

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA  
THIRD JUDICIAL DISTRICT AT ANCHORAGE

ROBERT CASSELL,

Plaintiff,

v.

STATE OF ALASKA, BOARD OF  
GAME,

Defendant.

Case No. 3AN-19-07460 CI

**PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM  
IN SUPPORT**

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**I. INTRODUCTION**

Ensuring the ability of Alaskans to manage and access Alaska’s resources was the central compact of statehood. The Alaska Constitution dedicates an entire Article to memorializing the public trust doctrine and mandating that Alaska’s natural resources be managed and developed “for the maximum benefit of its people” and that “[w]herever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use.”<sup>1</sup>

Despite these clear constitutional mandates, the Alaska Board of Game regularly sets aside significant numbers of hunting permits to Alaska’s highly sought-after big game exclusively for the benefit of *nonresident* hunters. For example, nearly 40% of all permits for the famed Kodiak Brown Bear hunt are annually earmarked for nonresidents and made off-limits to residents. Taking these permits and harvesting opportunities away from Alaskans and guaranteeing them to nonresidents is contrary to the Alaska Constitution and the practice must end. Accordingly, Plaintiff Dr. Robert Cassell, pursuant to the Court’s briefing order, submits the following motion for summary judgment.

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<sup>1</sup> Alaska Const. art. VIII, §§ 2, 3.

## II. FACTUAL BACKGROUND

### A. Wildlife in Alaska.

Alaska’s 365 million acres hold over 1,000 vertebrate species, including 32 species of carnivores—more than any other state.<sup>2</sup> It also has over a dozen species of big game animals.<sup>3</sup> Wildlife are so important that, unlike many other states, Alaska chose to codify citizens’ wildlife rights in its constitution.<sup>4</sup> Article VIII § 1 provides that Alaska’s natural resources should be made “available for maximum use consistent with the public interest.” Article VIII § 2 directs the legislature to “provide for the utilization, development, and conservation of all natural resources belonging to the State . . . for the maximum benefit of its people.” Finally, Article VIII, § 3 of the Alaska Constitution explicitly establishes Alaskans’ rights to wildlife, providing that “[w]herever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use.”

Hunting is one of the major ways Alaskans exercise their constitutional right to enjoy and benefit from the state’s wildlife resources. Alaska offers unparalleled

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<sup>2</sup> Exhibit 1, Alaska Dept. of Fish and Game, *Conservation Areas*, available at <https://www.adfg.alaska.gov/index.cfm?adfg=conservationareas.main>; Exhibit 2, Alaska Dept. of Fish and Game, *Species*, available at <https://www.adfg.alaska.gov/index.cfm?adfg=species.main> at 1.

<sup>3</sup> Exhibit 3, Alaska Dept. of Fish and Game, *Introduction to Alaska Big Game Hunting*, available at <https://www.adfg.alaska.gov/index.cfm?adfg=hunting.biggameintro>.

<sup>4</sup> Exhibit 4, Alaska Dept. of Fish and Game, *Constitutional Authority*, available at <https://www.adfg.alaska.gov/index.cfm?adfg=about.statutes>

wilderness hunting opportunities, ranging from small game such as grouse or hare, to big game such as brown bear.<sup>5</sup> All of Alaska’s wildlife resources are managed by the Alaska Department of Fish and Game (“ADF&G”). While Alaskans think of wildlife as abundant, virtually all big game animals have seasons and bag limits. From a management standpoint, all big game is scarce, and requires close and careful management.

## **B. Game Management in Alaska**

### **1. Board of Game’s Role and Responsibility.**

The State of Alaska Board of Game (“Board”) is part of ADF&G. It was created “[f]or purposes of the conservation and development of the game resources of the state[.]”<sup>6</sup> The Board consists of seven members and it promulgates regulations for hunting, including regulations that establish hunting seasons, areas for taking game, bag limits, and regulating the methods and means of hunting game in Alaska.<sup>7</sup> The Board is charged with making allocation decisions and the Department of Fish & Game is responsible for management based on those decisions.<sup>8</sup>

### **2. Board Allocation of Hunting Permits in Cases of Game Scarcity.**

The Board manages different hunts in different ways. For some, such as general

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<sup>5</sup> Exhibit 3; Exhibit 5 at 1, Alaska Dept. of Fish and Game, *Hunting, Trapping & Shooting*, available at <https://www.adfg.alaska.gov/index.cfm?adfg=hunting.main>.

<sup>6</sup> AS 16.05.221(b).

<sup>7</sup> AS 16.05.255; *see also* 5 AAC Chapters 84, 85, 92, and 99.

<sup>8</sup> Exhibit 6, Alaska Dept. of Fish and Game, *About the Board*, available at <http://www.adfg.alaska.gov/index.cfm?adfg=gameboard.main> at 1-2.

season hunts, the hunter merely needs to hold a hunting license.<sup>9</sup> For hunts involving certain wildlife populations in certain locations, however, the Board strictly limits the number of permits that can be issued. This occurs where the Board has determined that the subject animals do not exist in great enough numbers to support unlimited hunting. To ensure the animal populations are protected, the Board restricts the number of permits allowed for these species in the different game units.<sup>10</sup> For hunt permits that are highly sought-after, the Board has implemented a “drawing permit” system, where individuals apply for permits through a lottery.<sup>11</sup> The computerized lottery system randomly assigns each hunter a number, and the hunters provided with the lowest numbers receive hunting permits for the designated game unit.<sup>12</sup>

The Board decides how permits will be allocated between residents and nonresidents. It has the statutory authority to restrict nonresident hunting of big game animals “[w]henver it is necessary” “so that the opportunity for state residents to take big game can be reasonably satisfied in accordance with sustained yield principles.”<sup>13</sup>

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<sup>9</sup> Exhibit 7, Alaska Dept. of Fish and Game, *General Season Hunts*, available at <https://www.adfg.alaska.gov/index.cfm?adfg=huntlicense.general>.

