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 CONSOLIDATED REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION

The Alaska Constitution Article VIII states that wildlife are "reserved to the people for common use"[1] and should be managed "for the maximum benefit of its people."[2] The Alaska Supreme Court has accordingly affirmed that Alaska's game resources must managed "for the benefit of all of its people"[3]—in other words, for the benefit of *Alaskans.*

The State of Alaska, however, has decided that these clear constitutional directives allow it to prevent Alaskans from using their wildlife by excluding residents from almost half of the available permits to hunt big wildlife, such as Kodiak Brown Bear. How could this practice of excluding Alaskans from access to their own wildlife be consistent with reserving wildlife to Alaskans for their "common use" and for "the maximum benefit of its people"? The State's answer is to argue, convolutedly, that prohibiting Alaskans from permits for certain prized wildlife species, and instead giving those permits exclusively to nonresidents, somehow provides economic benefits to all Alaskans. It attempts to support this argument by claiming that because nonresidents are forced by law to hire and pay local guides, these guide payments and other expenditures will spread to all Alaskans in the form of some vague economic benefit.

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[1] Alaska Const. Art. VIII § 3.

[2] Alaska Const. Art. VIII § 2.

[3] *Pullen v. Ulmer*, 923 P.2d 54, 60-61 (Alaska 1996).

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The State cannot use economics to justify an otherwise unconstitutional wildlife management practice. The general directive to "manage for the maximum benefit of the people" must be read in conjunction with Article VIII's specific provisions addressing wildlife (Sections 3 and 4) and Article VIII as a whole. Indeed, while other provisions of Article VIII specifically provide for economic considerations, *e.g.* Section 12, which discusses the State's sale of mineral leases and permits, and Section 15, which allows the State to manage fisheries "to prevent economic distress among fishermen," economic considerations are notably absent from the language of Sections 3 and 4. Similarly, in order to manage wildlife for a "sustained yield" under Article VIII Section 4, the State must do so in a manner consistent with the common use clause in Section 3 and the whole of Article VIII. The State has multiple wildlife management tools available that do not involve deliberately excluding Alaskans from the opportunity to hunt their own wildlife.

Given the flaws in its constitutional arguments, it is not surprising the State, joined by APHA, tries to reframe the issue as Dr. Cassell arguing that the State must manage wildlife through a strong resident preference that excludes nonresidents. The Court should easily see through this sleight of hand. Dr. Cassell is arguing against the exclusion of Alaskans from accessing their own wildlife. All the State needs to do is end the practice of setting aside hunting drawing permits exclusively to nonresidents and open access to the permit drawings to all, Alaskan and nonresident alike. While Dr. Cassell believes a strong resident preference in managing drawing permits would be

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good policy and likely constitutionally required, any required level of resident preference is not an issue in this case.

Viewed in this light, the State and APHA's remaining arguments fall apart. The simple truth is that setting aside hunting permits exclusively for nonresidents unconstitutionally excludes Alaskans from access to and use of their own wildlife. This practice must come to an end.

II. UNCONTESTED FACTS

Dr. Cassell respectfully submits there are no material facts in dispute. It is undisputed that the Board of Game, through 5 AAC 92.061(a)(1) and other regulations, allocates a portion of drawing permits for prized Kodiak Brown Bear hunts exclusively to nonresidents. This is the only fact material to the Court's decision on Dr. Cassell's argument that the practice of dedicating permits to nonresidents violates the Alaska Constitution.

The State and APHA disagree, however, and repeatedly argue that giving nonresidents and the guides they must hire by law exclusive access to these hunting permits is necessary as a wildlife management tool. They claim that as a factual matter, residents will take more female bears, and that the Board must boost the Alaskan economy through the money nonresident hunters pay their guides. Neither of these alleged justifications for ignoring the Constitution is factually sound, and certainly neither has been established beyond dispute. More importantly, however, they are not material or relevant to the Court's inquiry on summary judgment. The Court need not be ensnared in a complicated factual dispute over how nonresident hunting impacts the

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economy, or how increasing resident hunters might impact harvesting. As Dr. Cassell argued in his Motion for Summary Judgment, this case presents a legal issue for the Court to decide based solely on the language of the Constitution.

III. ARGUMENT

A. Dr. Cassell Is Challenging the Constitutionality of the Permit Allocation in an Original Action, which Requires No Deference to the Board.

1. The State erroneously urges the Court not to substitute its judgment for that of the Board.

The State argues, as a threshold matter, that the Court owes the Board deference in deciding this issue, and urges the Court not to substitute its judgment for the Board's.[4] This argument misconstrues the nature of this suit. Dr. Cassell has not challenged a specific allocation decision made based on the Board's expertise, *e.g.,* claiming it is issuing too many permits, or that it should modify its allocation among users to a different percentage split. Rather, Dr. Cassell argues that the Board is constitutionally prohibited from ever giving nonresidents exclusive grants of access to Alaska wildlife. This case presents a standalone constitutional challenge to Board practice and regulation. *De novo* review therefore applies.[5]

2. Administrative Procedure Act standards are inapplicable.

The State similarly seeks to interject an Administrative Procedure Act test into the Court's review, arguing the Legislature authorized the Board to enact 5 AAC

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[4] State Br. at 4.

