Adam W. Cook
Shane C. Coffey
Birch Horton Bittner & Cherot
510 L Street, Suite 700
Anchorage, Alaska 99501
acook@bhb.com
scoffey@bhb.com
Telephone 907.276.1550
Facsimile 907.276.3680

James H. Lister
Birch Horton Bittner & Cherot
1100 Connecticut Ave., NW, Suite 825
Washington, DC 20036
jlister@dc.bhb.com
Telephone 202.862-8368
Facsimile 202.659.1027

Attorneys for *Amicus Curiae* Alaska Professional Hunters Association

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

ROBERT CASSELL, v. STATE OF ALASKA, BOARD OF GAME,	Case No. 3AN-19-07460 CI

OPENING BRIEF OF AMICUS CURIAE ALASKA PROFESSIONAL HUNTERS' ASSOCIATION ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

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Amicus curiae Alaska Professional Hunters Association ("APHA") respectfully submits this opening brief on the cross-motions for summary judgment, in support of the motion of Defendant Alaska Board of Game (the "Board" or the "State") and in opposition to the motion of Plaintiff Dr. Robert Cassell ("Dr. Cassell").

I. APHA'S ROLE IN THIS CASE

APHA is the State's association of licensed hunting guides, including guides who live and work on Kodiak Island. These guides earn their living leading hunters, mostly but not entirely residents of States other than Alaska, on brown bear expeditions in the Kodiak Island draw hunt. Defendant State Board of Game administers that hunt.

Earlier, Plaintiff Robert Cassell and APHA reached a procedural settlement governing APHA's participation in this case, which this Court then approved. Under the settlement, APHA as *amicus curiae* may file opening and reply briefs on the cross motions for summary judgment, and may participate in oral argument, and APHA also converts from *amicus curiae* to defendant-intervenor status in certain circumstances.[1]

II. CLAIMS ASSERTED, PROCEDURAL HISTORY AND FACTS

Plaintiff Cassell challenges the constitutionality of 5 AAC 92.061(a)(1) under Alaska Const. Art. VIII, § 3, known as the "common use clause."

His lawsuit follows a contested administrative proceeding before the Board in which Cassell and APHA and others participated and in which the Board denied Cassell's petition to intensify the existing preference for resident hunters in the Kodiak Island brown bear draw hunt set forth in 5 AAC 92.061(a)(1). The petition sought to

[1] The procedural settlement agreement regarding APHA's role (APHA Ex. 1) was approved by Judge Morse in an Order dated June 4, 2020 (APHA Ex. 2). This settlement resolved APHA's appeal of the denial of its motion to intervene.

increase the existing residence preference from the 2/3rds level (2/3rd of bear permits go to resident hunters, and 1/3 go to eligible non-resident hunters) to above the 9/10th level (90% of permits go to resident hunters, and resident and non-resident hunters share the remaining 10% through a lottery). *See* Complaint, ¶ 19. The existing rule is a 44-year-old solution adopted by the Board considering the interests of resident hunters, resident guides, and Kodiak National Wildlife Refuge, where most of the hunt occurs.[2]

Importantly, this is not an action for judicial review of the Board's denial of Cassell's petition. In opposing APHA's motion to intervene, which had noted that APHA was an active prevailing party before the Board, Cassell himself stressed this point: "This is not an administrative appeal of the Board's decision [to deny Cassell's petition]. It is an original action that seeks a declaration that the allocation in 5 AAC 92.061(a)(1) is contrary to the Alaska Constitution."[3] Thus the issue is not whether the Board's fact-finding and polices are supported by substantial evidence, but whether the existing rule is constitutional. There is no claim the Board violated any statute. *See* Complaint.[4]

Because of their lack of familiarity with harsh and sometimes dangerous conditions in remote portions of Alaska and the nuances of Alaska's hunting regulations,

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[2] Considering the interests of all U.S. citizens, the National Wildlife Refuge at the time advocated for a 50/50 resident/non-resident hunter split in permits. *See* APHA Ex. 3 to this Brief (Chervenak Public Comments on Cassell petition, p. 5). After a hearing, the Board of Game in 1976 instead adopted the present rule, which mandates that at least 60% of permits go to resident hunters. State.Op.Br. Ex. F (State 000174, 000178). Implementation details result in two-thirds (67%) of permits consistently going to resident hunters. State.Op.Br. at 8 and n. 35 (citing Cassell.Op.Br. Ex. 14 at 15).

[3] Cassell opposition to intervention at 3 (September 3, 2019).

[4] APHA relies on the State for discussion of procedural barriers to this suit, including standing. The State explains that AS 44.62.300 authorizes judicial review of the adoption of a rule, but not of the denial of a petition for a rule. State.Op.Br. at 10.

the non-resident hunters pursuing brown bear must by statute hire licensed guides, unless hunting with an Alaskan resident relative within the 2nd degree of kindred. AS 16.05.407. Resident hunters are more familiar with the climate and have the means to travel to Kodiak inexpensively, e.g. by boat, without substantial support and guidance.

Non-resident bear hunters come from further away and inject substantial money into the rural Kodiak economy, by hiring a local guiding company and obtaining lodging, food, equipment, and transport.[5] This is one example of how allowing non-resident tourists some access to its natural resources is vital to the State's tourism economy.[6] Non-residents also supply the lion's share of the State's revenue from hunting and trapping licenses, due to the State charging them higher prices than residents.[7]

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[5] See footnotes 8-10 below.

[6] Available surveys include the following (excerpts supplied as APHA Exs. 11-13):

Economic Impacts and Contributions of Sportfishing in Alaska, 2007 at ix, xvii and 108 (Alaska Dept. of Fish & Game and Southwick Associates, Inc., 2008) ("it was the nonresident spending that made a larger economic contribution …. Resident anglers spent more of their money on equipment that is manufactured primarily outside Alaska while nonresidents spent most of their money on trip-related purchases and pre-arranged packages that include services such as guides, lodging and meals produced by Alaska businesses.") https://www.adfg.alaska.gov/FedAidpdfs/PP08-01.pdf

Tourism and Its Effects on Southeast Alaska Communities and Resources: Case Studies from Haines, Craig, and Hoonah Alaska, pp. ii, iii and viii (U.S. Forest Service, 2005) (concluding that fishing and hunting are major forms of the tourism economy in Craig and Hoonah, noting political debates over pros and cons of fishing and hunting tourism and resource allocation). https://www.fs.fed.us/pnw/pubs/pnw_rp566.pdf

Economic Impacts of Guided Hunting in Alaska (McDowell Group, Feb. 2014), pp. 2-3. https://www.alaskaprohunter.org/Economic_Impacts_of_Guided_Hunting_Final.pdf. APHA witnesses Thor Stacey cited statistics from this study in his testimony to the Board. Ex. 4A to this brief, BOG 3/16/19 Transcript at p. 89, lines 20-25 (the guiding industry "brings approximately $87 million of economic benefits to the state each year. $55 million of that is new dollars … most of our clients are nonresident hunters").

[7] Non-residents now supply 70% of hunting and trapping license revenues, and the State receives a three-to-one federal match on that money. State.Op.Br. at 16. The high proportion of revenue from non-residents is similar to that in many other States.

