on it.

Condon: Well Mr. Chairman that's just a political judgement and I...your political judgements I'm sure are every bit as good as mine.

Sidney Huntington: You know this subsistence issue, I say is all just a

pain in the butt since it started as far as I'm concerned and will continue on to be that way and I can see right now what I advocated all along whats going to happen to this issue when it comes to the point on the final day of judging what ever day that might be today or tomorrow I say that we sit down there and adopt a policy and stuff like that that will change the subistence or add to the way the Fish Board might have done it or who ever might have done it_______ _________ if we adopt these policies to fit the Federal mandate and what the State has gone along and do adopt them. Well we have a bucket of worms sitting pretty normally, setting normally, there a bucket of worms setting up there. Ok, we're going to put in some of these hot juices and these things are going to boil. Well we've go the Sierra Clubers and all these other fellers around the country that are..start boiling then and then by the time they vote subsitence out and then we have the federal mandate thats hanging on us. And according to the way my friend Reagan has been running the situation now, which I proud of, I think that there will be no money to handle the resources of Alaska by the Federal government where they don't have no money. So if the Federal government were to take it upon themselves to say well do it anyway whether we have money or not the game warden is not entrusted any more because we didn't follow that mandate and so is the Federal government just going to haphazardly going to take it there and throw it away and lose all of the resources we have in the State of Alaska on account of these lousy God Damn issues that we're facing with today? I mean I'm going to vote that way. Am I going to set down there vote and say Yes this is it

knowing Damn well in my heart that I am voting the wrong way. Thats just exactly the way I feel. Have _______ as far as I'm concerned.

X Chris Goll: Well are you confident that, the initiative will prohibit if passed, that it will prohibit the Boards authority to discriminate between benefical users?

Condon: Well that's what it says.

Chris Goll: The reason that I question you is because the people that are behind this thing are saying something different.

Condon: Well lets look at how its worded. You can make your own judgment. ....again your not talking about distinctions between...well there.. you...certain kinds of preferences are permissible in terms of you can still make allocations between purse seiners and gill netters and those...those..kinds of allocation decisions but......for personal consumptive use no distinction shall be made for any reason on the basis of economic status, etc., so that you can not give a subsistence preference if the initiative is passed.

Chris Goll: I don't interpret that that way.

Chris Goll: Not at all and you are the counselor so I...I would appreciate you going perhaps into a little more detail on that. I interpret that as creating a form of equality amongst all the people of

Alaska where they can benefit, but we the Board, still have the latitude to discriminate. In other words we could say that in one area priority, one geographic area as example, priority should be given but subsistence should be given the highest priority whereas in another no.

Condon: Well let m read it again: "....no distinction shall be made for the reason of economic status, land ownership, local residency, past use, past dependence on the resource, or lack of alternative resources." and pretty hard for me to see, how given that language, you could then say were going to give a preference to a local community to any kind of specific subsistence users. You've got to let all people who want to use the resource for personal consumption use have an equal access to it.

Grif Quinton: I don't read that precluding in the case of shortage there, of like was stated last year, or was stated not on the Board but was stated amongst talking with a lot of di erent people, that if theres a shortage in a certain area that you could preclude certain means of transportation as means of taking and those would in effect favor one particular local over another. In other words you couldn't use airplanes or something like that.

Condon: I believe you could do that.

Grif Quinton: Now those are the kinds of things that we could do and

still you know that initiative wouldn't preclude something like that.

Condon: I would agree with that.

Szabo: This is a little bit off the subject that we're discussing but maybe before we get into the ANILCA would it be possible if we could get a map up on the wall showing what the Federal land classifications are cause I think that might be pertinent when we get into that.

Zahn: We'll bring one.

Beaton: Well you know along the lines of what Grif was saying there you could actually probabily almost accomplish what the Board of Fisheries, for example, set out to do with their mutual thing. A few things would fall through the cracks because of pressure. Thats what the real crunch is going to come down to ________ __________ ________ in place as for example, around the metro area such as the Tyonek there would be some real problems on setting up a discriminatory so to speak and not have an influx of people into those areas so you know you might be able to depact, or se. up a thing very similar to what Fisheries Board has now in place. From a legal standpoint you could never get into the customary traditional. Thats . key issue thats different about this initiative in what 'e are trying to deal with at the present time. And thats probably the key issue there, I mean you know, this group of people could use something you could never more do that if that

initiative passed. Is that correct?

Condon: Well thats my views. There are some ways that you ....

Beaton: I think I would have to concur with what you are saying _______ _______ __________ look at the troubles that we have now with the legal profession, you know, nitpicking so to speak and getting us on things that are not nearly that specific once you get a statute in place that is specific I don't see how we'd get around to reach that answer.

Joel Bennett: Going through the subsistence deliberations in the past two years I have always assumed it as having those two sides. You know one an allocation problem between users and another an impact problem the resource it's self and I'm just wondering if we could get some sort of projection by the Department or by your staff about what would happen in terms of resource management if we lose the ability to manage wildlife on the Federal enclaves. In other words what are we likely to be faced with given the worst situation, that is if they take that jurisdiction away. Thats one question I have. Another is what affects that situation on the return of the Marine Mammal management since that is being sought right now by this State and it also has subsistence requirements.

Joint Board of Fisheries

Anchorage Westward Hilton

December 1, 1981

Portion of Transcription Tape 3B

Commissioner Skoog: The Federal government obligations seems to me is strictly to provide for subsistence priorities on Federal lands. Once that they have assured lets say a moose population they would have determine what the allowable harvest would be on that moose population. They would have a specific number and once a subsistence priority was established by them, then certainly the sporting aspects and the commercial aspects of whatever could be handled by the State after the Federal government has made that initial determination. In fact I could envision it also going to the point that perhaps they would delegate their Federal authority back to the State to make that subsistence priority established under specific guidelines. I think that is the distinct possibility also particularly in view of the budget situation where they do not have manpower and money to really properly manage. You think not?

Larri Spengler: Commissioner I think we were talking about the worst case____________ of what was possible in the Law, not what we necessarily ______________.

Joel Bennett: Commissioner how would that work if you have to be assured that Subsistence priority and allow the sport type to occur concurrently. I do not understand, this is not just a numbers question

it is an accessibility question and everything else. It seems to me that they would establish a Subsistence season first and once all those needs are satisfied then the sport people could start.

Commissioner Skoog: I do not know the precise way it would work, but I would envision simply of making a decision that in this area let's take any one of the refuges for example they would make a decision on what kind of resources were there, fish and wildlife resources were utilized by subsistence users and they determine how many of the various species that that community needed for their subsistence purposes. They would probably set the regulations that would govern that and the season and outside that particular frame work, their could be allowed then a recreational take and/or a commercial take. All they have to comply with is the subsistence priority. They do not really have to concern themselves with the recreational and it seems to me that the State could continue to set that, but the State then would have to operate within a very rigid frame work, presumably laid down by the Federal government and Federal agencies.

Nick Szabo: I guess that is more along what my understanding was, was that their primary concern was subsistence and that it may require them to manage everything else if it got to that point, but as long as subsistence was satisfied they really did not have to come in and start managing everything else just because the State decided it was not going to comply with (d)(2). But the authorization or the implication is...

there is they can manage all fish and wildlife on all Federal lands if they feel that they have to do it though. I mean this is of course something the Boards debated and we heard a about the burros in Arizona and all that kind of stuff. There is more and more of a president that the Federal government can infact preempt the State on its traditional management role on lands that it owns. Is that correct?

Liza McCracken: Also, in the judicial enforcement section you could end up with a certain management by the courts where a citizen or individual can bring an action against the State for failure to provide for a subsistence standards in ANILCA. After exhaustion of State remedies they can bring an action in Federal district court and the court is granted authority under the judicial enforcement section to fashion regulations to accommodate the needs that have been perceived not to have been specifically provided for. There is potential for that kind of a situation to occur also.

Nick Szabo: Okay, but I mean has the issue been fairly resolved I mean I guess I had always had the kind of elementary impression you know the land owner including the Federal government that their primary concern was to protect their land and protection of the land thing that is how they got into the idea of management. You know they manage the boroughs because they wanted to save the grass so to speak and that type of thing, but we have gotten beyond that standpoint as far as they can preempt the traditional State management authority as far as resident of

fish and and wildlife. I mean actually get into the management rather than controlling access. I guess before I was always under the impression that you know in earlier years that the State's took the view anyway. The Federal government controlled access on their land. Now that was kind of defacto management but it really was not setting seasons and bag limits, it was just telling people whether they could enter the land or not. They are getting more and more into the role of decided specific management measures as opposed to just controlling access. Is that correct?

McCracken: Yes that is correct.. Also you want to look at what the basis for upon which the Congress has founded the ANILCA approach and it is not based only on the properpty clause but is also based on the authority of Congress to regulate ______________. So there is some different angles as far as the critical line of authority upon which Congress based the subsistence section in this title, specifically set out in the findings of Section 801 as to what authorities they are looking to in making the kinds of standards that they want established.

Szabo: Well, okay I understand all that, but I guess it is still not clear to me like say on a national forest there primary responsibility would be to insure that subsistence was provided for. Now, it seems to me that the simplest was that they would do that is just to say we are not going to all access for any other uses and then all they do is allow subsistence right? I mean that would be the simplest way or are they

going to say well we will just get into the whole game and we are going to set bag limits for sport fishing and we are going to set up a special sport season with bows and arrows or something like that. Would they get into that type of thing or would they just control it from a direct access.

Condon: Who knows. I think this is the best answer to that. If they want to try to into the bow and arrow business they can. The State's are not going to like it, but my guess is that in the end if they get into a legal fight about whether or not they can do it, the courts are going to say they can. They have not done this to date and hopefully they will not. There are a lot good reasons for them not to, but I think that the theories about who has what kind of authority, you can debate forever about why the Congress does what it does, why it did what it did with ANILCA, what the legal basis for their doing it, but I do not necessarily think that gets you anywhere. The specific Congressmen who voted for this bill I'm sure did not think about any of it.

Szabo: Going along that same line if the Federal government should take over management and the way that I am interpreting that this is their responsibility is to subsistence and in the event that let's say that the State would determine within a geographic area that there was a surplus of a particular species that could be harvested over and above what the Interior Department was saying there was, in other words the Interior Department was saying that 100% goes to the subsistence user

and we do not have a surplus beyond what the subsistence user would use but in the State's judgement there was a surplus, would the State have a good case in court then or would we not.

Condon: Well, if the Federal government disagrees with us we would not have a very good case in court. Assuming we are talking about Federal land and whether we are talking about controlling access or talking about dealing with the problem as a game manager I do not think it makes any difference they would get their way. But on the other hand if they did not, I do not know what would happen if they did not disagree with us. If subsistence needs were met and they agreed they were met and we agreed they were met and there were still harvestable game I do not know what would happen in that situation. _______________No, because obviously they are very hopeful that things can be worked out and they stay out of the business. That is what they want.

Beaton: Mr. Chairman I assume that in some kinds of applications that it might be interpreted a relationship to say anadromous species of fish there say ____________ to the rest of it. In other words the subsistence user would give an area, could make it contingent in Federal court that his needs were not being met because they were intercepted and the rest of it. That would probably be pretty much of a natural progression and thought in this particular case, is that fair to assume after the Craig Decision and the Boldt Decision and all the rest of it

that it would at least come down to this to?

Condon: Yes, well again you have a unique, somewhat unique situation here in Alaska compared to the borough situation in Arizona, New Mexico, Nevada or the wild horse problem and that is the Congress and Federal government have plenary power to deal with the Alaskan natives and they can excersie that power in a way which would deal with the _______ problem and so on if they want to.

Commissioner Skoog: Let's point out a little in Nick's statement that historical role of the State's in managing fish and resident wildlife is certainly under threat in ANILCA. The Federal agencies primarily concerned with habitat as they have been, but when ANILCA does is actually mandate them to manage all fish and wildlife resources on their Federal land in other subsistence resources specifically for subsistence. So any population that they are dealing with they must manage that in such a way that they are going to provide for all of the subsistence uses in that Federal land. In recreational fishing or hunting and commercially comes secondary to that. If that a good statement or proper statement.

McCracken: Yes.

Nick Szabo: Now, we got that one issue settled I guess or clarified I have another question. You have a whole list of these reports, but I could not find them in the book so I had no way of reading up on what

you were going to present. Maybe you are going to cover this later, but as far as this regional council system goes, you stated that you feel that even though there might be some legal basis for the Board's innovative loading boundary concept that the Interior would probably feel more comfortable with fixed boundaries and so forth. If there a requirement though in the act as to what, I mean assuming that you established in the six regions that are the minimum required in the Act, what is the requirement as far as the membership of the regional council itself? Can you clarify that?

Spengler: _____ you mean the membership as far as who sits on the council.

Szabo: Yes

Spengler: What the Federal law provides for is that the people who are using the resource be represented on the council. The draft regulations that we the Department of Fish and Game and the Department of Law will be proposing to you provide for the same membership that we have now, which is the chairman of the advisory committee or his designee will be on that committee.

Szabo: Well, I guess what my question is is does it prohibit say advisory committees that happen to be outside of that region from being on the regional council for that region.

Spengler: Well the language of ANILCA requires that the people be residents of the region. Now presumably the members of other advisory committees who are not in the region could go and sit in and say whatever they have to say and the council could take it into account, but they would not be members of that council because they would not members of that region.

Szabo: Okay, now it does say that in order to sit on the regional council you have to reside in the region or you just have to use the resources in the region?

Spengler: You have to reside in the region.

Szabo: Reside. So if we set up these regional councils that has to be composed of the advisory committees in the region itself.

Note: This is the end of the discussion relating to the repeal of the State Subsistence Law.

Alaska State Legislature

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House of Representatives

Committee on Judiciary

TO: Representative Ramona L. Barnes

FROM: William D. Cook, Legal Counsel, House Judiciary

DATE: March 5, 1982

RE: HB409

You have requested that I review this bill and specifically investigate the constitutionality of requiring a guide for non-resident aliens who hunt brown bear, grizzly bear, polar bear, sheep, caribou, or moose. The last two named species are additions to the list presently in AS 16.05.407(a) -- pertaining to "non-residents."

I would first like to point out that since the bill does not change or define the "non-resident" language at AS 16.05.407(a), the status of aliens who live in the United States but not in Alaska is in doubt. That problem could be aleviated simply by defining "non-residents"[1]. It would then be clear that these persons could still lawfully hunt caribou, moose and other unspecified species in Alaska without a guide.

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[1] I suggest that AS 16.05.407(f) at line 24 of the bill be deleted and that the following language be inserted there:

* Sec. 2. AS 16.05.940(12) is amended to read:
(12) "nonresident" means the following persons:
A. citizens of the United States, whether or not they reside in the United States, whose permanent place of abode is not in Alaska;
B. persons who are not citizens of the United States, whose permanent place of abode is in the United States but not in Alaska.

* Sec. 3. AS 16.05.940 is amended to add a new subsection:
(13) "nonresident alien" means a person who is not a citizen of the United States and whose permanent place of abode is not in the United States.

The primary question on the bill could be phrased: "Is it constitutional for the legislature to single out non-resident aliens and require guides for these hunts for caribou and moose, as well as the species listed presently in AS 16.05.570(a)?

In connection with the research or that question, I have reviewed the following material, attached hereto:

1. Copies (poor quality) of court documents in Bill Pinnell, et al v. The Department of Fish and Game et. al, Superior Court No. 69-2703D and Alaska Supreme Court Opinion No. 586 (November 24, 1969). These copies came from the Attorney General's office in Anchorage and were made from microfiche of that 1969-70 case.

2. March 5, 1979 memorandum opinion of Assistant Attorney General Sarah Elizabeth Fussnor to Dave Hardy, Game Biologist III.