[5] *Lauth v. State,* 12 P.3d 181, 184 (Alaska 2000).

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92.061(a)(1), and thus, this regulation is consistent with its authorizing statute.[6] Even if true, these points are irrelevant to the constitutional claim at issue. Consistency with the enabling statute and an economic impacts analysis have no application here, where the Court is reviewing a regulation on constitutional grounds, not reviewing a specific decision by the Board.

B. Dr. Cassell, as a Resident Hunter Who Regularly Applies for Hunting Permit Draws, Has Standing as an "Interested Party" under the Declaratory Judgment Act.

The State argues that Dr. Cassell is not an "interested person" under Alaska's declaratory judgment statute, AS 44.62.300, and the Alaska Supreme Court's decision in *Haynes v. Commercial Fisheries Entry Commission*.[7] This argument borders on frivolous. Dr. Cassell is an Alaskan resident hunter who has repeatedly and unsuccessfully applied for a Kodiak Brown Bear on a yearly basis, and brought a

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[6] State Br. at 7-9.

[7] State Br. at 5-7; *Haynes*, 746 P.2d 892 (Alaska 1987). The State's citation to *Haynes* is suspect and takes its standing discussion entirely out of context. There, the plaintiff had applied for an entry permit before the Commercial Fisheries Entry Commission ("CFEC"), was denied, and failed to appeal. *Id.* at 893. He then tried to resurrect his claim by filing a request for declaratory and injunctive relief three years later, arguing the regulation he applied under was invalid. *Id.* The Court concluded his claim for injunctive relief was untimely because of his prior failure to appeal the CFEC's decision. *Id.* at 894-96. The Court then held he could not seek declaratory relief because his claim was moot and because he lacked general standing to bring the claim. *Id.* at 896-97. Specifically, the Court stated Haynes "has no interest as a potential recipient of an entry permit. *Since he did not appeal the CFEC's denial of his application . . . that denial became final*." *Id.* (emphasis added). The Court then noted even if plaintiff were successful in challenging the validity of the regulation "he would be unable to use that holding to revive his application for a permit." *Id.* Thus, *Haynes's* language on standing must be understood in the context of a plaintiff who previously waived an appeal deadline. No such circumstances exist here.

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proposal to the Board of Game prior to initiating this lawsuit seeking a change in the regulations.[8] He is thus directly impacted by the unconstitutional permit practice he challenges in this case. These facts are undisputed and more than establish a "sufficient personal stake" in the issue at hand.[9] Indeed, if Dr. Cassell does not have standing here, *no one* does.[10]

The State also tries to argue, based on unfounded speculation and creative math (both of which are inappropriate on summary judgment), that Dr. Cassell has not shown that his chances of drawing a Kodiak bear tag would improve if he were to prevail here.[11] Dr. Cassell does not have to pass any threshold showing that he would directly personally benefit, or be "better off" from a favorable ruling here.[12] He is an interested

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[8] Opening Br. at 14-16 and Aff. of Cassell at ¶ 4.

[9] *Hoblit v. Comm'r of Nat. Res*., 678 P.2d 1337, 1340 (Alaska 1984) ("[T]he relevant inquiry is whether the party asserting standing has a sufficient 'personal stake' in the outcome of a controversy to ensure the requisite adversity.").

[10] Indeed, the State's attempt to impose a restrictive test for standing flies in the face of long-standing Alaska Supreme Court precedent. *See, e.g. Coghill v. Boucher,* 511 P.2d 1297, 1303 (Alaska 1973) ("In the past . . . this court has departed from a restrictive interpretation of the standing requirement."); *Moore v. State*, 553 P.2d 8, 23 (Alaska 1976) ("As previous decisions of this court indicate, the concept of standing has been broadly interpreted in Alaska favoring increased accessibility to judicial forums.").

[11] State Br. at 5-7. More residents apply for Kodiak Brown Bear permits than nonresidents on a per-permit basis. As a matter of basic math, if the 40% of permits currently set aside for nonresidents were made available to residents, Dr. Cassell would have a greater chance of drawing one of these permits.

[12] *See, e.g. State v. Lewis,* 559 P.2d 630, 634-635 (Alaska 1977), *appeal dismissed,* 432 U.S. 901 (1977) (plaintiff's interest-injury may be intangible, such as an aesthetic or environmental interest); *see also Wagstaff v. Superior Court, Family Court Division,* 535 P.2d 1220, 1225 & n.7 (Alaska 1975) ("[t]he basic idea ... is that an identifiable trifle is enough for standing to fight out a question of principle; the trifle is

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Alaskan hunter who regularly applies for Kodiak Brown Bear drawing permits and believes the permits are being unconstitutionally allocated. That is enough to establish standing.[13]

C. Dr. Cassell's Claim is Timely.

The State argues that Dr. Cassell's claim is barred by the statute of limitations and laches because he did not initiate suit the first time he learned of the Board's practice of allocation Kodiak Brown Bear permits to nonresidents.[14] This argument has no apparent basis in the law and should be rejected.

