

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

FILED  
STATE OF ALASKA  
THIRD DISTRICT  
2019 MAY 29 PM 12:40  
CLERK OF THE TRIAL COURTS

ROBERT CASSELL,

Plaintiff,

v.

STATE OF ALASKA, BOARD OF  
GAME,

Defendant.

BY \_\_\_\_\_  
DEPUTY CLERK

Case No. 3AN-19- 7460 CI

**COMPLAINT FOR DECLARATORY  
JUDGMENT AND INJUNCTIVE  
RELIEF**

Plaintiff Robert Cassell, by and through counsel Ashburn & Mason, P.C., hereby alleges the following:

**NATURE OF THE CASE**

1. Despite the Alaska Constitution's mandate that wildlife be reserved to the people of this state, the Board of Game regularly sets aside significant numbers of hunting permits 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.

2. Robert Cassell, an Alaskan resident and hunter, brings this action to protect the constitutional right of all Alaskan hunters to be first in line to enjoy the state's wildlife, without being crowded out by nonresident hunters.

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## PARTIES

3. Dr. Robert Cassell, DDS is an Alaska resident living in Wasilla, Alaska.

Dr. Cassell has a biology degree and previously worked for the Alaska Department of Fish and Game (“ADF&G”) as a wildlife technician. Dr. Cassell is a lifelong hunter and outdoorsman and regularly participates in Alaska hunts. Dr. Cassell is also a board member of Resident Hunters of Alaska (“RHAK”), an organization dedicated to enhancing and prioritizing opportunities for Alaskan resident hunters in accordance with responsible wildlife management.

4. The State of Alaska (“State”) is a sovereign state of the United States of America.

5. The State of Alaska, Board of Game (“Board”) is an agency of the State of Alaska created by AS 16.05.221(b) “[f]or purposes of the conservation and development of the game resources of the state[.]” Under AS 16.05.241 and AS 16.05.255, the Board has authority to adopt regulations governing the taking of game.

## JURISDICTION AND VENUE

6. The court has subject matter jurisdiction over this matter pursuant to AS 22.10.020(a) – (c).

7. Under AS 44.62.300, the Superior Court has authority to determine the validity of the Board’s regulations in a civil action. Under AS 22.10.020(g), the Superior Court may declare the rights and legal relations of a plaintiff and enter necessary or proper relief based on a declaratory judgment or decree against the defendant.

8. The court has personal jurisdiction over the Board pursuant to AS 09.05.015(a).

9. Venue is proper in the Third Judicial District pursuant to Alaska Rule of Civil Procedure 3(e) and AS 22.10.030.

### LEGAL BACKGROUND

10. Alaska's natural resources, including its wildlife, belong to the State, which holds them in trust for all Alaskans.<sup>1</sup> This principle was a pillar of statehood and is enshrined in the Alaska Constitution. Article 8, Section 3 of the Constitution provides, "Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use." Article 8, Section 2 provides, "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." Thus, it is constitutionally mandated that when state agencies make decisions regarding wildlife management and allocation, the rights of Alaskans must be given priority.

11. The Board of Game ("Board") is charged with ensuring that hunting within the State of Alaska takes place responsibly and sustainably under AS 16.05.221(b). For certain populations, the Board has determined that the subject animals do not exist in great enough numbers to support unlimited hunting. To ensure limits on the harvest for these scarce populations, the Board has implemented a

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<sup>1</sup> *Shepherd v. State, Dep't of Fish & Game*, 897 P.2d 33, 40-41 (Alaska 1995).

“drawing permit” system, where individuals apply for permits through a lottery system.

12. Yet under the current regulations, the Board also takes a number of these scarce permits *away* from Alaskans, and dedicates them to the exclusive use of nonresidents. As a result, often nonresident hunters have odds almost equal to Alaskans’ for drawing rare and highly sought-after permits. This is inconsistent with, and contrary to, the Constitution’s mandate that wildlife be reserved to Alaskans. Nowhere is this more apparent than in the permit process for Kodiak Brown Bear.

