SB

1971

Bill No. Senate Bill 191 MAR 12 1985 Date March 11, 1985

Title "An Act relating to employment preference for state residents; and providing for an effective date."

Contact: Robert W. Landau
465-2700
Robert Bacolas
465-4870

Since 1982, one of the Department's highest priorities has been the enforcement of preferential hiring of Alaska residents on state-funded public works projects, pursuant to AS 36.10.010. In late 1983, however, the state's resident hire law was challenged on constitutional grounds and resulted in a Superior Court decision that the law was unconstitutional. That decision is now on appeal to the Alaska Supreme Court.

One of the Superior Court's key findings was that there was insufficient evidence to show that the in-migration of non-residents was displacing qualified and available Alaska residents from public works employment. By explicitly setting forth the legislative findings underlying the resident hire law, Senate Bill 191 would provide a more solid foundation from which to defend the principle of Alaska hire.

The Department of Labor supports this proposed legislation. It will not have a fiscal impact on the Department.

APPROVED:

Jim Robison, Commissioner
Department of Labor

POSITION PAPER/Department of Labor

STATE OF ALASKA 1985 LEGISLATIVE SESSION
FISCAL NOTE

Revision Date:

REQUEST
Bill/Resolution No.: SB 191
Title: "An Act relating to employment preference for state residents"
Sponsor: Fischer, Rodey et al.
Requestor: Senate Labor & Commerce
Date of Request: 3-4-85

FISCAL DETAIL
Agency Affected: Labor
Program Category Affected: Public Protection
BRU, Program or Subprogram(s) Affected:
Labor Standards & Safety
Wage and Hour Administration

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 85	FY 86	FY 87	FY 88	FY 89	FY 90
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 SUPPLIES						
500 EQUIPMENT						
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700 GRANTS, CLAIMS						
800 MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE						

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GENERAL FUND						
FEDERAL FUNDS						
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TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS:

	FY 85	FY 86	FY 87	FY 88	FY 89	FY 90
FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: Attach a separate page if necessary

Prepared By: RB Robert J. Bacolas [signature]
Phone: 465-4870
Division: Labor Standards & Safety
Date: 3-4-85

Approved by Commissioner: RB Jim Robison [signature]
Date: 3-4-85
Agency: Labor

Distribution (by Agency preparing fiscal note):
- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)

7/1/84

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT

JAMES N. FRANCIS,

Plaintiff,

vs.

JAMES ROBISON, COMMISSIONER OF LABOR; ROBERT BACOLAS, DIRECTOR, DIVISION OF LABOR STANDARDS AND SAFETY; DONALD WILSON, DEPUTY DIRECTOR OF THE DIVISION OF LABOR STANDARDS AND SAFETY; JAMES R. CARR, SUPERVISOR OF THE WAGE & HOUR ADMINISTRATION; THE DEPARTMENT OF LABOR OF THE STATE OF ALASKA; AND THE STATE OF ALASKA,

Defendants,

INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRONWORKERS, LOCAL 751,

Intervenor.

No. 3AN 83-9969 Ci.

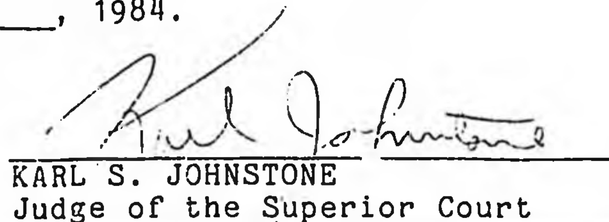
MAY 30 1984

PARTIAL JUDGMENT

Findings of fact and conclusions of law were entered herein on May 23, 1984 containing an express direction that final judgment be entered for the Plaintiff as to his claim that AS 36.10.010, on its face and in its application, violates the Privileges and Immunities Clause of Article IV of the United States Constitution, and whereas there is no just reason for delay in entering final judgment on this claim;

IT IS ORDERED, DECREED AND ADJUDGED that Plaintiff shall have judgment against the Defendants and Intervenor on Plaintiff's First Cause of Action, and that the Plaintiff shall recover from the Defendants and Intervenor his costs in the amount of $__________ and attorney's fees in the amount of $__________.

DATED: 6/1/84, 1984.



KARL S. JOHNSTONE
Judge of the Superior Court

ATTORNEY AT LAW
340 G Street • Suite 201
Anchorage, Alaska 99501
(907) 272-8591

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT

JAMES N. FRANCIS,
Plaintiff,
v.
JAMES ROBISON, COMMISSIONER OF LABOR, et al.,
Defendants.

3AN 83-9969 Civil

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based on the evidence, the Court makes the following Findings and Conclusions:

1. The plaintiff, James N. Francis, came to the State of Alaska in September of 1983 to look for work.

2. The plaintiff claims residency in the State of Montana, and has numerous indicia of such residency, such as real and personal property in Montana, voter registration in Montana, a driver's license from Montana, a bank account in Montana, and his license plates for his vehicle are from Montana.

3. The plaintiff has never been issued an Alaska hunting, fishing or trapping license.

4. The plaintiff is in the State of Alaska for the purpose of finding work so that he can eventually return to his home in the State of Montana.

5. The plaintiff belongs to the International Association of Bridge, Structural and Ornamental Ironworkers, Local 598, in Kalispell, Montana.

6. The plaintiff is an experienced and skilled ironworker by trade.

7. Upon the plaintiff's arrival in Alaska in September of 1983, he placed his name upon the out-of-work list of Ironworkers Local 751 which has hiring halls in Anchorage and Fairbanks, Alaska.