There is no applicable statute of limitations on the declaratory judgment Dr. Cassell seeks here.[15] The State tries to create one by asserting a laches argument, but this

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the basis for standing and the principle supplies the motivation.") (internal citations omitted);

[13] The State also argues that Dr. Cassell is attempting to bring an improper class action because he stated in his opening brief he was bringing this case "on behalf of all Alaskan hunters." State Br. at 5. The State fails to differentiate between a class action pleading and a rhetorical flourish. Dr. Cassell brings this case based on his own standing, but his intent in doing so is to benefit others. This does not require class certification.

[14] State Br. at 20-22. The State further argues Dr. Cassell can seek an injunction only as part of a direct appeal. *Id.* But there is no right of direct appeal from Board decisions. The Administrative Procedure Act (which, again, Dr. Cassell has not invoked here) and the Declaratory Judgment Act are the only remedies available, and they both allow for injunctive relief.

[15] *Metcalfe v. State*, 382 P.3d 1168, 1175-1176 (Alaska 2016), *abrogated on other grounds by Hahn v. GEICO Choice Ins. Co.*, 420 P.3d 1160 (Alaska 2018) (considering whether statute of limitations defense applied to claim for declaratory and injunctive relief prohibiting the enforcement of allegedly unconstitutional statute, and affirming that "equitable relief claims are not subject to statutes of limitations and are instead controlled by the doctrine of laches.") (citing *Moffitt v. Moffitt*, 341 P.3d 1102, 1105 (Alaska 2014)).

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argument goes too far.[16] It essentially asks the Court to impose a brand-new, uncodified, statute of limitations on any litigant who wishes to seek declaratory judgment that a certain state regulation or practice is unconstitutional.

Notably, the State is silent on when and how this "hidden" statute of limitations would apply: it does not comment on when it believes Dr. Cassell should have raised his claims. Dr. Cassell repeatedly applied for permits without success. He then brought a proposal to the Board of Game and went through the full proposal review process. When that proposal failed, he brought the current lawsuit. The State's argument that Dr. Cassell waited 44 years to bring this claim is a false construct. To highlight the absurdity of the State's argument: following the State's logic, if a plaintiff who had just turned eighteen filed the same lawsuit, none of the State's arguments here would apply. Surely a citizen's ability to bring a constitutional challenge to a state regulation is not dependent on age. Further, the State should be hesitant to advocate for a policy that litigants must rush to the courthouse once they are aware of a potential dispute, rather than doing what Dr. Cassell did here, which is try to work within the system to effect change and eventually brining a proposal before the Board.

In effect, the State asks the Court to rule that practices and regulations are above challenge if they have been around long enough—a proposition that lacks any support in the law,[17] and flies in the face of both justice and due process.[18]

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[16] *State v. Alex,* 646 P.2d 203, 215 (Alaska 1982) (declaratory judgment and injunctive relief "are prospective in application and seek to prevent future threatened harm. A laches analysis is simply inappropriate, since each new assessment would give rise to a new cause of action.").

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D. Granting Nonresidents Exclusive Access to Drawing Permits Unconstitutionally Excludes Alaskans from Access to their Own Wildlife.

1. Article 8, read as a whole, prioritizes the reservation of wildlife to Alaskans without reference to economic considerations.

Dr. Cassell is reading Article VIII of the Alaska Constitution as a whole and harmonizing its provisions.[19] Dr. Cassell's argument is principally founded on Section 3, which explicitly requires that Alaska's wildlife be "reserved to the people for common use." This specific provision must then be read in conjunction with the remainder of Article VIII. For example, Dr. Cassell also relies on Article VIII Section 2, which as APHA and the State acknowledge, was grounds for upholding residence preferences in *Shepherd v. State, Department of Fish & Game*.[20]

The State and APHA nonetheless contend that Dr. Cassell is reading Article VIII Section 3 in isolation, and that other constitutional provisions take precedence and allow the Board to grant exclusive access to Alaska's game to nonresidents based on perceived

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[17] *See, e.g., State v. Alex,* 646 P.2d at 215; *Metcalfe*, 382 P.3d at 1175-1176.

[18] Litigants often require significant time and effort to marshal the resources and will to take on the government, or to take on policies that are backed by entrenched interests. Imagine a case where the State segregated schools based on race and a litigant who endured this system finally manages to find the resources and courage to file a suit challenging the constitutionality of the segregation policy. The State cannot seriously argue this plaintiff would lack standing for failing to bring suit earlier.

[19] *Owsichek*, 763 P.2d at 496 ("It is a well accepted principle of judicial construction that whenever reasonably possible, every provision of the Constitution should be given meaning and effect, and related provisions should be harmonized.") (internal citations omitted).

[20] State Br. at 20; APHA Br. at 16- 18; *Shepherd*, 897 P.2d 33 (Alaska 1995).

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economic benefit.[21] In reality, the State and APHA are the ones cherry-picking constitutional provisions. When Article VIII is read as a whole, its message is clear: while economic factors are an allowable consideration for certain types of resources, they take a backseat to the specific guidance provided in Section 3 that wildlife is reserved "to the people for common use."