<sup>10</sup> See generally 5 AAC 85.010-.085.

<sup>11</sup> Exhibit 8, Alaska Department of Fish and Game, *Draw Hunt Summary*, available at <https://www.adfg.alaska.gov/index.cfm?adfg=huntlicense.draw>.

<sup>12</sup> Exhibit 9, Alaska Department of Fish and Game, *Drawing Hunt Permits Information*, available at <https://www.adfg.alaska.gov/index.cfm?adfg=huntlicense.lottery>.

<sup>13</sup> AS 16.05.256.

3. Board Allocation of Drawing Permits Exclusively to Nonresidents.

The Board has a long history of mandating that high percentages of the limited numbers of drawing permits go to nonresidents only—*despite* the scarcity of many popular big game animals, and *despite* its express statutory authority to ensure residents have access to big game hunts.<sup>14</sup> For example, in Game Unit 21(B), the Board allocates up to 50% of moose hunting permits to nonresidents and 50% to residents.<sup>15</sup> In other game units, it allocates up to 25% of hunting permits to nonresidents with the remaining permits allocated to residents.<sup>16</sup> By statute, all nonresidents who wish to hunt big game (brown and grizzly bear, mountain goat, sheep) must hunt with a licensed professional guide.<sup>17</sup>

Nowhere is the practice of dedicating to nonresidents a large percentage of Alaska's scarce game hunting permits more egregious than in the Kodiak Brown Bear hunt. The Kodiak Archipelago ("Kodiak") is home to the largest bears in the world: a unique subspecies of brown bear, *Ursus arctos middendorffi*, commonly known as the Kodiak Brown Bear, that has been genetically isolated from other bears for 12,000

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<sup>14</sup> The Board also limits the number of permits granted to nonresidents in general and places other restrictions on nonresidents, including bag limits and limited open season dates. *See generally* 5 AAC 85.010-.085.

<sup>15</sup> *See* 5 AAC 92.069(b)(3).

<sup>16</sup> *See* 5 AAC 92.057; 5 AAC 92.069(c); *see also* 5 AAC 85.045; 5 AAC 85.050.

<sup>17</sup> *See* AS 16.05.407, .408. A single exception allows nonresident U.S. citizens to hunt bear in the company of an Alaska resident who is a relative within the second degree of kindred. *See* AS 16.05.407(a)(2).

years.<sup>18</sup> Kodiak Brown Bears are generally considered to be one of the greatest trophy animals in North American hunting, and are prized by sport hunters.

Game Unit 8 includes the Kodiak Brown Bear and has for many years been subject to limited hunting permit draws.<sup>19</sup> The Kodiak Brown Bear draw is a highly coveted permit that thousands of hunters apply for each year, and only a select few are able to obtain. There are only about 3,500 Kodiak Brown Bears in existence.<sup>20</sup> Annually, hunters take only approximately 180 of these bears.<sup>21</sup>

The Board first enacted a permit limit for hunting Kodiak Brown Bears in 1968.<sup>22</sup> Permits were issued on a first-come, first-served basis and could be obtained by proxy.<sup>23</sup> Nonresidents soon were able to monopolize the best hunting areas through their guides, who waited in line for days and sometimes weeks in order to obtain a permit, while Alaska residents complained that they could not afford to stand in line for weeks in order to obtain a permit.<sup>24</sup> As the number of permits increased, the number of guides increased and

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<sup>18</sup> Exhibit 10, Alaska Department of Fish and Game, *Kodiak Brown Bear Fact Sheet*, available at <https://www.adfg.alaska.gov/index.cfm?adfg=brownbear.trivia> at 1.

<sup>19</sup> Much of Kodiak Island is within the Kodiak National Wildlife Refuge, where the federal government awards exclusive guide use areas where only one guide is authorized to offer permit hunts. See Exhibit 11, U.S. Fish and Wildlife Service, *Big Game Guiding*, available at <https://www.fws.gov/refuge/Kodiak/visit/permits.html> at 1.

<sup>20</sup> Exhibit 10 at 1.

<sup>21</sup> *Id.* at 2.

<sup>22</sup> Exhibit 12 at 1, Unit 8 Brown Bear Permit System, 1976 (provided by the State of Alaska in its regulatory history of Game Unit 8).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 1-2.

nonresidents took a greater proportion of permits. By 1974, nonresidents were taking 75% of the permits.<sup>25</sup>

In 1974, the Board proposed allocating a certain percentage of permits to residents and nonresidents.<sup>26</sup> In determining the allocated percentages, the Board considered other states that allocated 40% to nonresidents and 60% to residents.<sup>27</sup> The Board also discussed how those percentages were reasonable since they reflected the average allocation given to residents and nonresidents in Alaska from 1968 to 1974.<sup>28</sup> However, the Board did not consider that the reason nonresidents were able to obtain such high numbers of permits was a result of the first-come, first-served policy and the ability of nonresidents to use guides as proxies to obtain the permits.

The 40/60 nonresident/resident allocation remains in effect today. The current version of 5 AAC 92.061 provides in relevant part:

- (a) In the Unit 8 general brown bear drawing permit hunt, the department shall issue permits, and a hunter may apply for a permit, as follows:
  - (1) the department shall issue a maximum of 40 percent of the drawing permits to nonresidents and a minimum of 60 percent to residents; each guide may submit the same number of nonresident applications for a hunt as the number of permits available for that hunt;

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<sup>25</sup> *Id.* at 2.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 3.

