

1614

HJ

HB 409

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 [redacted] Fairbanks, Juneau and Kotchikan as named communities are excluded and that other communities which are of an urban character are excluded and that the insertion of those words mean that subsistence [redacted] 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 make the

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 what's 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 subsistence 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 got the Sierra Clubbers and all these other fellers around the country that are..start boiling then and then by the time they vote subsistence out and then we have the federal mandate that's hanging on us. And according to the way my friend Reagan has been running the situation now, which I'm 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. That's 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 beneficial 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 me 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 different 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 probably 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. That's 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 depict, or set 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. That's the key issue that's different about this initiative in what we are trying to deal with at the present time. And that's probably the key issue there, I mean you know, this group of people could use something you could never more do that if that

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initiative passed. Is that correct?

Condon: Well that's 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. That's 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 that their primary concern was subsistence and that it may require them to manage everything else in order to get 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 in fact 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 property 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 exercise 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

Official Business



POUCH V  
JUNEAU, ALASKA 99811

Pouch V  
State Capitol  
Juneau, Alaska 99811

(907) 465-4766  
(907) 465-4767  
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(session only)



## Members

Rep. Barnes, Chairman  
Rep. Anderson, Vice-Chairman  
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Rep. O'Connell  
Rep. Freeman  
Rep. Meekins  
Rep. Buchholdt

## House of Representatives

### Committee on Judiciary

P.O. Box 3382  
Anchorage, AK 99510  
(907) 274-1432  
(907) 274-1441  
POUCH V  
JUNEAU, ALASKA 99811

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 alleviated simply by defining "non-residents"<sup>1</sup>. It would then be clear that these persons could still lawfully hunt caribou, moose and other unspecified species in Alaska without a guide.

<sup>1</sup> 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 on 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 severely 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.<sup>2</sup>

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.

<sup>2</sup> 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.

AMENDMENT

#1

OFFERED IN THE HOUSE:

BY: FANNING, Roder

TO AS SS

HOUSE BILL No. 409

SENATE BILL No. \_\_\_\_\_

PAGE: 1

LINE: 22

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) one bag of fur shall - etc.

Original sponsors: Hurlbert, Zharoff and Grussendorf

1 IN THE HOUSE

BY THE RESOURCES COMMITTEE

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

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 TWELFTH LEGISLATURE - SECOND SESSION

5 A BILL

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

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

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

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

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

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

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

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

Effect of amendment. — The 1976 C.S.S.S.B. 335, see 1976 House Journal, p. 910.

Legislative committee report. — For report on ch. 268, SLA 1976 (FCCS HCS

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

*repealed*

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16.05.407

§ 16.05.410

FISH AND GAME

§ 16.05.420

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

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

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 Yukutat 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.

Sec. declares nated th ment sh Board o Board o departr which a eligible may not open sea resident cation f (b) E fee for a ch 57 S

Reviso from AS reenacted

Sec. license of 16 y resident (b) A resident consecu perman by age commis issued a it in his ch 94 S

Effect amendm remains

Article

Section 450. Issu 460. Cor ap 470. Fet te

# STATE OF ALASKA

JAY S. HAMMOND, GOVERNOR

## DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

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

March 15, 1982

(907) 276-3550

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<sup>1/</sup> 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.

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

(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<sup>2/</sup> during the pendency 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 . . . .

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<sup>2/</sup> 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  
Assistant Attorney General

# STATE OF ALASKA

## DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

JAY S. HAMMOND, GOVERNOR

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.

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 nonresident hunter safety rationale to support the statute. Schakel, supra; Jack, supra. Second, the exception for nonresident hunters accompanied by a relative also makes it difficult 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,<sup>1</sup> 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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<sup>1</sup> 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).

Honorable Kenneth J. Fanning  
Honorable Eric G. Sutcliffe

February 11, 1982  
Page 5

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  
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 and Game of the State of )  
Alaska, his successor, if any; )  
and THE DEPARTMENT OF FISH AND GAME OF )  
THE STATE OF ALASKA, )

Defendants. )

FILED in the Superior Court  
State of Alaska, Third District  
OCT 19 1969  
A. M. VERLACK, Clerk  
Deputy

No. 69-2703

ORDER

The plaintiffs' motion for preliminary injunction

come on before the Court for hearing on Tuesday, October 20, 1969, at 4:00 p.m., pursuant to a minute order of this Court and stipulation of the parties, and the parties hereto, appearing by their respective counsel, and the Court having taken the matter on the merits of said motion and having examined the affidavits before it and being fully advised in the premises does hereby grant said motion for preliminary injunction, upon the following terms, and IT IS HEREBY ORDERED as follows:

(1) The defendants and each of them, their agents, employees, and all persons acting in concert with them, are enjoined from enforcing the regulations 5 AAC 87.060 and 5 AAC 87.065 against the taking of Brown or Grizzly Bear by 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

*G. M. Johnson, Clerk  
By: M. Carlson, Deputy*

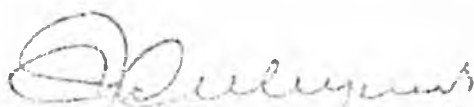
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State of Alaska in Anchorage proof of the existence of said contract or contracts and the contents thereof within seven (7) days from the date on which such party or person or his attorney receives notice of this order.

