

**IN THE SUPREME COURT OF THE STATE OF ALASKA**

Robert Cassell,	)	
	)	
Appellant,	)	
	)	
v.	)	
	)	
State of Alaska, Board of Game,	)	Supreme Court No.: S-18476
	)	
Appellee.	)	
<hr/>		
Trial Court Case No.: 3AN-19-07460 CI		

APPEAL FROM THE SUPERIOR COURT  
THIRD JUDICIAL DISTRICT AT ANCHORAGE  
THE HONORABLE ANDREW GUIDI, JUDGE

**BRIEF OF APPELLEE  
STATE OF ALASKA, BOARD OF GAME**

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## **AUTHORITIES PRINCIPALLY RELIED UPON**

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#### **Alaska Constitution, Article VIII**

##### **§ 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 replenishable resources belonging to the State shall be utilized, developed, and maintained on the sustained yield principle, subject to preferences among beneficial uses.

### **Alaska Regulations:**

#### **5 AAC 92.061. Special provisions for brown bear drawing permit hunts.**

(a) In the Unit 8 general brown bear drawing permit hunt, the department shall issue permits, and a hunter may apply for a permit, as follows:

(1) the department shall issue a maximum of 40 percent of the drawing permits to nonresidents and a minimum of 60 percent to residents; each guide may submit the same number of nonresident applications for a hunt as the number of permits available for that hunt;

(2) the department shall enter, in a resident drawing, each application from a resident and each application from a nonresident accompanied by a resident relative who is within the second degree of kindred; for each season, the department shall issue a maximum of four permits to nonresident hunters accompanied by a resident relative who is within the

second degree of kindred; however, the department may not issue, within one calendar year, more than one of these permits per individual hunt, as described in the permit hunt guide published each year by the department;

(3) the department shall enter, in a guided nonresident drawing, each complete application from a nonresident who will be accompanied by a guide; the department may enter an application and issue a drawing permit for the general hunt only to a successful nonresident applicant who presents proof at the time of application that the applicant will be accompanied by a guide, as required under AS 16.05.407 or 16.05.408;

(4) the following provisions apply to a guided nonresident drawing under this section:

(A) an applicant for a guided nonresident drawing permit may apply for one such permit for fall hunts and one such permit for spring hunts;

(B) after the successful applicants have been selected by drawing, the department shall create an alternate list by drawing the remaining names of applicants for a specific hunt and placing the names on the alternate list in the order in which the names were drawn;

(C) if a successful applicant cancels the guided hunt, the person whose name appears first on the alternate list for that hunt shall be offered the permit; if an alternate applicant cancels the guided hunt, the permit must be offered in turn to succeeding alternate applicants until the alternate list is exhausted;

(D) if a guided nonresident drawing permit is available, but the alternate list is exhausted, the permit becomes available, by registration at the Kodiak ADF&G office, to the first applicant furnishing proof that the applicant will be accompanied by a guide;

(5) repealed 7/1/2007.

## PARTIES

Robert Cassell is the appellant. The State of Alaska, Board of Game (Board) is the appellee.

## ISSUE PRESENTED

*Common Use.* Article 8 of the Alaska Constitution instructs the legislature to manage natural resources “for the maximum benefit of [the] people,” employing “the sustained yield principle, subject to preferences among beneficial uses.”<sup>1</sup> Section 3 reserves wildlife “to the people for common use.”<sup>2</sup>

A regulation guarantees at least 60% of permits to hunt Kodiak brown bear to Alaska residents. Does the allocation of some of the remaining permits to nonresident hunters amount to a “monopolistic grant” or “special privilege”<sup>3</sup> in violation of the common use clause?

## INTRODUCTION

Appellant Robert Cassell wishes to participate in a draw hunt for Kodiak brown bear. Disappointed that he has not yet secured a permit through the existing lottery system, Cassell challenges the Alaska Board of Game (Board) regulation allocating a minimum of 60 percent of Kodiak brown bear permits to Alaska residents and no more than 40 percent to guided non-residents.<sup>4</sup>

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<sup>1</sup> Alaska Const., Art. VIII, §§ 2, 4.

<sup>2</sup> *Id.* at § 3.