<sup>28</sup> *Id.*

The limited number of permits, and the limited allocation to Alaska residents, make it difficult for Alaska residents to obtain the coveted Kodiak Brown Bear hunting permit.<sup>29</sup> Approximately 5,000 Alaska residents apply for a Kodiak Brown Bear permit per year, but only 6.6% receive permits.<sup>30</sup>

According to ADF&G's summary of the standard practice, approximately 500 permits are issued annually, with 331 going to residents and 170 to nonresidents.<sup>31</sup> In some seasons, the split favors nonresidents more heavily: for example, in the fall 2018 Kodiak Brown Bear hunt lottery, only 116 permits were allocated to Alaska residents and 70 permits were allocated to nonresidents.<sup>32</sup> Each permit represented an opportunity to take a Kodiak Brown Bear in the fall 2018 hunt. These 70 permits—constituting nearly

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<sup>29</sup> A separate registration permit system applies to hunts on the Kodiak Island road system. See Exhibit 13 at 1, Alaska Department of Fish and Game, *Hunting Kodiak Brown Bears a Question & Answer Guide*, available at <http://www.adfg.alaska.gov/index.cfm%3Fadfg%3Dkodiakbear.kodiakfaqs>. This road-based hunting, of course, is a materially different hunting experience and as a general matter, far less coveted.

<sup>30</sup> Exhibit 10 at 2; Exhibit 14 at 27, Board of Game 2019 Proposals, Unit 8 – Kodiak Archipelago PowerPoint, available at <https://www.adfg.alaska.gov/static/regulations/regprocess/gameboard/pdfs/2018-2019/sc/rc4%206.2.pdf>. These numbers may change depending on the actual number of applicants within specific seasons and years and the number of available permits.

<sup>31</sup> See Exhibit 14 at 18, 27.

<sup>32</sup> Exhibit 15 at 20, 2019-2020 Alaska Drawing Permit Hunt Supplement, *Results of 2018 Permit Hunt Drawings* (“2018 Permit Results”) published by Alaska Department of Fish and Game, available at [https://www.adfg.alaska.gov/static/applications/web/nocache/license/huntlicense/pdfs/2019-2020\\_draw\\_supplement.pdf2849D3191DDC7BE063302C101A2389C0/2019-2020\\_draw\\_supplement.pdf](https://www.adfg.alaska.gov/static/applications/web/nocache/license/huntlicense/pdfs/2019-2020_draw_supplement.pdf2849D3191DDC7BE063302C101A2389C0/2019-2020_draw_supplement.pdf).

40% of the available permits in that season—were set aside exclusively for nonresidents, and were not even made available to Alaska residents in the lottery.

Nonresidents also receive extraordinarily favorable treatment for permits an original permit draw winner cannot use. Resident permits cannot be redistributed or transferred.<sup>33</sup> In a typical year, 44% of Alaska residents who receive a draw permit are unable to use them; because the State does not allow those permits to be transferred or re-allocated to other residents, those permits go unused.<sup>34</sup> By contrast, the State maintains an alternate list for nonresidents who applied for a permit and were not drawn, and redirects any unused permits to nonresidents on that list.<sup>35</sup> Further, if no names remain on the alternate list, a nonresident with a guide contract may secure one of the unused permits over-the-counter.<sup>36</sup> In practice, because of these generous reallocation policies for nonresidents (which are not available to residents), few nonresident permits go unused.<sup>37</sup>

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<sup>33</sup> See 5 AAC 92.050(a)(5).

<sup>34</sup> See Exhibit 14 at 26, 27; Exhibit 16 at 30, Transcript from Board Hearing March 19, 2019 (Tr. at 105) (Board of Game rejected a proposal to create an alternate list for resident hunters, so other residents could claim permits that otherwise would not be used).

<sup>35</sup> See 5 AAC 92.061(a)(4)(B), (C); Exhibit 15 at 2.

<sup>36</sup> See 5 AAC 92.061(a)(4)(D); Exhibit 15 at 2.

<sup>37</sup> See Exhibit 14 at 27 (on average 89% of available nonresident permits are used).

**C. Dr. Cassell's Board Proposal to Eliminate Nonresident Allocation and Board's Rejection.**

1. The Cassell Proposal.

Plaintiff Dr. Robert Cassell, DDS is an Alaska resident living in Wasilla, Alaska. Dr. Cassell has a biology degree and previously worked for ADF&G as a wildlife technician.<sup>38</sup> Dr. Cassell is a lifelong hunter and outdoorsman and regularly participates in Alaska hunts.<sup>39</sup> Dr. Cassell, like thousands of Alaskans, has repeatedly applied for but never received a Kodiak Brown Bear permit.<sup>40</sup>

In 2018, after being rejected yet again after applying for a permit for the season,<sup>41</sup> Dr. Cassell timely submitted a proposed regulation change ("Cassell Proposal") to the Board for consideration at the March meeting.<sup>42</sup> The Cassell Proposal requested that the Board amend the beginning of 5 AAC 92.061(a)(1) to read: "the department shall issue a minimum of 90 percent of the drawing permits to residents, with the remaining drawing permits available to residents and nonresidents on the same terms."<sup>43</sup> The Cassell Proposal also explained that the allocation of hunting permits exclusively to nonresidents was contrary to the Alaska Constitution's mandates that wildlife in the State of Alaska be

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<sup>38</sup> Cassell Aff. at ¶ 3.

<sup>39</sup> Cassell Aff. at ¶ 4.

<sup>40</sup> Cassell Aff. at ¶ 4.

<sup>41</sup> Cassell Aff. at ¶ 5-6.

<sup>42</sup> Exhibit 17, Cassell's Regulation Proposal Form 2018-2019 Board of Game ("Cassell Proposal"); Cassell Aff. at ¶ 7.

<sup>43</sup> Exhibit 17 at 1.