In denying Cassell's petition to intensify the existing preference for resident hunters from the two-thirds level to the nine-tenths or greater level, the Board cited:

(1) *the Kodiak Island guides' interest in continuing to earn a living providing hunting guide services*.[8] Ninety-seven percent (97%) of the guides licensed on Kodiak are residents.[9] The evidence that Kodiak guides earned their living primarily serving non-residents hunters and that the vast majority of non-resident permits would vanish if Cassell's proposal was adopted was undisputed.[10] The Supreme

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U.S. Fish and Wildlife Service, National Hunting License Data, Calculation Year 2017: https://www.fws.gov/wsfrprograms/subpages/LicenseInfo/Natl%20Hunting%20License%20Report%202017.pdf (resident and nonresident hunting license revenue by State).

[8] Multiple Board members credited the guides' evidence of the devasting economic impact that eliminating most non-resident bear permits would have. APHA Ex. 4C 3/19/19 Transcript pp 46 line 9 to 47 line 6 (Chairman Spraker), p. 44 line 22 to p. 46 line 6 (Turner), p. 41 line 21 to p. 43 line 9 (Van Daele, analyzing "maximum benefit" test of Alaska Const. Art. VIII § 2). The Board voted 5 to 1 to deny Cassell's petition.

[9] APHA Ex. 4B, 3/17/19 transcript, p. 26, lines 20-22 (Chervenak testimony).

[10] Cassell proposed moving from a non-resident allocation of 33% of permits to somewhere less than 10% of permits. Moving from 33% to 5% would eliminate five out of six non-resident permits, and thus 5/6th of the business. Moving from 33% to 10% would still eliminate 2/3rds of the business.

See APHA Ex. 4A, 3/16/19 transcript at p. 43 lines 5-22 (testimony of Kodiak guide and APHA President Sam Rohrer: "nonresident bear hunting brings in over $4 million of economic benefit to the community of Kodiak" and that his small guiding business would be "devastate[d]" if the non-resident allocation went from one-third of the permits to less than 10% of them) and at p. 50 line 6 to p. 51 line 12 (testimony of Kodiak guide Lance Kronberger: 'If Proposal 99 [Cassell proposal] was adopted, it would destroy the Kodiak guide industry. … The air taxis, the businesses, all the things that are in Kodiak that revolve around the guide industry they would all be drastically hindered…. we forget that a lot of guides, especially on Kodiak are residents of Kodiak and residents of Alaska."); APHA Ex. 4B, 3/17/19 Transcript at p. 38 lines 8 to 21 (decreasing non-resident share to 10% or less of the permits would put Kodiak resident and guide Chervenak out of business, as he would have "at a maximum, one non-resident hunter to guide …," and he would lay off seven to ten resident Alaskans working for him). For more details, see the Chervenak public comments, APHA Ex. 3, and the Kodiak Advisory Committee recommendation, APHA Ex. 5, p. 11 (calculating $4.16 million in Kodiak guiding revenue at 185 non-resident hunts x $22,500 guide fee per hunt, under the present allocation rule). For still more detail on individual guide

Court has held that guiding a hunt is a "use" of "wildlife" by an Alaskan resident protected by Alaska Const. Art. VIII § 3. See Argument Point B.4 below.

(2) *the excellent track record of guided non-resident hunters in harvesting male bears, rather than the female bears who are needed to perpetuate the species*.[11] AFD&G biologist made a thorough presentation on this point just before the Board voted to deny Cassell's petition.[12] This is just one of the conservation benefits attained when guides contribute their expertise and motivation to conserve the species for the long-term.[13] Indeed, it was the guides in the 1950s who saved Kodiak brown bears from efforts by the ranching industry to exterminate them, preserving both the bears and their own guiding businesses.

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businesses, see the intervention affidavits of Paul Chervenak, Mike Munsey, and Sam Rohrer Affidavits, previously filed with this Court (supplied as APHA Exs. 6, 7, and 8).

[11] Multiple Board members agreed with this conservation point. Ex. 4C, 3/19/19 Transcript, p. 37 lines 17-23 and p. 47 lines 6 to 20 (Chairman Spraker); p. 39 line 21 to p. 40 line 19 (Member Burnette questions biologist Nate Swoboda); p. 49 lines 6 to 15 (Member Burnette); p. 41 lines 21 to 22 (Van Daele); p. 48 lines 13 to 25 (Turner).

[12] ADFG biologist Swoboda testified that non-residents are much more successful in avoiding harvest of female bears than residents, and that limiting harvest of females was vital to keeping the harvest sustainable. APHA Ex. 4C, 3/19/19 Transcript, p. 32 lines 20 to 24 ("About 17% of the nonresident harvest and about 36% of the resident harvest are female bears"), p. 36 line 23 to p. 37 line 15 (total permits issued might have to be reduced if Cassell's proposal is adopted, due to residents' greater propensity to harvest female bears); *see* Cassell.Op.Br. Ex. 14 pp. 15-16 (graphic used by Swoboda in this testimony). Non-residents are better at harvesting males rather than females because they have guides to identify females. APHA Ex. 4B, 3/17/19 Transcript, p. 28, lines 9-18 and p. 37 lines 5-17 (Chervenak) and Ex. 3 (Chervenak comments, p. 3).

[13] As another example, guides are skilled at "scent control," which helps their clients avoid female bears (sows) and juvenile male bears, who have smaller home ranges and so do not disperse from uncontrolled scents like adult males do. APHA Ex. 3 p. 4 (Chervenak comments). "Guides are also better at spreading out use over time and the hunt area, giving everyone a higher quality and more successful hunt opportunity." *Id.*

III. SUMMARY OF ARGUMENT

This lawsuit reverses the normal roles of plaintiff and defendant in resident hunter preference cases. Normally in this type of litigation, out-of-state hunters sue a state to invalidate a state's preference for resident hunters, alleging that the state's decision to discriminate in favor of residents exceeds the bounds of what the equal protection or privileges & immunities clauses of the federal or state constitutions allow.[14]

Here, we instead have a resident hunter suing his own State, alleging that Alaska has engaged in too little discrimination in favor of resident hunters like him. This role reversal renders entirely off-point various precedents cited by Plaintiff Cassell upholding the discretion of state legislatures and state fish and game agencies to choose to prefer resident hunters over other hunters. The principle that constitutional provisions leave a broad range of decision-making discretion to legislatures and agencies operates here in favor of upholding the State's decision not to intensify its existing preference for resident hunters, just as in the typical resident hunter preference case that same principle operates in favor of upholding the decision of a state to prefer resident hunters.[15]

As explained below, Art. VIII §§ 2, 3, and 4 and Art. I § 23 of the Alaska Constitution together establish that the Alaska Legislature (and by delegation the Board of Game) is authorized but not obligated to adopt preferences for resident hunters. The Legislature or Board may in some instances choose to strongly prefer resident hunters

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[14] *See Baldwin v. Fish & Game Comm'n*, 436 U.S. 371 (1978) (landmark case).