<sup>3</sup> *Owsichek v. State, Guide Licensing and Control Bd.*, 763 P.2d 488, 496 (Alaska 1988).

<sup>4</sup> 5 AAC 92.061(a)(1).



Article VIII of the Alaska Constitution protects “broad public access to natural resources.”<sup>5</sup> Section 3 provides that “wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use.”<sup>6</sup> This Court has explained that the purpose of the clause is to prohibit monopolies over resources, meaning “exclusive grants or special privileges.”<sup>7</sup>

Because commercial guiding is among the “beneficial uses”<sup>8</sup> to which the Board may allocate Alaska’s wildlife, nonresidents have an important role in “maximum use” of wildlife for the “maximum benefit” of Alaskans. This Court made clear in *Owsichek v. State* that broad access to wildlife resources includes opportunities for both personal and professional use.<sup>9</sup> “[A] professional hunting guide’s ‘use’ of the wildlife resource,” simply put, “falls within the protection of the common use clause.”<sup>10</sup> The right to guide nonresident hunters professionally is “significant.”<sup>11</sup>

Given that precedent, Cassell does not argue that providing nonresidents access to Alaska big game hunting opportunities itself violates the common use clause. Nor does he take issue with the different eligibility requirements for resident and nonresident hunters (nonresidents, for example, must secure a guide contract and pay significantly

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<sup>5</sup> *Owsichek*, 763 P.2d at 493.

<sup>6</sup> Alaska Const., Art. VIII, § 3.

<sup>7</sup> *Owsichek*, 763 P.2d at 493.

<sup>8</sup> Alaska Const., Art. VIII, § 4.

<sup>9</sup> *Owsichek*, 763 P.2d at 497.

<sup>10</sup> *Id.* at 491 n.9.

<sup>11</sup> *Id.* at 497 & n.16.

higher license and tag fees [Exc. 12-13, 99]). He instead asserts that the *procedure* the Board uses to allocate between user groups—residents on the one hand, nonresidents who employ commercial guides on the other—is unconstitutional. Cassell redefines the “resource” to mean a permit, rather than the wildlife. He argues that residents must have access to every permit the Board issues, otherwise nonresidents have an unconstitutional “monopoly” over whatever portion of the permits the Board allocates to them.

The Board’s permit allocation strategy raises no common use problem. Bears, not permits, are the resource. Permits are a tool used to manage the resource through regulation of personal and commercially guided hunting. Allocating the majority of Kodiak brown bear drawing permits to resident hunters and a minority to nonresidents creates no monopoly or special privilege for nonresidents. Two-thirds of permits can be accessed only by residents, who alone have the opportunity to hunt big game independently and inexpensively. *Residents*, not nonresidents, are heavily favored.

The challenged regulation elegantly balances Article VIII’s wildlife management principles. It protects “common use” of Kodiak bears for the benefit of resident sport hunters, commercial guides, and other Alaskans. Most importantly, the Board’s strategy protects a thriving population of bears for future generations. Professional guides, who have the skill and incentive to minimize the harvest of female bears, are an important part of that successful conservation strategy. [Exc. 192, 573-74]

The Board’s allocation of a minority of permits to support different beneficial uses for Alaskans easily passes constitutional muster. This Court should affirm the superior court’s ruling rejecting Cassell’s challenge.

## STATEMENT OF THE CASE

### **I. The Board has managed a healthy Kodiak brown bear population and the hunt with great success for almost fifty years.**

The Kodiak Archipelago is home to around 3,500 of the largest bears in the world—*ursus arctos middendorffi*, a unique subspecies that has been genetically isolated from other grizzly and brown bears for 12,000 years. [Exc. 90, 166] Trophy hunters “highly value[]” the Kodiak brown bear. [Exc. 98, 534] Beyond hunting, the bears have tremendous intrinsic value as a species that inspires the awe and imagination of humans, including the few who live as their neighbors, those with strong cultural ties to the bears, visitors who have the opportunity to see, photograph, and study them, and those who know them only from pictures and writing. [Exc. 90-91, 166-69, 503, 534-39, 553]