“reserved to the people for common use” and “utiliz[ed] . . . for the maximum benefit of its people.”<sup>44</sup>

The Cassell Proposal, if accepted, would have provided that at minimum 90% of all drawing permits would be set aside for Alaskans, with the remaining permits available to all, nonresidents and Alaskans alike. Put another way, it would have enabled Alaskans to have a chance at *all* the permits, rather than only 60% of them. The Cassell Proposal stated it was in line with the resident allocation percentages adopted by many other states, including Arizona, Colorado, Idaho, Kentucky, Montana, Nevada, New Mexico, Oregon, and Utah.<sup>45</sup>

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<sup>44</sup> *Id.* at 2.

<sup>45</sup> *Id.* Specifically, Arizona limits the number of big game permits to “ten percent or fewer of the total hunt permits.” A.R.S. 17-332(A). Idaho limits nonresident hunting tags to ten percent. *See* Idaho Admin. Code R. 13.01.08.255; 2020 ID REG TEXT 525601 (NS), 2020 ID REG TEXT 525601 (NS). Kentucky similarly limits elk and deer hunting permits for nonresidents to 10 percent. 301 Ky. Admin. Regs. 2:132; 301 Ky. Admin. Regs. 2:178. Montana also limits nonresident hunting permits for big game to ten percent. *See* Mont. Code Ann. § 87-2-506. Nevada provides quotas on its big game hunting permits, which are generally limited to 10 percent of the quotas designated to residents. *See* Nevada 2019 Big Game Quotas, *available at* [http://www.ndow.org/uploadedFiles/ndoworg/Content/Public\\_Meetings/Com/CR%2019-14%20-%20Big%20Game%20Quotas%20-%20FINAL\(1\).pdf](http://www.ndow.org/uploadedFiles/ndoworg/Content/Public_Meetings/Com/CR%2019-14%20-%20Big%20Game%20Quotas%20-%20FINAL(1).pdf) (not provided as an exhibit due to its length); Nevada 2020 Big Game Quotas, *available at* [http://www.ndow.org/uploadedFiles/ndoworg/Content/Public\\_Meetings/Com/2020%20Approved%20Big%20Game%20Quotas%20CR%2020-11.pdf](http://www.ndow.org/uploadedFiles/ndoworg/Content/Public_Meetings/Com/2020%20Approved%20Big%20Game%20Quotas%20CR%2020-11.pdf) (same). New Mexico requires that a minimum of 84 percent of hunting permits go to residents. Six percent is limited to residents and nonresidents who contract with an outfitter, and the remaining 10 percent go to nonresidents. N.M. Stat. Ann. § 17-3-16. Oregon limits nonresident hunting permits to not more than five percent. Or. Admin. R. 635-060-0030. Utah limits the number of nonresident permits to approximately 10 percent of most resident big game permits. *See* Utah 2020 Big Game Odds, *available at* [https://wildlife.utah.gov/pdf/bg/2020/20\\_bg-odds.pdf](https://wildlife.utah.gov/pdf/bg/2020/20_bg-odds.pdf) (not provided as an exhibit due to

The Board considered the Cassell Proposal at its March 14-19, 2019 Southcentral Region meeting held in Anchorage. The Cassell Proposal received significant support from the public in timely written and oral comments. For example, the nonprofit organization Resident Hunters of Alaska (“RHAK”) made a detailed presentation that highlighted the importance of the Kodiak Brown Bear hunt to residents and presented numerous facts and statistics for the Board’s consideration.<sup>46</sup>

2. Board Rejection and Rationale.

On March 19, 2019, the final day of its meeting, the Board rejected the Cassell Proposal, with one member voting for, and five against.<sup>47</sup> In its deliberations, the Board appeared to agree with the statements from the State of Alaska Department of Law, provided during the comment period, that “[t]he Board has allocation authority[,]” apparently without regard to constitutional limits.<sup>48</sup> The Board also appeared to give significant weight to the comments of hunting guides that allocating more permits to residents would adversely affect the guiding business.

One of the Board members described the Cassell Proposal as “one of the most controversial proposals” the Board had received, and expressly referenced a responsibility, citing a statute delegating authority to the Commissioner of the

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its length); *see also* Utah 2019 Big Game Odds, available at [https://wildlife.utah.gov/pdf/bg/2019/19\\_bg-odds.pdf](https://wildlife.utah.gov/pdf/bg/2019/19_bg-odds.pdf) (same).

<sup>46</sup> Exhibit 18, RHAK Board of Game Public Testimony PowerPoint Presentation, March 16, 2019.

<sup>47</sup> Exhibit 16 at 14 (Tr. at 52).

<sup>48</sup> *Id.* at 11 (Tr. at 39).

Department of Natural Resources, not ADF&G, to manage the state’s game resources “in the interest of the economy and general well-being of the state.”<sup>49</sup> Another Board member referenced the Cassell Proposal as presenting a “guide versus resident” problem, noted that there were guides who had invested substantial sums in lodges and resources, and expressed dismay at the thought that guides could come up to Alaska and have to worry about their ability to secure a livelihood.<sup>50</sup>

In summary, the Board’s rationale for denying the Cassell Proposal and continuing to insist on an unconstitutional allocation of Alaskan resources appears to be that it has authority to allocate resources however it chooses, without regard to constitutional limits, and that modifying the Kodiak Brown Bear permit allocation would have an adverse economic effect on the guiding industry, despite the fact that economic regulation is not within the Board’s statutory authority.<sup>51</sup>

**D. Procedural History.**

Dr. Cassell filed his Complaint in this suit on May 29, 2019, asserting a constitutional challenge to the Board’s allocation of drawing permits to nonresidents. The State answered on July 15, 2019 and denied Cassell’s assertions. The guiding industry attempted to intervene through the Alaska Professional Hunters Association (“APHA”)

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<sup>49</sup> *Id.* at 11-12 (Tr. at 40-41).

<sup>50</sup> *Id.* at 12 (Tr. at 43-44).