Article VIII is broadly titled "Natural Resources" and addresses the full range of natural resources that exist in Alaska: lands, waters, fish, wildlife, forests, grasslands, and minerals. It opens with two general sections. Section 1 is a "Statement of Policy" expressing the State's desire to encourage resource development. Section 2 addresses the legislature's "General Authority" to manage natural resources and directs it to ensure that "all natural resources belonging to the State," are managed "for the maximum benefit of its people[,]" *i.e.*, Alaskans.

The other sixteen sections of Article VIII address specific types of resources. Some explicitly mention economic activities, such as Section 9, which authorizes the sale or grant of state land, and Section 12, which discusses the State's sale of mineral leases and permits. Others acknowledge citizens' personal economic interests, such as Sections 16 and 18, which require the State to pay just compensation for private land and water interests taken.

Although fish and wildlife appear together in Section 3 and are both reserved to the people of Alaska, the Board of Fish and the Board of Game are charged with

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[21] State Br. at 15; APHA Br. at 11.

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different missions. Section 15, "No Exclusive Right of Fishery," is notable because it expressly allows the State to manage fisheries "to prevent economic distress among fishermen and those dependent on them[.]" There is no comparable section addressing economic concerns in wildlife management—instead, the only specific directives on wildlife are to reserve it to the people of Alaska for common use (Section 3) and to manage it pursuant to the sustained yield principle (Section 4). The Constitution's silence on any economic considerations for wildlife is in direct contrast to its express discussion of economics as an appropriate concern for other resources. This silence speaks volumes.

Article VIII, therefore, viewed as a whole, makes clear that the general policy and authority stated in Sections 1 and 2—providing for "maximum use" of resources and management of resources "for the maximum benefit of its people"—can mean different things for different resources. For certain resources, such as minerals, it means economic development of the resource is a permissibly substantial concern. For others, such as fish, it means balancing common use principles with economic considerations. For wildlife, it simply means ensuring that wildlife is reserved to and available for the people of Alaska. To the extent economics play a role in wildlife management, that role is subordinate to the paramount concern of making wildlife available to Alaskans.

2. The Board's authority is subject to and limited by Article VIII and the Public Trust Doctrine.

Although the State and APHA attempt to frame the regulations and practices at issue as being authorized by statute, this is irrelevant: the question at issue in this suit is

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whether they are *constitutional*. 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 of its people."[22] In terms of wildlife management, Article VIII Section 3 is clear that "Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use." These are the guiding principles the Board of Game must honor when determining access to Alaska's wildlife in situations where open access is not possible, *e.g.*, when the Board determines that access must be limited by only issuing a set number of permits to hunt.[23]

In these circumstances, the plain language of Article VIII mandates that in issuing these permits, the Board must do so in a way that maximizes access to the Alaskan public.[24] The Board maintains discretion in terms of *how* to achieve this goal, but the Board's discretion is limited by the edicts of the Alaska Constitution. It is thus surprising that in these circumstances the Board has chosen, repeatedly, to set aside a portion of these scarce and highly sought-after hunting permits exclusively for

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[22] *Pullen v. Ulmer*, 923 P.2d 54, 60-61 (Alaska 1996).

[23] Despite the need to parcel out a limited number of permits to hunt, the State argues there is no "scarcity" of Kodiak brown bear, and embarks on a long discussion regarding population numbers and management. State Br. at 10 - 12. Scarcity does not need to mean endangered. The issue here is that there are not enough bears to allow all interested parties to hunt, and therefore hunting permits are limited and must be parceled out in some form, recognizing that not all who desire a permit will secure one.

[24] *Wernberg v. State*, 516 P.2d 1191, 1198-99 (Alaska 1973) ("the provisions in Article VIII were intended to permit the *broadest possible access to and use of state waters by the general public*.") (emphasis added).

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nonresidents.[25] None of the Board's constitutional and policy rationales for this practice holds water.

The State and APHA's central thesis is that allocating permit draws to nonresidents boosts economic activity and thus provides for the "maximum benefit of its people" as provided in Article VIII Section 2.[26] The State and APHA also assert that "Alaskans hunting bears is not the only appropriate use of the resource" and Article VIII Section 4 allows broad discretion to make "preference among beneficial uses."[27] The State and APHA mistakenly elevate the general language of Section 2 over the specific language of Section 3 regarding wildlife, and fundamentally misconstrue Section 4's mandates regarding "sustained yield."

3. Providing for the "Maximum Benefit of the People" under Article VIII Section 2 does not allow the alleged economic benefits to guiding industry to trump the restrictions on granting exclusive privileges to Alaska wildlife under Article VIII Section 3.

The State and APHA urge that the alleged economic benefit of setting aside permits for nonresidents is a constitutional cure-all because these economic impacts provide for the "maximum benefit of the people."[28] The argument is essentially that

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[25] APHA urges that no resource is being allocated to nonresidents here because an opportunity to hunt game is not a "resource." APHA Br. at 9. The court should ignore APHA's attempt at semantics. The resource here is Alaska game and the permit system acts as a gatekeeper to access this game. Setting aside 40% of available permits to nonresidents effectively sets aside 40% of the resource to nonresidents.

[26] State Br. at 16; APHA Br. at 3, 4 n. 8.

[27] State Br. at 15; APHA Br. at 22.