[15] *Alaskans for a Common Language, Inc., v. Kritz*, 170 P.3d 183, 193 (Alaska 2007) ("A presumption of constitutionality applies, and doubts are resolved in favor of constitutionality"); *Interior Alaska Airboat Ass'n, Inc. v. State Bd. of Game,* 18 P.3d 686, 689, 694-95 (Alaska 2001) ("Regulations are presumptively valid...," rejecting Art. VIII § 3 claim); *Alaska Fish Spotters Ass'n v. State Dept. of Fish & Game*, 838 P.2d 798, 801 (Alaska, 1992); *State v. Herbert,* 803 P.2d 863, 866-77 (Alaska 1990).

over non-resident hunters and even resident guides, but in other instances they may lawfully choose to share the wildlife resource more evenly.[16] Allowing non-resident hunters some access to Alaska's natural resources (here one-third of the resource) will in many situations, including the present situation, maximize the benefit to Alaskans from utilization of the wildlife, as called for by Art. VIII § 2. Such sharing makes possible a tourist economy benefiting Alaskan businesses and, very importantly, achieves the conservation values noted by the Board that the presence of the expert guide makes possible. Such sharing also makes possible the substantial contributions of non-resident hunters to the budget the Alaska Department of Fish & Game needs to properly conserve wildlife. Art. VIII § 3 does not detract from this maximum benefit test.

The case has another unique feature. The legal authority Plaintiff Cassell invokes (Alaska Const. Art. VIII § 3) is worded in terms of "use" of "wildlife," rather than in terms of hunting. Hunting (personally "taking" the animal) is just one "use" of wildlife. As discussed below, the Alaska Supreme Court has held that resident hunting guides are engaged in a "use" of wildlife protected by Art. VIII § 3, even when leading non-resident hunters. *Owsichek v. State Guide Licensing and Control Board*, 763 P.2d 488, 497, n. 15 and 16 (Alaska 1998). Thus, even were the Court to find that Art. VIII § 3 mandates that the Legislature or Board establish a very strong resident preference, Alaska's resident guides would share in that preference with Plaintiff Cassell. As there is no statutory allocation, the Board would still be entitled to share the wildlife resource.

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[16] *See Sullivan v. Resisting Environmental Destruction on Indigenous Lands,* 311 P.3d 625, 635 (Alaska 2013) ("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,'" quoting Alaska Const. Art. VIII § 2).

Finally, the State may not impose resident preferences where doing so would contravene federal law, Alaska Const. Art. I § 23, or be "in conflict with paramount federal interests," *Shepherd v. State Dept. of Fish & Game*, 897 P.2d 33, 41 (Alaska 1995). Were the State to change its allocation rules as Plaintiff Cassell seeks (excluding nearly all hunters from the rest of the United States) federal law and interests would be implicated, because the hunt occurs mostly on federal lands, Kodiak National Wildlife Refuge. The Alaska Constitution does not compel the Board to reject the Kodiak Refuge Manager's request (APHA Ex. 9) that the Board continue to allow substantial participation by residents of the other States on this hunt on federal lands.

IV. ARGUMENT

Ultimately this case is all about sharing a wildlife resource. The non-exclusive beneficial sharing provided for in 5 AAC 92.061(a)(1) (two-thirds of opportunity to hunt Kodiak Island brown bears in the draw hunt goes to resident hunters, one-third to non-resident hunters) falls well within the bounds allowed by Alaska's Constitution.

A. The Natural Resource at Issue (Kodiak Brown Bear) is Not Being Allocated Exclusively to Non-Residents.

The Court should not be sidetracked by the semantic and wholly unfounded argument advanced by Dr. Cassell -- that a "natural resource" of the State is somehow being allocated exclusively to non-residents of Alaska, when in fact resident hunters receive approximately two-thirds of the allocation. *See* Cassell.Op.Br. at 26-27.

In order to craft a claim that natural resources of the State are being exclusively dedicated to non-residents, contrary to the common use clause, Art. VIII § 3, Dr. Cassell adopts an unnatural and incorrect definition of the resource being allocated. He contends that the "resource" that matters for purpose of the Court's analysis is <u>not</u> the

harvestable bears within the hunt area, two thirds of which are allocated to resident hunters, or even the full set of permits, two thirds of which go to resident hunters. He instead contends that the pertinent resource is the remaining one third of the permits that are allocated to non-resident hunters. *Id.* at 26-27. Based on this strained definition of the pertinent resource, he contends a natural resource of Alaska (one third of the available bear permits) is being allocated exclusively to non-resident hunters.

Dr. Cassell's exercise in semantics falls apart because permits are merely an administrative tool used in the allocation process. Permits are not one of the natural resources that are addressed in the common use clause. Those resources are "wildlife," "fish," and "waters." Art. VIII § 3. The resource being allocated here from the standpoint of Article VIII of the Constitution is the opportunity to take "wildlife" (brown bear), and two thirds of that resource goes to Alaska's resident hunters. Accordingly, there is no exclusive allocation of any natural resource of Alaska to non-residents.[17]

B. The Alaska Constitution Does Not Require That Almost All Harvestable Kodiak Brown Bears Be Allocated to Resident Hunters, and Protects the Interests of Resident Guides.

The semantical varnish now gone, we get to Dr. Cassell's unvarnished argument: his contention that Art. VIII § 3 compels the Board to increase the magnitude of the existing preference for resident hunters, from a two-thirds level to a higher level.

1. Text of Relevant Constitutional Provisions.

The first four sections of the Natural Resources Article are all directly relevant as

[17] Even if permits (as opposed to harvestable bears) were themselves somehow considered a resource, the resource that would matter for analysis is the full set of permits, not a subset like 1/3rd of permits. The subset of permits allocated to non-resident hunters is just the product of allocating less than all permits to resident hunters.

they all concern allocation of wildlife, implicating hunting. Dr. Cassell invokes only § 3:

> § 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.
>
> § 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.
>
> § 4. Sustained Yield- Fish, forests, wildlife, grasslands, and all other replenish able resources belonging to the State shall be utilized, developed, and maintained on the sustained yield principle, subject to preferences among beneficial uses.

Notably, the Constitution does not define key operative terms in these provisions, including "maximum benefit of its people," "common use," and "use," leaving the Legislature discretion, which it delegates to the Board. *See* State.Op.Br. at 8.

While Natural Resources Article § 3 does not explicitly address resident preferences, three other provisions in the Constitution do.[18] Art. I § 23, an amendment adopted in 1988, authorizes but does not compel resident preferences:

> Art. I § 23. Resident Preference - This 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. (Emphasis added).

The other two provisions (Art. VIII § 14 and Art. IX § 2) were part of the original 1956 Constitution, and prohibit resident preferences as to two narrow topics:

> Art. VIII § 14. Access to Navigable Waters-Free access to the navigable or public waters of the State, as defined by the legislature, shall not be

[18] Art. VIII § 2 is an explicit requirement that the Legislature provide for the utilization of the State's natural resources for "the maximum benefit of its people," and so, in that sense, is a preference for Alaska's residents as a whole. However, as discussed below, that is not the same as a preference for resident hunters specifically, who are only one segment of impacted Alaskans, and also only one type of Alaskan user of wildlife.