<sup>51</sup> It is worth noting that on March 19, 2019, four of the Board’s seven members had personal financial connections to the guiding industry.

but the Court denied intervention.<sup>52</sup> APHA appealed this ruling to the Alaska Supreme Court but, before briefing began, agreed to a settlement with Dr. Cassell and the State regarding its participation in this litigation.<sup>53</sup> The parties stipulated to a summary judgment briefing schedule on July 15, 2020. This motion followed.

### III. ARGUMENT

#### A. Legal Standards.

Dr. Cassell asserts a constitutional challenge to the Board’s practice of nonresident allocation of hunting permits. Alaska courts exercise their independent judgment in reviewing constitutional questions.<sup>54</sup>

Summary judgment under Alaska Civil Rule 56 is appropriate where “there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.” The party moving for summary judgment bears the burden of demonstrating the absence of any genuine dispute of fact and the legal right to judgment.<sup>55</sup> “Once the moving party has made a prima facie showing, the burden shifts to the non-moving party to produce admissible evidence reasonably tending to dispute or contradict the movant’s evidence.”<sup>56</sup> To defeat a motion for summary judgment, the non-moving

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<sup>52</sup> Order Denying Motion for Intervention, Oct. 7, 2019.

<sup>53</sup> Stipulation and Settlement Regarding Alaska Professional Hunters Association Participation, May 21, 2020.

<sup>54</sup> *Sonneman v. Knight*, 790 P.2d 702, 704 (Alaska 1990).

<sup>55</sup> *Cikan v. ARCO Alaska, Inc.*, 125 P.3d 335, 339 (2005).

<sup>56</sup> *Id.* (internal citations and quotations omitted).

party must demonstrate “specific facts showing that there is a genuine, material factual dispute” and cannot merely rely on allegations.<sup>57</sup>

Here, there is no dispute regarding any material fact. All of the data and figures cited above come directly from the State of Alaska. Putting that aside, there is only one material fact relevant to this case – that the Board of Game allocates scarce and prized big game hunting permits for Alaska’s wildlife exclusively to nonresidents. This uncontested practice violates the Alaska Constitution, and therefore a summary judgment order that the Board of Game may not allocate any portion of game permits exclusively to nonresidents is appropriate.

**B. The Alaska Constitution Mandates that Alaska’s Wildlife Resources Are Reserved for Common Use and Must Be Managed for the Maximum Benefit of All Alaskans.**

Control over Alaska’s lands and resources was the driving force behind statehood.<sup>58</sup> When the delegates gathered in 1955 to draft the Alaska Constitution,

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<sup>57</sup> *Id.*

<sup>58</sup> *See, e.g., Metlakatla Indian Community v. Egan*, 369 U.S. 45, 47-48 (1962); *Pullen v. Ulmer*, 923 P.2d 54, 57 n. 5 (Alaska 1996); *see also* Alaska Legislative Affairs Agency, Alaska’s Constitution: A Citizen’s Guide (4th ed. 2002) available at [http://w3.legis.state.ak.us/docs/pdf/citizens\\_guide.pdf](http://w3.legis.state.ak.us/docs/pdf/citizens_guide.pdf) (Many Alaskans concluded “that the notion of the federal government’s superior vigilance as a trustee of the public interest was really a cloak for the institutional interests of bureaucrats and the economic interests of nonresident corporations exploiting those resources (principally Seattle and San Francisco salmon canning companies [ ]).”); HOUSE COMM. ON INTERIOR AND INSULAR AFFAIRS, Act Providing for the Admission of the State of Alaska into the Union of 1957, H.R. REP. No 85-624 (1958) (The Statehood Act “will enable Alaska to achieve full equality with existing States, not only in a technical juridical sense, but in practical economic terms as well. It does this by making the new State master in fact of most of the natural resources within its boundaries . . . .”); Univ. of Alaska Anchorage,

ensuring careful internal management of Alaska’s resources for the benefit of Alaskans, not outside interests, was a key issue.<sup>59</sup> The delegates ultimately drafted an entire Article directing the State to carry out prudent resource management that would benefit all Alaskans. The resulting Article VIII is unique amongst state constitutions in memorializing common law public trust and anti-monopoly principles regarding management of state lands, waters, and resources.<sup>60</sup>

Article VIII contains the following three sections:

§ 1. Statement of Policy

It is the policy of the State to encourage the settlement of its land and the development of its resources by making them available for maximum use consistent with the public interest.

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Institute for Social and Economic Research, Salmon Fish Traps in Alaska (1999) at 14 (“Alaska political entrepreneurs used the [fish] trap issue to rally the citizens of the territory around the quest for statehood.”), available at <http://www.iser.uaa.alaska.edu/publications/fishrep/fishtrap.pdf>.

<sup>59</sup> Victor Fischer, Institute of Soc., Econ. and Gov’t Research, Univ. of Alaska, Alaska’s Constitutional Convention 132-33 (1975); see also Gerald A. McBeath, The Alaska State Constitution 159 (2011) (The delegates to Alaska’s constitutional convention “were uniform in their belief that Alaska’s natural resources had been ‘locked up’ and devalued by the negligent actions of the federal government and absentee owners,” and that the careful development of Alaska’s resources “spelled the difference between a future of plenty or of poverty” for the new state.); Richard L. Neuberger *Gruening of Alaska*, 36 Survey Graphic 512 (1947) (prior to statehood, Alaska was seen as a “feudal barony” where “[a]bsentee corporations took away millions in fish, gold, and furs and left behind nothing in the form of social or economic benefits.”), available at <http://www.archive.org/stream/surveygraphic36survrich#page512/mode/2up>).

<sup>60</sup> *Owsichek v. State*, 763 P.2d 488, 493 (Alaska 1988) (“We begin by examining constitutional history to determine the framers’ intent in enacting the common use clause. *This was a unique provision, not modeled on any other state constitution.* Its purpose was anti-monopoly. This purpose was achieved by constitutionalizing common law principles imposing upon the state a public trust duty with regard to the management of fish, wildlife and waters.”) (emphasis added).