(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 10<sup>2</sup> 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 1910

  
Attorney for the  
State

ENTERED COURT RECORDS AT ANCHORAGE	
No. <u>325</u>	PAGE <u>80</u>

Julia Coster: ep.  
This is the only case I know of  
dealing with guilds 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  
search 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

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 3300

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

Plaintiffs,

vs.

DEPARTMENT OF FISH AND GAME OF  
 ALASKA, ROGIE F. REETZ,  
 Commissioner of Department of  
 Fish & Game of the State of Alaska,  
 or his successor, if any; LORINE W.  
 CRAYTON, 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  
 Third District

MAR 2 1970

By J. VOKACEK, Clerk

By \_\_\_\_\_ Deputy

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No. 69-2703 D

TRANSCRIPT OF M.O. SPREADING SUPREME COURT MANDATE

BEFORE THE HONORABLE G. J. OCELEPENTI  
 Superior Court Judge

Anchorage, Alaska  
 December 17, 1969  
 11:50 o'clock a.m.

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 as a case date on the record at this time in the name of the Department of Fish and Game of the State of Alaska versus Bill Pinnell and 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"... Department of Fish & Game of the State of Alaska, et al. mentioned this court for review of a preliminary injunction issued by the superior court dated October 7, 1969 in Civil Action No. 69-2703 entitled 'BILL PINNELL and MORRIS TOLIFSON, Individually and on behalf of all others similarly situated, Plaintiffs, vs. 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 as a matter of law. 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 Huell A. Nesbitt, Chief Justice of the Supreme Court, State of Alaska, this 5th day of 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 1:50 p.m. Court recessed.)

0309

\*\*\*\*\*  
END OF REQUESTED PORTION  
\*\*\*\*\*

1 IN THE SUPERIOR COURT FOR THE STATE OF ALASKA  
2 THIRD JUDICIAL DISTRICT

3 BILL PINNELL and MORRIS  
4 TOLIPSON, et al.,

5 Plaintiffs,

6 vs.

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

10 Defendants.

11 Civil Action No. 69-2703D

12 MEMORANDUM OF DECISION OF THE COURT  
13 IN SUPPORT OF DEFENDANTS' MOTION FOR  
14 SUMMARY JUDGMENT

15 I.

16 A. STATEMENT OF CASE AND FACTS

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

24 Wallace H. Noerenberg, by affidavit, has stated that  
25 between July 10, 1969 and July 30, 1969, Mr. Pinnell, one of the  
26 plaintiffs, contacted him and stated that he intended to initiate  
27 legal proceedings to invalidate the subject regulations. The  
28 1969 Fall brown and grizzly bear season commenced in game units  
29 1 through 4 on September 1, 1969, in units 5 and 6 on September  
30 15, 1969, and in other game management units on various dates  
31 between September 1, 1969 and November 1, 1969, 5 AAC 81.320(b).

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

1. 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.

7. The hearing upon plaintiffs' motion for temporary injunction was held on October 7, 1969 at Anchorage, Alaska, before the Superior Court, Third Judicial District, Judge C. J. Occhipinti, Judge. The hearing was based upon affidavits of the parties, and oral argument. In addition, the parties submitted points and authorities in opposition to the motion for preliminary injunction. The verified complaint and affidavits disclose the following facts.

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

19. 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. His affidavit further states that the brown and grizzly bear season opened in some parts of Alaska on September 1, 1969 and that he and others have existing contracts for guided hunts in Alaska.

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

30. 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.

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

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

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

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

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

- 20 (a) reduction in population of trophy sized  
21 brown bear in unit 9 and other units.
- 22 (b) reduce hunter pressure in unit 9 and  
23 other units.
- 24 (c) "quickie hunts" which cause game violation.
- 25 (d) competitive position of smaller operators.
- 26 (e) overharvest of brown bear in unit 9 and  
27 other units.

28 The affidavit of James A. Harper discloses that the  
29 Department of Fish and Game brown bear studies show a need for  
30 restriction on the take of brown bear to preserve a population  
31 of large bear and that the increased take is a result of the  
32 resident bear harvest. Page 11 of the brown bear studies stat  
33 that a prime management objective in respect to this resource  
34 to "upgrade the esthetics or quality of hunters for brown and  
grizzly bear, which are large game animals with limited distrib

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

5 B. APPLICABLE STATUTORY AND REGULATORY PROVISIONS.

6 Plaintiffs seek to have AS 16.05.407 declared unconsti-  
7 tutional under the equal protection and due process of clauses of  
8 the United States Constitution (Article XIV, amendments to the  
9 Constitution) and of the Alaska Constitution (Article 1, Sections  
10 1 and 7), and of the Commerce Clause of the United States  
11 Constitution (Article I, Section 8). AS 16.05.407 provides:

12 Nonresident hunting game animals must  
13 be accompanied by guides. It is unlaw-  
14 ful for a nonresident to hunt, pursue or  
15 take brown bear, grizzly bear, polar bear  
16 or sheep in this state unless personally  
17 accompanied by a person who is licensed  
18 as a master guide, registered guide or  
19 assistant guide by the department, or who  
20 is personally accompanied by a resident  
21 Alaskan over 19 years of age who is the  
22 spouse of or is related by blood within and  
23 including the second degree of kindred.\*\*\*

24 Plaintiffs seek also to have certain regulations of  
25 the Alaska Board of Fish and Game declared unconstitutional as  
26 being in violation of the above mentioned constitutional pro-  
27 visions and also as being in violation of the constitutional pro-  
28 hibition against impairment of the obligations of contracts of  
29 both the Alaska (Art. 1, Sec. 15) and United States (Art. 1, Sec.  
30 10) Constitutions. The regulations under attack appear in Title  
31 5, Alaska Administrative Code and provide as follows:

32 87.060. Guiding for brown or grizzly  
33 bear. No master or registered guide may  
34 take, assist in taking, participate in or  
35 assist in guiding for more than four (4)  
36 brown or grizzly bear during each regula-  
37 tory year, not more than two (2) of which  
38 may be taken in Unit 9.