Commercially guided hunting for nonresidents has a long history on Kodiak, predating statehood. [Exc. 91, 513] Hunting pressure and overharvesting in the 1960s led to emergency hunting closures and, in 1968, a new permitting system administered by the U.S. Fish and Wildlife Service. [Exc. 94, 187] That federal permit system functioned reasonably well for about a decade, but its implementation favored nonresidents. [Exc. 95] Because of the “first come first serve” nature of the permit program, nonresident customers of established Kodiak guides were receiving 55 percent of the permits and taking 60 or more percent of the bear harvest by 1975. [Exc. 95]

Alaska took over its constitutional role managing the Kodiak brown bear hunt in 1976. [Exc. 95-96] The Alaska Constitution assigns wildlife management authority to the

legislature,<sup>12</sup> which has delegated that regulatory power to the Alaska Board of Game and the Commissioner of Fish and Game.<sup>13</sup> From the beginning of its management of the hunt, the Board sought to “facilitate even distribution of the hunting effort” across 26 areas the Board created in Game Management Unit 8. [Exc. 96] The Board aimed to “stabilize the harvest at a predictable level” using data about hunting outcomes for resident and nonresident hunters, which differ because nonresidents must hunt with licensed professional guides.<sup>14</sup> [Exc. 12, 96] To “allow all hunters a reasonably equal opportunity to hunt,” the Board reserved a minimum of 60 percent of permits for residents and provided a maximum of 40 percent to nonresidents. [Exc. 96]

Over the subsequent 47 years, the Board and the Department have continued managing the Kodiak brown bear hunt to promote those same objectives—distributing hunting evenly across the Unit, providing for a stable population and predictable harvest, and offering fair hunting opportunities for all. [Exc. 91, 131, 173, 191] The minimum

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<sup>12</sup> Alaska Const., Art. VIII § 2 (“The legislature shall provide for the utilization, development, and conservation of all natural resources belonging to the State . . . for the maximum benefit of its people.”) & *id.* § 4 (“[W]ildlife . . . 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).

<sup>13</sup> AS 16.05.221(b) (creating the Board); AS 16.05.255 (setting forth the Board’s regulatory authority); AS 16.05.258(b) (requiring the Board to determine the harvestable portion of a population “consistent with sustained yield” and provide for subsistence as appropriate and then “other uses . . . subject to preferences among beneficial uses”); AS 16.05.270 (Board can delegate management authority to the Commissioner).

<sup>14</sup> AS 16.05.407. A narrow exception to the licensed guide requirement exists for nonresidents guided by an Alaska resident relative within the second degree of kindred; a maximum of four nonresident–relative permits can be awarded each season for Kodiak brown bear. [Exc. 12-13, 98, 120] 5 AAC 92.061(a)(2).

60 percent allocation of drawing permits to residents has remained the same since its adoption.<sup>15</sup> In practice though, residents receive more than the minimum. The allocation averages 66 percent for residents and 34 percent for nonresidents. [Exc. 117, 175, 281]

The Board’s management objectives aim for a harvest of no more than 6 percent of the total Kodiak brown bear population each year—around 210 bears. [Exc. 130, 191] The number of permits issued for the drawing hunt must take into account the expected harvest by both residents and nonresidents in the unlimited, open registration hunt. [Exc. 98] That hunt occurs on Kodiak’s road system to reduce human-bear interaction. [Exc. 186-87, 292] The six percent target must also include expected destruction of some problem bears each year in defense of life or property (in transcripts as “DLPs,” in Fish and Game parlance). [Exc. 182, 302] Very small changes in the different components of the bear harvest can disrupt these targets, so Fish and Game biologists hesitate to “add[] even a small number of permits to the drawing [hunt].” [Exc. 181-82]

Because data shows that healthy female adults are “the key” to population stability, the Board aims for at least sixty percent of the harvested bears to be males. [Exc. 137, 176, 196, 513] Harvesting mature males and conserving females leads to more cubs with better survival rates. [Exc. 166, 168, 516] Cubs and female brown bears with cubs cannot be harvested at all.<sup>16</sup>

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<sup>15</sup> 5 AAC 92.061(a)(1); Exc. 317.

<sup>16</sup> 5 AAC 92.260.