8. Placement upon the union's out-of-work list

would find work in the construction industry in Alaska.

9. On September 19, 1983, the plaintiff was dispatched by Ironworkers Local 751 to employment with Regan Steel & Supply Company working on construction on the North Pole High School project at North Pole, Alaska.

10. The North Pole High School project is a public works construction project.

11. The plaintiff was 127th on the union's B list at the time he received this dispatch. Such list is primarily maintained for nonresident union members.

12. The procedure in Local 751 is to call all names on the A list first and then the B list in their order in both the hiring halls in Anchorage and Fairbanks simultaneously.

13. No persons on Local 751's out-of-work list on the A list were willing or able to accept the dispatch to the North Pole High School on September 19, 1983.

14. No persons above the plaintiff on Local 751's out-of-work B list were willing or able to accept the dispatch to the North Pole High School on September 19, 1983.

15. The North Pole Senior High School project became the subject of a Department of Labor enforcement effort under A.S. 36.10.010 on October 10, 1983.

16. A number of nonresidents were identified as working for plaintiff's employer, Regan Steel & Supply Company, and it was notified by the Department of Labor on October 12, 1983, that it was not in compliance with A.S. 36.10.010 because of the nonresidents employed on the job.

17. The Department of Labor, in the October 12, 1983, letter to plaintiff's employer, gave it seven days from the receipt of that letter to come in compliance with A.S. 36.10.010 or funds supporting the project would be withheld.

18. On October 17, 1983, the plaintiff's employer informed the State Department of Labor that it would come into compliance with A.S. 36.10.010 by laying off nonresidents.

from Regan Steel & Supply on October 19, 1983.

20. None of the plaintiff's supervisors on the North Pole High School job complained about the job which the plaintiff was performing prior to his termination.

21. Regan Steel & Supply's work on the North Pole High School construction project continued after the plaintiff's termination.

22. Plaintiff was terminated because of his nonresidency.

23. Termination of plaintiff's employment with Regan Steel & Supply Company was the result of the enforcement of A.S. 36.10.010.

24. Since the plaintiff's termination by Regan Steel & Supply Company at the North Pole High School construction project, the plaintiff has sought work in the State of Alaska in the construction industry by placing his name upon Ironworkers Local 751's out-of-work list and going to the union hall every day to search for work.

25. It is likely that but for enforcement of A.S. 36.10.010, plaintiff, because of his work experience, would be employed within the State of Alaska.

26. Between April, 1980, and July, 1982, the population of Alaska has grown by nearly fifteen percent (15%).

27. The population of Alaska has increased in the recent past more rapidly than at any other time in its history, and the State is growing more rapidly than other states in the union.

28. Property values in Alaska have been increasing over the last five years.

29. Alaska is not a depressed area as that term is used in the economics profession.

30. All sectors of the Alaska economy are expanding and Alaska has experienced very rapid economic growth since 1980.

31. Employment in Alaska in 1983 was at record levels, and the rate of increase was the best since the days of the Alaska Pipeline in 1974-1975.

32. In 1983, the construction industry was the strongest sector in the state's economy, and it has had the greatest impact on the Alaska economy since the Alaska Pipeline years.

33. The construction industry in Alaska was exceptionally strong in both the public and private sectors during 1983.

34. Construction activity in the State of Alaska in 1984 is unlikely to reach the levels of 1983, but no precipitous decline is expected.

35. Numerous factors determine economic conditions, including unemployment, in the construction industry in the State of Alaska.

36. The major factor affecting the level of employment in Alaska in the construction industry is climatic changes as a result of extreme temperature differentials in the winter and summer months. Construction declines to substantially lower levels during the winter months, and increases, peaking out in August and September, during the latter summer months. During the peak periods of construction activity, the state experiences its lowest rate of unemployment.

37. The expenditure of state funds are a major factor affecting the level of employment in Alaska generally, and the construction industry in particular. The state expenditure for public works projects accounts for approximately sixty to seventy percent (60% to 70%) or more of the total annual construction dollar outlay within the state.

38. Private investment has a lesser effect on the level of construction activity from year to year in the State of Alaska, and such effect, from time to time, is affected by interest rates.

39. Unemployment is substantially greater in the rural areas than in the urban areas. The unemployment rate in Anchorage is less than the national average, while in the rural areas, it is greater than the national average and greater than the average within the State of Alaska.

the urban area than within the rural areas. Unemployment is less within the urban areas than within the rural areas.

41. Rural Alaskans lack the training that urban Alaskans have access to in construction work.

42. In-migration in the State of Alaska is a factor affecting unemployment in the construction industry in Alaska.

43. Alaska has the greatest proportion of out-of-state unemployment benefit payments (interstate claims). Alaska is also close to the top of all states in the dollar value of interstate claims.

44. There is no evidence in the record to establish what percent of the interstate claims are being paid to non-residents as opposed to residents who vacation or reside outside the state during the winter months. It is clear, however, from the record that interstate claims are made predominantly during the winter months, during which time construction activity has diminished because of the climatic change.

45. Reasonable inferences from the evidence support a finding that most of the job seekers coming to Alaska intend to become residents upon their entry into the state, thus contributing to the rapid population growth within the state.