39 Authority: AS 16.50.030

40 87.065. Licenses and tags required.

41 (A) Before guiding for brown and or grizzly  
42 bear, each master or registered guide must pro-  
43 cure non-transferable bear harvest control tags.

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

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

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

15 Authority: AS 16.50.050

16 In addition to the foregoing statute and regulations,  
17 § AAC 87.070 is pertinent to the subject matter of this action.

18 That regulation states:

19 87.070. Contracting with clients.

20 (A) A master guide or registered guide may  
21 contract to guide hunters, but only in areas in  
22 which he is currently licensed. An assistant  
23 guide may not contract to guide hunters, but  
24 may act as a guide when in the employ and under  
25 the supervision of a master guide or registered  
26 guide.

27 (B) A contractual agreement, properly  
28 executed on a form provided for this purpose,  
29 must be signed by both a guide and his clients  
30 before actually engaging in guiding. One copy  
31 of the contract must be retained by the guide  
32 on his person or at his camp in the hunting  
33 area when guiding the person named on the  
34 contract. One copy of the contract must be  
35 furnished to the client and one copy must be  
36 submitted to the Department in Juneau within  
37 10 days after its execution.

38 Authority: AS 16.50.030

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

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

43 ...shall be rendered forthwith if the plead-  
44 ings, depositions and admissions on file, to-  
45 gether with the affidavits, show that there is  
46 no genuine issue as to any material fact and  
47 that any party is entitled to a judgment as a  
48 matter of law.

49 As noted earlier, the verified complaint and plaintiff  
50 affidavits disclose they are big game hunters and derive a sub-  
51 stantial proportion of their income from that activity.

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1 Plaintiffs assert also that because of these regulations some of  
2 the hunts for which they have contracted must be cancelled re-  
3 sulting in financial loss to them. The affidavits filed on be-  
4 half of defendants set forth the reasons for the regulations  
5 and the objectives sought by the board in enacting them. Defen-  
6 dants assert, that even if all of the allegations of plaintiffs  
7 are true (defendants assume the truth of those allegations only  
8 for the purposes of this motion), defendants are entitled to  
9 judgment in their favor as a matter of law. The points upon  
10 which defendants rely may be summarized as follows:

- 11 (1) There is no impairment of the obligation  
12 of contract as a matter of law;
- 13 (2) The regulations are not unenforceable  
14 because of vagueness;
- 15 (3) This is a reasonable classification in  
16 respect to resident and non-resident  
17 hunters. Hence these plaintiffs are not  
18 denied equal protection of the law;
- 19 (4) There is no burden on interstate commerce  
20 as a matter of law in that residents of a  
21 state may be favored over non-residents of  
22 a state when the state's objective in  
23 limiting the interstate flow of hunters is  
24 reasonable;
- 25 (5) Plaintiffs do not have standing to raise the  
26 constitutional issues in respect to non-  
27 residents, since plaintiffs are residents  
28 of Alaska.

29 II.

30 POINTS AND AUTHORITIES

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

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

1 The applicable constitutional provisions are:

2 Article I, Section 10 of the United States  
3 Constitution which provides in part: "No state  
4 shall...pass any...law impairing the obligation  
5 of contract.  
6 and

7 Article I, Section 15 of the Alaska Constitution  
8 which provides in part, "No law impairing the  
9 obligation of contracts...shall be passed."

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

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

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

28 ...but the State also continues to possess  
29 authority to safeguard the vital interests  
30 of its people. It does not matter that  
31 legislation to that end 'has the result of  
32 modifying or abrogating contracts already  
33 in effect.' [cases cited]...the reservation  
34 of essential attributes of sovereign power  
35 is also read into contracts as a postulate  
36 of the legal order. (290 U.S. at pages  
37 434-435).

38 The reasoning of the United States Supreme Court is applicable  
39 here. The State of Alaska possess authority to safeguard the  
40 vital interests of its people. It is without dispute that one  
41 of the vital interests of this state is its wildlife resource.  
42 Defendants' affidavits on file show the following facts relative  
43 to the brown bear resource:  
44

- (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 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 ~~the~~ take in unit 9 must be accompanied by ~~similar~~ restrictions in other areas, or the ~~lack of~~ 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)