3. February 11, 1982 letter to Representative Kenneth J. Fanning from Assistant Attorney General G. Themes Koester

It is my opinion that there should not be an attempt to constitutionally justify HB409 on the basis of the following theories:

1. Inherent danger to the non-resident alien hunters of the listed species. The addition of caribou and moose for aliens, as distinguished from non-resident citizens (and possibly aliens residing outside of Alaska but in the U.S.) considerably diminishes that theory.

2. Language, cultural and legal differences. Many aliens are quite fluent in English, especially those from former British Empire nations. Cultural differences cannot be supported, either, or such aliens would be generally severly regulated in all types of activities where they are not presently regulated. Examples are: driving on an international drivers license; marriage within the United States of aliens from nations with laws and cultures recognizing polygamy; purchase of and investment in American properties -- although retaining an American attorney is generally useful (as retaining an Alaskan guide might be for big game hunts here), it is not required. Basically, "ignorance of the law" is no legal excuse for crime, whether the actor is citizen, alien, resident, or non-resident.

I believe that any constitutional justification on such language as is in HB409 should be based on the theory that the government of Alaska holds these species of game "in trust" for the people of this state.[2]

Under that theory, the government of the State may reasonably regulate this resource (as it can and does presently for all fish and game and may do for lumber) to promote the sustained yield of these species. If this principle is applied to justify HB409 discrimination between citizens and aliens as to caribou and moose, I suggest that language similar to the following be added as a subsection to the bill and to the statute:

> Whenever it is necessary to restrict the taking of big game so that the opportunity of Alaskan residents to take big game can be reasonably satisfied in accordance with sustained yield principles, the Board of Game shall, through a permit system, limit the taking of big game by nonresidents and by nonresident aliens to accomplish that purpose.

Of course the permit system would have to function on a reasonable basis, and for the clear purposes expressed in the above suggested language.

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[2] Article VIII, Section 4 of the Alaska Constitution states:

> Section 4. 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.

A M E N D M E N T

#1

OFFERED IN THE HOUSE: BY: Fanning, Randolph

TO CS SS HOUSE BILL No. 409

SENATE BILL No. ______

PAGE: 1 LINE: 2

Replace, with a new Sec 2

Sec 2. AS 16.05 is amended by adding a new section to read:

Sec 16.05.256. NONRESIDENT & RESIDENT ALIEN PERMITS.

THE BOARD OF GAME shall, through a permit system, limit the taking of big game by non-residents and non resident aliens when necessary, to protect adequate resident hunting opportunity.

(b) the board of [illegible] shall — etc —

Hein

Original sponsors: Hurlbert, Zharoff
and Grussendorf

IN THE HOUSE BY THE RESOURCES COMMITTEE

CS FOR SPONSOR SUBSTITUTE FOR HOUSE BILL NO. 409 (Resources)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWELFTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to guiding; and providing for an effective date."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. AS 16.05.407 is amended by adding new subsections to read

(d) It is a class A misdemeanor for a nonresident alien to hunt pursue or take brown bear, grizzly bear, polar bear, sheep, caribou, or moose in this state unless personally accompanied by a person who is licensed as a master guide, registered guide, or assistant guide under AS 08.54 or by a resident Alaskan over 19 years of age who is the spouse of or is related by blood within and including the second degree of kindred to the alien.

(e) A nonresident alien when purchasing a big game tag for the taking of an animal specified in this section shall first furnish to the state, on a form provided by the state, an affidavit showing that he will be accompanied in his hunt by a person who is qualified under the terms of this section. A nonresident shall have a copy of the affidavit in his possession while in the field hunting. A person who falsifies the required affidavit is guilty of perjury under AS 11.56.200.

(f) In this section, "nonresident alien" means a person who is a citizen of the United States and whose permanent place of abode is in the United States.

* Sec. 2. AS 16.05.340(e) and 16.05.407(c) are repealed.

* Sec. 3. This Act takes effect July 1, 1982.

Effect of amendment. — The 1976 amendment added the third sentence.

Legislative committee report. — For report on ch. 268, SLA 1976 (FCCS HCS CSSSSB 335), see 1976 House Journal, p. 910.

Sec. 16.05.400. Persons exempt from license requirement. (a) A license is not required of a resident or nonresident person under the age of 16 years for sport fishing nor shall a license be required of any resident under the age of 16 for hunting or trapping.

(b) A sport fishing, hunting or trapping license is not required of a resident who is 60 years of age or more and has been a resident for 30 consecutive years or more, as long as he remains a resident. (§ 9 art II ch 94 SLA 1959; am § 3 ch 180 SLA 1972)

Sec. 16.05.405. Taking game by proxy for the blind. (a) A resident holding a valid hunting license may take moose, caribou, deer, or elk under a hunting license issued to a blind resident in accordance with (b) of this section if the resident has the license of the blind person in his actual possession.

(b) A resident hunting license indicating that the purchaser is blind may be obtained from the Department of Revenue upon payment of the fee prescribed in § 340 of this chapter and upon presentation of either an affidavit of the applicant stating that he cannot distinguish light from darkness or an affidavit signed by a licensed physician or a licensed optometrist stating that the applicant's central visual acuity does not exceed 20/200 in the better eye with correcting lenses or that his widest diameter of visual field subtends an angle no greater than 20 degrees. (§ 1 ch 9 SLA 1967)

Sec. 16.05.407. Nonresident hunting game animals must be accompanied by guides. (a) It is unlawful for a nonresident to hunt, pursue or take brown bear, grizzly bear, polar bear or sheep in this state, unless personally accompanied by a person who is licensed as a master guide, registered guide or assistant guide by the department, or who is personally accompanied by a resident Alaskan over 19 years of age who is the spouse of or is related by blood within and including the second degree of kindred. A person who applies for a nonresident big game tag for the taking of an animal specified in this section shall first furnish to the state, on a form provided by the state, an affidavit showing that he will be accompanied in his hunt by a person who is qualified under the terms of this section. A person who falsifies the required affidavit is guilty of perjury.

(b) It is unlawful for a nonresident to import polar bear into this state unless personally accompanied by a person who is licensed as a master guide, registered guide or assistant guide by the department.

(c) The nonresident who violates (a) of this section is guilty of a misdemeanor and upon conviction is punishable by imprisonment for not

more than one year, or by a fine of not more than $2,500, or by both. (§ 1 ch 86 SLA 1967)

Revisor's note. — Chapters 9 and 86, SLA 1967, both added a new section designated AS 16.05.405. The section added by ch. 86 has been renumbered AS 16.05.407.

Sec. 16.05.410. License forfeiture. (a) Upon conviction of a person of a first violation of §§ 330 — 430 of this chapter or of a federal or state law or regulation for the protection of the sport fish and game of the state, the court may, in addition to the penalty imposed by law, revoke his license.

(b) Upon subsequent conviction of a person for a violation of §§ 330 — 430 of this chapter or of a federal or state law or regulation for the protection of the sport fish and game of the state, the court shall revoke his license.

(c) A person whose license has been revoked as provided in (b) of this section may not purchase another license of the same type for a period of not less than two years nor more than three years from the date of revocation as determined by the court.

(d) Repealed by § 2 ch 32 SLA 1968.

(e) Repealed by § 2 ch 32 SLA 1968. (§ 8 art II ch 94 SLA 1959; am § 17 ch 131 SLA 1960; am § 1 ch 56 SLA 1962; am §§ 4, 5 ch 75 SLA 1964; am § 2 ch 32 SLA 1968)

Legislative committee report. — For report on ch. 32, SLA 1968 (HCSCSSB 50 am), see 1968 House Journal, p. 169.

Sec. 16.05.420. Violations. (a) A false statement as to a material fact in an application for license makes the license issued upon it void. A person who knowingly makes a false statement or knowingly omits a material fact in an application violates §§ 330 — 430 of this chapter.

(b) A person who alters, changes, loans or transfers a license or tag issued to him to another person, or who uses a license or tag other than the one issued to him violates this chapter.

(c) Repealed by § 2 ch 32 SLA 1968.

(d) Repealed by § 2 ch 32 SLA 1968. (§ 7 art II ch 94 SLA 1959; am § 16 ch 131 SLA 1960; am §§ 6, 7 ch 75 SLA 1964; am § 2 ch 32 SLA 1968)

Revisor's note (1962). — This section originally referred throughout to "this Act" which now reads "this chapter"; however, § 16, ch. 131, SLA 1960, amended the first paragraph and referred to "this article" instead of "this Act." The revisor has changed that reference to "§§ 330 — 430 of this chapter."

Legislative committee report. — For report on ch. 32, SLA 1968 (HCSCSSB 50 am), see 1968 House Journal, p. 169.

(20) King salmon (oncorhynchus tshawytscha) and steelhead trout (Salmo gairdneri) sport fishing permit 5

A person who possesses a 25-cent license under (1) or (5) of this subsection may receive a king salmon and steelhead trout sport fishing permit without charge. A king salmon and steelhead trout sport fishing permit is nontransferable and must be signed by the bearer before use. The permit shall be used in conjunction with an appropriate sport fishing license. A person exempted from licensing under AS 16.05.400 may obtain a king salmon and steelhead trout sport fishing permit without charge.

(b) The commissioner of fish and game may issue without cost a permit to collect fish and game, including fur animals, subject to the limitations and provisions he considers appropriate, for scientific, propagative, or educational purpose. In addition, the commissioner may issue a permit for (1) the collecting of wild fur animals for fur farming, or (2) the recapturing of fur animals that have escaped from fur farms. The annual fee for a permit for collecting fur animals for fur farming purposes is $100.

(c) The commissioner of revenue may issue a duplicate license or a duplicate tag as a replacement for a license or tag issued under (a) of this section. A fee of $2 shall be charged for each duplicate license or tag and the duplicate shall not be issued unless the commissioner of revenue or his delegate is satisfied that the original has been lost or destroyed. This subsection does not apply to a 25-cent license issued under (a)(5) of this section.

(d) Members of the military service on active duty who are permanently stationed in the state, and their dependents, who do not qualify as residents under AS 16.05.940(14), may obtain special nonresident military small game and sport fishing licenses at the rates for resident hunting and sport fishing licenses, but may not take a big game animal without previously purchasing a regular nonresident hunting license and a numbered, nontransferable appropriate tag, issued at the nonresident rate, under (a)(16) of this section.

(e) Each master guide licensed under AS 08.54.100 and each registered guide licensed under AS 08.54.110 shall pay a fee in the following amount for each caribou, sheep, moose, brown or grizzly bear and polar bear taken on a hunt guided by or under the active supervision of the guide:

(1) polar, brown or grizzly bear:

(A) for each polar, brown or grizzly bear taken over a total of 5 polar, brown or grizzly bear per season and up to a total of 10 polar, brown or grizzly bear — $20;

(B) for each polar, brown or grizzly bear taken over a total of 10 polar, brown or grizzly bear per season and up to a total of 25 polar, brown or grizzly bear — $100;

(C) for each polar, brown or grizzly bear taken over a total of 25 polar, brown or grizzly bear per season — $500;

(2) moose:

(A) for each moose taken over a total of 5 and up to a total of 10 per season — $20;

(B) for each moose taken over 10 and up to a total of 25 per season — $100;

(C) for each moose taken over 25 per season — $500;

(3) sheep:

(A) for each sheep taken over a total of 5 and up to a total of 10 per season — $20;

(B) for each sheep taken over 10 and up to a total of 25 per season — $100;

(C) for each sheep taken over 25 per season — $500;

(4) caribou:

(A) for each caribou taken over 5 and up to a total of 10 per season — $20;

(B) for each caribou taken over 10 and up to a total of 25 per season — $100;

(C) for each caribou taken over 25 per season — $500. (§ 2 art II ch 94 SLA 1959; am § 1 ch 96 SLA 1959; am §§ 7 — 13 ch 131 SLA 1960; am § 1 ch 16 SLA 1963; am § 1 ch 29 SLA 1963; am § 2 ch 31 SLA 1963; am §§ 2, 3 ch 75 SLA 1964; am § 1 ch 83 SLA 1966; am § 2 ch 32 SLA 1968; am § 1 ch 4 SLA 1972; am §§ 1, 2 ch 180 SLA 1972; am §§ 2, 3 ch 82 SLA 1974; am § 1 ch 198 SLA 1976; am §§ 1, 2 ch 268 SLA 1976; am §§ 1, 2 ch 73 SLA 1979; am § 2 ch 19 SLA 1980; am §§ 1, 2, 4 ch 57 SLA 1980; am §§ 16, 17 ch 94 SLA 1980)

Effect of amendments. — The 1979 amendment, in subsection (a), substituted "$5,600" for "$3,600" in subparagraph (B) of paragraph (5) and added paragraph (20).

The first 1980 amendment deleted "(permit required north of Yakutat only)" following "sport fishing permit" near the beginning of paragraph (20) in subsection (a).

The second 1980 amendment added subparagraph (O) of paragraph (a)(16), inserted "big game" at the beginning of paragraph (a)(18), substituted a colon for "for bear, brown or grizzly, each . . . 25" near the beginning of paragraph (a)(18), and added subparagraphs (A) and (B) and the last sentence in paragraph (a)(18), and repealed paragraph (a)(19).

The third 1980 amendment transferred the former last sentence of subsection (b) to the end of paragraph (9) of subsection (a).

Sec. 16.05.345. Musk oxen.

Repealed by § 4 ch 57 SLA 1980.

Revisor's notes. — Section 3, ch. 57, SLA 1980, repealed and reenacted this section; however, the repeal was moved to § 4 of ch. 57 by the revisor of statutes and the language enacted by § 3 of ch. 57 was renumbered as AS 16.05.346.

Editor's notes. — The repealed section derived from § 1 ch. 20 SLA 1969.

STATE OF ALASKA

JAY S. HAMMOND, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

420 "L" STREET, SUITE 100
ANCHORAGE, ALASKA 99501

(907) 276-3550

March 15, 1982

The Honorable Ramona L. Barnes
Alaska State Legislature
House of Representatives
Pouch V (Mail Stop 3100)
Juneau, Alaska 99811

Dear Madam:

Liza McCracken from our office has been in contact with your staff regarding some early cases dealing with the constitutionality of certain guide laws and regulations. In particular, you were interested in the case of Pinnell v. Tolifson. The following is an outline of the facts and procedure of that case.

On October 1, 1969, Bill Pinnell and Morris Tolifson, registered guides, filed a complaint seeking a judicial declaration[1/] as to the validity of 5 AAC 87.060, 5 AAC 87.065 and AS 16.05.407.

5 AAC 87.060 provided:

> Guiding for brown or grizzly bear. No master or registered guide may take, assist in taking, participate in or assist in guiding for more than four (4) brown or grizzly bear during each regulatory year, not more than two (2) of which may be taken in Unit 9."

5 AAC 87.065 provided:

> Licenses and tags required. (A) Before guiding for brown or grizzly bear, each master or registered guide must procure non-transferable bear harvest control tags.

1/ This is an action whereby a party requests the court to rule on the constitutionality of a regulation or statute.

03-C8LH

(B) Bear harvest control tags will be issued in sets of three (3). Not more than four (4) sets of harvest control tags will be issued to a master or registered guide.

And AS 16.05.407 provided:

Nonresident hunting game animals must be accompanied by guides. (a) It is unlawful for a nonresident to hunt, pursue or take brown bear, grizzly bear, polar bear or sheep in this state unless personally accompanied by a person who is licensed as a master guide, registered guide or assistant guide by the department, or who is personally accompanied by a resident Alaskan over 19 years of age who is the spouse of or is related by blood within and including the second degree of kindred.