### FACTS GIVING RISE TO CLAIMS

13. The Kodiak Archipelago (“Kodiak”) is home to the largest bears in the world: a unique, genetically isolated subspecies of brown bear, *Ursus arctos middendorffi*, commonly known as the Kodiak Brown Bear. Kodiak Brown Bears are generally considered to be one of the greatest trophy animals in North American hunting, and are prized by sport hunters.

14. There are approximately 3,500 Kodiak Brown Bears on Kodiak, or approximately 0.7 bears per square mile. Because the bears are relatively scarce, and the population is not large enough to support unlimited hunting, the Board requires in certain areas that a limited number of permits be issued by lottery.

15. Kodiak is in Southcentral Region Game Unit 8 (“GMU 8”). 5 AAC 92.061 is the regulation that governs the Kodiak Brown Bear hunt in GMU 8. It 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;

16. According to ADF&G, approximately 5,000 Alaska residents apply for a Kodiak Brown Bear permit per year, but fewer than 10% receive permits.

17. According to the 2018-2019 Alaska Drawing Permit Hunt Supplement (“2018 Supplement”) published by ADF&G, 116 permits were allocated to Alaska residents and 68 permits were allocated to nonresidents for the Fall 2018 Kodiak Brown Bear hunt lottery. A true and correct excerpted copy of the 2018 Supplement is attached as Exhibit 1. Each permit represented an opportunity to take a Kodiak Brown Bear in the Fall 2018 hunt. These 68 permits—constituting nearly 40% of the available permits—were set aside exclusively for nonresidents, and were not made available to Alaska residents in the lottery.

18. On December 7, 2017, Plaintiff Robert Cassell submitted a timely application to ADF&G for a permit to hunt Kodiak Brown Bear in GMU 8 during the next hunting season. On February 16, 2018, Cassell was notified by ADF&G via e-mail that he had not received a permit. A true and correct copy of the notification e-mail, with personal information redacted, is attached as Exhibit 2.

19. On April 30, 2018, Cassell timely submitted a proposed regulation change (“Cassell Proposal”) to the Board for consideration at the March meeting. A true and correct copy of this proposal, with personal information redacted, is attached as Exhibit

3. 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.” 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 “reserved to the people for common use” and “utiliz[ed] . . . for the maximum benefit of its people.”

20. 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, California, Colorado, Idaho, Kentucky, Montana, Nevada, New Mexico, Oregon, and Utah.

21. The Cassell Proposal was included as Proposal 99 in the proposal book for the Board’s March 2019 meeting on Southcentral Region issues. Public comments were solicited for all proposals, including the Cassell Proposal.

22. From March 14 to 19, 2019, the Board met in Anchorage to consider all the regulation changes that had been timely proposed, including the Cassell Proposal. Cassell provided oral testimony at the meeting.

23. The Cassell Proposal received significant support from the public in written and oral comments. For example, RHAK made a detailed presentation that

highlighted the importance of the Kodiak Brown Bear hunt to residents. A true and correct copy of the RHAK presentation materials is attached as Exhibit 4.

24. An ADF&G biologist made a presentation on historical participation rates and harvest information. A true and correct copy of the ADF&G presentation materials is attached as Exhibit 5. Ultimately, the ADF&G took a neutral position on the proposal from a conservation and wildlife management perspective.

25. On March 19, 2019, the Board declined to adopt Cassell's proposal, with one member voting for, and five against.

26. 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 the authority to make allocation decisions[,]” apparently without regard to constitutional limits.

27. 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.

28. The Chairman of the Board 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 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.” 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.

29. 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.

30. With the Board's refusal to adopt the Cassell Proposal, or even consider the constitutional implications of the status quo regarding nonresident hunting allocation, Cassell is left with no other option but to bring the current action to remedy the Board's insistence on unconstitutionally allocating Alaskan resources to nonresidents.