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

4 Furthermore, plaintiffs are disregarding some elementary  
5 principles of contract law. It is well established that non-  
6 performance of a contract is excused where, before the time for  
7 performance, a change in the governing domestic law makes per-  
8 formance of the contract illegal and therefore impossible. See  
9 statement of Contracts Section 458. This rule applies to govern-  
10 mental regulations, Texas Co. v. Hovarth Shipping Company, 296  
11 U.S. 619 (1927) (suit to recover damages for breach of charter  
12 contract was not actionable when boat requisitioned by govern-  
13 ment). See also annotation at 84 ALR 2d 12 at page 43. Thus,  
14 the prospect of such impossibility is inherent in any contract,  
15 and particularly one involving a natural resource of the State.  
16 Also inherent in any contract is the implication that a state, in  
17 the valid exercise of its police power, may render the contract  
18 invalid, American Budget Corp. v. Furman, 67 N.J. supra, 132, 170  
19 A.2d 63 (1961). In this case a state statute making the business  
20 of debt counselling was attacked on constitutional grounds. The  
21 court held that even though 1000, more or less, existing contracts  
22 were rendered invalid, the exercise of state police power over-  
23 rode the constitutional prohibitions. In Alaska the protection  
24 and propagation of bear is a permissible objective of police  
25 power, Nelson v. State of Alaska, 387 P.2d 1933 (Alaska, 1964).

26 B. THE REGULATIONS ARE NOT UNCONSTITUTIONALLY  
27 VAGUE OR AMBIGUOUS.

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

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

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

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

15 The provisions of the two sections taken together and  
16 an examination of the objectives of the Board of Fish and Game  
17 in the enactment of these regulations requires the conclusion  
18 that what is prohibited by the regulations is the taking of more  
19 than four bear. The participating in more than four hunts, even  
20 though unsuccessful is not prohibited. There would be no sense  
21 to the harvest tag requirement, unless the sections are inter-  
22 preted in the way urged by defendants. Furthermore, the  
23 affidavits of the defendants filed earlier in this action indicate  
24 that what is sought to be controlled is an overharvest of trophy  
25 sized brown bear in Alaska and the control of the number of bear  
26 taken in unit 9. The intended objective would not be reasonably  
27 accomplished by limiting the number of unsuccessful hunts in  
28 which a guide could participate but can reasonably be accomplished  
29 by limiting the number of bear which a guide may take. The con-  
30 struction used by defendants is therefore the only one which in  
31 fact may be reasonably applied in light of all the circumstances.

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

1 of all others similarly situated against the Indianapolis Re-  
2 development Commission to enjoin it from proceeding under the  
3 Redevelopment Act of 1945 and 1947 which dealt with the redevelop-  
4 ment of blighted areas. The Indiana Supreme Court held that the  
5 guides and standards set forth in the act were sufficient to meet  
6 the requirements of the due process clause of the Fourteenth  
7 Amendment. The Court laid down rules to be considered in deter-  
8 mining whether a statute is unconstitutional because of vagueness  
9 or ambiguity. The Court stated:

10 When it is asserted that a statute is so  
11 indefinite that its enforcement would result  
12 in a denial of due process or amount to an  
13 unauthorized delegation of legislative functions,  
14 the court must consider the enactment in the  
15 light of the problem to which the legislature  
16 was undertaking to deal. . . . Such statutes are  
17 valid when they clearly designate the dangers  
18 and hazards against which the legislatures sought  
19 to provide protection and reasonably indicate  
20 the means or a method by which that is to be  
21 accomplished. (154 N.E.2d at page 520)

22 A consideration of the problems sought to be overcome by the  
23 Board of Fish and Game and by considering the requirement of the  
24 regulations as to four bear harvest control tags, the regulation  
25 under attack clearly designate the hazard against which the  
26 legislature sought protection. See also Illinois Steel Company  
27 v. Fuller, 216 Indiana 180, 23 N.E. 2d 259 (1939) and State v.  
28 Miller, 129 N.W. 2d, 356 (Ind., 1964). Perhaps the clearest  
29 application of the rules to be followed by a court in resolving  
30 the issue of whether a statute is unconstitutional because of  
31 vagueness is found in Donathan v. McMinn County, 187 Tenn. 220,  
32 213 S.W. 2d 173 (1948). That case was an action by taxpayers  
33 attacking the validity of an act creating a county council for  
34 McMinn County, Tennessee. The plaintiffs asserted that the  
35 language creating the council was void in that there was no  
36 criteria by which to determine the extent of the powers of the  
37 county council. The powers of the council were described as all  
38 those necessary to govern, except as are "not expressly vested by  
39 the Constitution of the State of Tennessee or by general law of

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

7 [it] is not the difficulty in ascertaining  
8 whether close cases fall within or without  
9 the prohibition of a statute, but whether  
10 the standard established by the statute is  
11 so uncertain that it cannot be determined  
12 with reasonable definiteness that any  
13 particular act is disapproved. (page 176  
14 213 S.W. 2d)

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

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

25 The reasonable construction urged by the defendants will render  
26 the regulation valid. The Court also stated as a rule of con-  
27 struction:

28 The legislative intent will prevail over  
29 the strict letter or literal sense of the  
30 language used, and, in order to carry into  
31 effect this intent, general terms will be  
32 limited, and those that are narrow expanded.  
33 (213 S.W.2d at page 177)

34 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.

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

6 C. THE STATUTE AND REGULATIONS UNDER  
7 ATTACK DO NOT, BY THEIR OPERATION,  
8 DEPRIVE PLAINTIFFS OF EQUAL PRO-  
9 TECTION UNDER THE LAW, OR OF THE  
10 PROCESS OF LAW.