Bill Pinnell and Morris Tolifson, plaintiffs, argued that 5 AAC 87.060 was "vague, unclear, misleading, and subject to such various interpretations as to render it null, void and unenforceable as being in violation of and a denial of the due process of law and equal protection of the laws clauses of the Constitution of the United States (Article XIV, Amendments to the Constitution), and the Constitution of the State of Alaska (Article I, Sections 1 and 7) in that by one construction each master or registered guide is allowed to take four (4) brown or grizzly bear per regulatory year irrespective of the number of such hunts in which he participates, and by another construction, such master or registered guide would be prohibited from taking even one (1) brown or grizzly bear per regulatory year after having participated in four (4) prior unsuccessful hunts. By such latter interpretation, a master or registered guide, once having participated in four (4) unsuccessful hunts, would thereafter be prohibited from taking even one (1) brown or grizzly bear, whereas, qualified residents (and presumably qualified nonresidents, also) are allowed to participate in an unlimited number of hunts and are yet entitled to go hunting thereafter and take one (1) bear."

The argument against 5 AAC 87.065 was that it impaired contracts previously entered into before the regulation was enacted and impairment of contracts violates Article I, Section 10 of the Constitution of the United States and of Article I, Section 15 of the Constitution of the State of Alaska.

Lastly, the plaintiffs argued AS 16.05.407 violated the due process and equal protection clauses of the Constitution of the United States (Article XIV, Amendments to the Constitution) and the Constitution of the State of Alaska (Article I, Sections 1 and 7) in that it discriminated against registered guides in favor of Alaskan residents who wish to take their nonresident relatives hunting. The residents who took their nonresident relatives hunting were not restricted as to the number of hunts allowed nor forbidden to charge for their services.

The plaintiffs requested the superior court to rule the regulations null and void and issue an injunction[2/] during the pendancy of the action.

October 7th in open court and October 10th by written order, Judge C. J. Occhipinti granted the plaintiffs' request for an injunction. The injunction referenced only the regulations, not the statute. On December 5, 1969, the Supreme Court of Alaska vacated the superior court's injunction.

The complaint for declaratory judgment was heard on the merits. The guides and the State of Alaska presented their arguments. Judge C. J. Occhipinti determined AS 16.05.407 was constitutional. The court held that:

> The State certainly has a right to limit the take of its game in the pursuit of reasonable and necessary propagation of the species. Further, in view of the fact that such game roams a vast and potentially dangerous climatic area, non-residents wandering in such an environment could, because of their ignorance of the environment, create problems not only for their own safety, but also compel rescue operations that would be costly and an unnecessary burden on taxpayers. Knowledgeable guides licensed by the State, appear to be a reasonable solution . . . .

2/ A court order which would suspend the enforcement of the regulation and statute until the court ruled on their constitutionality.

> This Court will thus not strike the Statute, as it is a reasonable and necessary legislation to exercise control over this natural resource, but any regulations arising to implement this Statute, should provide equitable and reasonable restrictions to effectuate its purpose.

The two regulations were ruled unconstitutional because of vagueness. The decision of Judge Occhipinti was not appealed. This is the only Alaska case which addressed the issue of the constitutionality of AS 16.05.407 and the court held it was constitutional.

I hope this assists you in reviewing the legislation. If we can be of any further assistance, please do not hesitate to call.

Very truly yours,

WILSON L. CONDON
ATTORNEY GENERAL

By: Kathleen McGuire
Kathleen McGuire
Assistant Attorney General

KM:jf

STATE OF ALASKA

JAY S. HAMMOND, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

POUCH K-STATE CAPITOL
JUNEAU, ALASKA 99811

February 11, 1982

Honorable Kenneth J. Fanning
Honorable Eric G. Sutcliffe
Co-Chairmen
Resources Committee
Alaska House of Representatives
Twelfth Legislature, Second Session
Pouch V
Juneau, Alaska 99811

Re: SSHB 409, "An Act relating to guiding; and providing for an effective date." Our file J66-485-82

Dear Representatives Fanning and Sutcliffe:

At your direction, I have researched a number of the questions which were raised at the Resources Committee hearing on SSHB 409, "An Act relating to guiding; and providing for an effective date." There have been two cases in other states construing statutes similar to AS 16.05.407(a). Those cases are discussed in some detail below. However, the conclusions which we draw from them can be summarized as follows:

1. The statute would be more defensible if it applied to nonresidents hunting all species of game, not a selective list of species. If selected species are listed, the statute probably would be found unconstitutional if it treats similar species differently (for example, if the statute applies to the hunting of moose and caribou but not deer and elk).

2. The exception for nonresidents hunting in the company of a resident relative would make the statute less defensible as a proper exercise of the state's police power.

3. Giving the Board of Game the authority to designate areas where nonresident citizens of the United States must be accompanied by a guide (or a resident relative) would make the statute less defensible as a proper exercise of the state's police power.

In addition, as set out in greater detail below, you should be aware that the courts have expressed rather strong disapproval of distinctions based on alienage (i.e., whether one is a citizen of a foreign country). Accordingly, if it is the committee's desire to treat nonresident aliens differently than nonresident citizens of the United States, the courts will require that there be very good reasons for such a difference in treatment.

Discussion

In Schakel v. State, 513 P.2d 412 (Wyoming 1973), a Wyoming statute requiring nonresident hunters to be accompanied by a licensed guide or a Wyoming resident while hunting elk, deer, bear, moose or mountain sheep on national forest, national park or national game refuge lands was challenged. The statute did not require the nonresident to be accompanied by a licensed guide or a resident when hunting on other public lands or on privately-owned lands. The evidence showed that this resulted in an overharvest of the listed species on lands adjoining the national forests, national parks and national game refuges. The court therefore concluded that the statute was not reasonably designed to accomplish the purpose of protecting game. The court also found that the statute was not reasonably designed to ensure greater nonresident hunter safety because antelope were not included in the list of species although the danger to a nonresident hunter from hunting antelope was just as great as it was hunting elk. Moreover, the court found that a wilderness area was inherently dangerous to one not familiar with it regardless of the species being hunted. In addition, the court noted that state lands within national forests (townships 16 and 36) should have been included if safety was the prime factor. Regarding nonresident hunters being accompanied by residents, the court stated:

> The addition of the provision that any resident owner of a big game license may receive a guide license and guide two nonresident hunters without bond or without any qualifications whatsoever without remuneration therefore is impossible to reconcile with the theory of safety unless one indulges in the violent presumption that mere residence in this State makes a competent, knowing guide whether he be acquainted with the area or not.

513 P.2d at 415.

In State v. Jack, 539 P.2d 726 (Montana 1975), a Montana statute requiring nonresidents hunting game animals in national forests, national wilderness areas, national game refuges or state game ranges was challenged. The statute permitted private land owners to authorize hunts on their lands, and the fish and game commissioner was given the power to waive the guide requirement for nonresidents hunting deer and antelope in areas designated by the commissioner. The state attempted to justify the statute on four grounds: (1) that it was designed to ensure the safety of nonresident hunters unfamiliar with the weather and terrain; (2) that state fish and game regulations were more likely to be obeyed because residents were more familiar with them and also were more interested in preserving game; (3) that the requirement protected landowners against improper use of their land; and (4) that the requirement afforded law enforcement officers better control of nonresident hunters. The court found that the safety rationale was undercut because the statute could be waived for deer and antelope even though the terrain was just as dangerous for deer and antelope hunters as it was for the hunters of other species and because deer and antelope are no less dangerous than elk or moose. The court found that the state had not demonstrated any true connection between residency and respect for game regulations and the environment and, even if such a connection existed, the relationship was remote when former residents and nonresident landowners were subject to the guide requirement. The court found that the state had not demonstrated that the requirement protected land owners and afforded law enforcement officers better control and, if such a connection had been shown, then there would have been no basis for the practice of the commissioner in waiving the requirement for deer and antelope in the eastern part of the state but not the western part which he apparently had done.

Applying the holdings of these two cases to SSHB 409 leads to the following conclusions.

First, the listing of individual species where the requirement applies (and, by omitting certain species, making the requirement inapplicable) eliminates the use of a non-resident hunter safety rationale to support the statute. Schakel, supra; Jack, supra. Second, the exception for nonresident hunters accompanied by a relative also makes it difficut to use a nonresident hunter safety rationale. Schakel, supra. (In Schakel, the court found that the exception for a nonresident accompanied by a resident defeated the nonresident hunter safety rationale; the connection is even more tenuous where the exception is only for a nonresident hunter accompanied by a relative.) Third,

if the statute otherwise is permissible, the statute should be uniformly applied statewide and not vary in application on an area-by-area basis determined either by the legislature, Schakel, supra, or by the executive. Jack, supra.

It also should be noted that neither of these cases stand for the proposition that it is constitutionally permissible to require that nonresidents be accompanied by a guide. However, if such a requirement is to have some chance of being sustained, the statute should not include those elements found constitutionally impermissible in Schakel, supra, and Jack, supra

Finally, "classifications based on alienage [i.e., whether one is a citizen of a foreign country] are subject to close judicial scrutiny." Park v. State, 528 P.2d 785, 787 (Alaska 1974), citing Sugarman v. Dougall, 413 U.S. 634 (1973). For this reason, I would reiterate my comment at the committee hearing that there must be a legitimate legislative justification for treating nonresident aliens differently than nonresident citizens of the United States if the legislature determines that it is going to make such a distinction. Mr. Hinman, Deputy Director of the Division of Game, alluded to some possible reasons for such a distinction. We believe at least two of those he suggested have some merit: (1) the fact that nonresident aliens as a class may be expected to have greater difficulty in understanding game regulations written in English than nonresident citizens of the United States; and (2) that hunting traditions and customs in foreign countries in many cases are significantly different from such customs in Alaska and the other United States.

As a final comment, I recall your request that I draft a letter of intent for the committee outlining these justifications. However, in the event of a challenge to the statute, the court will be interested in what the committee actually intended, not what the Department of Law believes the committee might want to intend. Accordingly, while I would be happy to work with the committee and attempt to answer the committee's questions whether a given purpose for establishing classifications between residents, nonresidents and nonresident aliens is permissible,[1] ultimately any letter of intent should be the product of the committee's deliberations. (Of course, a necessary predicate is that the committee determine precisely what classifications between

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[1] The committee should be aware the Alaska Supreme Court has, on previous occasions, expressed serious reservations regarding classifications based on residency, particularly durational residency. See, e.g., Williams v. Zobel, 619 P.2d 422 (Alaska 1980), and Williams v. Zobel, 619 P.2d 448 (Alaska 1980).

residents, nonresidents and nonresident aliens it wishes to include in the bill.)

I hope you find these comments helpful. If I can be of further assistance, please contact me at your convenience.

Sincerely,

WILSON L. CONDON
ATTORNEY GENERAL

By: G. Thomas Koester

G. Thomas Koester
Assistant Attorney General

GTK:dlm

cc: Committee Members
Bill Sponsors
Keith Specking

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT

BILL PINNELL and MORRIS TOLIFSON, individually and on behalf of all others similarly situated,

Plaintiffs,

vs

THE DEPARTMENT OF FISH AND GAME OF THE STATE OF ALASKA, AUGIE F. REETZ, Commissioner of the Department of Fish and Game of the State of Alaska, or his successor, if any; LOREN W. CROXTON, Deputy Commissioner of Sport [illegible] and Game of the State of Alaska, [illegible] successor, if any; and [illegible] OF FISH AND GAME OF THE STATE [illegible] ALASKA,

Defendants.

FILED in the Superior Court State of Alaska, [illegible]
OCT 10 1969
[illegible] VOKACEK, Clerk
By [illegible] Deputy

No. 69-2703

ORDER

The plaintiffs' motion for preliminary [illegible] come on before the Court for hearing on Tuesday, [illegible] at 4:00 p.m., pursuant to a minute order of this [illegible] stipulation of the parties, and the parties [illegible] by their respective counsel, and the Court having [illegible] ment on the merits of said motion and having examined the [illegible] before it and being fully advised in the premises does [illegible] grant said motion for preliminary injunction, upon the fol[illegible] terms, and IT IS HEREBY ORDERED as follows:

(1) The defendants and each of them, their [illegible] employees, and all persons acting in concert with [illegible] enjoined from enforcing the regulations 5 AAC 87.060 and 5 AAC 87.065 against the taking of Brown or Grizzly [illegible] the above-named plaintiffs and all other members of their class who are acting pursuant to a valid and binding contract made and entered into prior to the effective dates of said regulations; provided however, that any party or person claiming the benefit of such a contract shall furnish to the Department of Law of the

State of Alaska in Anchorage proof of the existence of said contract or contracts and the contents thereof within seven (7) days from the date on which such party or person or his attorney receives notice of this order.

(2) The plaintiffs shall furnish a penal bond in the amount of $1,000.00 with sufficient sureties conditioned for the payment of such costs and damages as may be incurred or suffered by the defendants herein who are or may be found to have been wrongfully enjoined, said bond to be without prejudice to the rights of the plaintiffs to apply for relief to this Court in the event that they are unable to make such bond.

(3) Provided also, however, that this matter shall be set for hearing on the merits upon suitable motions by October 27, 1969, or as soon thereafter as counsel may be heard.

DATED this 10th day of October, 1969, at 1:30 o'clock P.M.

JUDGE OF THE SUPERIOR COURT

SERVICE OF THE FOREGOING

BY RECEIPT OF COPY THEREOF ACKNOWLEDGED ON THIS DAY OF Oct 1969

Attorney for the State

ENTERED COURT JOURNAL AT ANCHORAGE
No. 9.25 PAGE/50

Julia Coster: cy:

This is the only case I know of dealing with guiding from the late '60's; this is not a complete copy of the case, but includes the superior court's decision and state's memorandum & also includes opinion of Supreme court regarding one aspect of case that was appealed. I am not familiar with the whole history of the proceedings, so without further research I cannot give you the details.

SEM.

THE FOLLOWING DOCUMENT(S) MAY NOT FILM LEGIBLY BECAUSE OF POOR QUALITY OF THE ORIGINAL.

IN THE SUPERIOR COURT OF THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT

2000
3300

BILL FINNELL and MORRIS TOLIFSON, individually and on behalf of all others similarly situated,

Plaintiffs,

vs.

THE DEPARTMENT OF FISH AND GAME OF THE STATE OF ALASKA; AUGIE F. REETZ, Commissioner of the Department of Fish & Game of the State of Alaska, or his successor, if any; LOREN M. CROXTON, Deputy commissioner of Sport Fish and Game of the State of Alaska, or his successor, if any; and THE BOARD OF FISH AND GAME OF THE STATE OF ALASKA,

Defendants.

FILED in the Superior Court
State of Alaska, Third District

MAR 2 1970

M. VOKACEK, Clerk

By ________ Deputy

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No. 69-2703 D

TRANSCRIPT OF M.O. SPREADING SUPREME COURT MANDATE

BEFORE THE HONORABLE C. J. OCCHIPINTI
Superior Court Judge

Anchorage, Alaska
December 17, 1969
[illegible] o'clock [illegible]

APPEARANCES:

FOR THE PLAINTIFF: None.

FOR THE DEFENDANT: None.

STATE OF ALASKA
__________ COURT

D-162
0307

PROCEEDINGS

THE COURT: For the record, I would like to spread a [illegible] date on the record at this time in the [illegible] of the Department of Fish and Game of the State of Alaska versus Bill Pinnell [illegible] Morris Tolifson, individually and on behalf of all others similarly situated, 69-2703, file 10 -- 1202 Mandate. "To: The Superior Court of the State of Alaska, Third Judicial District"... [illegible] Department of Fish & Game of the State of Alaska, et al. petitioned this court for review of a preliminary injunction [illegible] by the superior court dated October 7, 1969 in Civil Action [illegible] 69-2703 entitled 'BILL PINNELL and MORRIS TOLIFSON, individually and on behalf of all others similarly situated, Plaintiffs, [illegible] DEPARTMENT OF FISH AND GAME OF THE STATE OF ALASKA, et al., Defendants.' On November 24, 1969 this court granted review and filed its written opinion vacating the preliminary injunction [illegible] low. It is ORDERED: 1. The preliminary injunction of the superior court, entered October 7, 1969, is vacated. 2. No costs or attorney's fees are allowed. WITNESS The Honorable Buell A. [illegible] Chief Justice of the Supreme Court, State of Alaska, this 5th day [illegible] December, 1969." Signed by Josephine M. McPhetres, Clerk, Supreme Court, State of Alaska. Court will now recess until 2:00 o'clock.