46. There is not sufficient evidence to support a finding that nonresident construction workers are a peculiar source of unemployment in the construction industry in Alaska any more than they would be in any other state. The only inference that can be drawn from the record is that nonresident construction workers come to Alaska to work during peak construction periods of time, during which there are more jobs available and less unemployment resulting.

CONCLUSIONS OF LAW

1. This Court has jurisdiction of the parties and the subject matter of the proceedings.

2. At all times applicable to this proceeding, the plaintiff did not qualify for the employment preference provided by A.S. 36.10.010, since at the time of discrimination, he was a nonresident of the State of Alaska

3. Plaintiff has standing to maintain this action.

4. A.S. 36.10.010 discriminates against the exercise of a privilege protected under the Privileges and Immunities Clause of Article IV of the United States Constitution.

5. A.S. 36.10.010 draws a distinction based upon state citizenship.

6. A.S. 36.10.010 on its face and in its application violates the Privileges and Immunities Clause of Article IV of the United States Constitution.

7. The right to obtain employment in any state is a fundamental right and is a privilege which snall be immune from any burden unless the State of Alaska can show a legitimate purpose for such burden. In this case, the State has failed to establish by a preponderance of the evidence such a legitimate purpose.

8. The defendants and intervenor have failed to prove by a preponderance of the evidence that nonresident construction workers constitute a peculiar source of unemployment in the State of Alaska.

9. Serious factors affecting unemployment within the State of Alaska are the extreme climatic conditions, the change in the legislative appropriation for public works construction projects, the extreme rapid growth of population experienced by Alaska, and the wildly fluctuating interest rates which have a direct effect on the private sector construction spending.

10. Statistics over the last several years demonstrate that Alaska's unemployment rate has increased at a rate lesser than the nationwide average. Whereas Alaska's unemployment rate several years was substantially greater than the nationwide rate, it now stands much closer to the national average, further supporting the conclusion that nonresident employment is not a serious factor in the unemployment rate in Alaska.

11. The State and the intervenor have failed to prove by a preponderance of the evidence that there is a

citizens of other states on public works construction projects within the State of Alaska.

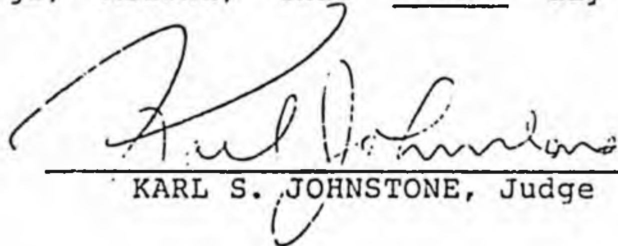
12. A.S. 36.10.010 provides that ninety to ninety-five percent of Alaska residents shall be employed on municipal public works construction projects where they are available and qualified.

13. A.S. 36.10.010 requires that ninety to ninety-five percent of the workers on a state-funded construction project, on a craft by craft basis, shall be Alaska state residents where they are available and qualified.

14. The State and intervenor have failed to prove by a preponderance of the evidence that the preference granted Alaska residents is closely tailored to alleviate unemployment in the construction industry in the State of Alaska.

IT IS ORDERED that plaintiff shall file and serve a proposed Partial Judgment consistent with these Findings of Fact and Conclusions of Law.

Dated at Anchorage, Alaska, this 23 day of May, 1984.



KARL S. JOHNSTONE, Judge

Bill No. Senate Bill 191

MAR 12 1985

Date March 11, 1985

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Contact: Robert W. Landau 465-2700 Robert Bacolas 465-4870

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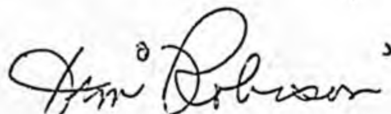
The Department of Labor supports this proposed legislation. It will not have a fiscal impact on the Department.

APPROVED:



Jim Robison, Commissioner
Department of Labor

POSITION PAPER/Department of Labor

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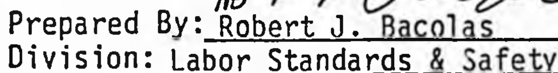


Prepared By: Robert J. Bacolas   Phone: 465-4870
Division: Labor Standards & Safety   Date: 3-4-85

Approved by Commissioner: Jim Robison   Date: 3-4-85
Agency: Labor

Distribution (by Agency preparing fiscal note):
- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)

7/1/84

Gerald C. Newton
315 Dunbar Ave.
Fairbanks, Alaska
March 1, 1985

MAR 8 1985

Senator Zharoff
Alaska State Legislature
Pouch V (MS 3100)
Juneau, Alaska 99811

Dear Senator Zharoff:

This letter is about out of state workers on the North Slope, and is in support of Senate Bill 191 introduced by Senators Vic Fischer, Bettye Fahrenkamp, Pat Rodey, Joe Josephson, and Fred Zharoff. SB 191 is an act relating to employment preference for state residents; and providing for an effective date.

This year Alaskans are facing a crisis. With the current federal trend toward deregulation and the surplus labor market in the lower forty eight states, Alaskan workers are being forced to compete with a growing nonresident work force. This competition is unfair because it costs more to live in Alaska; to compete with workers living in other states Alaskans have to lower their quality of life to a level lower than that enjoyed by the nonresident workers. Eventually, it becomes advantageous for the Alaskans to move to other states and become nonresident workers themselves. This trend has already become common, and is one reason so much money leaves this state, lowering the standard of living for all Alaskans.