11 AS 16.05.407 provides that a non-resident may not  
12 guide for certain bear or sheep in Alaska unless accompanied by  
13 a master or registered guide. An exception is made in the case  
14 of a non-resident spouse or kindred within the second degree of  
15 Alaska residents over 19 years of age. Such non-residents may  
16 hunt when accompanied by the eligible relative. Plaintiff's  
17 assert this statute unconstitutionally discriminates in favor of  
18 qualified Alaska residents who may wish to take their eligible  
19 residents on hunts. It is noteworthy that plaintiff's assumptions  
20 in this regard are not supported by a single thread of fact.  
21 There is no evidence to show that AS 16.05.407 has operated in  
22 this manner.

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

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

- 31 1. The equal protection clause of the  
32 Fourteenth Amendment does not take from the  
33 State the power to classify in the adoption  
34 of police laws, but admits of the exercise of  
35 a wide scope of discretion in that regard, and  
36 avoids what is done only when it is without  
37 any reasonable basis and therefore is purely  
38 arbitrary. 2. A classification having some  
39 reasonable basis does not offend against that  
40 clause merely because it is not made with mathe-  
41 metical nicety or because in practice it results

1 in some inequality. 3. When the classification  
2 in such a law is called in question, if any  
3 state of facts reasonably can be conceived that  
4 would sustain it, the existence of that state  
5 of facts at the time the law was enacted must  
6 be assumed. 4. One who assails the classifi-  
7 cation in such a law must carry the burden of  
8 showing that it does not rest upon any reason-  
9 able basis, but is essentially arbitrary.'  
10 [Case cited.]

11 To these rules we add the caution that 'Dis-  
12 criminations of an unusual character especially  
13 suggest careful consideration to determine  
14 whether they are obnoxious to the constitu-  
15 tional provision.'

16 The Morey case involved an Illinois statute regulating currency  
17 exchanges. Such businesses were prohibited from doing certain  
18 acts. However, exempted from the provisions of the statute was  
19 The American Express Company. The court held that application  
20 of this act to the non-exchange companies, exchanges denied them  
21 equal protection of the laws. The court found no reasonable  
22 basis to exclude the American Express Company. The fact that  
23 The American Express Company was properly operated at the time  
24 the act was passed in no way guaranteed that it would continue  
25 in that condition.

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

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

40 2. The classification allowing different treatment for  
41 non-resident second degree kindred of Alaska residents is

1 close as necessary under the Morey test. Those relatives  
2 eligible under the statute would be the father, brother, grand-  
3 father, son and grandson of the Alaska resident. These are pre-  
4 cisely the persons most likely to make a family visit to a  
5 resident Alaskan. The loose test of mathematical certainty has  
6 been met.

7 3. The classification can be reasonably sustained  
8 an assumed state of facts at the time the law was enacted. In  
9 addition to the fact that Alaska is regularly visited by  
10 relatives within the second kindred, it is also  
11 reasonable to assume the following: (1) A non-resident is quite  
12 likely not to be familiar with the laws and environmental require-  
13 ments for hunting these animals in Alaska; (2) A non-resident is  
14 quite likely not to be familiar with the laws and regulations  
15 governing hunting in Alaska; (3) A resident Alaskan is quite  
16 likely to be familiar with the above mentioned laws and require-  
17 ments. Thus, the requirement that non-residents be accompanied  
18 by a guide is a reasonable means to overcome the problems faced  
19 by non-residents. However, an Alaskan resident could serve the  
20 same purpose with respect to his close relative, and it is not  
21 likely that a non-resident would charge his close relative for  
22 taking him on a hunt. Hence, that non-resident would not be  
23 violating AS 16.50.215(3) for guiding without a license. Guiding  
24 is defined by AS 16.50.420(2) as assisting another person to  
25 take or photograph game with the intent of receiving compensation.  
26 The existence of these statutes make impossible the fact assumed  
27 by plaintiffs that the resident relatives are operating a guiding  
28 business.

29 4. The classification is asserted by plaintiffs and it  
30 is up to them to show its essential arbitrariness. This they  
31 have completely failed to do, especially in the light of the  
32 foregoing. Plaintiffs have shown nothing arbitrary either in  
33 their complaint or in their affidavits.  
34

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

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

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

*Abel  
Now*

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

18 The Court then found that the facts which justified this statute  
19 were the sale of the exempted commodities was necessary either  
20 for the health of the populace or for items necessary for  
21 Sunday recreation. The case at bar passes the test of McGowan.  
22 The classification rests upon grounds which are relevant to  
23 achieving the state's objectives. Those objectives are the con-  
24 servation of the wildlife resource, more efficiency in the en-  
25 forcement of the game laws and the promotion of safety within  
26 the industry. As pointed out earlier, facts can be reasonably  
27 assumed which support these objectives and the classification.

28 2. The contested statute does not violate the due  
29 process clauses of the Alaska and Federal Constitutions.