THE CLERK: This Court stands in recess until 2:00 o'clock.

(Whereupon at 1:59 [illegible] Court recessed.)

0309

****
END OF SEQUESTERED PORTION
****

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT

BILL PINNELL and MORRIS TOLIFSON, et al.,

Plaintiffs,

vs.

THE DEPARTMENT OF FISH AND GAME OF THE STATE OF ALASKA, et al.,

Defendants.

Civil Action No. 69-2703D

MEMORANDUM OF [illegible] AUTHORITIES IN SUPPORT OF [illegible] MOTION FOR SUMMARY JUDGMENT

I.

A. STATEMENT OF CASE AND FACTS

The Alaska Board of Fish and Game adopted the regulations which are the subject of this action at its meetings held in Juneau, Alaska, commencing February 9, 1969 (verified Complaint paragraphs V and VI). These regulations were filed in the office of the Secretary of State on May 23, 1969 (Certificate of George Sharrock, Acting Secretary of State attached to defendants' affidavits).

Wallace H. Noerenberg, by affidavit, has stated that between July 10, 1969 and July 30, 1969, Mr. Pinnell, one of the plaintiffs, contacted him and stated that he intended to initiat legal proceedings to invalidate the subject regulations. The 1969 Fall brown and grizzly bear season commenced in game units 1 through 4 on September 1, 1969, in units 5 and 6 on September 15, 1969, and in other game management units on various dates between September 1, 1969 and November 1, 1969, 5 AAC 81.320(b).

Plaintiffs commenced this action on October 2, 1969 and defendants were served with summons, complaint and temporary restraining order on October 3, 1969. On October 3, 1969 defendants moved to dissolve the temporary restraining order. At the hearing the parties agreed that that order would be dissolved

under certain conditions, pending the hearing upon plaintiffs' application for a temporary injunction. The stipulation in open court was to the effect that defendants would not prosecute any violation of the subject regulations under an alleged interpretation of those regulations which would prohibit a guide from participating in more than four unsuccessful hunts.

The hearing upon plaintiffs' [illegible] for temporary injunction was held on October 7, 1969 at [illegible] before the Superior Court, Third Judicial District, [illegible] C. J. Occhipinti, Judge. The hearing was ba[illegible] affidavits of the parties, and oral argument. In addit[illegible] submitted points and authorities in opposition [illegible] motion for preliminary injunction. The verifi[illegible] and affidavits disclose the following facts.

Plaintiffs are registered [illegible] and outfitters doing business in the State of Alaska and derive a substantial portion of their income from hunting brown and grizzly bear.

The affidavit of Morris Tolifson in support of his motion for preliminary injunction states in summary that he is an experienced registered guide doing business in the State of Alaska and is familiar with the Fish and Game Regulations. The affidavit further states that the brown and grizzly bear [illegible] opened in some parts of Alaska on September 1, 1969 and [illegible] he and others have existing contracts for guided hunts in Alaska.

He states that because of the regulations some of his hunts must be cancelled with resulting financial loss and loss reputation to him and others. Similar statements appear in paragraph XIII of the verified complaint.

A supplemental affidavit of Morris Tolifson filed on the date of the hearing for preliminary injunction states that he has two brown bear hunts contracted for the Fall of 1969 and two for the Spring of 1970 and that his partner Bill Pinnell has four such hunts contracted for the Fall of 1969. Each has in addition received deposits for bookings for brown bear hunts in

the Spring of 1970. He states also that while guiding for other game on two occasions they were unable to fill the bear tags of clients, since had they done so, they could not have met the contractual obligations with other clients.

Mr. Tolifson has attempted to contact other guides, but could only contact two. Each said they had gotten one bear this season and each had one more hunt scheduled for this Fall. All other guides were out on hunts.

In addition to the documents and affidavits noted above, defendants submitted affidavits of various officials of the Department of Fish and Game.

The affidavit of W. B. Stewart, Director of the Division of Protection of the Department of Fish and Game states that the regulations here under attack were considered at length in the November and February meetings of the Board of Fish and Game.

The affidavit of Ben L. Hilliker, Deputy Commissioner for Sport Fish and Game states that the regulations were to meet the following problems:

(a) reduction in population of trophy sized brown bear in unit 9 and other units.

(b) reduce hunter pressure in unit 9 and other units.

(c) "quickie hunts" which cause game violation.

(d) competitive position of smaller operators.

(e) overharvest of brown bear in unit 9 and other units.

The affidavit of James A. Harper discloses that the Department of Fish and Game brown bear studies show a need for restriction on the take of brown bear to preserve a population of large bear and that the increased take is a result of the n resident bear harvest. Page ii of the brown bear studies stat that a prime management objective in respect to this resource to "upgrade the esthetics or quality of hunters for brown and grizzly bear, which are large game animals with limited distri

bution and abundance taken almost exclusively for trophies. Prime consideration should be given to writing and enforcing regulations pertaining to aircraft used in connection with hunting".

B. APPLICABLE STATUTORY AND REGULATORY PROVISIONS.

Plaintiffs seek to have AS 16.05.407 declared unconstitutional under the equal protection and due process of clauses of the United States Constitution (Article XIV, amendments to the Constitution) and of the Alaska Constitution (Article 1, Sections 1 and 7), and of the Commerce Clause of the United States Constitution (Article I, Section 8). AS 16.05.407 provides:

> Nonresident hunting game animals must be accompanied by guides. (a) It is unlawful for a nonresident to hunt, pursue or take brown bear, grizzly bear, polar bear or sheep in this state unless personally accompanied by a person who is licensed as a master guide, registered guide or assistant guide by the department, or who is personally accompanied by a resident Alaskan over 19 years of age who is the spouse of or is related by blood within and including the second degree of kindred.***

Plaintiffs seek also to have certain regulations of the Alaska Board of Fish and Game declared unconstitutional as being in violation of the above mentioned constitutional provisions and also as being in violation of the constitutional prohibition against impairment of the obligations of contracts of both the Alaska (Art. 1, Sec. 15) and United States (Art. 1, Sec. 10) Constitutions. The regulations under attack appear in Title 5, Alaska Administrative Code and provide as follows:

> 87.060. Guiding for brown or grizzly bear. No master or registered guide may take, assist in taking, participate in or assist in guiding for more than four (4) brown or grizzly bear during each regulatory year, not more than two (2) of which may be taken in Unit 9.
>
> Authority: AS 16.50.030
>
> 87.065. Licenses and tags required.
> (A) Before guiding for brown and or grizzly bear, each master or registered guide must procure non-transferable bear harvest control tags.

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(B) Bear harvest control tags will be issued in sets of three (3). Not more than four (4) sets of harvest control tags will be issued to a master or registered guide.

(C) These tags must be attached by the master or registered guide, one to the skull, one of the skin and one to the carcass prior to moving the hide or skull ten feet from the carcass.

(D) Those tags attached to the skull and to the skin shall remain attached until the skin is sealed and the skull examined and sealed by the Department of Fish and Game representative.

Authority: AS 16.50.030

In addition to the foregoing statute and regulations, 5 AAC 87.070 is pertinent to the subject matter of this action. That regulation states:

87.070. Contracting with clients.
(A) A master guide or registered guide may contract to guide hunters, but only in areas in which he is currently licensed. An assistant guide may not contract to guide hunters, but may act as a guide when in the employ and under the supervision of a master guide or registered guide.

(B) A contractual agreement, properly executed on a form provided for this purpose, must be signed by both a guide and his clients before actually engaging in guiding. One copy of the contract must be retained by the guide on his person or at his camp in the hunting area when guiding the person named on the contract. One copy of the contract must be furnished to the client and one copy must be submitted to the Department in Juneau within 10 days after its execution.

Authority: AS 16.50.030

C. SUMMARY JUDGMENT FOR DEFENDANTS IS APPROPRIATE IN THIS CASE.

Alaska Rules of Civil Procedure, Rule 56(c) states that summary judgment

...shall be rendered forthwith if the pleadings, depositions and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.

As noted earlier, the verified complaint and plaintiffs' affidavits disclose they are big game hunters and derive a substantial proportion of their income from that activity.

Plaintiffs assert also that because of these regulations some of the hunts for which they have contracted must be cancelled resulting in financial loss to them. The affidavits filed on behalf of defendants set forth the reasons for the regulations and the objectives sought by the board in enacting them. Defendants assert, that even if all of the allegations of plaintiffs are true (defendants assume the truth of those allegations only for the purposes of this motion), defendants are entitled to judgment in their favor as a matter of law. The points upon which defendants rely may be summarized as follows:

(1) There is no impairment of the obligation of contract as a matter of law;

(2) The regulations are not unenforceable because of vagueness;

(3) This is a reasonable classification in respect to resident and non-resident hunters. Hence these plaintiffs are not denied equal protection of the law;

(4) There is no burden on interstate commerce as a matter of law in that residents of a state may be favored over non-residents of a state when the state's objective in limiting the interstate flow of hunters is reasonable;

(5) Plaintiffs do not have standing to raise the constitutional issues in respect to non-residents, since plaintiffs are residents of Alaska.

II.

POINTS AND AUTHORITIES

A. THE REGULATIONS UNDER ATTACK DO NOT IMPAIR THE OBLIGATIONS OF CONTRACT.

Plaintiffs have not, by affidavit or other pleading shown that in fact any of their alleged contracts will be impaired by the regulation. Their statements, both by complaint and affidavit are based upon conjecture. However, the existence or non-existence of contracts which may be impaired is of little importance since as a matter of law, the constitutional provision does not apply to these regulations.

The applicable constitutional provisions are:

> Article I, Section 10 of the United States Constitution which provides in part: "No state shall...pass any...law impairing the obligation of contract.
> and
>
> Article I, Section 15 of the Alaska Constitution which provides in part, "No law impairing the obligation of contracts...shall be passed."

It is true that the applicable provision of the Alaska and United States Constitutions proscribe state impairment of the obligation of contracts. But that prohibition is not an absolute one. Home Building & Loan Association v. Blaisdell, 290 U.S. 398 (1934) is an exhaustive Supreme Court opinion on the meaning of the prohibition contained in the United States Constitution. That case was concerned with the issue as to whether the Minnesota Mortgage Moratorium Law was violative of the impairment of contract section of the United States Constitution. The Supreme Court held the statute was constitutional and stated:

> [Judicial decisions] put it beyond question that the prohibition is not an absolute one and is not to be read with literal exactness like a mathematical formula. [290 U.S. at page 428]

The court noted that the protection of a valid state interest must prevail over the strict application of the prohibition, it said:

> ...but the State also continues to possess authority to safeguard the vital interests of its people. It does not matter that legislation to that end 'has the result of modifying or abrogating contracts already in effect.' [cases cited]...the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order. (290 U.S. at pages 434-435).

The reasoning of the United States Supreme Court is applicable here. The State of Alaska possess authority to safeguard the vital interests of its people. It is without dispute that one of the vital interests of this state is its wildlife resource. Defendants' affidavits on file show the following facts relative to the brown bear resource:

(1) Reduction in trophy size bear in unit 9;

(2) Hunter pressure should be shifted from unit 9 to other areas;

(3) That harvest level of 150 brown bear was was safe in unit 9;

(4) That "quickie" hunts, with attendant game violations such as bear baiting were a problem;

(5) That the non-resident harvest of bear in unit 9 has increased 100% since 1961, while the resident harvest has decreased by over 100% since that time.

(6) That the restrictions on bear take in unit 9 must be accompanied by similar restrictions in other areas, or the increase in hunting pressure would be detrimental to the bear population elsewhere.

The foregoing shows that the Board was attempting to deal with and solve a problem vital to the interests of the state, its wildlife. Must the alleged pre-existing contractual obligations of these plaintiffs have priority over this state's interest? The United States Supreme Court, based on Blaisdell would answer a clear "No"! Carried to its logical conclusion, the reasoning of plaintiffs could require that if the class they represent has sufficient contracts to severely overharvest the bear, that overharvest must occur before the state may act. This reasoning clearly is fallacious and inconsistent with the requirements imposed upon the relevant constitutional provisions.

The fact that the public interest must be considered in determining the validity of a regulation has been recognized by the Alaska Supreme Court. Boehl v. Sabre Jet Room, Inc. 349 P.2d 585 (Alaska, 1960) was an action against the Alaska Alcoholic Beverage Control Board to have regulations setting closing hours for liquor establishments declared invalid. The lower court judgment declaring regulations invalid was reversed. The Supreme Court stated:

> Where the police power of the state is so vitally involved, as it is here, it becomes imperative that those who are charged with the duty of regulating the industry have a freedom of action not restricted by limitations that may be required where other types of businesses are involved. (349 P.2d at page 589)

Likewise, in this case the public interest is so affected by the activities of the guiding industry that it may be restricted in a way that others may not.

Furthermore, plaintiffs are disregarding some elementary principles of contract law. It is well established that non-performance of a contract is excused where, before the time for performance, a change in the governing domestic law makes performance of the contract illegal and therefore impossible. Restatement of Contracts Section 458. This rule applies to governmental regulations, Texas Co. v. Hogarth Shipping Company, 256 U.S. 619 (1927) (suit to recover damages for breach of charter contract was not actionable when boat requisitioned by government). See also annotation at 84 ALR 2d 12 at page 43. Thus, the prospect of such impossibility is inherent in any contract, and particularly one involving a natural resource of the State. Also inherent in any contract is the implication that a state, in the valid exercise of its police power, may render the contract invalid, American Budget Corp. v. Furman, 67 N.J. supra, 124, 170 A.2d 63 (1961). In this case a state statute making the business of debt counselling was attacked on constitutional grounds. The court held that even though 1000, more or less, existing contracts were rendered invalid, the exercise of state police power overrode the constitutional prohibitions. In Alaska the protection and propagation of bear is a permissible objective of police power, Nelson v. State of Alaska, 387 P.2d 933 (Alaska, [illegible]).

B. THE REGULATIONS ARE NOT UNCONSTITUTIONALLY VAGUE OR AMBIGUOUS.

Plaintiffs assert that the regulations in question may be interpreted two different ways. (1) Each master or registered guide is allowed to take four brown or grizzly bear per regulatory year, irrespective of the number of hunts in which he participates; or, (2) that each master or registered guide may not take one bear after participating in four prior hunts, even if some or all are unsuccessful.

Plaintiffs' position is not well taken in that the regulations may be reasonably interpreted only to prohibit the taking of four bears, notwithstanding the number of hunts in which a guide participates. 5 AAC 87.060 must be read in conjunction with 5 AAC 87.065 requiring that:

> Before guiding for brown and/or grizzly bear, each master or registered guide must procure non-transferable bear harvest control tags.

The regulation further provides that bear harvest control tags will be issued in sets of three and not more than four sets of harvest control tags will be issued to a master or registered guide. The tags then must be affixed to certain portions of the carcass of the bear.

The provisions of the two sections are taken together and an examination of the objectives of the Board of Fish and Game in the enactment of these regulations requires the conclusion that what is prohibited by the regulations is the taking of more than four bear. The participating in more than four hunts, even though unsuccessful is not prohibited. There would be no sense to the harvest tag requirement, unless the sections are interpreted in the way urged by defendants. Furthermore, the affidavits of the defendants filed earlier in this action indicate that what is sought to be controlled is an overharvest of trophy sized brown bear in Alaska and the control of the number of bear taken in unit 9. The intended objective would not be resonably accomplished by limiting the number of unsuccessful hunts in which a guide could participate but can reasonably be accomplished by limiting the number of bear which a guide may take. The construction used by defendants is therefore the only one which in fact may be reasonably applied in light of all the circumstances.