Two days ago a friend of mine returned from the Kuparuk oil field where he worked at the Kuparuk industrial complex. His objective opinions follow:

1. **90 percent of the workers at the Kuparuk oil field are out of state workers.**

2. **Out of state companies are forming partnerships with Native corporations to get work on the North Slope.**

3. **These out of state companies hire a few Alaskan Natives but bring in the bulk of their people from out of state.**

4. **The oil companies are going along with this practice because they want to break the Alaskan unions.**

5. **Culinary workers are being paid $5 to $6 an hour. The previous wage was about $18.00 an hour.**

SB 191

It is extremely difficult to obtain accurate statistics about what is going on at the North Slope especially at the newer oil fields such as Milne Point, but from every source I've been able to find, the stories are the same - more and more out of state workers and out of state companies paying less than the prevailing wages. I and many other people that have worked on the Slope for the last ten years are convinced that by allowing the Alaskan construction work force to be circumvented by an increasing number of North Slope employers a severe unemployment problem has been created in Alaska. We now make up thirty percent of the Alaskans receiving unemployment benefits. It is unreasonable to expect the State of Alaska to continue funding public works projects to put Alaskans to work when North Slope producers encourage and condone the use of nonresident companies and workers.

The hiring of nonresidents is having a devastating effect on Alaska's young people, especially young natives that attempt to move into the urban areas and find employment. The Federal Government and the State of Alaska has sponsored a complete erosion of native village lifestyles by building modern schools, installing satellite television and telephones and sending middle class school teachers to teach in the villages. Now, when the Alaskan natives become disenchanted with village lifestyles and seek employment in the urban areas they find three nonresidents lined up for every job available. It is intolerable that the State of Alaska does not take a more active role in providing for the general welfare of the native people by curtailing the hiring of nonresident workers.

SB 191 only addresses residency hire on state funded public works projects. If we fail there then there is no hope. I firmly believe that if a public works project were to happen here in Fairbanks, and if some out of state company got the contract and brought in out of state workers while Alaskans go unemployed, there would be violence in a proportion never seen before in Alaska. Telling unemployed Alaskans that they cannot work because it is unconstitutional is not going to help.

Here are some suggestions that might help:

1. Provide a State guaranteed loan and bonding program for Alaskan construction companies. This is especially needed by some of the smaller Native owned construction companies; the lack of such a program is one reason so many of these companies form partnerships with lower forty eight companies.

2. Appoint a State Local Hire Coordinator to work with the private sector to encourage local hire. This also might help with the current military housing contracts which do not have local hire provisions.

3. Open a State Department of Labor office on the North Slope. This office should use an electrical and mechanical inspector. The present State electrical and mechanical inspectors for the interior are responsible for the area North of the Alaska Range. This is an area about the size of Texas. More inspectors are needed.

4. Encourage local hire through advertising.

5. Toughen the requirements for general contractors.

6. Make the occupational licensing laws and tests tougher. Some other states require continuing education to keep various occupational licenses. Alaska should adopt this same practice.

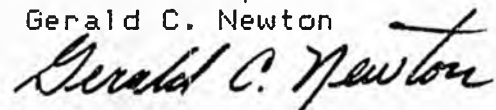
7. Create new occupational licenses for a Master Electrician and Master Plumber, and require one such licensed person for each electrical and plumbing contract. This should be in addition to the contractor's license already required.

8. Make the discriminatory hiring of only nonunion applicants against the law. It is a common practice for nonunion shops to not hire applicants if they are members of a union. As a result, most nonunion companies hire out of state workers because many Alaskan workers are members of unions.

Alaska has had the problem of nonresident hire for as long as I can remember. In the late 1950's and early 60's my father had the same problem. After our family lived on unemployment benefits, moose meat, and potatoes all winter my father used to sit by the barrel stove and complain to me about how workers were driving up the Alcan and going to work. Today, some twenty five years later, I see the same thing, except now they are using jet aircraft, and the problem has worsened. Many construction workers feel that unless the State of Alaska takes a more active and immediate role in protecting the construction industry, we are inviting more abuses of local hire and an even more severe unemployment problem.

Thank you for your time and concern.

Yours truly,
Gerald C. Newton



Editorial

It's Time to Look Again at an Alaska Hire Law

With the January 10, 1985 finding of the Wyoming Supreme Court that the Wyoming Preference for State Laborers Act does not violate the privileges and immunities clause of the United States Constitution, perhaps it is time again for Alaska legislators to try to draft an Alaska Hire bill that will be constitutional.

The Wyoming Preference Act of 1971 says in part: "Every person who is charged with the duty of construction, reconstructing, improving, enlarging, altering or repairing any public works project or improvement for the state or any political subdivision, municipal corporation, or other governmental unit, shall employ only Wyoming laborers on the project or improvement."

The opinion of the high court quotes the United States Supreme Court in Toomer v. Witsell, supra:

"Like many other constitutional provisions, the privileges and immunities clause is not an absolute. It does bar discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States. But it does not preclude disparity of treatment in the many situations where there are perfectly valid independent reasons for it."

The Wyoming high court rules the Wyoming Preference Act did not offend the privileges-and-immunities clause because there was a close link between valid reasons for the act and the discrimination practiced.

The state of Wyoming, in its brief, identified the purpose of the Act as the reduction of unemployment among the labor force which makes possible government projects through contributions to the public treasury.

And without question, the high court said, reduction of unemployment among Wyoming citizens constitutes a valid state goal.

The Wyoming high court drew a sharp contrast of the Alaska Hire Act which the U.S. Supreme Court ruled unconstitutional in Hicklin v. Orbeck and its preference act.