§ 2. General Authority

The legislature shall provide for the utilization, development, and conservation of all natural resources belonging to the State, including land and waters, for the maximum benefit of its people.

§ 3. Common Use

Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use.

These provisions explicitly codify the “public trust doctrine” in Alaska, which “imposes on the State a trust duty to manage the fish, wildlife and water resources of the state for the benefit of the people.”<sup>61</sup> Under Article VIII and the public trust doctrine, Alaska’s game resources are State-owned “assets” that can be appropriated and must be controlled “for the benefit of all its people.”<sup>62</sup> The Alaska Supreme Court observed that “the provisions in Article VIII were intended to permit the *broadest possible access to and use of state waters by the general public.*”<sup>63</sup> The same principle applies to game and other state resources. And while it should go without saying, the “general public” and “the people” in this context mean *Alaskans*.<sup>64</sup>

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<sup>61</sup> *Id.* at 495 (Alaska 1988); see also *Herscher v. State, Department of Commerce*, 568 P.2d 996, 1003 (Alaska 1977) (the State acts “as trustee of the natural resources for the benefit of its citizens.”); cf. AS 38.05.126(b) (State “holds and controls all navigable or public water in trust for the use of the people of the state.”).

<sup>62</sup> *Pullen v. Ulmer*, 923 P.2d 54, 60-61 (Alaska 1996).

<sup>63</sup> *Wernberg v. State*, 516 P.2d 1191, 1198-99 (Alaska 1973) (emphasis added).

<sup>64</sup> *E.g., Sullivan v. Resisting Envt’l. Destruction on Indigenous Lands (REDOIL)*, 311 P.3d 625, 634–35 (Alaska 2013) (discussing Article VIII Section 1 and 3 and stating “the legislature is tasked with the duty to determine the procedures necessary for ensuring that the State’s resources are used ‘for the maximum benefit of its people.’ It is not the court’s place to provide instruction on *how* the State should determine what action would be for the maximum benefit of the *Alaskan people*.”) (emphasis added); *Shepherd v. State, Dep’t of Fish and Game*, 897 P.2d 33, 40 (Alaska 1995), (“the natural resources of

**C. Article VIII Prohibits Exclusive Grants of Alaska’s Game Resources that Disadvantage Alaskans as a Whole.**

A central pillar of resource and game management in Alaska is Article VIII’s express prohibition on granting any special privileges or exclusive rights to state resources to a subset of individuals at the expense of the Alaskan people as a whole.<sup>65</sup> The Alaska Supreme Court has made clear that the provisions of Article VIII “share at least one meaning: exclusive or special privileges to take fish and wildlife are prohibited.”<sup>66</sup>

The Alaska Supreme Court addressed this issue in detail in *Owsichek v. State*,<sup>67</sup> in the context of a constitutional challenge to a statute that authorized the Guide Licensing and Control Board to grant hunting guides “exclusive guide areas,” which were geographic areas where only one designated guide could lead professional hunts and all others (except unguided licensed hunters) were excluded. In an opinion by Justice Rabinowitz, the Court held that this scheme of giving chosen guides a monopoly over certain territory violated the Common Use clause.

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the state belong to the state, which controls them as trustees for *the people of the state*, is explicit in the Alaska Constitution. . . . As the trustee of those resources *for the people of the state*, the state is required to *maximize for state residents* the benefits of state resources . . . .”) (emphasis added).

<sup>65</sup> *McDowell v. State*, 785 P.2d 1, 6 (Alaska 1989) (the provisions of Article VIII “share at least one meaning: exclusive or special privileges to take fish and wildlife are prohibited.”).

<sup>66</sup> *Id.*

<sup>67</sup> 763 P.2d 488 (Alaska 1988).

The Court examined the constitutional history of the Common Use clause and noted clear intent to “prohibit ‘exclusive grants or special privileges,’” and ensure “that the public retain broad access to fish, wildlife and water resources, and that these resources not be the subject of private grants.”<sup>68</sup> It then noted that it had on multiple occasions held that the Common Use clause is intended to provide “independent protection” of the public’s access to natural resources.<sup>69</sup> Based on these principles, the Court rejected the State of Alaska’s argument that the Common Use clause gave it “a broad grant of authority to the state to manage these resources, and that it places no limitations on this authority greater than those contained in other constitutional provisions.”<sup>70</sup> The Court concluded that:

[E]xclusive guide areas and joint use areas fall within the category of grants prohibited by the common use clause. These areas allow one guide to exclude all other guides from leading hunts professionally in “his” area. These grants are based primarily on use, occupancy and investment, favoring established guides at the expense of new entrants in the market, such as Owsichek. To grant such a special privilege based primarily on seniority runs counter to the notion of “common use.”<sup>71</sup>

As discussed in more detail below, the allocation of scarce game resources to nonresidents where nonresidents are required to hire local guides is simply another

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<sup>68</sup> *Id.* at 493-94 (citing 4 Proceedings of the Alaska Constitutional Convention 2460 (Jan. 17, 1956)).

<sup>69</sup> *Id.* at 495-96.

<sup>70</sup> *Id.* at 491.

<sup>71</sup> *Id.* at 496.

impermissible grant of monopoly rights over Alaska’s resources to nonresidents and the guiding industry.

**D. The Alaska Constitution and Alaska Law Expressly Provide for Game Allocations Favoring Residents over Nonresidents.**

Alaska law has long recognized that resource allocations favoring residents over nonresidents are consistent with the Alaska Constitution. Indeed, in 1988 voters added a provision to the Alaska Constitution expressly providing that “[t]his constitution does not prohibit the State from granting preferences, on the basis of Alaska residence, to residents of the State over nonresidents to the extent permitted by the Constitution of the United States.”<sup>72</sup> While the overriding purpose of this amendment was to protect “local hire” provisions from being held unconstitutional on the basis of the equal protection clause,<sup>73</sup> it applies with equal force in the context of applying a resident preference when allocating scarce and highly sought-after game resources.