To achieve the target harvest and male/female numbers, the Department decides how many drawing permits to issue each year and allocates them between residents and guided nonresidents, within the boundaries of the Board's regulation. The Department uses data about the rate at which residents and nonresidents use their permits, the groups' successful hunt percentages, and the percentage of female bears each group harvests. [Exc. 129-32, 172, 190-91] Because of the skill and experience of professional guides, nonresidents harvest older bears on average and significantly fewer females. [Exc. 130, 172-73, 191-92, 502-03] Professional guides tend to employ better scent control, essential for success in hunting mature adult male bears, while less experienced hunters more often "drive[] the adult boars miles and miles away, leaving the sows and sub adult boars" with smaller home ranges available for harvest. [Exc. 503] Professionals with experience also understand the importance of spreading use over time and topography. [Exc. 503]<sup>17</sup>

Management of the Kodiak brown bear resource has proved very successful. [Exc. 175, 190-91, 196, 292, 500, 590] The existing approach has produced a "model of stability" [Exc. 302] and a "healthy and productive" population. [Exc. 90, 130] In short, "Kodiak continues to provide sustainable hunting opportunities while producing some of the largest bears in the world." [Exc. 191]

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<sup>17</sup> Sometimes guides working in federally established exclusive guide use areas will even forego a valuable opportunity to book a client if they do not feel their area has adequate large, male trophy bears for the permits available, because they aim to harvest only those animals with their clients. [Exc. 189]

**II. The Board rejected Cassell’s proposed change to 5 AAC 92.061, which would have guaranteed 90 percent of draw permits to residents and placed the remaining 10 percent in a pool open to all.**

Robert Cassell is a Wasilla resident and a board member of amicus curiae Resident Hunters of Alaska. [Exc. 2] He applied for two Kodiak brown bear hunts during the 2018-2019 season, but his name was not drawn. [Exc. 5, 13, 16-17] As a resident, Cassell could apply for up to six hunts for the same species, including submitting multiple applications for a single hunt. [Exc. 12, 188] He applied for fall season Kodiak brown bear hunts in the Aliulik Peninsula and Deadman Bay. [Exc. 13, 17] In contrast, nonresidents applying for Kodiak brown bear hunts could apply for just one fall and one spring hunt. [Exc. 12, 188] Nonresidents must produce a signed contract with an Alaska-licensed guide registered to guide in the hunt area to apply for a permit. [Exc. 12-13] And nonresidents pay \$1,000-\$1,300 for a bear tag, compared to \$25 for residents, and more than \$20,000 for guide services. [Exc. 99, 582]

In 2018, Cassell proposed a regulation change to the Board. [Exc. 5] He suggested amending 5 AAC 92.061(a)(1) to require the Department of Fish and Game to “issue a minimum of 90 percent of the drawing permits to residents, with the remaining drawing permits available to residents and nonresidents on the same terms.” [Exc. 6, 18, 172] The Board held public hearings and received comments on the proposal, including from local fish and game advisory committees. [Exc. 20, 164, 288, 499, 505, 517, 552] A Fish and Game biologist testified about how the proposal’s adoption would alter the harvest, using data about resident and nonresident hunting outcomes. [Exc. 117-18, 172-74] Assuming existing resident participation and success rates, the change would “likely [lead to] . . .

reduction in the overall harvest, but the same number of females [would] be harvested.” [Exc. 173, 513] Maintaining the target of no more than forty percent females might therefore require “reduc[ing] the number of permits.” [Tr. 173-74, 513]

Opponents of Cassell’s proposal cited the disruption it would bring to the successful wildlife management system established over five decades. [Exc. 175, 301, 553] Decreasing nonresident hunters’ access to permits so sharply would eliminate most commercial guided hunting in Kodiak, with significant detriment to bear conservation and management efforts, as well as loss of the economic benefits nonresidents bring. [Exc. 292, 294, 299, 301-02, 553-56, 567, 570]

In March 2019, the Board voted 5-1 against Cassell’s proposal. [Exc. 7, 177] Board members voting “no” cited the existing successful, balanced management of the bear population under the longstanding allocation. [Exc. 175-77] They also noted the benefits that flow to Alaskans, guides and others alike, from the significant nonresident investment attracted by commercial guiding on Kodiak Island. [*Id.*] And the Board emphasized that the existing system allocates ample hunting opportunities to residents, and that changing it could actually reduce those opportunities. [*Id.*]