It said the U.S. Supreme Court cited three bases for holding the discrimination imposed by the Alaska Hire Act failed to bear a close relation to the problem of high unemployment in Alaska.

"First, the state had made no showing that nonresidents were a peculiar source of widespread unemployment. Rather than the influx of non-residents looking for work, the major cause of unemployment appeared to be the inadequate education and training and the geographical remoteness of many jobless residents -- particularly the Eskimo and Indian residents. Secondly, the court determined that Alaska Hire did not narrowly address the problem of unemployment, since the Act simply preferred all residents, regardless of their employment status, education or training. Finally, the Supreme Court observed that the discriminatory effect of Alaska Hire extended well beyond those activities in which the state held a substantial proprietary interest."

In contrast, Wyoming court noted the Wyoming Preference Act sought to prevent a qualified Wyoming worker's remaining unemployed while a non-resident went to work on a government-funded construction project. It pointed out the statute made no attempt to eradicate the general unemployment which might be due to factors unrelated to non-residents. Accordingly, it said the act directed its discriminatory treatment toward the non-resident applicants for jobs on public-works projects — those individuals who constitute the peculiar source of the evil identified by the state.

The court point out the Wyoming Preference Act specifically addressed the problem of unemployment among Wyoming construction workers. Section 16- 6-203 requires contractors to contact the local employment office to determine whether qualified resident workers are available. If the number of qualified residents listed with state employment offices is insufficient to meet employment needs, contractors are free to hire non-resident workers. Finally, the high court attached significance to the fact that the Wyoming Preference Act confined its discriminatory effects to projects constructed from public funds.

"The government's proprietary interest in the subject matter of the discriminatory statute constitutes a crucial factor in support of the statute's validity," the high court wrote.

We believe this recent ruling by the Wyoming Supreme Court should give legislators a new chance at an approach to local hire which has stood a court test. The approach should be used by Alaska, substituting for the provision covering state public works contracts which are paid for by Wyoming residents, a provision which covers not only state contracts but contracts covering the production of oil, gas, and other minerals, a portion of which belong to the State of Alaska and represent the prime source of revenue currently paying for the operating budget of the State of Alaska.

We were not at all happy with Alaska's former Alaska Hire law. It was too broad and encompassing and we had the feeling from the time it was passed that it was unconstitutional. What we need is a narrow, specific law that speaks to the evil of which we complain, that non-residents are taking jobs from residents, jobs in which the state and its people have a proprietary interest.

We would feel much better about an Alaska Preference Act modeled after the Wyoming Act. We believe it would be constitutional and at the very least worth a try.

Alaska State Legislature

Senate

Committee on Labor & Commerce

Pouch V
State Capitol
Juneau, Alaska 99811

Official Business

SB 191 Sectional Analysis:

Section 1) Adds a new section establishing Legislative Findings.

Alaska has one of the highest rates of unemployment in the nation and the state has a compelling interest in reducing unemployment among its residents.

Construction accounts for 10% of available employment in the state, and workers in that industry receive about 30% of UI benefits. Unemployment in the construction industry is higher than in other industries and the state should consider the welfare of its residents when funding public construction projects.

Reduction of unemployment among resident c nstruction workers is in the public interest. Nonresident workers compete for a limited number of available jobs, contributing to the high rates of unemployment in the industry. The state therefore has a special interest in seeing the benefits of public construction accrue to state residents.

The Legislature finds there is a legitimate and compelling interest to afford employment preference to state residents for state funded construction related work.

Section 2) Immediate effective date.

FEB 1 8 1985

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ATTORNEY
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FAIRBANKS, ALASKA 99701

ATTORNEY FOR
U/A LOCAL 375
PLUMBERS & PIPEFITTERS
AND ITS MEMBERS

February 13, 1985

To: Each Member of the Alaska Legislature

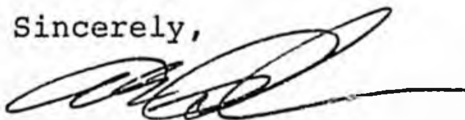
Lenny Arsenault found, through a national magazine, that the State of Wyoming was able to make a resident hire law stick. I had the Wyoming Supreme Court air mail me a copy of the opinion. Lenny is at a national meeting and wanted me to forward it to each of you as quickly as possible.

For use in drafting potential Alaska legislation, I note that the interest which a resident of Wyoming has in a Wyoming public funds contract can be equated to the same thing in Alaska and probably we can add the interest which Alaska residents have in any facilities producing royalty petroleum or royalty gas which belongs to the State; especially since the majority of the State's income comes from such production and it directly influences all matters of expenditure in the State.

The findings of fact or "whereas clauses" should be carefully drafted.

Good luck with this.

Sincerely,



ARTHUR LYLE ROBSON, Attorney for
U.A. Local 375 and Its Members

ALR:CLM

Enclosure: State of Wyoming Opinion

IN THE SUPREME COURT, STATE OF WYOMING

OCTOBER TERM, A.D. 1984

January 10, 1985

STATE OF WYOMING, Plaintiff, v. ROGER ANTONICH, Defendant.	)	No. 84-35

Bill of exceptions from the County Court of Converse County, the Honorable John Allan Holtz, Judge.

A. G. McClintock, Attorney General, Gerald A. Stack, Deputy Attorney General, John W. Renneisen, Senior Assistant Attorney General, and Michael A. Blonigen, Assistant Attorney General, for plaintiff.