[28] State Br. at 16-17; APHA Br. at 3, 4 n. 8.

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nonresidents must use guides,[29] and by setting aside large numbers of permits exclusively for nonresidents, these nonresidents must pay large sums of money to the guides to hunt, and this trickles down to the rest of the Alaska economy.[30]

As a threshold matter, this argument depends on a "fact" that is far from established. The alleged benefit to Alaskans from the Board's support of the guiding industry would be very much in dispute and an inappropriate basis for summary judgment—if it were a material fact. However, as explained below, the State and APHA's effort to insert this "fact" into the summary judgment analysis is legally flawed. Ultimately, the alleged economic benefit—even if true, which Dr. Cassell would dispute—is irrelevant to the Court's inquiry.

The first mistake in this argument is elevating the general prescriptions in Article VIII Section 2 over the specific provisions regarding access to wildlife in Article VIII Section 3. The specific trumps the general,[31] as AHPA acknowledges.[32] Here, this means in terms of wildlife management, the common use clause in Section 3 provides

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[29] AS 16.05.407; *see also Owsichek v. State of Alaska Guide Licensing and Control Board*, 763 P.2d 488, 497 n.16 (Alaska 1988).

[30] State Br. at 15; APHA Br. at 3-4.

[31] *State v. Planned Parenthood of the Great Nw.*, 436 P.3d 984, 996 (Alaska 2019) ("Under the interpretive canon *ejusdem generis,* when a general term follows specific terms, the general term "will be interpreted in light of the characteristics of the specific terms, absent clear indication to the contrary.")(*citing City of Kenai v. Friends of Recreation Ctr., Inc.*, 129 P.3d 452, 459 (Alaska 2006) and *quoting West v. Umialik Ins. Co.*, 8 P.3d 1135, 1141 (Alaska 2000)); Ejusdem generis, *Black's Law Dictionary* (10th ed. 2014) ("A canon of construction holding that when a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items of the same class as those listed.").

[32] APHA Br. at 15.

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specific guidance on how the Board may, and may not, provide for the "maximum benefit of the people" in terms of granting open access to the State's game resources. At a minimum, this means not excluding Alaskans from access to hunting permits in favor of nonresidents. Ultimately, the economic benefits argument proves too much because the perceived economic benefit of *any* chosen policy could trump the remaining provisions of Article VIII.

The second mistake in this argument is that it incorrectly, and baselessly, assumes that this system of government patronage benefits *all Alaskans.* In fact it provides economic benefits to the *guides*, but these benefits come at the direct cost of denying Alaskans access to hunting their own game resources. Further, these economic benefits are not at all distributed among "the people," like revenues from oil and gas lease sales, taxes, and royalties.[33] Rather, the State and APHA rely on speculative arguments that the money nonresidents pay guides somehow benefits all "the people." Even if there were some dissipated benefit to the Alaskan economy in general—which, again, has not been established—there is nothing to support the State and APHA's assumption that this benefits individual Alaskans.

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[33] *Cf. Owsichek* 763 P.2d at 497 (noting exclusive guide areas do not provide remuneration to the State.) The State claims that 70% of revenues received from sales of licenses and tags under the federal Robinson-Pittman Act are derived from nonresidents and therefore excluding residents in favor of nonresidents in terms of issuing hunting permits is a permissible policy choice. State Br. at 16. The economic benefits, assuming the State is correct as a factual matter, do not justify violating the Constitution any more than the alleged economic benefits derived from subsidizing the guiding industry.

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The final mistake is that the State cannot elevate economic concerns over all else. The Alaska Supreme Court made this clear in *Brooks v. Wright*,[34] when it rejected the notion of applying private trust law to the "public trust" created by Article VIII. The Court there first recognized that:

> The public trust doctrine provides that the State holds certain resources (such as wildlife, minerals, and water rights) in trust for public use and that government owes a fiduciary duty to manage such resources for the common good of the public as beneficiary.[35]

The Court went on to state:

> [T]he wholesale application of private trust law principles to the trust-like relationship described in Article VIII is inappropriate and potentially antithetical to the goals of conservation and universal use.[36]

Specifically, the Court noted:

> For instance, private trusts generally require the trustee to maximize economic yield from the trust property, using reasonable care and skill. But Article VIII requires that natural resources be managed for the benefit of all people, under the assumption that both development and preservation may be necessary to provide for future generations, and that income generation is not the sole purpose of the trust relationship.[37]

Brooks is therefore clear that economic considerations cannot be allowed to swallow Article VIII's provisions protecting access to wildlife.

APHA attempts to circumvent this issue by arguing Dr. Cassell is citing *Brooks* for the proposition that the State must always subordinate economic benefits to Alaska

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[34] 971 P.2d 1025 (Alaska 1999).

[35] *Id.* at 1031-32.

[36] *Id.* at 1033.

[37] *Id.* at 1032 (internal citations omitted).