30 Plaintiffs attack the questioned statutes and regula-  
31 tions on the basis that they impose certain restriction upon  
32 their business of guides for brown and grizzly bear in Alaska.  
33 The conditions, it is argued are unconstitutional in the light  
34 of the due process clauses of the Alaska and Federal Constitutions

35 Plaintiffs' position is not supported by decisions of  
36 the United States Supreme Court. Perhaps the leading case in-  
37 volving the application of the due process clause to state  
38 regulatory activity is West Coast Hotel Co. v. Parrish, 300 U.S.  
39 379 (1937). In that case the Washington minimum wage law for  
40 women was under attack on the ground that it violated the  
41 employer's rights under the due process clause, in that it

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

2 And if the protection of women is a legitimate  
3 end of the exercise of state power, how can it  
4 be said that the requirement of the payment of  
5 a minimum wage fairly fixed in order to meet the  
6 very necessities of existence is not an admissi-  
7 ble means to that end? The legislature of the  
8 State was clearly entitled to consider the  
9 situation of women in employment, the fact that  
10 they are in the class receiving the least pay,  
11 that their bargaining power is relatively weak,  
12 and that they are the real victims of those who  
13 could take advantage of their necessitous cir-  
14 cumstances. . . . The legislature had the right  
15 to consider that its minimum wage requirements  
16 would be an important aid in carrying out its  
17 policy of protection. . . . Even if the wisdom  
18 of the policy be regarded as debatable and its  
19 effects uncertain, still the legislature is  
20 entitled to its judgment. (300 U.S. at pages  
21 398-399).

22 So in the case at bar, it can be said with equal justification  
23 that the <sup>(1)</sup> protection of the wildlife resources, the <sup>(2)</sup> promotion of  
24 safety and the <sup>(3)</sup> enforcement of laws relating to hunting are legiti-  
25 mat ends of the exercise of state power. To promote these ends  
26 the legislature and Board were entitled to consider the fact of  
27 the over harvest of brown and grizzly bear and to consider that its  
28 statutory and regulatory requirements would be an important aid  
29 in carrying out their policy of protection.

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

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

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

1 The leading United States Supreme Court Opinion in this  
2 area is Toomer v. Witsell, 334 U.S. 385 (1948). This was an  
3 action by plaintiffs to enjoin as unconstitutional a South  
4 Carolina statute requiring that non-resident shrimp fishermen  
5 a license fee 100 times the fee paid by residents. The court  
6 held the particular license fee was without reasonable basis.  
7 However, the court did comment upon the powers of the state in  
8 the area of fish and game regulation. It first noted the early  
9 Supreme Court case of McCready v. Virginia, 94 U.S. 391 (1876)  
10 which held that a state could prohibit non-residents from planting  
11 oysters in Virginia tidal beds. The court recognized that the  
12 state was vested with ownership of the fish and wildlife and  
13 that the right of citizens of the state in these objects was:

14 a property right, and not a mere privilege  
15 or immunity of citizens.  
16 (334 U.S. at 402)

17 The Court thus recognized that the application to the usual con-  
18 stitutional provisions has been made out in the area of a  
19 state's dealing with wildlife in its land and waters. The same may  
20 be said, of course, for game within the state. Plaintiffs'  
21 reliance on Brown v. Anderson, 202 F.Supp. 96 (U.S. D.C. Alaska,  
22 1962) is misplaced. In that case the State of Alaska prohibited  
23 non-residents from engaging in fishing commercially for salmon.  
24 Salmon were found by the court to be free swimming, like the  
25 shrimp in Toomer and hence not subject to complete state re-  
26 gulation as in the case of game. Thus, whatever Brown may state  
27 relative to the commerce clause is not applicable to this case  
28 where the brown and grizzly bear resource is confined wholly to  
29 this state. Much more clearly in point is State v. Kemp, 73 S.D.  
30 48, 44 N.W. 2d 214 (1950). That was an action against a defendant  
31 convicted of unlawfully killing a migratory water fowl in viola-  
tion of the statute providing:

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

1 Defendant raised objection to the statute, based upon constitutionality. The Supreme Court held that the lower court's determination that the statute was valid was correct. Defendant 2 3 4 that case was a non-resident. He was refused a license and thereafter hunted. Defendant raised the objection as to constitutionality based upon Article IV, Section 2 of the Constitution guaranteeing that:

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

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

16 This law protects ducks and geese against  
17 a host of hunters who otherwise would be  
18 hunting these birds simply as an incident  
19 to pheasant hunting in South Dakota.

20 The Court also stated:

21 Apart from the ownership theory there is  
22 another basis upon which a state may regulate  
23 the taking of wild game, including migratory  
24 birds. We, of course, refer to the exercise  
25 of the police power...

26 Acting under the police power the state may  
27 discriminate against citizens of other states  
28 provided there is substantial reason for the  
29 discrimination beyond the mere fact that they  
30 are citizens of other states.

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

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

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

W. D. Case?

1 Moreover, plaintiffs do not have standing to raise the  
2 issue that interstate commerce is being unlawfully restricted.  
3 Plaintiffs are not representing a class of non-resident citizens.  
4 Tileston v. Ullman, 318 U.S. 44 (1943). In that case the plain-  
5 tiff, a physician, sought to have a Connecticut statute prohibi-  
6 ting the use of drugs or instruments to prevent conception de-  
7 clared unconstitutional. The plaintiff, a doctor, alleged that  
8 the statute infringed the constitutional rights of his patients.  
9 The court stated:

10 The sole constitutional attack upon the  
11 statutes under the Fourteenth Amendment  
12 is confined to their deprivation of life -  
13 obviously not appellants' but his patients'.  
14 There is no allegation that appellant's  
15 life is in danger. His patients are not  
16 parties to this proceeding and there is no  
17 basis on which we can say that he has  
18 standing to secure an adjudication of his  
19 patients' constitutional right to life,  
20 which they do not assert in their own behalf.  
21 (318 U.S. at page 46)

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

### 26 III.


#### 27 CONCLUSION

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

31 DATED at Anchorage, Alaska, this 24th day of October,  
32 1969.

33 Respectfully submitted,

34 G. KENT EDWARDS  
35 Attorney General

36 By:   
37 Charles K. Cranston  
38 Assistant Attorney General

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

— THIRD JUDICIAL DISTRICT

WILL FINNELL and JAMES MCLEIPSON  
individually and on behalf of all  
others similarly situated,

Plaintiffs,

vs.