### **III. Cassell’s facial challenge to 5 AAC 92.061(a)’s allocation under the common use clause of the Alaska Constitution failed in the superior court.**

In May 2019, with his proposal having failed before the Board, Cassell sued. [Exc 1-11] He described this case as an attempt “to protect the constitutional right of all Alaskan hunters to be first in line to enjoy the state’s wildlife, without being crowded out



by nonresident hunters.” [Exc. 1] He alleged that in denying his proposed amendment, the Board “insist[ed] on an unconstitutional allocation of Alaskan resources.” [Exc. 8]

Cassell’s lawsuit does not challenge the 2019 denial of his proposal, but rather, raises a constitutional challenge to the 1976 regulation. [At. Br. 17] His Complaint raised two counts for declaratory relief and two counts seeking corresponding injunctive relief. [Exc. 8-10] First, he sought a declaratory judgment that “the Board’s and/or 5 AAC 92.061(a)(1)’s allocation of any Kodiak Brown Bear permits exclusively to nonresidents is contrary to Article VIII, § 3 of the Alaska Constitution.” [Exc. 8-9] He sought an injunction to prevent “the Board from enforcing or adopting any regulation or policy that grants available Kodiak Brown Bear permits exclusively to nonresidents.” [Exc. 9-10] Second, he sought an alternative declaration that the “allocation of nearly 40% of the available Kodiak Brown Bear permits exclusively to nonresidents is contrary to Article VIII, § 3 . . . .” [Exc. 9] And he sought an alternative injunction preventing “the Board from enforcing 5 AAC 92.061(a)(1)’s allocation of nearly 40% of the available Kodiak Brown Bear permits exclusively to nonresidents.” [Exc. 10]

The parties cross-moved for summary judgment on Cassell’s challenge to the regulation. Cassell pursued only the first theory raised in his complaint, arguing that “any allocation” of any “portion” of the Kodiak brown bear hunting permits to nonresidents creates a constitutionally impermissible “monopoly” over the resource. [Exc. 62-71] He did not challenge the 60/40 allocation itself, arguing instead that whatever the allocation, residents must be eligible to apply for all permits. [Exc. 59, 66-68, 71]

The Board argued that the regulation is constitutional, pointing out that residents are guaranteed at least 60 percent of the permits and that nonresidents' access to a portion of the hunting opportunity is not, by definition, a "monopoly" on the resource. [Exc. 279]

Summary judgment was granted in favor of the Board. [Exc. 494-95] The court held that "Article VIII, § 3 of the Alaska Constitution" does not require the Board "to allocate to resident hunters more than two-thirds of the harvestable bears in the Kodiak draw hunt." [Exc. 495] Describing Cassell's arguments as "generally weak and lacking in legal support" and resting on "verbal sleight of hand," the Court emphasized that "[t]he regulation adopted by the Board in 1976 grants roughly two out of three drawing permits to Alaska residents, and there is not a single Kodiak brown bear hunt that excludes residents." [Exc. 495]

Cassell appeals.

### **STANDARD OF REVIEW**

This Court reviews summary judgment rulings de novo.<sup>18</sup> A grant of summary judgment will be affirmed where "there is no genuine issue of material fact in dispute and the moving party is entitled to judgment as a matter of law."<sup>19</sup> The meaning of a constitutional provision "is a question of law to which [this Court] appl[ies] its independent judgment."<sup>20</sup>

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<sup>18</sup> *West v. State, Bd. of Game*, 248 P.3d 689, 694 (Alaska 2010).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

“[W]hen an executive agency decision about natural resources is challenged under article VIII,” this Court’s “role . . . is limited to ensuring that the agency has ‘taken a “hard look” at all factors material and relevant to the public interest.’”<sup>21</sup>

## ARGUMENT

The “sole issue” Cassell raises is his facial challenge to the 1976 regulation allocating at least 60 percent of Kodiak brown bear drawing permits to Alaska residents. [At. Br. 16] The regulation provides that “the department shall issue a maximum of 40 percent of the drawing permits to nonresidents and a minimum of 60 percent to residents.”<sup>22</sup> He alleges that the regulation (1) violates the common use clause’s anti-monopoly principle [At. Br. 18-26], and (2) inappropriately balances Article VIII use and conservation goals generally. [At. Br. 33-37] Neither challenge has merit.