> denied any citizen of the United States or resident of the State, except that the legislature may by general law regulate and limit such access ….
>
> Art IX § 2. Nondiscrimination - The lands and other property belonging to citizens of the United States residing without the State shall never be taxed at a higher rate than the lands and other property belonging to the residents of the State.

These two provisions show the framers of the original Constitution addressed resident preferences with specificity when they wished to enact constitutional law on that topic.

2. Other Related Provisions of the Constitution Establish That Plaintiff is Reading Art. VIII § 3 Incorrectly.

The provision Plaintiff Cassell solely relies upon, Art. VIII § 3, declares that "fish, wildlife, and waters" in their natural state are "reserved to the people for common use." Based on clear explanations by the framers at the Alaska Constitutional Convention, "common use" is a reference to making these natural resources freely available, unimpaired by private ownership of wildlife, fish, and waters in their natural state.[19] *See also*, Argument Point C below (contrary to Plaintiff's contention, the guiding concessions issued by the U.S. Fish & Wildlife Service on Kodiak National Wildlife Refuge comply with Alaska Supreme Court standards for avoiding unconstitutional private monopolies). Art. VIII § 3 does not refer to residents of other States, and there is no clear textual indication of intent to exclude non-residents from Alaska's wildlife, fish, and waters. Notably, where the Supreme Court upheld a resident hunter preference that the Legislature had chosen to grant by statute, the Court did so primarily by reference to neighboring Art. VIII § 2, which directs that the State manage natural

[19] The Proceedings of the Alaska Constitutional Convention at pages 2461-65 include extended discussion of Art. VIII § 3. http://www.akleg.gov/pdf/billfiles/ConstitutionalConvention/Proceedings/Proceedings%20-%20Complete.pdf (what became § 3 was then numbered as § 4).

resources including wildlife so that it is "utilize[d]" for "the maximum benefit of its people." *See Shepherd*, 897 P.2d at 40-41.

The "maximum benefit" test of Art. VIII § 2 will sometimes lead the Legislature and Board to strongly prefer resident hunters, but not always. Sometimes the maximum benefit to Alaskans from utilization of wildlife is attained through sharing some of the natural resource with non-residents. That is the case here, because non-resident hunting so strongly supports the Alaska tourism economy and non-residents employ guides who have the skills to attain the special conservation benefits noted by the Board made possible by guide expertise (clients harvest more male than female bears).

The rigidity with which Plaintiff Cassell reads Art. VIII § 3 is not at all inherent in its language. Discussion of it at the Constitutional Convention emphasized that it was worded generally and so would require "considerable legislation essential to give [it] any meaning or application."[20] It is a canon of statutory construction that two provisions addressing the same topic must be "harmonized" where possible so each is given effect. *Nelson v. Municipality of Anchorage*, 267 P.3d 636, 642 (Alaska 2011). Here it is entirely possible to harmonize Art. VIII §§ 2 and 3. The two provisions together forbid private monopolistic grants of wildlife, fish, and water. Such grants would violate the "common use" clause. But they do not compel the total exclusion of non-residents when a "use" by non-residents is occurring that benefits residents, here through the substantial hunting license fees provided by non-resident tourists, the tourism economy on Kodiak, and the wildlife conservation benefits from guide expertise.

[20] Proceedings of the Alaska Constitutional Convention, p. 2464 (remarks of Mr. Riley – at the time what became Art. VIII § 3 was numbered as § 4, so he referred to § 4).

This conclusion is further supported by (a) Art. VIII § 1, which calls for utilization of natural resources to promote the "development" of the State, (b) another provision of Art. VIII § 2, which calls for "conservation" of wildlife for the benefit of Alaskans, which the guides with their expertise assist with here, and (c) Art. VIII § 4 which requires management so that hunting does not exceed the sustainable yield level. Once one accepts the principle that non-residents are not categorically excluded from use of Alaska's wildlife, fish, and waters, Art. VIII § 4 provides the Board with discretion to allocate (i.e. make "preferences among beneficial use"), including by sharing available resources between resident and non-resident hunters.

In a key passage in his brief, Cassell cites *Brooks v. Wright*, 971 P.2d 1025 (Alaska 1999) in an effort to force the State to subordinate the economic benefit to Alaskan businesses from use of wildlife by non-resident hunters (here in hunts led by resident guides). Cassell.Op.Br. at 30 and n. 93. However, *Brooks* does not support Cassell's argument. The Supreme Court there held that the State manages wildlife as a public rather than private trustee, and observed that the State therefore is charged with maximizing benefit "to all Alaskans" for the long term, including "to provide for future generations" -- a goal not always served by the short-term strategy of taking the wildlife and selling it to the highest bidder. 971 P.2d at 1071 ("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.")

Were the Board of Game in denying Cassell's Petition focused <u>solely</u> on maximizing the State's short-term cash revenues, Plaintiff's citation to *Brooks* might be

apt. But instead the transcript of the Board proceedings shows a painstaking effort by the Board to do what *Brooks* tells the Board to do - find the solution that best benefits all of Alaska's citizens in the long term. 971 P.2d at 1071. The Board did so after a careful weighing of the interests of Alaskans living on Kodiak Island, Alaskans elsewhere (who might want to come to the Island to hunt, and might also benefit from similar hunting or fishing-based tourism economies in their part of Alaska), and also the special conservation values promoted by guided hunting, which conserves the bear population for future use by Alaskans (recounted above).[21] Nothing in *Brooks* prevents the economic benefit to Alaskan businesses from use of wildlife from being a proper consideration by the State in determining how to manage wildlife for the "maximum benefit of its people" over the long-term. *See* Art. VIII § 2. Nothing in *Brooks* requires that the Board weigh the interests of resident hunters over that of other Alaskans who directly and substantially benefit from non-resident hunting.[22]

Any lingering possibility that Art. VIII § 3 contains within it an unstated mandate that the Legislature grant total or near-total preferences to resident hunters is dispelled by the provision of the Constitution that most specifically addresses the topic of resident preferences, Art. I § 23. That provision, entitled "resident preference," clarifies that "[t]his constitution does not prohibit the State from granting preferences, on the basis of

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[21] *See* n. 8 and n. 10 above for cites to Board Members' remarks in the transcript.

[22] Plaintiff Cassell's reliance on *Brooks* is further undermined by the absence of any dispute in that case between resident Alaskan hunters and other Alaskans operating businesses catering to non-resident hunters. The discussion cited by Plaintiff arose in the very distant context of deciding whether the Legislature's responsibility to manage wildlife as a trustee precluded allowing placement on the ballot of a citizen initiative to ban the use of snares in trapping wolves. *Brooks*, 971 P.2d at 1026, 1030-1033.