### COUNT I

#### **Declaratory Judgment that Any Exclusive Allocation of Kodiak Brown Bear Permits to Nonresidents Violates the Alaska Constitution**

31. All foregoing allegations are incorporated into this count.

32. Article VIII, § 3 of the Alaska Constitution provides: "Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use." In other words, the Alaska Constitution requires the State of Alaska to reserve wildlife, including Kodiak Brown Bear, to the residents of Alaska for common use.



33. Cassell is entitled to an order declaring and adjudging that the Board's and/or 5 AAC 92.061(a)(1)'s allocation of any Kodiak Brown Bear permits exclusively to nonresidents is contrary to Article VIII, § 3 of the Alaska Constitution.

### COUNT II

#### Declaratory Judgment that 5 AAC 92.061(a)(1)'s Allocation of Kodiak Brown Bear Permits to Nonresidents Violates the Alaska Constitution

34. All foregoing allegations are incorporated into this count.

35. Article VIII, § 3 of the Alaska Constitution provides: "Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use." In other words, the Alaska Constitution requires the State of Alaska to reserve wildlife, including Kodiak Brown Bear, to the residents of Alaska for common use.

36. In the alternative, Cassell is entitled to an order declaring and adjudging that the Board's and/or 5 AAC 92.061(a)(1)'s allocation of nearly 40% of the available Kodiak Brown Bear permits exclusively to nonresidents is contrary to Article VIII, § 3 of the Alaska Constitution.

### COUNT III

#### Temporary and Permanent Injunction Preventing the Board from Enforcing or Adopting Any Policy or Regulation Allocating Kodiak Brown Bear Permits Exclusively to Nonresidents

37. All foregoing allegations are incorporated into this count.

38. Article VIII, § 3 of the Alaska Constitution provides: "Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for

common use.” In other words, the Alaska Constitution requires the State of Alaska to reserve wildlife, including Kodiak Brown Bear, to the residents of Alaska for common use.

39. Cassell is entitled to an order temporarily or permanently restraining or enjoining the Board from enforcing or adopting any regulation or policy that grants available Kodiak Brown Bear permits exclusively to nonresidents.

#### COUNT IV

#### Temporary and Permanent Injunction Preventing the Board from Enforcing 5 AAC 92.061(a)(1)'s Allocation of Nearly 40% of the Available Kodiak Brown Bear Permits Exclusively to Nonresidents

40. All foregoing allegations are incorporated into this count.

41. Article VIII, § 3 of the Alaska Constitution provides: “Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use.” In other words, the Alaska Constitution requires the State of Alaska to reserve wildlife, including Kodiak Brown Bear, to the residents of Alaska for common use.

42. In the alternative, Cassell is entitled to an order temporarily or permanently restraining or enjoining the Board from enforcing 5 AAC 92.061(a)(1)'s allocation of nearly 40% of the available Kodiak Brown Bear permits exclusively to nonresidents.

#### PRAYER FOR RELIEF

Based on the foregoing, Cassell prays for the following relief:

A. For an order declaring and adjudging that the Board and/or 5 AAC 92.061(a)(1)'s allocation of any Kodiak Brown Bear permits exclusively to nonresidents is contrary to Article VIII, § 3 of the Alaska Constitution.

B. In the alternative, for an order declaring and adjudging that the Board and/or 5 AAC 92.061(a)(1)'s allocation of nearly 40% of the available Kodiak Brown Bear permits exclusively to nonresidents is contrary to Article VIII, § 3 of the Alaska Constitution.

C. For an order temporarily or permanently restraining the Board from enforcing or adopting any regulation or policy allocating any of the available Kodiak Brown Bear permits exclusively to nonresidents.


D. In the alternative, for an order temporarily or permanently restraining the Board from enforcing 5 AAC 92.061(a)(1)'s allocation of nearly 40% of the available Kodiak Brown Bear permits exclusively to nonresidents.

E. For costs and full reasonable attorney's fees under AS 09.60.010(c) and the Alaska Rules of Civil Procedure;

F. For such other relief deemed just and equitable.

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DATED: 5/29/19

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