### **I. As part of Article VIII’s requirement that natural resources be sustainably managed for the benefit of all Alaskans, the common use clause forbids private monopolies over Alaska’s wildlife for individuals or groups.**

Section 3 of Article VIII, is succinct: “wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use.”<sup>23</sup> This Court interprets the Alaska Constitution “according to reason, practicality, and common sense,”<sup>24</sup> “based upon the plain meaning and purpose of the provision[s] and the intent of

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<sup>21</sup> *Sagoonick v. State*, 503 P.3d 777, 788 (Alaska 2022).

<sup>22</sup> 5 AAC 92.061(a)(1).

<sup>23</sup> Alaska Const., Art. VIII, § 3.

<sup>24</sup> *West*, 248 P.3d at 694.

the framers.”<sup>25</sup> Words in constitutional provisions should be given “their natural, obvious[,] and ordinary meaning.”<sup>26</sup>

“[W]henever reasonably possible, every provision of the Constitution should be given meaning and effect, and related provisions should be harmonized.”<sup>27</sup> This Court therefore interprets the common use clause as part of Article VIII as a whole.<sup>28</sup> Section 1 requires a general resource management policy of “maximum use consistent with the public interest.”<sup>29</sup> Section 2 assigns to the legislature the duty to implement that policy, “provid[ing] for the utilization, development, and conservation of all natural resources belonging to the State . . . for the maximum benefit of its people.”<sup>30</sup> And section 4 instructs that wildlife management be guided by “the sustained yield principle, subject to preferences among beneficial uses.”<sup>31</sup>

Cassell invokes Article VIII, section 3’s reservation of Alaska’s wildlife “to the people for common use.” “Common use” is among the Article VIII provisions that this

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<sup>25</sup> *Id.*; *Brooks v. Wright*, 971 P.2d 1025, 1028 (Alaska 1999).

<sup>26</sup> *West*, 248 P.3d at 695.

<sup>27</sup> *Owsichek*, 763 P.2d at 496 (quoting *Park v. State*, 528 P.2d 785, 786-87 (Alaska 1974)).

<sup>28</sup> *E.g.*, *Alaska Fish & Wildlife Conservation Fund v. State*, 347 P.3d 97, 102 (Alaska 2015) (“Sections 3, 15, and 17 of article VIII are the equal access clauses of the Alaska Constitution; they provide the constitutional framework within which the State regulates subsistence hunting and fishing.”); *McDowell v. State*, 785 P.2d 1, 13-14 (Alaska 1989) (“To the greatest extent possible, we must interpret the provisions of Article VIII consistent with each other.”) (Moore, J., concurring).

<sup>29</sup> Alaska Const., Art. VIII, § 1.

<sup>30</sup> Alaska Const., Art. VIII, § 2.

<sup>31</sup> Alaska Const., Art. VIII, § 4.

Court has read as incorporating the common law public trust doctrine.<sup>32</sup> Article VIII's provisions together create "a trust-like relationship in which the state holds natural resources such as fish, wildlife, and water in 'trust' for the benefit of all Alaskans."<sup>33</sup> Article VIII "enshrines an overarching constitutional policy of making natural public resources available for maximum use consistent with the public interest."<sup>34</sup>

"Common use" does *not* mean Alaskans have open access to use natural resources free of regulation.<sup>35</sup> "[I]n guaranteeing people 'common use' of . . . wildlife . . . , the framers of the constitution" anticipated regulation, such as "time honored" conservation methods like "[l]icensing requirements, bag limits, and seasonal restrictions."<sup>36</sup>

The Court has defined the type of regulations the common use clause forbids in a number of cases. The clause prohibits regulations that transfer "*private* right and title [to]

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<sup>32</sup> *Pullen v. Ulmer*, 923 P.2d 54, 60 (Alaska 1996) ("[C]ommon law principles incorporated in the common use clause impose upon the state a trust duty to manage the fish, wildlife and water resources of the state for the benefit of all the people.").