Alaska residence," where consistent with federal law. The State is "not prohibited" from granting resident preferences, which means that the State is not required to grant such preferences. "Mandatory words impose a duty; permissive words grant discretion." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* at 100 (Thompson/West 2012); Norman Singer, *Sutherland Statutes and Statutory Construction* § 25.1 (Nov. 2020) ("Many statutes … grant powers without imposing any obligation to exercise them..."); *see Roeckl v. F.D.I.C.,* 885 P.2d 1066, 1074 (Alaska 1994) ("the fact that the legislature has affirmatively chosen to permit, rather than require, the registration of assumed business names weighs heavily against accepting FDIC's invitation to fashion a judicially imposed registration requirement") (citing A.S. 10.35.010, which provided that businesses "may" register with the State); *Aspen Exploration Corp. v. Sheffield*, 739 P.2d 150, 162, n. 27 (Alaska 1987) (statute provides State "may" grant submerged lands privileges, but "this in no way requires the state to grant such privileges"); *Walden v. Dept. of Transp*., 27 P.3d 297, 302 (Alaska 2002).[23]

The canons of statutory and constitutional construction confirm this conclusion. Art. I § 23 addresses the topic at hand, resident preferences, far more specifically than any hidden message on that topic that may be embedded in Art. VIII § 3, and Art. I § 23 was also enacted more recently (in 1988) than Art. VIII § 3 (in 1956). *Nelson*, 267 P.3d at 642 (specific governs over the general, and the more recent over the earlier). The conclusion Art. VIII § 3 does not address resident preferences is supported by it being adopted as part of the original 1956 Constitution along with Art. VIII § 14 and Art. IX § 2,

[23] *See Forrer v. State*, 471 P.3d 569, 585, n. 164 (Alaska 2020) (canons of statutory construction apply when construing Constitution, also citing Scalia & Garner, *supra*).

which expressly address resident preferences for navigable water access and property taxes. They show that the framers of the original Constitution used express language when addressing resident preferences. Art. VIII § 3 lacks express language.[24]

The Supreme Court's *Shepherd* opinion does not change this analysis. 897 P.2d at 40-41. That case involved a hunt for "moose, deer, elk, and caribou by residents for personal or family consumption," and the Legislature had adopted a statute giving that important use "preference over takings by nonresidents." AS 16.05.255(d); *Shepherd*, 897 P.2d at 35. A guide serving non-resident clientele sued, alleging that the resident preference statute exceeded the bounds of discretion available to the State under the U.S. and Alaska Constitutions. *Id*. at 36 (equal protection and commerce clause arguments). Thus, *Shepherd* was a traditional resident preference hunting case. The Supreme Court cited the long line of cases upholding against federal and state constitutional challenges the discretion of state legislatures to choose to enact resident preferences in allocating state-managed wildlife. *Id*. at 39-40. But the Board here declined to grant the more intense resident preference that Cassell requested, so the same wide discretion that state legislatures and agencies possess in wildlife management supports its decision not to intensify the existing resident preference.[25]

Citing Art. VIII §§ 1-4, the Supreme Court in *Shepherd* unremarkably held that neither the federal nor the state constitution prohibited the Alaska legislature from choosing to enact a resident preference that ensures Alaskans have food to eat. "[T]he

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[24] Plaintiff Cassell cites various statutes and regulations from other States to show that other state legislatures and other state game agencies have chosen to enact stringent resident preferences. Those citations do nothing to suggest that the Alaska Legislature or Board of Game is compelled to intensify the existing resident hunter preference.

[25] *See* caselaw cited in n.15 and n. 16 above.

state is required to maximize for state residents the benefit of state resources. In cases of scarcity, this can often reasonably be accomplished by excluding or limiting the participation of non-residents ….” 897 P.2d at 40-41. The Court’s reference to “maximiz[ing] … benefits of state resources” was to Art. VIII § 2, which directs that the State “provide for the utilization, development, and conservation of all natural resources … for the maximum benefit of its people.” Note that the Court recognized the option of the Legislature to “limit[]” rather than “exclude[]” non-resident participation in “cases of scarcity ….” *Id.* This means that Art. VIII § 3’s “reserved for common use of the people” phrasing cannot be read as a mandate directed to the Legislature and Board requiring that they totally exclude non-residents from use of wildlife, fish, and waters. *See id.*[26]

After articulating this holding, the Supreme Court observed that grant of a resident preference “arguably is required” in some circumstances. *Shepherd*, 897 P.2d at 40-41. Because the Legislature had chosen to enact a strong resident preference statute for the hunt at issue in that case, the Supreme Court had no occasion to rule on whether or when enacting a resident preference was constitutionally required, so the passage was both dicta and did not reach any firm conclusion (“arguably required.”) Additionally, Art. I § 23 did not come into play in the *Shepherd* case, as that provision authorizes the State to enact resident preferences, and the Legislature had done just that in enacting a statute preferring resident hunting of ungulates for food. Thus, there was no occasion to consider the point that Art. I § 23’s recognition of the State’s

[26] The State is correct that the brown bear population in the Kodiak draw hunt area is stable and not scarce. Allocation of permits for sustainable use keeps the population healthy. State.Op.Br. at 12; *see also*, APHA Ex. 4D, 3/18/19 Transcript at p. 16, lines 5-8 (testimony of AFD&G biologist Swoboda). The need for regulation and allocation holds true for many valuable game populations, but it does not make them “scarce.”

permissive authority to adopt resident preferences means that a decision to adopt such preferences is discretionary. *See Roeckl*, 885 P.2d at 1074.

In short, Plaintiff has failed to show here that achieving the maximum benefit for Alaskans (*Shepherd*, 897 P.2d at 40-41) requires granting all or nearly all the wildlife resource (i.e. more than 90% of harvestable brown bears) to resident hunters.

3. Examination of the History of the Alaska Constitutional Convention that Plaintiff Cites Yields Results Supporting the Present Allocation Rule.

Plaintiff Cassell cites the legislative history of the Alaska Constitutional Convention and treatises on the Alaska Constitution to support the uncontested proposition that the framers of the Constitution desired that Alaska have more control over its natural resources as a State than it did as a Territory. Cassell.Op.Br. at 20 and n. 59. However, there is no support for the different proposition that the framers sought to bind the future legislature to use that control over resources in the way Cassell wants.

Rather, the Alaska Constitutional Convention proceedings and a treatise Cassell cites shows a strong motivating desire on the part of the Delegates – a desire to draft a proposed Alaska Constitution in a way that would persuade a Congress composed of representatives from the 48 States to ratify it and admit Alaska to the Union. Binding the future legislature to exclude residents of other States from hunting and fishing would have been counter-productive for two reasons: (1) it would have limited rather than expanded the future legislature's control over natural resources and (2) it would have risked provoking opposition to ratification and Statehood in a Congress. The Chairman of the Alaska Statehood Committee opened the Convention on November 8, 1955 by reminding the Delegates they were drafting a Constitution in an exercise in "salesmanship" that "will be presented … [to] the members of Congress in connection

with legislation to admit Alaska as a State."[27] He continued by warning that the proposed Constitution must pass "the three most rigid tests imaginable," the second of which was "approval of Congress."[28] Consistent with that stern message, a leading commentator (Gerald McBeath) cited by Plaintiff explains that: "The need to please Congress was a compelling argument in the debate over several sections of the constitution."[29] The same treatise notes that prohibiting resident preferences as to property tax rates (Art. IX § 2) was a "signal" to residents of other States that they would not face discrimination if they engaged in commerce in Alaska.[30]

Another leading authority on the 1955-56 Alaska Constitution Convention cited by Plaintiff (Gordon Harrison) explains that the framers discussed whether out-of-state workers would take jobs in Alaska but "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."[31] This further bolsters the point above – that when Art. VIII § 1 through 4 and the rest of the original Constitution was drafted, it was too risky for the framers to direct resident preferences that excluded or nearly excluded residents of the other States from participation.