Daniel E. White, Cheyenne, for defendant.

Before *THOMAS, C.J., and ROSE, **ROONEY, BROWN, and CARDINE, JJ.

ROSE, J., delivered the opinion of the Court; THOMAS, C.J., filed a specially concurring opinion.

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*Became Chief Justice January 1, 1985.
**Chief Justice at time of oral argument.

ROSE, Justice.

We granted the State of Wyoming's application to file a bill of exceptions in order to address a single issue:

> "Does the Wyoming Preference for State Laborers Act, Section 16-6-201, et seq., W.S. 1977, violate the privileges and immunities clause of the United States Constitution?"

We will hold that the challenged Act is narrowly tailored to fit a particular problem identified by the State and, therefore, does not impermissibly infringe the privileges and immunities of the citizens of states other than Wyoming.1/ Accordingly, we sustain the bill of exceptions filed by the State.

WYOMING PREFERENCE ACT OF 1971

In 1971, the legislature adopted the "Wyoming Preference Act," §§ 16-6-201 through 16-6-206, W.S.1977, which requires contractors to employ available qualified Wyoming laborers for public-works projects in preference to nonresident laborers. Section 16-6-203, W.S.1977, contains the key provision of the Act:

> "Every person who is charged with the duty of construction, reconstructing, improving, enlarging, altering or repairing any public works project or improvement for the state or any political subdivision, municipal corporation, or other governmental unit, shall employ only Wyoming laborers on the project or improvement. Every contract let by any person shall contain a provision requiring that Wyoming labor be used except other laborers may be used when Wyoming laborers are not available for the employment from within the state or are not qualified to perform the work involved. The state employment office nearest the proposed contract or construction site shall maintain a list of laborers, classified by skills, who are residents and are available for employmen[illegible] When the nearest state employment offi[illegible] unable to provide the requested number of laborers from its own list, it shall immediately contact other state em-

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1/ The United States Constitution, Art. IV, § 2, provides:

> "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

ployment offices and request the names of other available laborers. Every person required to employ Wyoming laborers shall inform the nearest state employment office of his employment needs. If the state employment office certifies that the person's need for laborers cannot be filled from those listed as of the date the information is filed, then the person may employ other than Wyoming laborers."

On September 22, 1983, the Converse County prosecuting attorney charged Roger Antonich, general superintendent of Westates Construction Company, with violating § 16-6-203, supra. The information alleged that Antonich fired a Wyoming worker from a public-school construction project in order to hire out-of-state workers. The county court judge dismissed the charge on the ground that § 16-6-203, supra, violates the privileges and immunities clause of the federal constitution. The court relied on Hicklin v. Orbeck, 437 U.S. 518, 98 S.Ct. 2482, 57 L.Ed.2d 397 (1978), and recent cases from other jurisdictions in which the courts have invalidated statutory preferences for local workers. After examining these and similar opinions, we conclude that certain distinguishing features in Wyoming's Preference Act sufficiently limit its scope so as to satisfy the demands of the privileges-and-immunities clause.

PRIVILEGES-AND-IMMUNITIES CLAUSE ANALYSIS

An examination of a state enactment to determine its validity under the privileges-and-immunities clause involves a two-step analysis. First, the reviewing court must determine whether the statute burdens a fundamental right or activity, since only those "privileges" and "immunities" which bear upon the concept of interstate harmony fall within the scope and purpose of the clause. United Building and Construction Trades Council of Camden County and Vicinity v. Mayor and Council of the City of Camden, ___ U.S. ___, ___ S.Ct. ___, 79 L.Ed.2d 249, 258-259 (1984); Baldwin v. Fish and Game Commission of Montana, 436 U.S. 371, 383-388, 98 S.Ct. 1852, 56 L.Ed.2d 354 (1978); Toomer v. Witsell, 334 U.S 385, 395-396, 68 S.Ct. 1156, 92 L.Ed. 1460 (1948). Second, the court must examine the reasons for the discriminatory treatment to determine their validity and their relation to the degree of discrimination imposed by the statute. This portion of the test was developed by the United States Supreme Court in Toomer v. Witsell, supra:

"Like many other constitutional provisions, the privileges and immunities clause is not an absolute. It does bar discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of

> other States. But it does not preclude disparity of treatment in the many situations where there are perfectly valid independent reasons for it. Thus the inquiry in each case must be concerned with whether such reasons do exist and whether the degree of discrimination bears a close relation to them. The inquiry must also, of course, be conducted with due regard for the principle that the States should have consideration leeway in analyzing local evils and in prescribing appropriate cures." (Emphasis added.) 334 U.S. at 396.

The Toomer court established that classifications based on noncitizenship cannot stand

> "* * * unless there is something to indicate that non-citizens constitute a peculiar source of the evil at which the statute is aimed." 334 U.S. at 398.

The State concedes that the discrimination against nonresidents under the Wyoming Preference Act burdens a fundamental right. In an early case, the United States Supreme Court held that the privileges-and-immunities clause protects the right of a citizen of one state to travel to another state for purposes of employment. Ward v. Maryland, 12 Wall 418, 430 (1870). The Supreme Court reaffirmed this principle in Hicklin v. Orbeck, supra, 437 U.S. at 525. Even more pertinent to the instant case, the Supreme Court recently held that an enactment preferring local workers for public construction projects burdens a fundamental right and, therefore, falls within the purview of the privileges-and-immunities clause. United Building and Construction Trades Council of Camden County and Vicinity v. Mayor and Council of the City of Camden, supra, 79 L.Ed.2d at 258-261. Clearly, Wyoming's Preference Act offends the privileges-and-immunities clause unless a close link exists between valid reasons for the Act and the discrimination practiced.