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businesses under Article VIII.[38] Putting aside that the alleged economic benefits here are simply a subsidy to the guiding industry, this is not Dr. Cassell's argument. Economic benefits to *Alaskans as a whole* can be relevant when evaluating whether resource decisions pass muster under Article VIII,[39] but economics cannot trump other specific constitutional directives, such as those in Section 3 regarding use of wildlife. This is one of the fundamental lessons from *Brooks*. APHA recognizes that it would be impermissible for the Board to focus only on short-term cash revenues, but alleges that the Board here was trying to find a solution that benefitted all Alaskans.[40] However, the Board in reality is only focusing on short-term cash revenue to the guiding industry and then assuming, without foundation or legal justification, that these subsidies will trickle down to others.

Ultimately, Article VIII Section 3 expressly limits Board authority to allocate State resources to chosen favorites under the guise of benefiting all Alaskans, especially when Alaskans are being deliberately excluded from using a State resource.

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[38] APHA Br. at 13.

[39] For example, if the Board were analyzing what percentage of drawing permits should be set aside for residents and what percentage should be open to all, it could decide to leave a certain percentage open to all based on the potential economic benefits of nonresidents securing some of these open draw permits. Again, the issue here is that the Board cannot decide that nonresidents benefit the economy such that residents must be excluded from even applying for a certain percentage of drawing permits.

[40] APHA Br. at 13.

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4. The ability to manage for "preferences among beneficial uses" is limited to achieving a "sustained yield"; economic subsidies to chosen industry cannot qualify as a "beneficial use."

Article VIII Section 4 provides:

> 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.

The State and APHA argue that allocating hunting draw permits to nonresidents is simply exercising a preference "among beneficial uses," and that the economic activity generated from nonresident hunters is an "appropriate use" of Alaska's game because it allegedly helps the "economy."[41] Article VIII Section 4, however, is a specific provision addressing sustained yield. As a matter of textual interpretation, the reference to "preferences among beneficial uses" provides for certain flexibility when making sustained yield decisions. It does not allow for the broad economic arguments the State and APHA try and place on it.

Moreover, the allowance for "preferences among beneficial uses" allows for allocations *between user groups*, *e.g.* sport, commercial and subsistence fishers, or in the wildlife context, trophy hunting and subsistence hunting.[42] Here, the resident and

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[41] State Br. at 15; APHA Br. at 22.

[42] *See, Kenai Peninsula Fisherman's Co-op Ass'n, Inc. v State*, 628 P.2d 897, 903 (Alaska 1981) and *McDowell v. State*, 785 P.2d 1, 8 (Alaska 1989) (where the Court defined the State's role in establishing preferences among beneficial uses of fish and game under Article VIII § 4 in terms of the State's ability to "make allocation decisions between sport, commercial, and subsistence *users*.") (emphasis added). *Meier v. State Board of Fisheries*, 739 P.2d 172, 174 (Alaska 1987) ("noting the Board of Fisheries'

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nonresident hunters seeking drawing permits are almost all sport hunters—in other words, they are all engaged in the same use. There is thus no allocation between user groups to be addressed here.[43] Giving away permits that could go to Alaskans and reserving them exclusively for nonresidents is not allocating between user groups or choosing between uses of the resource. Rather, it is a deliberate decision to *exclude* Alaskans from access to a portion of the resource by setting aside a percentage of permits exclusively to nonresidents. The ability to differentiate between beneficial uses under Article VIII Section 4 does not apply to restrictions to access to natural resources.[44]

APHA also argues that under *Owsichek*, guiding a hunt is a constitutionally protected "use."[45] APHA is correct that *Owsichek* noted that a hunter and their guide were both "using" wildlife resources as sport hunters.[46] But this does not mean that hunting guides have a constitutionally protected interest in guiding nonresident hunters who are required by law to hire them. Rather, it means that guides can claim they are

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"duty to conserve and develop fishery resources implies a concomitant power to allocate fishery resources among competing users.").

[43] *Alaska Fish & Wildlife Conservation Fund v. State*, 347 P.3d 97, 102–03 (Alaska 2015), (in the common use context, the Court has "consistently defined 'user groups' in terms of the nature of the resource (*i.e.*, fish or wildlife) and the nature of the use (*i.e.*, commercial, sport or subsistence)." *(citing Alaska Fish Spotters Ass'n v. State, Dep't of Fish & Game,* 838 P.2d 798, 801 (Alaska 1992).

[44] *E.g.*, *State v. Kenaitze Indian Tribe*, 894 P.2d 632, 640 (Alaska 1995) ("Article VIII limitations on the state's power to restrict access to natural resource user groups do not apply to the state's authority to allocate fishery resources among sport, commercial, and subsistence users.").

[45] APHA Br. at 20.

[46] *Owsichek*, 763 P.2d at 497 n.15.

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using the resource in the same way as the sport hunters they are guiding, nothing more.[47] As *Owsichek* stated, "[t]he common use clause makes no distinction between use for personal purposes or use for professional purposes."[48] The fact is APHA's members' interest in being able to guide a hunt has nothing to do with the issue of setting aside permits exclusively to nonresidents. The guides' ability to solicit clients and lead hunts remains the same even if the Board had adopted Dr. Cassell's proposal, as guides are always free to secure resident clients. But it is constitutionally inappropriate for the Board to favor nonresident hunters to the exclusion of Alaskans, solely to funnel nonresident clients to the guides.