The completed Alaska Constitution unsurprisingly contained no provision mandating resident preferences to the exclusion of visitors from the other States. The

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[27] Proceedings of the Alaska Constitutional Convention, First Day, November 18, 1955 pp. 8-9 (remarks of Mr. Atwood)

[28] *Id*. pp. 9. The other two "rigid tests" were approval by Alaskans and posterity.

[29] Gerald A. McBeath, the Alaska State Constitution, p. 133 (Oxford Univ. Press 2011).

[30] McBeath, p. 178.

[31] Gordon Harrison, Alaska Legislative Affairs Agency, Alaska's Constitution: a citizen's guide at 10.

exercise in restraint was successful. Congress "accepted, ratified, and confirmed" the Alaska Constitution. Alaska Statehood Act, P.L. No. 85-508 § 1.[32] The Constitution should be interpreted to conform with the intent of the framers, which was to avoid taking steps that might draw opposition from representatives from the other States.

Seeking to distinguish the analysis in the Gordon Harrison treatise quoted above, Dr. Cassell notes that decades later, with Statehood already in hand, and the need to persuade the other States to support Statehood no longer a consideration, Alaskans amended the Constitution by adding Art. I § 23, which declares that the Constitution "does not prohibit" the State from adopting resident preferences. Cassell.Op.Br. at 24 and n. 72. As discussed, that provision's permissive language confirms the Legislature and Board have the authority but not the obligation to enact resident preferences.

4. Guiding a Hunt is a "Use" of Wildlife Protected by Article VIII § 3.

Even if Article VIII § 3 is read as constitutionally mandating a very strong resident preference in favor of "use" of "wildlife" by Alaskans, the existing allocation rule (5 AAC 92.061(a)(1)) remains valid because the Alaska Supreme Court has held that guiding a hunt is a "use" of wildlife protected by Article VIII, § 3. *Owsichek,* 763 P.2d at 491, n. 9 and 497, n. 15-16. Thus, Alaskan resident guides share in any constitutionally mandatory residential preference to which Plaintiff Cassell is entitled. As no statutory provisions directs resident hunters be preferred, the Board would retain authority under Art VIII § 3 to consider that "use" by Alaskan guides in allocating harvestable bears.

[32] The Senate Report for the Alaska Statehood Act notes "Alaska's value for resources, for the defense of the free world, and for available lands to be used by present and future generations of ***Americans***." *Providing for the Admission of State of Alaska into the Union*, Sen. Rept. No. 1163, p. 7 (85th Congress) (emphasis added).

In *Owsichek*, a hunting guide sued the State under Art. VIII, Sec. 3, seeking to invalidate a non-competitively-based State-run hunting guide concession program. 763 P.2d 488 (Alaska, 1988). The Supreme Court held that hunting guides are eligible to invoke Art. VIII § 3 despite not being the hunter:

> Admittedly, there is a difference between commercial fishermen and professional guides: a commercial fisherman takes his catch himself before selling it to others for consumption, while a hunting guide does not actually take the game, a privilege reserved for the client. We view this as an insignificant distinction that does not remove professional hunting guides from protection under the common use clause [Art. VIII, § 3]. 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.

Owsichek, 763 P.2d at 497, n. 15. It concluded: "We believe that a professional hunting ***guide's 'use' of the wildlife*** resource is sufficiently direct that he ***falls within the protection of the common use clause."*** *Id*., at 491, n. 9 (emphasis added).

Notably, in reaching this conclusion, the Supreme Court expressly stated its awareness that Alaskan hunting guides serve a largely non-Alaskan clientele. "The common use clause makes no distinction between use for personal purposes and use for professional purposes. [continuing in footnote] The right to lead hunts professionally is a significant one. Nonresidents of Alaska are required to hire a guide in order to hunt brown bear, polar bear, and sheep." *Owsichek*, 763 P.2d at 497 and n. 16.[33] This precludes any fanciful suggestion that Art. VIII, § 3 requires the interest of Alaskan hunting guides be considered only in the unusual situation where the customer happens

[33] A.S. 16.05.407 has since been modified so that non-residents must hire a guide to hunt brown and grizzly bear, sheep, and also goats. Polar bears are no longer hunted due to the species now being listing under the Endangered Species Act.

to be a resident, and confirms that professional economic interests of hunting guides are an appropriate consideration by the Board when making allocation decisions.

Thus, Alaskan guides leading non-resident hunters on the Kodiak Island brown bear draw hunt enjoy just as much protection under the common use clause (Art. VIII, § 3) that Plaintiff Cassell relies on as Plaintiff Cassell. Accordingly, were the Court to find that Art. VIII § 3 mandates a strong preference for resident Alaskans (which it does not), the Board would still have ample discretion to allocate that preference between resident hunters and resident guides, and the present allocation would still be lawful.

The Court may wonder why the status of guides as resident users of wildlife was not addressed by the Supreme Court in *Shepherd*. The answer is that the resident status of the hunting guides would not have helped the guides in that case, because there the Legislature had adopted a narrow statutory preference for resident hunters seeking ungulates for personal and family consumption as food. *Shepherd*, 897 P.2d at 35. Resident guides leading non-resident hunters fell outside that statutory preference. AS 16.04.255(d) (1995). The Legislature is free to prefer one "use" of wildlife over another. Art. VIII §§ 2 and 4 (State may enact "preferences among beneficial uses"). It did so in *Shepherd*, but not here, which is unsurprising as bears are primarily hunted for recreation, rather than for food. The Board may properly share any constitutionally-mandatory resident preference between resident hunters and resident guides.

C. APHA Guides Do Not Operate Private Monopolies Controlling Wildlife Resources.

To support his argument for a more intense resident preference that excludes resident guides, Plaintiff Cassell contends that Alaska's hunting guides are engaged in

a private monopolistic use of wildlife that is contrary to the "common use" clause of Art. VIII § 3. See Pltf.Op.Br. at 22-23. He treats APHA as an unnamed defendant.

Guide Concessions Competitively Awarded by FWS. Plaintiff Cassell's first argument along these lines is that the guiding concessions for Kodiak National Wildlife Refuge issued by the U.S. Fish & Wildlife Service ("FWS") to APHA members are private monopolies that contravene Art VIII § 3. Cassell.Op.Br. at 22-23. This claim is not in the Complaint and so not before the Court, and a necessary party to litigate any such claim (FWS) is not a party to this case.[34] The claim is also far reaching, in that FWS and the National Park Service operate similar guide concession programs on just about all of the National Wildlife Refuge and National Preserves in Alaska.