The Alaska Supreme Court emphatically affirmed the constitutionality of preferring residents over nonresidents in allocating game resources in *Shepherd v. State, Department of Fish & Game*.<sup>74</sup> There, two Alaska big game guides challenged AS

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<sup>72</sup> Alaska Const. art. I § 23.

<sup>73</sup> *E.g.*, Gordon Harrison, Alaska Legislative Affairs Agency, Alaska’s Constitution: A Citizen’s Guide at 10 (Alaska Legislative Affairs Agency ed., 5<sup>th</sup> ed. 2013) (“Convention delegates discussed the problem of nonresident contractors importing workers for jobs that could be performed by local people, but they did not contemplate using the constitution to put Alaskans at the head of the line. Such an idea would have been unthinkable at a time when congressmen from other states held the key to statehood.”).

<sup>74</sup> 897 P.2d 33 (Alaska 1995).

16.05.255(d), which commanded the Board of Game to “provide that ... the taking of moose, deer, elk, and caribou by residents for personal or family consumption has preference over taking by nonresidents.”<sup>75</sup> The guides argued that the State may not discriminate against nonresident recreational hunters because residency provides no basis to distinguish between trophy hunters and those that hunt for food.<sup>76</sup> The Court rejected this argument because:

[U]nder the federal and state constitutions the state has a special interest in the fish and wildlife within its boundaries and is entitled to grant allocational preferences to state resident recreational users.<sup>77</sup>

The Court noted that the United States Supreme Court had expressly upheld the constitutionality of a Montana regulatory scheme restricting nonresidents’ rights to hunt elk, noting that traditionally, states owned or held in trust naturally occurring fish and wildlife for their own citizens and were not required to allow nonresidents to share in the harvest.<sup>78</sup> The Court accepted the State’s argument that the resident preference served an important state interest because it “*conserve[ed] scarce wildlife resources for Alaska residents*,”<sup>79</sup> and noted “the preference for Alaska residents with respect to natural

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<sup>75</sup> *Id.* at 35.

<sup>76</sup> *Id.* at 39.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 40-41 (citing *Baldwin v. Fish & Game Comm’n*, 436 U.S. 371 (1978)).

<sup>79</sup> *Id.* at 43 (emphasis added).

resources is explicit in the state constitution and serves to differentiate resident from nonresident user groups.”<sup>80</sup>

As set forth in more detail below, exclusively allocating the state’s game to *nonresidents* in cases of scarcity flies in the face of these principles and is a direct violation of the mandates of Article VIII.<sup>81</sup>

**E. Allocating Hunting Permits Exclusively to Nonresidents Violates Article VIII.**

Given the clear edicts in Article VIII, one would expect that when confronted with scarce game resources, the Board of Game would allocate hunting access in a manner that ensured Alaskans have access to Alaska’s game. But the Board has chosen the opposite approach, repeatedly choosing to mandate that nonresidents be guaranteed a certain (often high) percentage of permits at the direct expense of Alaskans. Doing so constitutes an impermissible exclusive grant of Alaska’s game and turns the common use and maximum benefit principles on their heads.

Granting nonresidents a guaranteed percentage of big game permit draws gives nonresidents exclusive and privileged access to Alaska’s game. Under *Owsicheck*, this grant of exclusive monopoly access would be impermissible if given to a subset of Alaskans, *e.g.*, if a certain percentage of Kodiak Brown Bear permits were reserved for

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<sup>80</sup> *Id.* at 44.

<sup>81</sup> A large area of Kodiak Island is within the Kodiak National Wildlife Refuge, and is therefore subject to federal, not state, management. There, the federal government continues the practice of exclusive guide territories, unencumbered by the Alaska Constitution. *See supra* n. 19.

Kodiak residents.<sup>82</sup> Granting this exclusive privilege to nonresidents is even more constitutionally infirm. Moreover, as discussed below, given that nonresident hunters are required to use local Alaskan guides, the nonresident allocation also constitutes an impermissible grant of special economic privilege and access to Alaska guiding industry at the expense of Alaska resident hunters.<sup>83</sup>

It is also incredible that, when faced with a scarce and prized Alaskan resource, the State would respond by *barring* Alaskans from that resource—and instead *transferring* it to nonresidents. The Alaska Supreme Court explained in *Shepherd* that:

The State of Alaska devotes substantial resources to the protection and management of fish and wildlife. As the trustee of those resources for the people of the state, the state is required to maximize for state residents the benefits of state resources. In cases of scarcity, this can often reasonably be accomplished by excluding or limiting the participation of nonresidents. *In such circumstances, the state may, and arguably is required to, prefer state residents to nonresidents, except when such preferences are in conflict with paramount federal interests.*<sup>84</sup>

While the question of whether the State is *required* to prefer residents over nonresidents was not directly at issue in *Shepherd* and thus was not decided in that case, the answer is a clear “yes,” given the sweeping and explicit provisions in Article VIII.

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<sup>82</sup> *Cf. McDowell v. State*, 785 P.2d 1, 7-8 (Alaska 1995) (requirement that one live in a certain area to engage in subsistence fishing violates Article VIII).

<sup>83</sup> *Owsichek*, 763 P.2d at 497, n. 16 (noting that the exclusive guide areas it struck down were particularly significant given that nonresidents must hire guides in order to hunt brown bear and other big game, and therefore the exclusive areas granted an impermissible monopoly over this market). This point is addressed *infra* at Section III.F.

<sup>84</sup> *Shepherd* at 40-41 (emphasis added).