The State, in its brief, identifies the purpose of the Act as the reduction in unemployment among the labor force which makes possible government projects through contributions to the public treasury. Stated conversely, the evil which the Wyoming Preference Act combats is

> "* * * a resident remaining unemployed while a nonresident takes a job on a Wyoming public works project." (State's brief.)

Thus, the Wyoming Preference Act attempts to insure that government-created jobs benefit the State's citizens.

Without question, reduction in unemployment among Wyoming citizens constitutes a valid state goal. See United Building and

Construction Trades Council of Camden County and Vicinity v. Mayor and Council of the City of Camden, supra; Hicklin v. Orbeck, supra. We turn, therefore, to an examination of the relationship between this legitimate reason underlying the Wyoming Preference Act and the discrimination mandated against nonresidents.

Enactments to alleviate high unemployment levels through the hiring of residents in preference to nonresidents generally have swept too broadly to survive challenges brought under the privileges-and-immunities clause. The prime example of such legislation is the "Alaska Hire" Act at issue in Hicklin v. Orbeck, supra. That Act required the employment of qualified Alaska residents in preference to nonresidents for positions associated with

> "* * * all oil and gas leases, easements or right-of-way permits for oil or gas pipeline purposes, unitization agreements, or any renegotiation of any of the preceding to which the state is a party * * *." 437 U.S. at 520, n.2.

The United States Supreme Court cited three bases for holding that the discrimination imposed by this statute failed to bear a close relation to the problem of high unemployment in Alaska. First, the state had made no showing that nonresidents were a peculiar source of widespread unemployment. Rather than the influx of nonresidents looking for work, the major cause of unemployment appeared to be the inadequate education and training and the geographical remoteness of many jobless residents--particularly the Eskimo and Indian residents. 437 U.S. at 526-527. Secondly, the Court determined that Alaska Hire did not narrowly address the problem of unemployment, since the Act simply preferred all residents, regardless of their employment status, education or training. 437 U.S. at 527. Finally, the Supreme Court observed that the discriminatory effect of Alaska Hire extended well beyond those activities in which the state held a substantial proprietary interest:

> "* * * In sum, the Act is an attempt to force virtually all businesses that benefit in some way from the economic ripple effect of Alaska's decision to develop its oil and gas resources to bias their employment practices in favor of the State's residents. We believe that Alaska's ownership of the oil and gas that is the subject matter of Alaska Hire simply constitutes insufficient justification for the pervasive discrimination against nonresidents that the Act mandates." 437 U.S. at 531.

A number of state courts have adopted the foregoing rationale in invalidating enactments which grant an employment preference to local workers. Laborers Local Union No. 374 v. Felton Construc-

tion Company, 98 Wash.2d 121, 654 P.2d 67 (1982); Massachusetts Council of Construction Employers, Incorporated v. Mayor of Boston, 384 Mass. 466, 425 N.E.2d 346 (1981), rev'd under the commerce clause, 460 U.S. 204, 103 S.Ct. 1042, 75 L.Ed.2d 1 (1983); Salla v. County of Monroe, 48 N.Y.2d 514, 399 N.E.2d 909, 423 So.2d 878, cert. denied 446 U.S. 909 (1979). We find, however, that Wyoming's Preference Act, unlike the enactments at issue in these cases and Alaska Hire, precisely fits the particular evil identified by the State.

As noted above, the act seeks to prevent a qualified Wyoming worker's remaining unemployed while a nonresident goes to work on a government-funded construction project. The statute makes no attempt to eradicate the general unemployment in this state which may be due to factors unrelated to nonresidents. Accordingly, the Act directs its discriminatory treatment toward the nonresident applicants for jobs on public-works projects--those individuals who constitute the peculiar source of the evil identified by the State.

Secondly, the Wyoming Preference Act specifically addresses the problem of unemployment among Wyoming construction workers. Section 16-6-203, supra, requires contractors to contact the local employment office to determine whether qualified resident workers are available. If the number of qualified residents listed with state employment offices is insufficient to meet employment needs, contractors are free to hire nonresident workers. An employer need not attempt to hire residents away from other jobs or to dismiss nonresidents and hire residents as they become available. Under the Act, an employer must deny nonresidents employment only when the state employment office provides a sufficient number of residents who are qualified and available to go to work.

Finally, we attach significance to the fact that the Wyoming Preference Act confines its discriminatory effects to projects constructed from public funds. The government's proprietary interest in the subject matter of the discriminatory statute constitutes a crucial factor in support of the statute's validity:

> "* * * The fact that [the city] is expending its own funds or funds it administers in accordance with the terms of a grant is certainly a factor--perhaps the crucial factor--to be considered in evaluating whether the statute's discrimination violates the Privileges and Immunities Clause. But it does not remove the [city] ordinance completely from the purview of the Clause." United Building and Construction Trades Council of Camden County and Vicinity v. Mayor and Council of the City of Camden, supra, 79 L.Ed.2d at 260.