In any event, the claim is easily refuted. FWS has established a guide concession program applicable to National Wildlife Refuges in Alaska including Kodiak. 50 C.F.R. 36.41(e). That program complies with the test adopted by the Alaska Supreme Court to distinguish lawful competitively-bid guide concession programs from unlawful natural resource monopolies violating Art. VIII § 3. *Owsichek*, 763 P.2d at 496 (finding a non-competitive State-run guide concession program in the 1980s was unconstitutional, but clarifying that "nothing in this opinion is intended to suggest that leases and exclusive concessions on state lands are unconstitutional"). The Supreme Court then listed the characteristics that would make an exclusive concession constitutional: (a) being awarded "subject to competitive bidding" on terms protecting the public interest, as opposed to mere "seniority," (b) having a limited term, rather than

[34] Although Cassell in his brief questions the constitutionality of various aspects of the State's statutes and rules regarding guides, no such claim is raised in this Complaint. *See* State.Op.Br. at 1, n. 1 (Plaintiff is limited to those claims pleaded in the Complaint).

"unlimited duration," (c) being not "transfer[able] for a profit as if [the guide] owned" a property right, and (d) providing for "remuneration" to the government. *Id*. at 497-98.

Even though FWS, as a federal agency, is not bound by *Owsichek*, FWS still complies. FWS's prospectuses for the various Refuges in Alaska uniformly include the necessary public interest protections.[35] The Alaska Peninsula Refuge just completed accepting applications earlier this week on April 5, 2021, and that very recent prospectus is a good preview of the next Kodiak Refuge prospectus. A copy is supplied as APHA Ex. 10. Running through the *Owsichek* factors reviewed above:

(a) FWS uses public interest selection criteria in competitive bidding including: "ability to provide high quality … guiding service to the public," "experience and knowledge of the guide use area, and the terrain, climate, and species to be hunted," "Safety plan, safety training, and safety equipment," and "History of Violations, Accidents, and Incidents.". Ex. 10 at 14-15 and attached Form E. Periodic performance reviews verify guides comply with bids. Ex. 10. at 10.

(b) FWS limits concessions to a five-year term, renewable for only one more five-year term upon good performance, after which rebidding occurs. Ex. 10 at 3. Thus there are no grants of concession contracts with unlimited durations.[36]

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35 https://www.fws.gov/alaska/alaska/pages/permits/big-game-guide-prospectus

36 Kodiak guides are fully subject to competition during the terms of their concessions from Kodiak National Wildlife Refuge, as well as when concessions are rebid by prospectus. Non-residents seeking to hunt brown bear in the Kodiak draw hunt on Refuge lands can choose from among many guides – each guide has a concession for only a small part of the Refuge. The Refuge is divided in 24 areas for guide concession purposes, no guide can serve more than three areas, and there are no guide concessions at all on the portion of the hunt that occurs on State land. https://www.fws.gov/refuge/Kodiak/visit/permits.html.

(c) Concessions are not freely transferrable. Subletting by a guide is expressly prohibited, and the concession "permit is not transferable" without FWS approval. Ex. 10 at 3 (and attached Special Use Permit Application at 7); and

(d) Concessions provide remuneration to the governmental agency issuing them. *Id.* at 10 (FWS charges the guide fees calculated based on days of client use).

Distribution of Permits. Plaintiff Cassell also does not like it that resident hunters enter a lottery for permits, while non-resident hunters obtain permits on what is effectively a first-come first-served system as to portions of the Kodiak draw-hunt that occur exclusively on federal lands, until those permits run out. Cassell.Op.Br. at 12-13.

As APHA understands it, Cassell is claiming that the guides serving non-residents on federal lands can obtain non-resident permits for their clients in a monopolistic way. This is another claim that is not in the Complaint, and is not before the Court. In any event, there is no constitutional violation stemming from the difference between how resident permits are distributed to resident hunters and how non-resident permits are distributed to non-resident hunters. As noted above, the issue is not whether the system is ideal, or if it could be improved, but whether it is constitutional.

The difference between how resident and non-resident permits are distributed results from basic economic principles related to the benefits that non-resident hunting provides to Alaskan residents. Residents pay far less than non-residents to participate in the Kodiak brown bear draw hunt, so more residents want permits, necessitating a lottery. Residents may pay $1,000 to $3,000 for the hunt, as the Legislature exempts them from hiring a guide, and charges them low license and permit fees (approximately $70), and residents travel to Kodiak from closer by and have less costly lodging and

transport options (e.g. by personal boat). By contrast, the Legislature has decided to charge non-residents substantially higher license and permit fees (which beneficially subsidizes the lower prices paid by resident hunters) and require that non-residents hire a guide, to ensure safety and compliance with Alaskan hunting laws for those unfamiliar with Alaska. Non-residents also live further away and so spend more on lodging, transport, and equipment. Altogether, non-residents pay $30,000 to $35,000 to engage in the hunt.[37]

While the resident costs are low enough to spark high demand and thus require a lottery, the number of non-residents willing to pay the very high prices charged them is small enough that the State has been able to employ what is effectively a first-come first-served system for those Drawing Bear ("DB") areas wholly on federal land, within the overall area of the draw hunt.[38] Non-residents who inquire after the limited number of non-resident permits for the DB areas of interest to them are exhausted are turned away. This point is often reached two years before the hunt.

Weighing pros and cons. Importantly, the benefits to the Alaskans from allowing non-resident participation in this hunt correspond directly with the reasons why it is so much more expensive to hunt as a non-resident, which in turn is why a lottery is

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[37] Total costs consist of the guide fee of $20,000 to $25,000, $1160 for license and bear permit, transport, lodging, food, and other costs. *See* APHA Ex. 5 at 11-12.

[38] Cassell Brief Ex. 15 p. 3 supplies a map of the Drawing Bear ("DB") areas, including those wholly on federal lands and those partially or fully on non-federal lands. Because hiring a guide is a pre-requisite to non-resident hunting, and FWS authorizes one guide to practice his trade in each DB within the Refuge, the non-resident customers book a guide first and then the guide per state regulations seeks a non-resident permit for his client, until non-resident permits are exhausted. This means the lottery system effectively operates as first-come first-served on those DBs that are on wholly federal land. For DBs that are partially or wholly on State or private land, more non-residents apply than there are spots, so the system is effectively a lottery system.

necessary to distribute resident permits, but a combination of first-come first-served and a lottery works for distributing non-resident permits. As reviewed above, a major benefit for Alaska's people from non-resident hunting flows directly from the large amounts paid by non-residents for guiding, lodging, transport, equipment, and taxidermy services. The substantial amounts the non-residents pay guides make possible the guiding industry, which in turn allows for the conservation benefits that guide expertise provides (assisting clients in identifying female bears and instead harvesting male bears, other benefits noted above). Meanwhile lower-income and moderate-income Alaskan resident hunters enjoy subsidized lower hunting license fees (wherever and whatever they hunt in Alaska), because non-residents pay much more for licenses and permits.

Ultimately, the "pros" of non-resident participation (the contributions from non-resident hunters noted above, conservation benefits from hiring guides, and the subsidized lower prices paid by resident hunters) are intertwined with the "cons" (higher demand for low-priced hunts by residents, reducing the odds of drawing a resident permit). The odds of drawing a permit for a resident hunter and non-resident hunter could be equalized by sharply increasing the hunt cost for residents (such as through increases to the license and permit fee), so that fewer residents enter the lottery, but that would not be helpful for low-to-moderate income resident hunters. The odds of drawing a permit could also be equalized between resident and non-resident hunters by reducing the hunt costs for non-residents, thereby incentivizing more applications, such as through eliminating the requirement to hire a guide, and reducing license and permit prices for non-residents. However, that would reduce the benefits to Alaskans from non-resident hunting, and expose non-residents unfamiliar with Alaska to safety risks.