The interpretation of the regulations urged by defendants is consistent with and governed by applicable case law. Alanel Corp. v. Indianapolis Redevelopment Commission, 239 Ind. 35, 154 N.E. 2d 515 (1958) was brought by the plaintiff on behalf

of all others similarly situated against the Indianapolis Redevelopment Commission to enjoin it from proceeding under the Redevelopment Act of 1945 and 1947 which dealt with the redevelopment of blighted areas. The Indiana Supreme Court held that the guides and standards set forth in the act were sufficient to meet the requirements of the due process clause of the Fourteenth Amendment. The Court laid down rules to be considered in determining whether a statute is unconstitutional because of vagueness or ambiguity. The Court stated:

> When it is asser[illegible] a statute is so indefinite that [illegible]ement would result in a denial of du[illegible] or amount to an unauthorized del[illegible] legislative functions, the court must c[illegible] enactment in the light of the probl[illegible] which the legislature was undertaking to [illegible] ... Such statutes are valid when they clearly designate the dangers and hazards against which the legislatures sought to provide protection and reasonably indicate the means or a method by which that is to be accomplished. (154 N.E.2d at page 520)

A consideration of the problems sought to be overcome by the Board of Fish and Game and by considering the requirement of the regulations as to four bear harvest control tags, the regulation under attack clearly designate the hazard against which the legislature sought protection. See also Illinois Steel Company v. Fuller, 216 Indiana 180, 23 N.E. 2d 259 (1939) and State v. Miller, 129 N.W. 2d, 356 (Ind., 1964). Perhaps the clearest application of the rules to be followed by a court in resolving the issue of whether a statute is unconstitutional because of vagueness is found in Donathan v. McMinn County, 187 Tenn. 220, 213 S.W. 2d 173 (1948). That case was an action by taxpayers attacking the validity of an act creating a county council for McMinn County, Tennessee. The plaintiffs asserted that the language creating the council was void in that there was no criteria by which to determine the extent of the powers of the county council. The powers of the council were described as all those necessary to govern, except as are "not expressly vested by the Constitution of the State of Tennessee or by general law of

this state which is not subject to modification by a private act,..." Also the council had all the power to govern, "exce those expressly reserved in the State Constitution or in controlling general law to another agency." The Court stated the rule to be following in determining whether a statute is too vague under the due process clause:

> [it] is not the difficulty in ascertaining whether close cases fall within or without the prohibition of a statute, but whether the standard established by the statute is so uncertain that it cannot be determined with reasonable definiteness that any particular act is disapproved. (page 176 213 S.W. 2d)

As shown above the particular act disapproved can be ascertain with reasonable definitness. The Court also laid down other rules of construction to govern the determination whether a statute is void for vagueness. These rules are:

> Whenever an act is susceptible of two constructions, one of which may render the act valid and the other invalid, the courts adopt the construction that will render the act valid. (213 S.W.2d at page 177)

The reasonable construction urged by the defendants will render the regulation valid. The Court also stated as a rule of construction:

> The legislative intent will prevail over the strict letter or literal sense of the language used, and, in order to carry into effect this intent, general terms will be limited, and those that are narrow expanded. (213 S.W.2d at page 177)

Thus the terms of the regulations which would tend to support a conclusion that unsuccessful hunts may be prohibited may be limited in such a manner as to prohibit the taking of more than four bear. Another rule was laid down as follows:

> That is not uncertain or vague which by the orderly processes of litigation can be rendered sufficiently definite and certain for purposes of judicial decision. (213 S.W.2d at page 176)

This court may, in this litigation, render any ambiguity in the regulation definite.

By applying all of the rules of construction to the regulations here in question, it is clear that they prohibit the taking of more than four (two in unit 9) bear per guide, and not the participation in more than four hunts, even though unsuccessful.

C. THE STATUTE AND REGULATIONS UNDER ATTACK DO NOT, BY THEIR [illegible], DEPRIVE PLAINTIFFS OF [illegible]- TECTION UNDER THE LAW, [illegible] PROCESS OF LAW.

hunt?

AS 16.05.407 provides that a non-[illegible]nt may not guide for certain bear or sheep in Alaska [illegible] accompanied by a master or registered guide. An exception [illegible] made in the case of a non-resident spouse or kindred within the second degree of Alaska residents over 19 years of age. Such non-residents may hunt when accompanied by the eligible relative. Plaintiffs assert this statute unconstitutionally discriminates in favor of qualified Alaska residents who may wish to take their eligible residents on hunts. It is noteworthy that plaintiffs' assumptions in this regard are not supported by a single thread of fact. There is no evidence to show that AS 16.05.407 has operated in this manner.

1. The contested statute does not violate the equal protection clause of the Alaska or United States Constitutions.

Defendants assert that the limitations and requirements imposed by the legislature are a valid exercise of legislative power. The United States Supreme Court in Morey v. Doud, 354 U.S. 457 (1957) quoted with approval from Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, the following criteria for determining whether a classification is valid:

> '1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results

in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary.' [Case cited.]

To these rules we add the caution that 'Discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision.'

The Morey case involved an Illinois statute regulating currency exchanges. Such businesses were prohibited from doing certain acts. However, exempted from the provisions of the statute was The American Express Company. [illegible] court held that application of this act to the non-exem[illegible]hanges denied them equal protection of the laws. [illegible]ourt found no reasonable basis to exclude the American [illegible]s Company. The fact that The American Express Company was properly operated at the time the act was passed in no way guaranteed that it would continue in that condition.

Applying the test of Morey to the case at bar we find the following:

1. The classification is not purely arbitrary. The classification of non-residents who require a guide and those within the eligible degree of kindred who may hunt with resident relatives is legislative recognition of a fact of life in Alaska. Many Alaskans are visited by close relatives. A resident Alaskan quite often will wish to take those close relatives hunting. Rather than impose upon the resident the requirement that a guide accompany him or his relative, the legislature has recognized that in this area of close family relationships the restrictions may be relaxed. The legislature's recognition of a distinction based upon relationships of individual is not arbitrary, but a recognition of what in fact occurs in Alaska.

2. The classification allowing different treatment for non-resident second degree kindred of Alaska residents [illegible]

close as necessary under the *Morey* test. Those relatives eligible under the statute would be the father, brother, grandfather, son and grandson of the Alaska resident. These are precisely the persons most likely to make a family visit to a resident Alaskan. The loose test of mathematical certainty has been met.

3. The classification can be reasonably sustained by an assumed state of facts at the time the law was enacted. In addition to the fact that Al[illegible] regularly visited by relatives within the second [illegible] kindred, it is also reasonable to assume the fol[illegible] 1) A non-resident is quite likely not to be familiar w[illegible] and environmental requirements for hunting these anim[illegible]ska; (2) A non-resident is quite likely not to be familiar with the laws and regulations governing hunting in Alaska; (3) A resident Alaskan is quite likely to be familiar with the above mentioned laws and requirements. Thus, the requirement that non-residents be accompanied by a guide is a reasonable means to overcome the problems faced by non-residents. However, an Alaskan resident could serve the same purpose with respect to his close relative, and it is not likely that a non-resident would charge his close relative for taking him on a hunt. Hence, that non-resident would not be violating AS 16.50.215(3) for guiding without a license. Guiding is defined by AS 16.50.420(2) as assisting another person to take or photograph game with the intent of receiving compensation. The existence of these statutes mak impossible the fact assumed by plaintiffs that the resident relatives are operating a guiding business.

4. The classification is asserted by plaintiffs and it is up to them to show its essential arbitrariness. This they have completely failed to do, especially in the light of the foregoing. Plaintiffs have shown nothing arbitrary either in their complaint or in their affidavits.

5. This classification is not unusual in the sense that the one in Morey was unusual. As noted above there is a sound reasonable basis upon which the classification was made.

In addition to the foregoing the statute and the regulations under attack are reasonable restrictions upon the harvest of bear. It has been shown by defendants' affidavits that non-residents account for a substantial portion of the take of brown and grizzly bear. The guide requirement and take limitation will tend to reduce the bear taken by non-residents. Reduction of the take of bear has been shown necessary to preserve the trophy bear population and to restrict the total take in unit 9. Since the state's objective is to preserve the brown and grizzly bear resource, the classification created by the statute and the regulations meet the test of one of the latest cases involving the application of the due process clause to economic activity, McGowan v. Maryland, 366 U.S. 420 (1961). In that case the court was determining the validity of a Maryland statute which prohibited all labor, business and commercial activity on Sunday. Exempted from the statute was the sale of items of bathing apparel, dance hall and amusement park activities and certain activities conducted within specific localities within the state. The statute was attacked on several grounds, among which was the equal protection clause. The court held that the statute was not unconstitutional and said the following with respect to the equal protection clause:

> Appellants argue that the Maryland statutes violate the 'Equal Protection' clause of the Fourteenth Amendment on several counts. First, they contend that the classifications contained in the statutes concerning which commodities may or may not be sold on Sunday are without rational and substantial relation to the object of the legislation. Specifically, appellants allege that the statutory exemptions for the Sunday sale of the merchandise mentioned above render arbitrary the statute under which they were convicted. Appellants further allege that [the statute] is capricious because of the exemptions for the operation of the various amusements that have been listed and because slot machines, pin-ball machines, and bingo are legalized and are freely played on Sunday.

> The standards under which this proposition is to be evaluated have been set forth many times by this Court. Although no precise formula has been developed, the Court has held that the Fourteenth Amendment, permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it. (366 U. S. at pages 425-426)

The Court then found that the facts [illegible] justified this statute were the sale of the exempted comm[illegible] was necessary either for the health of the populace or [illegible] items necessary for Sunday recreation. The case at ba[illegible] the test of McG[illegible]. The classification rests upon grounds [illegible] are relevant [illegible] achieving the state's objectives. Those objectives are [illegible] conservation of the wildlife resource, more efficiency in the enforcement of the game laws and the promotion of safety within the industry. As pointed out earlier, facts can be reasonably assumed which support these objectives and the classification.

2. <u>The contested statute does not violate the due process clauses of the Alaska and Federal Constitutions.</u>

Plaintiffs attack the questioned statutes and regulations on the basis that they impose certain restriction upon their business of guides for brown and grizzly bear in Alaska. The conditions, it is argued are unconstitutional in the light of the due process clauses of the Alaska and Federal Constitutio

Plaintiffs' position is not supported by decisions of the United States Supreme Court. Perhaps the leading case involving the application of the due process clause to state regulatory activity is <u>West Coast Hotel Co. v. Parrish</u>, 300 U.S. 379 (1937). In that case the Washington minimum wage law for women was under attack on the ground that it violated the employer's rights under the due process clause, in that it

deprived them of their freedom of contract. The Court stated:

> And if the protection of women is a legitimate end of the exercise of state power, how can it be said that the requirement of the payment of a minimum wage fairly fixed in order to meet the very necessities of existence is not an admissible means to that end? The legislature of the State was clearly entitled to consider the situation of women in employment, the fact that they are in the class receiving the least pay, that their bargaining power is relatively weak, and that they are the ready victims of those who could take advantage of their necessitous circumstances. . . . The legislature had the right to consider that its minimum wage requirements would be an important aid in carrying out its policy of protection. . . . Even if the wisdom of the policy be regarded as debatable and its effects uncertain, still the legislature is entitled to its judgment. (300 U.S. at pages 398-399).

So in the case at bar, it can be said with equal justification that the protection of the wildlife resources, the promotion of safety and the enforcement of laws relating to hunting are legitimat ends of the exercise of state power. To promote these ends the legislature and Board were entitled to consider the fact of over harvest of brown and grizzly bear and to consider that its statutory and regulatory requirements would be an important aid in carrying out their policy of protection.

What the United States Supreme Court in West Coast Hotel is saying is that all that due process requires for valid regulation of economic activity is that there be a legitimate purpose and a rational means for accomplishing that purpose. The statutes and regulations here under attack meets those requirements.

D. THE REGULATIONS DO NOT VIOLATE THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION.

Plaintiffs assert that the regulations under attack violate the commerce clause of the United States Constitution (Article 1, Section 8) in that they place a substantial burden upon the movement in interstate commerce of non-resident brown and grizzly bear hunters. They urge that this restriction infringes upon the power of congress in this area. Plaintiffs are once again in error.

The leading United States Supreme Court Opinion in this area is Toomer v. Witsell, 334 U.S. 385 (1948). This was an action by plaintiffs to enjoin as unconstitutional a South Carolina statute requiring that non-resident shrimp fishermen [illegible] a licensee fee 100 times the fee paid by residents. The court held the particular license fee was without reasonable basis. However, the court did comment upon the powers of the state in the area of fish and game regulati[illegible] It first noted the early Supreme Court case of McCready v. [illegible]n, 94 U.S. 391 (1876) which held that a state could [illegible]n-residents from planting oysters in Virginia tidal beds [illegible] recognized that the state was vested with ownershi[illegible]er and wildlife and that the right of citizens o[illegible] those objects was:

> a property right, [illegible] privilege
> or immunity of citi[illegible]
> (334 U.S. at 402)

The Court thus recognized that [illegible]n to the usual constitutional provisions has been [illegible]ut in the area of a state's dealing with wildlife in i[illegible] and waters. The same may be said, of course, for game within the state. Plaintiffs' reliance on Brown v. Anderson, 202 F.Supp. 96 (U.S. D.C. Alaska, 1962) is misplaced. In that case the State of Alaska prohibited non-residents from engaging in fishing commercially for salmon. Salmon were found by the court to be free swimming, like the shrimp in Toomer and hence not subject to complete state regulation as in the case of game. Thus, whatever Brown may state relative to the commerce clause is not applicable to this case where the brown and grizzly bear resource is confined wholly to this state. Much more clearly in point is State v. Kemp, 73 S.D. 48, 44 N.W. 2d 214 (1950). That was an action against a defendant convicted of unlawfully killing a migratory water fowl in violation of the statute providing:

> No license shall be issued to a non-resident
> for the hunting, taking or killing of any
> migratory water fowl.

Defendant raised objection to the statute, based upon constitu-tionality. The Supreme Court held that the lower court's deter-mination that the statute was valid was correct. Defendant in that case was a non-resident. He was refused a license and thereafter hunted. Defendant raised the objection as to con-stitutionality based upon Article IV, Section 2 of the Consti-tution guaranteeing that:

> That citizens of each state shall be entitled to all privileges and immunities of citizens of the several states.

The Court found that in 1945 there were 97,980 non-residents hunting licenses issued in the state and that it was necessary to restrict the hours of hunting to give some protection to the pheasant against the horde of non-resident hunters. The Court said:

> This law protects ducks and geese against a host of hunters who otherwise would be hunting those birds simply as an incident to pheasant hunting in South Dakota.

The Court also stated:

> Apart from the ownership theory there is another basis upon which a state may regulate the taking of wild game, including migratory birds. We, of course, refer to the exercise of the police power...
>
> Acting under the police power the state may discriminate against citizens of other states provided there is substantial reason for the discrimination beyond the mere fact that they are citizens of other states.

The Court observed that in South Dakota the limitation of hunting hours on pheasants gave much idle time to non-resident hunters. They, therefore, spent this time in hunting ducks and geese and that because of this the natural flyways for ducks and geese were subject to excessive hunting and possible destruction. The Court, therefore stated:

> We conclude, therefore, that non-residents constitute a peculiar source of evil at which the statute is aimed.

Thus, if the interstate flow of non-resident hunters could be thwarted in South Dakota, the interstate flow of bear hunters can similarly be limited in Alaska.