The Court elaborated in that case:

> "Every inquiry under the Privileges and Immunities Clause 'must . . . be conducted with due regard for the principle that the states should have considerable leeway in analyzing local evils and in prescribing appropriate cures.' Toomer v. Witsell, 334 U.S. 385, 396, 92 L.Ed. 1460, 68 S.Ct. 1156 (1948). This caution is particularly appropriate when a government body is merely setting conditions on the expenditure of funds it controls." 79 L.Ed.2d at 261.

The Wyoming statute at issue in the present case requires merely that governmental funds, allocated to public-works projects, be used to hire qualified, available residents in preference to nonresidents. The statute does not effect the sort of wide-ranging discriminatory treatment fatal to Alaska Hire in Hicklin v. Orbeck, supra. Since the Wyoming Preference Act limits its discriminatory effect to government-created jobs, it presents minimal affront to the privileges and immunities of noncitizens. United Building and Construction Trades Council of Camden County and Vicinity v. Mayor and Council of the City of Camden, supra.

We hold that the Wyoming Preference Act does not violate the privileges-and-immunities clause of the federal constitution, notwithstanding the Act's infringement upon a recognized fundamental right. The Act narrowly addresses the goal of reduced unemployment among the state's taxpayers by preferring available, qualified residents for government-funded positions. Since the degree of discrimination bears a close relation to the state's valid reasons for discriminatory treatment, we affirm the Act's validity under the test established in Toomer v. Witsell, supra, and refined in subsequent cases.

Although not determinative of our decision here, we recently held in Galesburg Construction Company, Inc. of Wyoming v. Board of Trustees of Memorial Hospital of Converse County, Wyo., 641 P.2d 745 (1982), that Wyoming's preference for resident bidders on public-works contracts, § 9-8-302, W.S.1977, does not violate the equal-protection provisions of the state and federal constitutions. Our result in the instant case, upholding Wyoming's preference for resident workers on public-works projects, harmonizes with our decision in Galesburg Construction Company, Inc. of Wyoming v. Board of Trustees of Memorial Hospital of Converse County, supra.

The bill of exceptions is sustained.

THOMAS, Chief Justice, specially concurring.

I am in complete accord with the result reached by the majority in this case, but I have a concern about the adequacy of the record to support the nexus between the evil of "a qualified Wyoming worker's remaining unemployed while a nonresident goes to work on a government-funded construction project" and the statute in question. I agree that that is a possibility, but the record does not demonstrate it. The statutory language simply makes the state employment offices a repository of information, and does not limit the "list of laborers, classified by skills, who are residents" to the unemployed. It simply requires that they be "available for employment."

I am satisfied that on the basis of existing precedent the role of the State in connection with "constructing, reconstructing, improving, enlarging, altering or repairing any public works project or improvement for the state or any political subdivision, municipal corporation or other governmental unit" is that of a market participant pursuing essentially a proprietary function. It is inappropriate to invoke the Privileges and Immunities Clause to inhibit the State in that regard. Both Hicklin v. Orbeck, 437 U.S. 518, 98 S.Ct. 2482, 57 L.Ed.2d 397 (1978), and United Building and Construction Trades Council of Camden County and Vicinity v. Mayor and Council of the City of Camden, _____ U.S. _____, S.Ct. ___, 79 L.Ed.2d 249 (1984), recognize that while the proprietary interest of the State in the property with which the statute deals is often a crucial factor in determining whether a discriminatory statute against non-citizens violates the Privileges and Immunities Clause. I perceive that, without articulating such a concept, the Supreme Court of the United States has preserved a delicate balance between the Reservation of Powers Clause found in Amendment X to the Constitution of the United States of America and the Privileges and Immunities Clause. The line that is drawn is that between the governmental function of the State and the right of the State to participate in the marketplace, satisfy its proprietary functions, and contract freely with those with whom it chooses to contract.

In Hicklin v. Orbeck, supra, at 437 U.S. 531, the Supreme Court recognized what it described as a mutually reinforcing relationship between the Privileges and Immunities Clause of Art. IV, § 2, and the Commerce Clause, which it said stems from their origin in the Fourth Article of the Articles of Confederation. In Reeves, Inc. v. Stake, 447 U.S. 429, 65 L.Ed.2d 244, 100 S.Ct. 2271 (1980), the Court said:

> " * * * The State's refusal to sell to buyers other than South Dakotans is 'protectionist'

> only in the sense that it limits benefits generated by a state program to those who fund the state treasury and whom the State was created to serve. * * * Such policies, while perhaps 'protectionist' in a loose sense, reflect the essential and patently unobjectionable purpose of state government--to serve the citizens of the State."

Conceding that the Court there was dealing with the application of the Commerce Clause, because of the mutually reinforcing relationship between the two clauses, I find that concept applicable in this instance with respect to the Privileges and Immunities Clause.

It cannot be held objectionable for a sovereign state to adopt legislation which provides in essence that to the extent possible public works contracts benefit the citizens of the state whose contributions to the public treasury fund those projects. A state should not be foreclosed by the invocation of the Constitution of the United States of America from loyalty to interests of its own citizens. So long as a statute is narrowly drawn to protect only the right of the state to contract as it sees fit with respect to expenditures for public works projects which it owns and which it funds, I am satisfied that as a matter of law such a statute does not offend the Privileges and Immunities Clause found in Art. IV, § 2 of the Constitution of the United States of America. This, of course, makes it unnecessary for the court to pursue the remand technique invoked in United Building and Construction Trades Council of Camden County and Vicinity v. Mayor and Council of the City of Camden, supra.

I would agree that the bill of exceptions should be sustained for the foregoing reasons.