Moreover, trying to characterize guides as a "user group" of wild game competing for access with other user groups such as resident hunters is not a helpful construct for APHA. Viewed in this light, the mandated percentage of permit draws to nonresidents who must in turn hire guides is precisely the type of program that has been struck down as an unconstitutional "giveaway" when proposed by initiative. For example, in *Pullen v. Ulmer*,[49] the Court addressed an initiative that provided that "subsistence, personal use, and sport fisheries shall receive a preference to take a portion of the harvestable salmon surplus" and that these users "must be ensured of a reasonable opportunity to take enough salmon necessary to satisfy the harvest needs of those

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[47] *Id.* ("The work of a guide is so closely tied to hunting and taking wildlife that there is no meaningful basis for distinguishing between the rights of a guide and the rights of a hunter under the common use clause.").

[48] *Id.* at 497.

[49] 923 P. 2d 54 (Alaska 1996).

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fisheries before other fisheries may be allocated the remaining portion of the harvestable surplus."[50] The Court struck down this initiative as a give-away program because "it [was] clear that the proposed initiative [was] designed to appeal to the self-interests of sport, personal[,] and subsistence fishers, in that [those] groups [were] specifically targeted to receive state assets in the circumstances of harvestable shortages."[51] The Court noted that this initiative could have resulted in the closure of some commercial fisheries.[52]

Similarly in *Lieutenant Governor of State v. Alaska Fisheries Conservation Alliance*,[53] the Court addressed an initiative (13PCAF) that would have banned setnet gillnetting in nonsubsistence areas in Cook Inlet. The Court held that "13PCAF would be a 'give-away program'" because it would benefit other user groups (such as drift net fishers) and stated "all other fisheries have a fair chance of gaining from the passage of this initiative and little chance of losing from it."[54]

The only substantive argument the State and APHA make regarding sustained yield – the actual subject of Article VIII Section 4 – is to speculate that resident hunters take more female bears than nonresidents, and therefore allowing more permits to resident hunters risks the current management regime.[55] Even if this assertion were

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[50] *Id*. at 55.
[51] *Id.* at 63.
[52] *Id.* at 64.
[53] 363 P.2d 105, 106 (Alaska 2015).
[54] *Id.* at 112 (citing *Pullen v. Ulmer*, 923 P.2d at 63).
[55] State Br. at 7; APHA Br. at 5, 12, 27.

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true—which is far from clear as a factual matter—the Board cannot manage wildlife populations in a manner that violates the Constitution under the argument doing so benefits a particular wildlife population. The Board has other management tools at its disposal (such as altered hunting regulations and bag limits) to address a sustainable harvest.

E. Article VIII Section 3 Prohibits Giving Exclusive Grants of Access to Alaska Wildlife to Nonresidents and Allows for Resident Preferences.

The fundamental issue here is that the Alaska Constitution prohibits the Board from granting nonresidents exclusive access to Alaska game by setting aside a set number of drawing permits for a lottery where only nonresidents are eligible. It is true that under *Shepherd* the Board may apply strong resident preferences when allocating access to Alaska wildlife.[56] Likewise, Dr. Cassell's proposal to the Board to remedy the unconstitutional practice of allocating draw permits exclusively to nonresidents also included a robust resident preference in setting aside a large percentage permits exclusive to residents.[57] This case, however, is not about what specific level of resident preference the Board must adopt in deciding how to allocate hunting draw permits. The issue is that regardless of whether any permits are exclusively set aside for residents, the Board under no circumstances may set aside permits exclusively for nonresidents.

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[56] *Shepherd v. State, Dept. of Fish & Game*, 897 P. 2d 33 at 40-41 (1995) (emphasis added).

[57] Opening Br. at 14.

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The State and APHA, however, repeatedly attempt to turn this case into a debate about what levels of resident preference the Board is constitutionally required to grant.[58] While this is an important issue, and given the Court's statements in *Shepherd* some level of residence preference may indeed be required by the Constitution,[59] it should not be allowed to obscure the fundamental prohibition on providing *exclusive* grants of access to Alaska wildlife to *non*residents.[60]

Viewed in this light, APHA's argument regarding the resident preference provision in Article I Section 21 must be rejected. APHA argues that Article I Section 23 allows a resident preference, but does not require one, and therefore one cannot read any requirement for resident preference in any other provision of the Constitution, such as Article III Section 3.[61] APHA is simply wrong in arguing that allowing for a resident preference in "local hire" scenarios is mutually exclusive with protecting Alaskans' access to Alaska's game resources. The Alaska Supreme Court was clear in *Shepherd*

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[58] State Br. at 8, 18-20; APHA Br. at 20.

[59] Opening Br. at 27; *Shepherd*, 897 P. 2d at 40-41("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.") (emphasis added).

[60] The State and APHA both try and argue that nonresidents are not being given any exclusive monopoly access because a majority of permits remain exclusively allocated to residents under the 60/40 split in the current regulation. State Br. at 8, 17 -20; APHA Br. at 20. This argument misses the point. The 40% set aside exclusively to nonresidents is the problem because this takes away 40% of available permits from Alaskans and allows only nonresidents to apply for them. For this subset of permits, this is indeed a grant of special privilege where nonresidents have a monopoly on these permits.