Moreover, plaintiffs do not have standing to raise the issue that interstate commerce is being unlawfully restricted. Plaintiffs are not representing a class of non-resident hunters. Tileston v. Ullman, 318 U.S. 44 (1943). In that case the plaintiff, a physician, sought to have a Connecticut statute prohibiting the use of drugs or instruments to prevent conception declared unconstitutional. The plaintiff, a doctor, alleged that the statute infringed the constitutional rights of his patients. The court stated:

> The sole constitutional attack upon the statutes under the Fourteenth Amendment is confined to their deprivation of life - obviously not appellants' but his patients'. There is no allegation that appellant's life is in danger. His patients are not parties to this proceeding and there is no basis on which we can say that he has standing to secure an adjudication of his patients' constitutional right to life, which they do not assert in their own behalf. (318 U.S. at page 46)

The same may be said of this case. If a constitutional right of non-residents under the commerce clause is violated, then the non-residents must assert this right. This they have not done. Plaintiffs cannot do it for such non-residents.

III.

CONCLUSION

On the basis of the foregoing, it is urged that this Court enter summary judgment in favor of defendants and that plaintiffs take nothing by this action.

DATED at Anchorage, Alaska, this 24th day of October, 1969.

Respectfully submitted,

G. KENT EDWARDS
Attorney General

By:
Charles K. Cranston
Assistant Attorney General

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT

[illegible] and [illegible], individually and on behalf of all others similarly situated,

Plaintiffs,

vs.

THE DEPARTMENT OF FISH AND GAME OF THE STATE OF ALASKA; ALGIE P. [illegible], Commissioner of the Department of Fish and Game of the State of Alaska, or his successor, if any; [illegible] W. [illegible], Deputy Commissioner of Sport Fish and Game of the State of Alaska, or his successor, if any; and THE BOARD OF FISH AND GAME OF THE STATE OF ALASKA,

Defendants.

No. [illegible]-27[illegible] B

SUMMARY JUDGMENT

On October 1, 19[illegible], the Plaintiffs filed a verified [illegible] questioning the validity of certain regulations of the [illegible] of Fish and Game of the State of Alaska. The Attorney G[illegible] for the State of Alaska, answering for all the Defendants [illegible] the invalidity, [illegible] that the Court dismiss the action.

Cross motions for Summary Judgment were made, and a [illegible] held on October 31, 19[illegible], after which the Court took the [illegible] under advisement.

The parties are in substantial agreement on the bas[illegible]

[illegible] ALASKA

COURT

AS 16.05.407 provides as follows:

"Non-resident hunting [illegible] must be accompanied by guides. ([illegible] is unlawful for a non-resident to hunt [illegible] or take brown bear, grizzly bear, [illegible] bear or [illegible] sheep in this state, unless personally accom- panied by a person who is licensed [illegible] guide, registered guide or assistant [illegible] by the department, or who is personally [illegible] panied by a resident Alaskan over 19 years of age, who is the spouse of or is related [illegible] within and including the second degree of kindred."

The Department of Fish and Game of the State of [illegible], under Authority of AS 16.50.030 has the duty of [illegible] cedural and substantive regulations under the Admini[illegible] Procedure Act (AS 44.62) required or reasonably necessary for its administration.

In February, 1969, the Department, as authorized, [illegible] gated certain regulations directed to the guiding or [illegible] of bear or grizzly bears by registered guides. These [illegible] are as follows:

"87.060. <u>Guiding for Brown or Grizzly Bear.</u> No Master or registered guide may take, assist in taking, participate in or assist in guiding for more than four (4) brown or grizzly bear during such regulatory year, not more than two (2) of which may be taken in Unit 9."

"87.065. <u>Licenses and tags required.</u> (A) Before guiding for brown and or grizzly bear, each master or registered guide must procure non-transferable bear harvest control tags. (B) Bear harvest control tags will be issued in sets of three (3). Not more than four (4) sets of harvest control tags will be issued to a master or registered guide. (C) These tags must be attached by the Master or registered guide, one to the skull, and one to the skin, and one to the carcass prior to moving the hide or skull ten feet from the carcass. (D) These tags attached to the skull and to the skin shall remain attached until the skin is sealed and the skull examined and sealed by the Department of Fish & Game representative."

The Plaintiffs have challenged the regulations above on four constitutional grounds, namely:

1. The regulations materially impair the obligation of contracts in violation of Article I, Section 10 of the Constitution of the United States and of Article I, Section 15 of the Constitution of the State of Alaska.

2. Regulation 87.060 is so vague, unclear and misleading and subject to various interpretations as being [in violation of] a denial of the due process of law and equal protection of the laws clauses of the Constitution of the United States (Article XIV, Amendments to the Constitution), and the Constitution of the State of Alaska (Article I, Section 1 and 7.)

3. Such regulations, when considered in light of Section 16.05.407 of the Alaska Statutes, discriminate unfairly in favor of certain residents of the State of Alaska and against the Plaintiffs and members of their representative class, and thus are a denial of the due process of law and the equal protection of the laws clauses of the Constitution of the United States and the State of Alaska.

4. Said regulations are in violation of the commerce clause of the Constitution of the United States (Article 1, Section 8). Since a substantial burden is placed on the movement in interstate commerce of non-resident brown or grizzly bear hunters; and thus results in infringement of the power of the Congress of the United States to regulate commerce among the several states.

[illegible] Attorney General has defended each ground, [illegible] for summary judgment in favor of the Defendants [illegible] there [illegible] no [illegible] issue as to any material fact, and said Defendants are entitled to a judgment as a matter of law, based on the validity of the statute and resulting [illegible].

The parties have cited much [illegible] upholding the legal theories, although not [illegible] with the fa[illegible] or upholding as a matter of law [illegible].

Taking each ground separately, this Court finds as follows:

1. Impairment of contract. The Constitutions [illegible] the United States and the State of Alaska prohibit the [illegible] of any law that impairs the obligation of contracts. [illegible], necessity, exceptions must at times be made, for it [illegible] the prohibition is not absolute. The law cannot follow [illegible] with mathematical precision, human minds and conditions [illegible] as they are. At times, valid State or Federal interest [illegible] prevail to avert a result worse than the damage caused by [illegible] absolute following of the prohibition. Safeguarding the vital interest of the people of a state, or the nation must remain paramount. In Home Building & Loan Associations vs. Blais[illegible] 290 US 398 (1934), the Supreme Court of the United States [illegible] interfere with the enforcement of contracts, considering the depressed economic status of the nation, and although the contra[illegible] in existance were not rendered void, their enforcement was substantially impaired.

Further in exercising its police powers, [illegible] be restricted to honor contracts, where in so doing [illegible] a vital natural resource would result, or the [illegible] over some vital industrial interest, health or welfare [illegible] State may be endangered. The objection to the statute and [illegible]lations here attached on the grounds of impairment of con[illegible] is not well taken. The people of the State of Alaska have [illegible] interest in the game within the State, and the taking of [illegible] may be regulated by proper exercise of reasonable and necessary legislation to prevent any abuse of its taking or its possible extinction.

2. Vague or Ambiguous Regulations. The Plaintiffs contend that 87.060 indicates that each master or registered guide is limited to four hunts, whether any of the hunts are successful in the taking of game. The Defendants contend that a [illegible] of 87.065 providing for bear harvest control tags clarif[illegible] such ambiguity. However, 87.065 also limits the Department to the issuance of four sets of tags. No provision is made to replace misplaced or defaced tags, nor any provision made to account for tags. The enforcement of such regulations is criminal in nature, and any statute or regulation so sounding, must, in order to protect the public in general, have no interpretation other than one specifically stated. The public cannot be informed in these matters if prosecution "might" follow, but

must be intelligently apprised that any violation, specifically defined, will be prosecuted. Vague definitions such as [illegible] or participating cannot be easily enforced. The amount [illegible] assistance one guide may give another in the ultimate taking of a bear is too vague. Merely the transportation of one guide [illegible] another to a camp site might be considered assisting in the game taken. The loan of a rifle by one guide to another could also be considered assisting. In this, [illegible] other subsequent reasons, the regulations are held to be vague.

3. Deprivation of equal Protection or Due Process. Plaintiffs attack AS 16.05.407 as being unconstitutional since, in its application, it discriminates against a class, as residents take 42% and non-residents 58% of the brown and black bear. The state defends its right to regulate the taking of game, by limiting non-residents to hunts only if accompanied by registered guides. Arguments of both sides do not sway this Court in either direction.

The State certainly has a right to limit the take of its game in the pursuit of reasonable and necessary propagation of the species. Further, in view of the fact that such game roams a vast and potentially dangerous climactic area, non-residents wandering in such an environment could, because of their ignorance of the environment, create problems not only for their own safety, but also compel rescue operations that would be costly

and an unnecessary burden on the taxpayers. [illegible] licensed by the State, appear to be a reasonable [illegible] real issue, as seen by this Court, is any limitation [illegible] on the residents as opposed to the non-residents in [illegible] taken. The State could limit the take in any [illegible] entire State, setting a reasonable system or [illegible] a certain number each year or closing the take entirely. [illegible] setting a limitation in the numbers taken, the State [illegible] in this Court's opinion, and based on the previous [illegible] divide equitably the number to be taken by residents and non-residents by regulation. But limiting guides to the taking [illegible] a certain number of hunts, but not limiting residents is [illegible] not a means of protecting the species or limiting the take. [illegible] Court will thus not strike the Statute, as it is a reasonable and necessary legislation to exercise control over this [illegible] resource, but any regulations arising to implement this [illegible] should provide equitable and reasonable restrictions to [illegible] its purpose. Guides should not be limited, rather the [illegible] by the hunters, through limitation of tags or by other means would appear consistant.

4. Violation of the United States Constitution - Commerce Clause. Plaintiffs contend the regulations [illegible] the commerce clause of the United States Constitution, [illegible] discriminates against non-residents. Actually, as the [illegible]

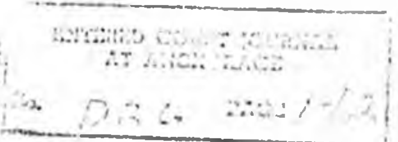
are interpreted, it is not the non-resident who [illegible] its application, but the well-known, responsible [illegible] guide. Neither party argued this facet of the issues to [illegible] extent, and the Court assumes the matter is moot.

In Summary, and based on the reasons given, the [illegible] may have Summary Judgment as limited above. The Defendant[illegible] Motion for Summary Judgment is hereby denied.

DATED at Anchorage, Alaska, this 3rd day of December [illegible].

C. J. [illegible]
Superior Court Judge

cc: File
Boyko
Attorney General



THE SUPREME COURT OF THE STATE OF ALASKA

MENT OF FISH & GAME ATE OF ALASKA, et al., Petitioners, v. LL and MORRIS individually and on all others similarly Respondents.	)	69-22 File No. OPINI [No. 586 - November

Review from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, C. J. Occhipinti, Judge.

Appearances: Charles K. Cranston, Assistant Attorney General, and G. Kent Edwards, Attorney General, for Petitioners. Edgar Paul Boyko of Boyko & Walton, Anchorage, for Respondents.

Before: Dimond, Rabinowitz, Boney, and Connor, Justices. [Nesbett, Chief Justice, not participating]

RABINOWITZ, Justice.

Respondents Pinnell and Tolifson commenced a superior ion for declaratory judgment in which they sought a on that certain regulations of the Alaska Board of Fish ere invalid. The first of these regulations provided

No master or registered guide may take, assist in taking, participate in or assist in guiding for more than four (4) brown or grizzly bear during each regulatory year, not more than two (2) of which may be taken in Unit 9.[1]

In regard to licenses and tags required, the second regulation in question provided:

(a) Before guiding for brown and or grizzly bear, each master or registered guide must procure non-transferable bear harvest control tags.

(b) Bear harvest control tags will be issued in sets of three (3). Not more than four (4) sets of harvest control tags will be issued to a master or registered guide.

(c) These tags must be attached by the master or registered guide, one to the skull, one to the skin and one to the carcass prior to moving the hide or skull ten feet from the carcass.

(d) Those tags attached to the skull and to the skin shall remain attached until the skin is sealed and the skull examined and sealed by the Department of Fish and Game representative.[2]

In conjunction with their declaratory judgment action, respondents moved for, and were granted, a preliminary injunction. Under the terms of this preliminary injunction, petitione were

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1 5 Alaska Adm. Code § 87.060.

2 5 Alaska Adm. Code § 87.065.

> enjoined from enforcing the regulations 5 AAC [illegible] and 5 AAC [illegible] against the taking of brown or Grizzly bear against the above-named [respondents] and all other members of their class who are acting pursuant to a valid and binding contract made and entered into prior to the effective dates of said regulations. . . .

The Department of Fish and Game [illegible] a petition review and asked this court to stay [illegible] court's liminary injunction pending determination [illegible] the merits of department's petition for review. On [illegible], we ued the stay sought by petitioners. We now grant review. dy has led us to the conclusion that the superior court's liminary injunction reflects a departure so significant om the accepted and usual course of judicial proceedings . . . to call for this court's power of supervision and review."[3]

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[3] Supreme Ct. R. 23(a) provides in part that:

> An aggrieved party may petition this court for review of any order or decision of the superior court, not otherwise appealable under Rule [illegible], in any action or proceeding, civil or criminal, as follows:
>
> (a) From interlocutory orders granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions.

Supreme Ct. R. 24 further provides that:

> A review shall not be a matter of right, but will be granted only . . . (3) where the superior court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by an inferior court or administrative tribunal, as to call for this court's power of supervision and review.

The superior court's non-compliance with two controlling rules of civil procedure has caused us to characterize its issuance of the preliminary injunction as a departure from accepted and usual judicial procedures. Of paramount importance here are Rules 52(a) and 65(d), Rules of Civil Procedure. Civil Rule 52(a) establishes that:

> In all actions tried upon the facts without a jury or with an advisory jury . . . the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. (emphasis added)

Also pertinent is that portion of Civil Rule 65(

which requires that:

> Every order granting an injunction and every restraining order shall set forth the reasons for its issuance . . . .

The superior court did not make and enter any f

of fact and conclusions of law concerning the preliminary

tion which it issued. Study of the superior court's ord

preliminary injunction reveals that it does not comport

requirement of Civil Rule 65(d). We have thus concluded

preliminary injunction was entered in contravention both

65(d)'s requirement that the reasons for the issuance o

preliminary injunction be disclosed and rule 52(a)'s re

that findings of fact and conclusions of law, which art

"the grounds" for the issuance of the preliminary injunction, be filed.[4]

Civil Rule 65(d)'s requirement that the order granting an injunction set forth reasons for its issuance applies to every type of preliminary injunction. There are no exceptions.[5] Under the parallel provisions of the federal rules of civil procedure, judicial precedent has established that Civil Rule 65(d) should be scrupulously observed, and that a material departure from the rule's requirement may warrant vacation or

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[4] The trial court's non-adherence to these rules of civil procedure resulted in the following line of argument which was made before this court by counsel for respondents:

> As to Paragraph 2, the petitioners are in no position to make assertions as to what the court did or did not give consideration to. Although by virtue of the order granting the preliminary injunction, it appears that the court granted such injunction on the ground that the challenged regulations are invalid as being violations of the Constitutional prohibitions against impairment of obligations of contracts; however, the other constitutional grounds of challenging the subject regulations as raised by the plaintiffs in their verified complaint were duly argued by counsel at the hearing of the motion for preliminary injunction, and it cannot now be said that the lower court rested its order upon the impairment of obligations of contracts argument alone.