THE DEPARTMENT OF FISH AND GAME OF  
THE STATE OF ALASKA; ARDIE F. RENTZ,  
Commissioner of the Department of  
Fish and Game of the State of Alaska,  
his successor, if any; ARDIE W.  
MORRIS, Deputy Commissioner of 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.

Case No. 2702 B

JUDICIAL FINDINGS

On October 1, 1909, the plaintiffs filed a verified  
petition questioning the validity of certain regulations of the  
Department of Fish and Game of the State of Alaska. The Attorney General  
for the State of Alaska, answering for all the defendants  
the invalidity, advised that the Court dismiss the petition.  
Some motions for summary judgment were made, and a  
hearing on October 31, 1909, after which the Court took the  
case under advisement.

The parties are in substantial agreement on the facts

WALTER S. WEAVER  
COURT

AS 16.05.407 provides as follows:

"Non-resident hunting rules" is must be  
accompanied by guides. ( ) is unlawful  
for a non-resident to hunt or take  
brown bear, grizzly bear, or bear or  
sheep in this state, unless personally accom-  
panied by a person who is licensed as a guide  
guide, registered guide or assistant guide  
by the department, or who is personally accom-  
panied 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."

The Department of Fish and Game of the State of Alaska,  
under Authority of AS 16.50.030 has the duty of adopting pro-  
cedural and substantive regulations under the Administrative  
Procedure Act (AS 44.62) required or reasonably necessary  
for its administration.

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

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"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 such regulatory year, not more than two (2) of which may be taken in Unit 9."

"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.

(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  
2       1. The regulations materially impair the obligation  
3       contracts in violation of Article I, Section 10 of the Constitution  
4       of the United States and of Article I, Section 15 of the Constitu-  
5       tion of the State of Alaska.

6       2. Regulation 37.050 is so vague, unclear and misleading  
7       and subject to various interpretations as being [in violation of]  
8       a denial of the due process of law and equal protection of  
9       the laws clauses of the Constitution of the United States (Articles  
10       III, Amendments to the Constitution), and the Constitution of  
11       the State of Alaska (Article I, Section 1 and 7.)

12  
13       3. Such regulations, when considered in light of Section  
14       16.05.407 of the Alaska Statutes, discriminate unfairly in  
15       favor of certain residents of the State of Alaska and against  
16       the Plaintiffs and members of their representative class, and  
17       thus are a denial of the due process of law and the equal pro-  
18       tection of the laws clauses of the Constitution of the United  
19       States and the State of Alaska.

20       4. Said regulations are in violation of the commerce clause  
21       of the Constitution of the United States (Article I, Section 3).  
22       Since a substantial burden is placed on the movement in interstate  
23       commerce of non-resident brown or grizzly bear hunters; and  
24       thus results in infringement of the power of the Congress of  
25       the United States to regulate commerce among the several states.

The Attorney General has defended each ground, and the  
17 primary judgment in favor of the Defendants as there is no  
18 remaining issue as to any material fact, and said Defendants are  
19 entitled to a judgment as a matter of law, based on the validity  
20 of the statute and resulting regulations.

The parties have cited much authority supporting the  
21 legal theories, although not necessarily centered on with the fa-  
22 ct of upholding as a matter of law the specific laws in question.

Taken; each ground separately, this Court finds as follows

1. Impairment of contracts. The Constitutions of  
23 the United States and the State of Alaska prohibit the passing  
24 of any law that impairs the obligation of contracts. However,  
25 necessity, exceptions must at times be made, for it is well known  
the prohibition is not absolute. The law cannot follow a course  
with mathematical precision, human minds and conditions being  
as they are. At times, valid State or Federal interests must  
prevail to avert a result worse than the damage caused by the  
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. Blaisdell,  
290 US 398 (1934), the Supreme Court of the United States did  
not interfere with the enforcement of contracts, considering the  
depressed economic status of the nation, and although the contracts  
in existence were not rendered void, their enforcement was  
substantially impaired.

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Further in exercising its police powers, it should not be restricted to honor contracts, where in so doing, there is a vital natural resource would result, or the result is over some vital industrial interest, health or welfare of the State may be endangered. The objection to the statute in actions here attacked on the grounds of impairment of contract is not well taken. The people of the State of Alaska have a great interest in the game within the State, and the taking of same 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 regulation of 87.065 providing for bear harvest control tags clarifies 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 arbitrary 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

1  
 2 must be intelligently apprised that any violation, specifically  
 3 defined, will be prosecuted. Vague definitions such as assisting  
 4 or participating cannot be easily enforced. The amount  
 5 assistance one guide may give another in the ultimate taking  
 6 a bear is too vague. Merely the transportation of one guide  
 7 another to a camp site might be considered assisting in the same  
 8 taken. The loan of a rifle by one guide to another could also  
 9 be considered assisting. In this, and other subsequent  
 10 reasons, the regulations are held to be vague.