The balancing of the pros and cons in allocating wildlife resources is a task the Constitution leaves to the Legislature, which delegates it to the Board.[39] The current system seeks the "maximum benefit" from the "utilization" of wildlife for the State's people, and so is constitutional, Art. VIII § 2, even if there might be ways to improve the system through the regulatory or legislative process.[40]

D. A Federal Interest is Present and Comity Principles Apply.

Finally, the Board of Game respected the written request of the Manager of the Kodiak National Wildlife Refuge that the Board deny Cassell's petition. The Manager's public comments filed with the Board to oppose Cassell's petition made two points: (1) that residents of all 50 States should be allowed a reasonable opportunity to hunt on their own federal lands, and (2) the current sharing system has worked well, as evidence by success in harvesting male bears as opposed to females, which is a reference to the success guided non-resident hunters have had in avoiding females:

> The Fish and Wildlife Service has a long history of provision of hunting opportunity ***to the American public*** on National Wildlife Refuges. On federal refuge lands ***we are required to ensure*** that the allocation of ***hunting opportunity is fairly balanced between State-resident and non-resident hunters***. On Kodiak Refuge, which comprise 52% of the land area of GMU 8, this fair balance has been struck with the long-standing standard of allocation of drawing permits for recreational sport hunting of brown bear. Specifically, this standard has provided 60% of

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[39] Const. Art. VIII §§ 2 and 3; State.Op.Br. at 4, n. 16 (citing delegating statutes); *see Sullivan*, 311 P.3d at 635.

[40] Dr. Cassell also has immediately available to him an "over-the-counter" or "registration" hunt for brown bear on the north eastern part of Kodiak Island, the part of the island that is mostly outside of Kodiak National Wildlife Refuge. That hunt is not restricted by limited allocation ("draw") of permits, and thus provides additional opportunities for both resident and non-resident hunters. State.Op.Br. Ex. F (000178)

> drawing permits to Alaska resident hunters and 40% of drawing permits to non-resident hunters.[41]
>
> This permit allocation standard has been highly successful--both by providing balanced opportunity to American hunters, and by ensuring a productive bear population that includes adequate representation of trophy-class males. Review of bear harvest data for Kodiak Refuge indicates a long-term trend of increased ratio of males including trophy-class males.
>
> I oppose Proposal 99 and further recommend no change to the current resident and non-resident allocation standard for drawing permits for recreational sport hunting of brown bear in GMU 8.[42]

By adhering to the longstanding allocation rule, consistent with the Refuge Manager's request, the Board lawfully maintained good relations with a governmental neighbor (the U.S. FWS) and avoided risking the federal preemption that might follow if the Board had excluded almost all residents of the other States from the bear hunt on these federal lands, as Cassell's petition sought to do. By denying Cassell's petition to increase the resident preference to an unbalanced 90% to 100% level, the Board also ensured it was complying with Alaska Const. Art. I, § 23, which authorizes the State to establish resident preferences if compliant with federal law. *Shepherd*, 897 P.2d at 41 (resident preferences cannot be enacted in "conflict with paramount federal interests").

While it is premature to evaluate whether granting Cassell's petition would have triggered federal preemption (because the Board denied Cassell's petition), important

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41 As noted above, a variety of implementation issues result in resident hunters consistently receiving two-thirds of the permits, not 60%. State.Op.Br. at 8 and n. 35. Also, while federal Refuge lands make up 52% of Game Management Unit 8 (Kodiak Island), they make up a substantially greater portion of the land on which the Kodiak brown bear draw hunt is conducted. This can be seen on the State map of the draw hunt at issue, supplied as Ex. 15 p. 2 to Plaintiff Cassell's brief. The bold lines mark the areas making up the draw hunt and the hatched areas are Refuge lands.

42 Letter from Michael Brady, Refuge Manager, Kodiak National Wildlife Refuge to Board of Game, February 19, 2021 (emphasis added, Ex. 9 to this brief).

federal interests are implicated. A key statutory purpose of the National Wildlife Refuge System is to "recognize compatible wildlife-dependent recreational uses as the priority general public uses of the System through which the ***American public*** can develop an appreciation for fish and wildlife." 16 U.S.C. § 668dd(a)(4)(H) (emphasis added). "Wildlife dependent recreation" includes "hunting …." § 668ee(2). As the Refuge's comment notes, the "American public" is more than Alaskans. Taxpayers from all 50 States pay to operate and maintain the Refuge. At the very least, the Board of Game has the discretion to be a good government-to-government neighbor with Kodiak National Wildlife Refuge, and decline to precipitate a federal / state dispute with it.[43]

V. CONCLUSION

The State Board of Game was not required by Article VIII § 3 of the Alaska Constitution to allocate to resident hunters more than 2/3^{rds} of the harvestable bears in the Kodiak draw hunt. Further, Art. VIII § 3 protects Alaska hunting guides as well as resident Alaskan hunters, and the balanced allocation rule now in place falls well within the permissible bounds set by that provision and related Art. VIII § 2 and 4. Plaintiff Cassell has available to him his normal remedy as a resident Alaskan voter of advocating that the Legislature consider adopting a more intense resident hunter preference.[44] He has failed to show why a Court should make such a decision.

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[43] By authorizing but not obligating the State to enact resident preferences where doing so complies with federal law, Art. I § 23 wisely allows the State to make case-by-case judgments regarding both (1) whether an intense resident preference is really in the best interests of Alaskans in a particular situation, and (2) the prospects for prevailing in any preemption litigation with whatever federal agencies might be involved.

[44] Art. VIII § 2 ("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.")

Dated April 8, 2021

BIRCH HORTON BITTNER & CHEROT

Attorneys for Amicus Curiae Alaska Professional Hunters Association

By: _____

Adam W. Cook, ABA #0611071
Shane C. Coffey, ABA #1705018
James H. Lister, ABA #1611111

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 8th day of April, 2021, a true and correct copy of the foregoing was served on the following in the manner indicated:

Matthew T. Findley
Eva R. Gardner
Ashburn & Mason
1227 W. 9th Avenue, Suite 200
Anchorage, AK 99501
matt@anchorlaw.com
eva@anchorlaw.com

☐ U.S. Mail
☐ Facsimile
☑ Electronic Delivery
☐ Hand Delivery

Cheryl Rawls Brooking
Aaron Peterson
Office of the Attorney General
1031 W. 4th Avenue, Suite 200
Anchorage, AK 99501
cheryl.brooking@alaska.gov
aaron.peterson@alaska.gov

☐ U.S. Mail
☐ Facsimile
☑ Electronic Delivery
☐ Hand Delivery

Service also made today (electronic) on counsel for Amicus Curiae Resident Hunters of Alaska
Susan Orlansky
Reeves Amodio, LLC
susano@reevesamodio.com

BIRCH HORTON BITTNER & CHEROT

By: _____