[5] Mayflower Industries v. Thor Corp., 182 F.2d 800 (3d Cir. 1950).

reversal.[6] Like conclusions have been reached regarding [illegible] necessity of compliance with Rule 52(a), Federal Rules of Civil Procedure. In <u>Mayo v. Lakeland Highlands Canning Company, Inc.</u>,[7] the United States Supreme Court said:

> It is of the highest importance to a proper review of the action of a court in granting or refusing a pre-liminary injunction that there should be a fair compliance with Rule 52(a) of the Rules of Civil Procedure.

In light of the foregoing, we hold that the supe[illegible] court's order granting preliminary injunction was procedur[illegible] defective. Strict compliance with the provisions of Civil Rules 52(a) and 65(d) is required, particularly in the cir-cumstances where the trial court is enjoining the enforceme[illegible] of an administrative regulation or statute. Without such compliance the court is not in a position to meaningfully

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[6] [illegible] v. St. Louis-San Francisco Ry. Co., 274 [illegible] 588, 591, [illegible] 1219, 1222 (1927); Shannon v. Retail Cl[illegible] Internat[illegible] Protective Ass'n, 128 F.2d 553, 555 (7th Cir. [illegible] 7 J. Moore[illegible] Practice ¶ 65.11, at 1665-66 (2d ed. 196[illegible]

[7] [illegible] 310, 316, 84 L. Ed. 774, 779 (1940) (footnote [illegible]).

exercise its review jurisdiction.

The preliminary injunction ente[illegible] [illegible]cated.[8]

---

[8] Normally we would remand the matter in order to
rd the trial court the opportunity to comply with Civil Rules
) and 65(d). We have not ordered such a remand in the case
ar because of the fact that a hearing has been held upon
ondents' motion for a permanent injunction. Further, we have
informed that a decision on the merits of the permanent
iction is anticipated in the very near future.

THE PRECEDING DOCUMENT(S) MAY NOT FILM LEGIBLY BECAUSE OF POOR QUALITY OF THE ORIGINAL.

of ALASKA

MEMORANDUM

TO: Dave Hardy
Game Biologist III
Game Division
P.O. Box 234
Homer, Alaska 99603

DATE: March 5, 1979

FILE NO: A-66-253-79

TELEPHONE NO:

FROM: AVRUM M. GROSS
ATTORNEY GENERAL

SUBJECT: Position Paper Review - Alien Non-Guided Hunts

By:
Sarah Elizabeth Fussner
Assistant Attorney General

You have requested the Department of Law to review the issue paper attached to your December 12, 1978 memorandum to Wilson Condon, Deputy Attorney General, regarding alien hunters. Specifically, your questions are:

Question No. 1. "What actions must a person perform before he can be successfully prosecuted for guiding without a license?"

Summary Answer: To be guilty of guiding without a license a person must aid or attempt to aid another person, personally or through an assistant, to hunt, pursue, capture or in any way disturb any species of game when done for monetary or material compensation.

To be guilty of transporting without a license a person must convey another person for the primary purpose of hunting big game or removing parts of big game taken, when the price charged for the service reflects more than the normal operating cost of the transportation.

Analysis. A. It is unlawful to guide without a license pursuant to AS 08.54.210(3). Prosecution for failure to have a current guide license or transporter license when engaging in certain activities is based upon AS 08.54.210(3):

> It is unlawful for a person to guide or transport as defined in this chapter without being licensed under this chapter and without having the license in his actual possession; however, for purposes of transporting by air, in the case of a corporation, company, partnership or other business entity, the license may remain at the principal place of the business entity;

[Emphasis added.] The definitions of "guide" and "transport" are critical to any prosecution for guiding or transporting without being licensed. The key language in the definition of "guiding" is "assisting another to take game."

B. Guiding is aiding another to take game for compensation. Attached is a copy of a memorandum from Tom Meacham, Assistant Attorney General, to William Bellingar, Guide Investigator, dated September 26, 1977, which gives a general interpretation of the definition of "guiding". I attach the memorandum for your reference.

The statutory definition of "guiding" is found in AS 08.54.204(2), which states:

> "Guide", "guides" or "guiding" means assisting another person to take game with the intent of receiving monetary or material remuneration for the services, by accompanying and directing that person personally or through a licensed assistant guide for the duration of a hunt, and not solely for the purpose of providing transportation services;

The language used in that definition is given further legislative definition as well as regulatory interpretation as discussed below.

The primary concept of the definition of "guide" is assisting another person to take for compensation. The term "take" is defined by the legislature in AS 16.05.940(18) which provides:

> "Take" means taking, pursuing hunting, fishing, trapping, or in any manner disturbing, capturing, or killing or attempting to take, pursue, hunt, fish, trap, or in any manner capture or kill fish or game;

The term "take" is thus given a very broad meaning by the legislature, and apparently encompasses any intentional invasion of the habitat and peace of an animal, not limited to big game animals ("in any manner disturb...fish or game").

Although the term "take" is not defined in title 8, ch 54, (the title that covers licensing guides), it is

arguable that the definition of "take" provided in the Fish and Game Code, title 16, ch 5, applies to, or is to be given great weight in construing, the concept of "take" used in the guide licensing statutes and regulations. This is particularly true since there is no conflicting definition of "take" in the guiding laws or regulations (see, in contrast, the distinctly different definition of "resident" that appears in the Fish and Game Code and in the guide licensing title).

The term "take" can be given different emphasis depending on the context of the law. For example, the term "take" when used in a bag limit definition (cf. 5 AAC 81.310- a hunter must "take" in accordance with bag limits) is likely to be construed by a court to mean actually killing, not merely hunting or pursuing. The need for this construction is obvious when one considers that otherwise a person would be guilty of "taking" an entire flock of birds merely by aiming his gun in their direction. United States v. Chew, III, 540 F.2d 759 (4th Cir. 1976). In Chew, a hunter was convicted of exceeding the bag limit on doves; the appellate court upheld the conviction but in so doing held that the definition of "take" (which was similar to Alaska's) was overly broad when read literally but could be reasonably construed when applied to someone who actually killed too many birds.

Putting together the definition of "take" with that of "guiding" the functions of guiding would appear to extend not only to the act of shooting or killing a game animal, but also to any activities associated with tracking or disturbing game for hire or attempting to do so while in the field.

C. Guiding is not limited to big game. "Guiding" refers to game, not just big game. "Game" is defined in AS 16.05.940(9) to mean:

> any species of bird or mannal, including a feral domestic animal, found or introduced in the state, except domestic birds and mammals.

The Board of Game has classified game as big game, fur animals, small game and unclassified game. 5 AAC 90.020. Thus, guiding activities include assisting in taking all game species for remuneration, although AS 16.05.407 only requires a nonresident hunter to be accompanied by a guide for hunting, pursuing or taking brown bear, grizzly bear, polar bear or sheep.

In summary, the statutory elements of "guiding" for purposes of criminal prosecution are: aiding or attempting to aid another person, either personally or through an assistant, to hunt, capture, pursue, or in any way disturb any species of game when done for compensation, either for money or goods.

D. Guiding for purposes of guide licensing encompasses additional activities other than assisting in the take in the field. The concept of "guiding", for purposes of licensing and regulating the profession goes beyond the act of aiding another to "take" game for hire. Reading the guide statutes as a whole, the meaning of guiding is expanded to include additional responsibilities. 12 AAC 38.070 "Responsibility of Guide to his Client" provides that a guide must insure that his client has proper licenses and tags, that he take every reasonable measure to insure the safety and comfort of his clients, and that he have adequate first aid, food, shelter and transportation for his clients. Also 12 AAC 38.180 "Guiding Ethics" lists activities that are not condoned by the guide profession, including misrepresenting accommodations and rates, not cooperating with peace officers, making guarantees of success, failing to maintain an adequate camp and facilities, etc. Arguably, all of these activities, though they may not necessarily occur while in the field and hunting, must relate to a "contract hunt", i.e. a hunt for hire.

Putting all the above statutes and regulations together, it appears that a guide, in his professional capacity, performs many functions that go beyond the act of "guiding", i.e. hunting or attempting to direct a client to game. A guide is acting in his professional capacity when he writes letters describing his services, rates and accommodations. Similarly he acts in his professional capacity when he prepares the trophies, antlers, horns, etc. taken by his clients. Also a guide acts in his professional capacity when he insures that all meat of trophies are taken and salvaged in accordance with state law. A guide is not, however, legally "guiding" after the hunt is over (i.e. after game is killed), but he is still performing professional services encompassed by the broad licensing powers of the Guide Board -- he could be subject to civil disciplinary actions, not criminal prosecution.

In summary, when a guide performs any of the above-described activities associated with the professional guide, he is subject to disciplinary action against his professional license, but is not subject to criminal prosecution unless he violates a state fish and game or regulation,

fails to have a current hunting and fishing license, fails to report a violation by his client, or hires more than three assistants. AS 08.54.210.

E. It is unlawful to transport without trans-porter license. Transporter licenses are required pursuant to AS 08.54.142 and .144. "Transport" is defined in AS 08.-54.210(5):

> "[T]ransporting" or the "activity of transporting" means conveying a person by any lawful means to an area for remuneration or material benefit in excess of normal operating costs, when the primary purpose of the person being conveyed is the taking of big game and the associated removing of big game meat and parts of big game after big game has been taken; big game as used in this paragraph means game which, if taken by a non-resident, would require a big game tag.

[Emphasis added.] The key concepts in this definition are (1) the person transporting is charging more than the tariff rate for air taxi flying or more than normal operating costs; (2) the primary purpose or intent of the person being transported is to hunt big game; (3) unlike the definition of "guiding", transporting is limited to big game.

Big game is defined in 5 AAC 90.020(3) to include:

> [B]lack bear, brown and grizzly bear, polar bear, bison, caribou, Sitka blacktail deer, elk, mountain goat, moose, musk oxen, mountain or Dall sheep, wolf and wolverine.

The definition of "transporting" further limits big game to those species for which a nonresident must have a tag. This refers to AS 16.05.340(9) "License and tag fees" which provides:

> A nonresident may not take a big game animal without previously purchasing a numbered, nontransferable, appropriate tag, issued to him as provided in (16) of this subsection.

The tags listed in AS 16.05.340(16) include black bear, brown or grizzly bear, polar bear, bison, caribou, deer,

elk, goat, moose, sheep, walrus, wolf and wolverine. The one species that does not appear both in 5 AAC 90.020(3) and AS 16.05.340(a) is musk oxen, which is hunted by permit only and tags are provided if a season is open. AS 16.05.350.

In summary, those activities for which a person must hold a current transporter license include:

> [T]o convey a person for the primary purpose of hunting big game or to remove the parts of big game taken, when the price charged for the service reflects more than the normal operating cost of the transportation.

F. Example of guiding without a license. A person who performs the above actions relating to transporting or guiding as it is defined for criminal cases without a license could be prosecuted under AS 08.54.210. By this analysis, an alien, for example, who offers a package hunt for Swedes or Germans for moose in Alaska and either personally or through an assistant, aids the hunters to take the game, and who charges for the service more than the normal operating costs of transportation to the field, is guilty of guiding and transporting without a license.

Question No. 2. If the state chose to pass legislation setting different tag fees and guide requirements for aliens as opposed to non-resident U.S. citizens, what court tests would it have to pass? How should the legislation be drafted so as to maximize the possibility of surviving judicial review?

Summary Answer: A state law that discriminated against aliens by charging them a higher hunting license fee would be subject to strict judicial scrutiny and would have to be the least drastic means of furthering a compelling state interest.

Analysis of this rather complex question requires several steps: (1) Who is an "alien"? (2) What is the basis for classifying aliens differently from U.S. citizens? (3) What state interest is protected?

A. Aliens defined. An alien is defined generally as a citizen or subject of a foreign state or a foreign government (see Black's Law Dictionary, at 95 and DeCano v. State, 110 P.2d 627 (Wash. 1941)). The Board of Fisheries defines "alien" in 5 AAC 39.975 as:

> [A] person who is not a citizen of the United States, and who does not have a petition for naturalization pending before the district court.

An alien may be a resident alien or a non-resident alien, and may live legally in the United States even though he is not naturalized. Aliens living within the United States are granted certain protections (to make contracts, sue and be sued, be protected by law enforcement, etc.) and as a result they owe a temporary and local allegiance to the country in which they reside.

B. <u>Basis of Challenge to Laws that Discriminate Against Aliens</u>. Whether a law that discriminates against an alien will withstand constitutional scrutiny may depend on whether the alien is: (1) an alien not lawfully in the state; (2) a non-resident alien; or (3) a resident alien.

Probably a law prohibiting an alien not lawfully in the U.S. from taking fish and game would be upheld under a state's police powers. (<u>See</u>, <u>e.g.</u>, AS 16.05.905, prohibiting aliens not lawfully admitted to the U.S. from engaging in commercial fishing or taking marine mammals in territorial waters.)

Laws or regulations that discriminate against a non-resident alien, a non-resident citizen, or a resident alien, are subject to attack under:

(1) Article IV § 2 of the U.S. Constitution - privileges and immunities;

(2) 14th Amendment of the U.S. Constitution - equal protection;

(3) Article I § 8 of the U.S. Constitution - commerce clause; or

(4) Article VI, U.S. Constitution - supremacy clause.

Analysis of the constitutionality of the law or regulation depends on which constitutional challenge is raised.

(1) <u>Privileges and Immunities</u>. A law or regulation aimed directly at aliens could not be overturned under the privileges and immunities clause, because that clause

protects only citizens. Similarly, a law that discriminated against non-resident American citizens by restricting or prohibiting them from sport hunting might arguably withstand a privileges and immunities challenge on the grounds that sport hunting, unlike commercial fishing, is not a right of citizenship to be protected, but is merely a privilege.

The test applied by the U.S. Supreme Court to determine whether a law that discriminates against non-residents violates the privileges and immunities clause was set out in Toomer v. Witsell, 334 U.S. 385 (1948). The court there struck down a South Carolina shrimp fishing law that charged non-residents one hundred times the resident license fee for shrimping in its three-mile coastal waters. The court distinguished its earlier decision, McCready v. Virginia, 94 U.S. 391 (1876), (which had upheld a law allowing Virginia citizens only to plant oysters in state tidal waters) on the grounds that McCready involved non-migratory fish in inland waters and that it was based on an outdated "ownership" theory of fish game. The court then held that the ability to engage in commercial fishing is a right protected by the privileges and immunities clause, and that no law may discriminate against non-citizens (of the state) unless "there is something to indicate that non-citizens constitute a peculiar source of the evil at which the statute is aimed", Toomer, supra at 398.

In a subsequent case, the U.S. Supreme Court addressed a similar privileges and immunities challenge to a Montana law that charged non-residents a higher hunting license fee. The court in Baldwin v. State Fish and Game Commissioner, ___U.S.___, 98 S.Ct. 1852 (1978) upheld the scheme, on the ground that the privileges and immunities clause does not encompass recreational sport hunting:

> Some distinctions between residents and non-residents merely reflect the fact that this is a Nation composed of individual States, and are permitted; other distinctions are prohibited because they hinder the formation, the purpose, or the development of a single union of those states. Only with respect to those "privileges" and "immunities" bearing upon the vitality of the Nation as a single entity must the State treat all citizens, resident and non-resident, equally.... Equality in access to Montana elk is not basic to the maintenance or well-being of the Union. ___U.S. ___, 98 S.Ct. at 1861-62.

Thus the initial test for a privileges and immunities challenge is whether the law affects a right to engage in a livelihood or whether the activity is merely recreational and a sport. If the latter, a privileges and immunities challenge will not prevail.

(2) Equal Protection Under 14th Amendment. State laws that discriminate against aliens or non-residents must withstand a different test when challenged under the "equal protection" clause of the 14th Amendment.

First, the court must determine whether the class discriminated against is "inherently suspect" or if the law affects a "fundamental right." If so, the court will "strictly scrutinize" the intent and purpose of the law to establish whether there is a "compelling state interest" that necessitates the law and that the law is the least drastic means to further that interest. Dunn v. Blumstein, 405 U.S. 330 (1972). If the classification is not "suspect," and the right not "fundamental" the court will restrict its review of the law to a determination whether the law and the classification it establishes is "rationally related to a permissible state interest."