11 3. Deprivation of equal Protection or Due Process.

12 Plaintiffs attack AS 16.05.407 as being unconstitutional since,  
 13 in its application, it discriminates against a class, as  
 14 residents take 42% and non-residents 58% of the brown and  
 15 black bear. The state defends its right to regulate the taking  
 16 of game, by limiting non-residents to hunts only if accompanied  
 17 by registered guides. Arguments of both sides do not sway the  
 18 Court in either direction.

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

1 and an unnecessary burden on the taxpayers. ~~Unnecessary~~  
 2 licensed by the State, appear to be a reasonable ~~and~~  
 3 real issue, as seen by this Court, is any limitation ~~on~~  
 4 on the residents as opposed to the non-residents in the ~~total~~  
 5 taken. The State could limit the take in any area, or in the  
 6 entire State, setting a reasonable system or quotas, ~~or~~  
 7 a certain number each year or closing the take entirely.  
 8 setting a limitation in the numbers taken, the State  
 9 in this Court's opinion, and based on the previous ~~cases~~  
 10 divide equitably the number to be taken by residents and non-  
 11 residents by regulation. But limiting guides to the taking of  
 12 a certain number of hunts, but not limiting residents is ~~not~~  
 13 not a means of protecting the species or limiting the take.  
 14 Court will thus not strike the Statute, as it is a reasonable  
 15 and-necessary legislation to exercise control over this ~~natural~~  
 16 resource, but any regulations arising to implement this ~~law~~  
 17 should provide equitable and reasonable restrictions to ~~achieve~~  
 18 its purpose. Guides should not be limited, rather the ~~number~~  
 19 by the hunters, through limitation of tags or by other ~~means~~  
 20 would appear consistent.  
 21

22 4. Violation of the United States Constitution -  
 23 Commerce Clause. Plaintiffs contend the regulations ~~violate~~  
 24 the commerce clause of the United States Constitution, as  
 25 discriminates against non-residents. Actually, as the ~~regulations~~

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

5  
6 In Summary, and based on the reasons given, the Court  
7 may have Summary Judgment as limited above. The Defendant's  
8 Motion for Summary Judgment is hereby denied.

9 DATED at Anchorage, Alaska, this 3<sup>rd</sup> day of December, 1963.

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12 \_\_\_\_\_  
13 C. J. QUINN  
14 Superior Court Judge

15 cc: file  
16 Boyko  
17 Attorney General

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THE SUPREME COURT OF THE STATE OF ALASKA

DEPARTMENT OF FISH & GAME )  
 STATE OF ALASKA, et al., )  
 )  
 Petitioners, )  
 )  
 v. )  
 )  
 HILL and MORRIS )  
 individually and on )  
 all others similarly )  
 )  
 Respondents. )  
 )

69-270  
File No.

O P I N I O N

[No. 586 - November 14, 1969]

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 action for declaratory judgment in which they sought a ruling on that certain regulations of the Alaska Board of Fish were 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 3.

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.

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

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5 Alaska Adm. Code § 87.060.

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5 Alaska Adm. Code § 87.065.

enjoined from enforcing the regulations  
5 AAC 27.050 and 5 AAC 27.055 against  
the taking of brown or golden 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 filed a petition  
for review and asked this court to stay the superior court's  
interlocutory injunction pending determination of the merits of  
the department's petition for review. On October 23, 1969, we  
granted the stay sought by petitioners. We now grant review.  
The superior court's interlocutory injunction reflects a departure so significant  
from the accepted and usual course of judicial proceedings  
as to call for this court's power of supervision and review.

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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 6, 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 shall 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 super-  
vision 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(d) 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 findings of fact and conclusions of law concerning the preliminary injunction which it issued. Study of the superior court's order granting the preliminary injunction reveals that it does not comport with the requirement of Civil Rule 65(d). We have thus concluded that the preliminary injunction was entered in contravention both of Civil Rule 65(d)'s requirement that the reasons for the issuance of a preliminary injunction be disclosed and rule 52(a)'s requirement that findings of fact and conclusions of law, which are

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

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. 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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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.

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

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reversal. Like conclusions have been reached regarding  
necessity of compliance with Rule 52(a), Federal Rules of  
Civil Procedure. In Mayo v. Lakeland Highlands Canning  
Company, Inc.,<sup>7</sup> 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 super-  
court's order granting preliminary injunction was procedur-  
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 enforce-  
ment of an administrative regulation or statute. Without such  
compliance the court is not in a position to meaningfully

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<sup>7</sup> 358 U.S. 588, 591. See also Mayo v. St. Louis-San Francisco Ry. Co., 274 U.S. 1219, 1222 (1927); Shannon v. Retail Clerks' Internat'l Protective Ass'n, 128 F.2d 553, 555 (7th Cir. 1944); 7 J. Moore, Federal Practice ¶ 65.11, at 1665-66 (2d ed. 1961).

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

exercise its review jurisdiction.

The preliminary injunction entered <sup>is</sup> vacated.

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

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

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 mammal, 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 transporter 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. Basis of Challenge to Laws that Discriminate Against Aliens. 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. (See, e.g., 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) Privileges and Immunities. A law or regulation aimed directly at aliens could not be overturned under the privileges and immunities clause, because that clause