To quantify the privilege nonresidents enjoy under the current regulatory scheme, in 2018, when Dr. Cassell entered the fall Kodiak Brown Bear permit lottery, he and all other Alaskan residents had only approximately a 11% chance of winning a permit.<sup>85</sup> By contrast, nonresidents entering in the fall 2018 had approximately a 71% chance of winning.<sup>86</sup>

While any allocation of big game permits exclusively to nonresidents is unconstitutional on its face, the impact this nonresident giveaway has on Alaskans who wish to hunt Alaskan game has been profound and further confirms the necessity of ending this practice and conforming big game hunting permit allocations to the constitutional requirements of Article VIII.

**F. The Board's Economic Justifications for Nonresident Privilege Do Not Pass Constitutional Muster Because They Impermissibly Privilege a Subset of Alaskans.**

The Board's justification for mandating that nonresidents draw a certain percentage of big game permits in times of scarcity is solely economic. The Board claims

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<sup>85</sup> Exhibit 15 at 20. There were 6,553 total Alaska resident applications for Kodiak Brown Bear hunts for fall 2018. *Id.* Residents can apply for up to six hunts per species. 5 AAC 92.050(a). Assuming each resident applied for six Kodiak Brown Bear hunts, which is a generous assumption, there were approximately 1,092 total resident applicants (6,553/6). Only 116 resident permits were provided, meaning residents had only a 10.62% chance of obtaining a permit (116/1092). Exhibit 15 at 20.

<sup>86</sup> Nonresidents can only apply for one Kodiak Brown Bear permit per season. 5 AAC 92.061(a)(4)(A). In fall 2018, there were 99 nonresident applications for the Kodiak Brown Bear hunt and 70 total nonresident permits. Exhibit 15 at 20. Thus, nonresidents had a 70.7% chance of obtaining a permit (70/99). Put differently, a nonresident hunter was nearly *seven times* more likely to obtain a permit than a resident hunter.

that it is free to decide that granting permits to nonresidents will have a positive impact on the local guiding industry.<sup>87</sup> Similarly, in its motion to intervene in this matter, APHA asserted that eliminating the nonresident appropriation would “devastate the hunting guide industry on Kodiak Island” and “the hunting guide business in Alaska general” because the State’s guiding industry is dependent on nonresidents.<sup>88</sup>

These economic justifications, even if true,<sup>89</sup> do not pass constitutional muster. The State cannot allocate a scarce Alaska resource to nonresidents for the purpose of subsidizing a politically well-connected Alaska industry. This is precisely the type of policy decision Article VIII was meant to prohibit, and exactly the kind of special privilege deemed unconstitutional in *Shepherd*.

Given the Board chair’s reference to the “economy and general well-being of the state,”<sup>90</sup> the State may also argue in opposition that the practice of appropriating Alaska game to nonresidents does not just subsidize the guide industry, but provides broader

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<sup>87</sup> Exhibit 16 at 11 (Tr. at 39).

<sup>88</sup> APHA Mem. in Support of Mot. to Intervene at 4, Aug. 5, 2019.

<sup>89</sup> APHA’s doomsday assertions about the alleged “devastation” of the guide industry are entirely speculative. Nonresidents are still eligible to apply for permits under a constitutional allocation scheme, guides are always free to offer their services to Alaskans, and resident hunters visiting Kodiak would necessarily contribute to the local economy by taking advantage of local amenities (lodging, food, supplies, transportation). The issue is that APHA’s constituency is being directly subsidized by the current State allocation scheme and they simply do not want to have to change their business model. Ultimately, this issue is not relevant to the outcome here because any allocation of hunting permits to nonresidents is unconstitutional on its face, regardless of the impacts of ending this unconstitutional practice.

<sup>90</sup> Exhibit 16 at 12 (Tr. at 42).

economic benefit to the State. As an initial matter, such a claim does not ring true. The guiding industry is the overwhelming beneficiary of this unconstitutional allocation scheme, something APHA hammers repeatedly in its motion to intervene so it can defend the current system.<sup>91</sup> Further, to the extent one argues economic impacts, residents who secure hunting permits will also travel on planes, eat at restaurants, and patronize merchants for supplies.

This debate, however, is irrelevant. The edicts of Article VIII and the public trust doctrine require management of Alaska game for the maximum benefit of Alaskans, and denying Alaskans access to their own resources in favor of nonresidents is unconstitutional, regardless of any speculative economic impacts.<sup>92</sup> The State cannot claim it is constitutionally sound to utilize Alaska's game to increase revenue for certain business enterprises because in the context of natural resources, "income generation is not the sole purpose of the [public] trust relationship."<sup>93</sup>

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<sup>91</sup> APHA Mem. in Support of Mot. to Intervene at 2, 4, 5, 7, 8, 10-11, 16-17, 21.

<sup>92</sup> The State in its opposition to this motion may also include some biologist musings on how the Kodiak bear harvest might change should Cassell's rule be adopted. This line of defense is even more speculative and ill-advised than the economic justifications for violating the Constitution. If aligning permit allocations to conform to constitutional requirements results in some material change to harvest patterns, ADF&G is more than capable of adapting.

<sup>93</sup> *Brooks v. Wright*, 971 P.2d 1025, 1052 (Alaska 1999).

#### IV. CONCLUSION

Allocating a portion of big game hunting permits to nonresidents is a blatant violation of Article VIII and the public trust doctrine. This practice not only severely restricts the ability of Alaskans to access their own resources as guaranteed by the constitution, but functions as an impermissible appropriation of state resources to a privileged well-connected subset of nonresidents and guides. Dr. Cassell therefore respectfully requests the Court grant summary judgment in his favor and find that when the Board allocates big game hunting permits, it may not allocate any portion of these permits exclusively to nonresidents.

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**CERTIFICATE OF SERVICE**

I certify that on December 23, 2020 a copy of the foregoing was delivered via e-mail to:

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