The court in Baldwin, supra, at 1862 concluded that recreational hunting was not a "fundamental right" (for purposes of privileges and immunities analysis which protects a longer list of rights than does the equal protection clause. (Hicklin v. Orbeck, 565 P.2d 159, 168 n.16 (Alaska 1977), rev'd on other grounds __ U.S. __, 57 L.Ed.2d 397 (1978)). However, the class of aliens (regardless of residency) has been held to be a suspect class for state laws, though not federal laws. Mathews v. Diaz, 426 U.S. 67 (1976), Sugarman v. Dougall, 413 U.S. 634 (1973) (civil service); Takahashi v. Fish and Game Commission, 334 U.S. 410 (1948) (commercial fishing); Frovlov v. Delo, 383 N.Y.S. 2d 470 (N.Y. 1976) (hunting license). Thus, in order to uphold a law that discriminated between resident citizens and resident aliens, the state would have to show that distinguishing the class of aliens was necessary to further a compelling state interest. Frovlov, supra, at 472; Takahashi, supra at 416-17. A classification based solely on alienage must thus correspond to the class from which an "evil" is to be feared. Patsone v. Commonwealth of Pennsylvania, 232 U.S. 138 (1914) (upholding a state law prohibiting aliens from killing game for sport and to that end making possession of shotguns by aliens unlawful).

It may thus be more difficult to demonstrate that a law directed at aliens only is directed at the primary source of the problem. The court in Takahashi, supra at 419 held:

> The protection of this section [8 U.S.C. § 41 relating to rights of all persons under U.S. Jurisdiction] has been held to extend to aliens as well as to citizens. Consequently the section and the Fourteenth Amendment on which it rests in part protect "all persons" against state legislation bearing unequally upon them either because of alienage or color.... The Fourteenth Amendment and the laws adopted under its authority thus embody a general policy that all persons lawfully in this country shall abide "in any state" on an equality of legal privileges with all citizens under non-discriminatory laws. [Footnotes omitted.]

The court concluded that the power of a state to apply its laws exclusively to alien inhabitants is "confined within narrow limits." Takahashi, supra at 420.

Applying this language to an Alaska law that would bar aliens from hunting, or otherwise restrict their ability to engage in sport hunting, its validity would depend in part on whether the privilege of sport hunting is encompassed by the privileges citizens can also enjoy. Arguably, sport hunting is not such a privilege enjoyed by all citizens, but is a special privilege that may be restricted to state citizens in order to protect the resource. In Patsone v. Pennsylvania, 232 U.S. 138 (1914) (cited in Takahashi, supra at 410) the Supreme Court sustained, against Fourteenth Amendment due process and equal protection challenges, a state law barring aliens from hunting wild game in the interest of conserving game for citizens of the state. The distinction between the Patsone and Takahashi cases apparently was that in Patsone the court found no conflicting federal law or treaty, that the privilege of taking wild game was not a right of citizenship, and a state could keep game for its own citizens. (Citing Geer v. Connecticut, 161 U.S. 519 (1896)).

Takahashi, suggests that to earn a living by fishing is a right of citizenship, and that:

> To whatever extent the fish in the three-mile belt off California may be capable of ownership by California, we think that "ownership" is inadequate to justify California in excluding any or all aliens who are lawful residents of the state from making a living by fishing in the ocean off its shores while permitting all others to do so.

Based on the Takahashi case, it appears that a law directed at non-residents, rather than aliens (whether resident or non-resident), would be easier to justify.

Earlier analysis used to uphold state laws directed at non-residents (citizen or alien) relied on the theory of "state ownership" of fish and game resources. In re Eberle, 98 F. 295 (7th Cir. 1899) (upholding state law charging non-residents a much higher hunting license fee); State v. Tower, 24 A. 898 (Me. 1892) (upholding a state law forbidding non-residents from hunting in the state).

The "state ownership" theory is that the wild game (and fish) in a state is the property of the state under its sovereign ownership." Patsone v. Pennsylvania, 232 U.S. 138 (1914) (no resident aliens may hunt deer); McCready v. Virginia, 94 U.S. 391 (1877) (state title to oysters in tide waters). This analysis has, in recent years, been severely eroded, although not overruled. Fish that migrate have been deemed not the state's property, Toomer v. Witsell, 334 U.S. 385 (1948) and state laws prohibiting aliens from commercial fishing in territorial waters, when the aliens held a federal gear license, have been stricken. Douglas v. Seacoast Products, Inc., 431 U.S. 265 (1977). Although the ownership theory has been deemed "but a fiction," Toomer v. Witsell, 334 U.S. 385, 402 (1948), and a "slender reed," Missouri v. Holland, 252 U.S. 416, (1920), nevertheless it has not been overruled.

Very Important *

Courts today have, however, tended to replace "ownership" concepts with the principle that under a state's police powers, the state is trustee of the fish and game within its borders and may take reasonable measures to protect and manage it. Baldwin, supra at 1864 (Burger concur.); State v. Kemp, 44 N.W.2d 214 (S.D. 1950), dism'd 340 U.S. 923 (1951) (U.S. S.Ct. dism'd for want of "substantial federal question" a South Dakota law excluding non-resident from hunting migratory waterfowl.)

Alaska's supreme court has taken a similar approach to protection of its natural resources. The court in Hicklin v. Orbeck, 565 P.2d 159 (Alaska 1977) struck down the durational (one year) residency requirement for pipeline jobs, on the grounds that, under equal protection analysis, a "fundamental right" (travel or migration) was infringed upon and the law must be strictly scrutinized; however the court also upheld a non-durational residency provision, claiming the right to work is not a fundamental right, and therefore the law must merely "bear a fair and substantial relation to a permissible state interest." Hicklin, supra at 167. The court relied on McCready v. Virginia, 94 U.S. 391 (1877) and the Alaska Constitution Art. VIII § 2, that holds Alaska's natural resources for the benefit of her people, to conclude that the natural resources of the state "belong" to Alaskans "in a way that, in our federal system, Alaska's society and economy in general do not." Hicklin, supra, at 169. The United States Supreme Court reversed the state decision in Hicklin v. Orbeck, ___ U.S. ___, 57 L.Ed.2d 397 (1978), however, stating that Alaska's hire law violates the privileges and immunities clause because the state failed to show that non-residents are "a peculiar source of the evil" and because the Alaska hire preference does not bear a substantial relationship to the problem. The Supreme Court further held that the theory of state ownership of its resources does not remove a law concerning that resource from the prohibitions of the privileges and immunities clause. *

The analysis suggested by the above equal protection cases, assuming "strict scrutiny" is not used, is whether the state can present sufficient evidence that the discrimininatory law is justified by problems that class creates. For example, the court in Baldwin, supra found that residents contributed to the feeding of elk, that non-resident hunting pressure threatened the resource, and that the law was supportable on these and similar grounds. In contrast, the court in Gullaney v. Anderson, 342 U.S. 415 (1952) struck down a territorial fishing law that required aliens and non-residents to pay higher fishing license fees; the court found no evidence that the higher fee represented actual compensation to the state for a higher enforcement burden, but did not rule out the possibility that this could be a legitimate basis for discrimination. Thus the "rational basis" for the law was not established, and it failed constitutional scrutiny.

(3) Supremacy Clause: Art. VI § 2. Constitutional challenges to discriminatory state laws based on the supremacy clause fall into two categories: first, laws directed at

aliens that conflict with rights granted to aliens under federal laws or treaties; second, state laws that impinge upon a federally granted license or privilege. Both types of cases receive the analysis discussed by the court in Takahashi, supra: no law that conflicts with a treaty, or with a particular federal right or privilege, will survive U.S. Supreme Court scrutiny. Federal legislation pre-empts state law in fields that have been traditionally occupied by the states only where there is a manifest intent of Congress. This has been held to include federal vessel licenses to engage in fisheries. Douglas v. Seacoast Products, Inc, 524 ed.2d 204. See also, Kleppe v. New Mexico, 426 U.S. 529 (1976) which struck down a state wild burro law that "conflicted" with a federal law protecting the animals on federal lands.

Assuming there is no overriding federal law involved, a state could pass a discriminatory law if it is based on, and rationally related to, a valid state interest. Since the Baldwin court has concluded that sport hunting is not a fundamental right of citizenship, a sport hunting law aimed at restricting non-residents or aliens would probably survive a challenge under the supremacy clause.

(4) Commerce Clause; Art. I § 8. A state law that restricted access by non-residents or aliens to a resource and thereby detrimentally affected interstate commerce, could be struck down under the commerce clause. For example, the court in Douglas v. Seacoast Products, Inc., ___U.S.___, 52 L.Ed.2d 304 (1977) held that Congress had the power to regulate the taking of fish in state waters where there was some effect on interstate commerce. The court struck down a Virginia law that limited the right of non-residents and aliens to catch fish in territorial waters.

It is unlikely that this analysis would find a similar sport hunting law invalid, since the Baldwin court has held sport hunting to be a purely recreational activity, not a source of livelihood.

Summary. Whether Alaska could pass a constitutionally supportable law or regulation that restricted the ability of non-residents or aliens from taking game would depend on whether the state could gather enough evidence showing the need to protect this resource and showing that the non-residents or aliens were a special threat.

The evidence to look at includes: the higher tax burden borne by state residents, which taxes support game

management; the likelihood of enforcement problems generated by aliens or non-residents; the likelihood of non-residents or aliens not abiding by, or being familiar with, state game laws; dangers to non-residents and aliens unfamiliar with climate, terrain, wildlife habits [see attached article on point]; the need to limit the overall take of the species; protection of game and conservation purposes.

If the state simply charges a higher license fee to non-residents, the evidence to support this will be easy to supply. If only aliens are charged a higher fee, the burden will be much higher on the state. [The burden of proof is on the one who challenges the law, of course, but once the discrimination is established, the state must defend the classification.]

A second possibility for legislation would be to require all aliens to be accompanied by guides. If directed only at aliens and not non-resident citizens, it would be necessary to demonstrate that aliens present a different danger to the game (because of language barriers making it difficult to comprehend rules, training, allegiance to laws, culture, or other reasons).

The easier-to-justify approach would be to require all non-residents (aliens or citizens) to be accompanied by guides. The justification then would rest on: greater likelihood of violations due to unfamiliarity with laws; costs of enforcement and need to have the guide function as a person responsible for the legality of the hunt; danger to the non-resident who is not familiar with weather, terrain, and animals, and the likely cost to the state of aiding non-residents in distress.

One problem with the required guide approach is that as the law (AS 16.05.407) now stands guides are only required for brown bear, grizzly bear, polar bear and sheep. This makes it difficult to justify a guide requirement based on safety of the hunter, since it does not include goat, moose and other species that present as great or greater potential hazards to the hunter, in terms of terrain, weather, etc. Thus AS 16.05.407 would have to be expanded to include all species.

In State v. Jack, supra, the supreme court in Montana struck down a state law requiring guides for non-residents on national forest, wilderness or game refuge lands or state game refuges. The basis for the decision was that because the law did not apply to deer and antelope, it could not be based on legitimate safety needs, and therefore had no reasonable connection with the classification.

In conclusion, although the Supreme Court has severely eroded a state's sovereign ownership of game, it has not ruled out the possibility of establishing a constitutionally sound law reserving sport hunting to resident citizens. In order to draft a supportable resident law or regulation, the state or state board must demonstrate clearly that the purpose of the discriminatory law is strictly related to valid biological interests, essential state management goals and similar unimpeachable motives and that the law does not conflict with established federal laws or treaties.

SEF:ln(bwb)

cc: Robert Hinman
Marcus Jensen
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Col. Wolstad
Bill Bellingar
Don Harris
Ron Somerville
John Gissberg

> [A] person who is not a citizen of the United States, and who does not have a petition for naturalization pending before the district court.

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BILL ANALYSIS

Department	Sponsor (Principal)	Bill Number
Public Safety	Hurlbert, Zharoff & Grussendorf	HB 409

Department Position

Support with amendment.

Division Director	Date	Commissioner	Date
Colonel Robert J. Stickles	2/22/81	Commissioner William R. Nix	2-25-82

Comments:

☐ Position Noted	By	Date

SUMMARY

1. a) Related Bills (Similar or Conflicting	1. b) Other Agencies Affected by Bill
SB 302 HB 199	Unknown

2. a) Organizational Support for Bill	2. b) Organizational Opposition to Bill
Unknown	Unknown

3. Program Effects of Bill

Would require non-residents to have a guide or be guided by a relative for specific species. Would require non-resident aliens to have a guide or be guided by a resident for specific species.

4. Fiscal Impact: ☐ None ☒ Fiscal Note Attached

5. Amendments Proposed:

Amend HB 409 by adding black bear, (including the cinnamon and blue color phases) deer and mountain goat to the following: AS 16.05.407(d) line 24 or 25; Amend HB 409 by adding Class A guide to the following: AS 16.05.407(a) line 18 or 19; AS 16.05.407(d), line 26 or 27.

6. Comments:

The above amendments are offerred to clean up the bill in perceived enforcement problem areas. Under 16.05.407(a) and (d), non-residents or non-resident alien hunters would be required to have a guide's services to hunt or pursue the big game species mentioned under these specific sections. Without the inclusion of Class A guides there would be a legal question as to whether a non-resident or non-resident alien could legally hunt with a Class A guide under this bill.

Big game species requiring a guide for non-resident aliens should also include black bear (including the cinnamon and blue color phases), deer and mountain goat under 16.05.407(d) of this bill.

(Continued)

HB 409 Bill Analysis
2/22/82

Large numbers of German, Swedish and Belgium non-resident alien hunters are being placed in camps in areas such as Prince William Sound, the Brooks Range and the Alaska Peninsula by booking agents for the specific purpose of hunting black bear and other species that presently do not require a guide. This places the unsupervised alien hunter in habitat of other big game species covered under HB 409. Inclusion of black bear, deer and mountain goats under this bill would be advantageous to the Division of Fish and Wildlife Protection from an enforcement standpoint.

FISCAL NOTE

I. REQUEST
Bill/Resolution No. HB 409
Title An Act Relating to Guiding and Providing and Effective Date
Requested by Hurlbert, Zharoff and Grussendorf Date 2/19/82

II. FISCAL DETAIL
Agency Affected Department of Public Safety
Program Category Affected NNRMEC
BRU, Program, Or Subprogram(s) Affected Fish & Wildlife Protection
(Note: If more than one budget component is affected, separate line-item amounts and funding for each component in the analysis section.)

EXPENDITURES (Thousands of Dollars)

	FY 82	FY 83	FY 84	FY 85	FY 86	FY 87
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 COMMODITIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS,CLAIMS,ETC.						
TOTAL	0	0	0	0	0	0

FUNDING (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER (Specify Source)						
	0	0	0	0	0	0

POSITIONS

FULL TIME						
PART TIME						
TEMPORARY						
	0	0	0	0	0	0

III. ANALYSIS (See Fiscal Note Preparation Instruction, Section III)

IV. DATE 2/19/82 PREPARED BY Colonel Robert J. Stickles
AGENCY Department of Public Safety
PHONE 269-5532

Original: Legislative Finance
cc: Budget and Management
Prime Sponsor (First Legislator Named)

33-001 (Rev. 12/81)

Baldwin → more flexibility

seasons for non-res.

W. Arctic Caribou herd ⇒
some permits limits – any n-r

When based on traditional lands –
probably count.
– probably could do

Would have limit level of n-r alien
who hunt moose & caribou.

Base the no. of permits on same no. of aliens

Trust – Resource – still has to be a [illegible] [illegible]

Its not look at mathematic accuracy.