[61] APHA Br. at 6, 8, 10, 14 – 17, 20.

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that "the state may, and arguably is required to, prefer state residents to nonresidents" where fish and wildlife resources are scarce.[62]

More fundamentally, this argument rests on APHA's sleight of hand in restating Dr. Cassell's claim as one about resident preference, when Dr. Cassell's claim is that the Board may not grant exclusive rights to nonresidents. Dr. Cassell is not arguing, as APHA alleges, that Article VIII Section 3 is a "mandate to the legislature and Board requiring they totally exclude nonresidents from use of wildlife, fish, and game."[63] Rather, Dr. Cassell is arguing against a practice that *excludes residents.* A permit scheme without any nonresident set-asides would avoid the constitutional problem raised in this case. Dr. Cassell believes a robust resident preference is good policy and Constitutionally permissible, but is not arguing any specific level of resident preference is required.

F. The Alaska Supreme Court's Decision in *Shepherd* Confirms that Excluding Alaskans from Hunting Permits by Granting Nonresidents Exclusive Access Violates the Constitution.

In *Shepherd*, the Alaska Supreme Court upheld AS 16.05.155(d) by approving its provisions favoring residents over nonresidents. The Court concluded that the resident preference served an important state interest because it "*conserve[ed] scarce wildlife*

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[62] *Shepherd* at 40-41 (emphasis added).

[63] APHA also argues that that Constitutional history demonstrates it was drafted with the overarching intent to have Congress pass the Statehood Act and therefore it could not possible be that it was drafted with any intent to exclude nonresidents from use of State resources. APHA Br. at 18 -19. Putting aside that this mischaracterizes the key issue here, this argument is speculation with no cited support in the Constitutional history or subsequent case law.

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resources for Alaska residents,"[64] and noted "the preference for Alaska residents with respect to natural resources is explicit in the state constitution and serves to differentiate resident from nonresident user groups."[65]

The State nonetheless argues that the Alaska Supreme Court rejected Dr. Cassell's position in *Shepherd* because the Court of its own volition did not declare any exclusive allocation to nonresidents unconstitutional.[66] But the constitutionality of a nonresident permit allocation was not at issue in *Shepherd*. The Court's silence therefore means nothing. The State's argument also turns *Shepherd* on its head, as the Court was clear that in times of scarcity, *i.e.* when permits must be issued to hunt game as opposed to allowing open access, the Board should *favor* residents. The State wants this Court to read this conclusion as the Alaska Supreme Court placing its imprimatur on the Board favoring *nonresidents* over residents. The State has it entirely backwards.[67]

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[64] *Id.* at 43 (emphasis added).

[65] *Id.* at 44. The Court's use of the term "user groups" here was a general reference, and not a reference to how the term "user groups" is used when addressing Article VIII §§ 3 & 4. *Alaska Fish & Wildlife Conservation Fund v. State*, 347 P.3d 97, 102–03 (Alaska 2015), (in the common use context, the Court has "consistently defined 'user groups' in terms of the nature of the resource (*i.e.*, fish or wildlife) and the nature of the use (*i.e.*, commercial, sport or subsistence).").

[66] State Br. at 20.

[67] The State also argues that *Shepherd's* guidance on favoring residents over nonresidents when the Board must allocate hunting permits only applies to subsistence hunting, and not game hunting. State Br. at 14. Again, sport hunting was simply not an issue in *Shepherd*. The principles articulated in *Shepherd* apply to sport and subsistence hunting alike, and *Shepherd* did not limit its holding to subsistence.

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G. Federal Comity Does Not Require Violating the State Constitution.

APHA argues that the United States government, which manages the Kodiak National Wildlife Refuge, has expressed support for Alaska's nonresident permit allocation system and that the Court and the State should defer to this federal preference out of comity.[68] The Alaska Supreme Court, however, emphatically rejected this notion in striking down the rural subsistence preference in *McDowell v. State*.[69] There, the State's subsistence statue was written to comply with provisions of the federal Alaska National Interest Lands Conservation Act.[70] Nonetheless, the Court found this violated the Alaska Constitution and rejected any pleas to abide by federal policy preferences. [71] The bottom line is that federal management choices must yield to the provisions of the Alaska Constitution.[72]

IV. CONCLUSION

If Article VIII's wildlife provisions mean one thing, it is that Alaskans cannot be excluded from access and use of Alaska's wildlife in favor of granting exclusive hunting rights to nonresidents. No economic or wildlife management arguments can ever justify prohibiting Alaskans from applying for a large percentage of permits to hunt their own wildlife. Dr. Cassell therefore respectfully reiterates his request that the Court grant

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[68] APHA Br. at 28-29.

[69] 785 P.2d 1, 6 (Alaska 1989).

[70] *Id.* at 3.

[71] *Id.* at 7-8.

[72] Dr. Cassell seeks a ruling that prevents the Board from applying exclusive nonresident preferences. The Court need not wade into how this rule would apply on federal lands and how one determines jurisdiction in these circumstances.

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summary judgment in his favor and find that when the Board of Game considers access to big game hunting permits, it may not set-aside any portion of these permits exclusively to nonresidents.

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