<sup>33</sup> *Kanuk ex rel. Kanuk v. State, Dep't of Nat. Res.*, 335 P.3d 1088, 1099 (Alaska 2014); *accord Shepherd v. State, Dep't of Fish & Game*, 897 P.2d 33, 40 (Alaska 1995) ("That the natural resources of the state belong to the state, which controls them as trustee for the people of the state, is explicit in the Alaska Constitution." (citing Alaska Const. Art. VIII, §§ 2-4)); *Gilbert v. State, Dep't of Fish & Game*, 803 P.2d 391, 399 (Alaska 1990) ("[F]ish . . . are the property of the state, held in trust for the benefit of all the people of the state, and the obligation and authority to equitably and wisely regulate the harvest is that of the state"); *Owsichek*, 763 P.2d at 495 ("[T]he state acts 'as trustee of the natural resources for the benefit of its citizens.'").

<sup>34</sup> *Sagoonick*, 503 P.3d at 796.

<sup>35</sup> *Owsichek*, 763 P.2d at 492.

<sup>36</sup> *Id.*

a private person to wildlife.”<sup>37</sup> Its purpose is “anti-monopoly,”<sup>38</sup> to “prevent the state from giving out ‘exclusive grants or special privilege as was so frequently the case in ancient royal tradition.’”<sup>39</sup>

The first step in a common use analysis is therefore to determine whether the challenged regulation creates a monopoly or special privilege for a person or closed group. Such “grants of exclusive or special privileges with respect to fish and game”<sup>40</sup> receive “close scrutiny.”<sup>41</sup> A burden on equal access for all Alaskans must serve “important” state interests and “the means used to accomplish the purpose must be designed for the least possible infringement on Article VIII’s open access values.”<sup>42</sup>

But a challenged regulation that creates no exclusive grant of access or special privilege receives general Article VIII analysis.<sup>43</sup> That deferential review asks only if the agency took a “hard look” at the constitutionally relevant factors.<sup>44</sup>

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<sup>37</sup> *Id.* at 493 (emphasis added) (quoting Alaska Constitutional Convention Papers, Folder 210, paper prepared by Committee on Resources entitled “Terms”). *Owsichek* also quotes *Geer v. Connecticut*, 161 U.S. 519, 529 (1896), a case upon which the framers of Alaska’s constitution relied, for the distinction between resource management “for the benefit of private individuals as distinguished from the public good”). *Id.* at 494.

<sup>38</sup> *Owsichek*, 763 P.2d at 496.

<sup>39</sup> *Id.* at 493; *Brooks*, 971 P.2d at 1031.

<sup>40</sup> *McDowell*, 785 P.2d at 9.

<sup>41</sup> *Owsichek*, 763 P.2d at 494.

<sup>42</sup> *McDowell*, 785 P.2d at 10. The Court has applied both of these tests to regulations creating special privileges, without choosing between them. *State, Dep’t of Fish & Game v. Manning*, 161 P.3d 1215, 1221 (Alaska 2007).

<sup>43</sup> *Sagoonick*, 503 P.3d at 788 (summarizing the standards that apply to general Article VIII challenges).

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

**II. Allocation of Kodiak brown bear draw permits between resident sport hunters and commercially guided nonresident hunters raises no common use problem because it creates no exclusive access or special privilege.**

This Court’s cases provide examples of forbidden monopolistic “special privileges” for individuals or closed groups. Conversely, the Court has approved regulations allocating resources between user groups for public purposes, which raise no common use concerns. The regulation challenged here falls into the latter category.

**A. Common use violations occur when Alaskans are excluded from using a resource while an individual or a closed group enjoys access.**

In *Owsichek v. State*, this Court described as the “lodestar of American public trust law” a case in which “the Illinois legislature purported to grant to a railroad more than 1,000 acres of land underlying Lake Michigan in the harbor of Chicago.”<sup>45</sup> Such private grants were precisely what the framers of Alaska’s constitution meant to prohibit through the public trust doctrine and the common use clause.<sup>46</sup>

The “exclusive guide areas and joint use areas” system failed common use scrutiny in *Owsichek* because of its close resemblance to private grants.<sup>47</sup> “One guide” could “exclude all other guides from leading hunts professionally in ‘his’ area.”<sup>48</sup> Exclusive areas were awarded “based primarily on seniority” rather than a process

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<sup>45</sup> *Id.* at 496 (discussing *Illinois Central Railroad Co. v. Illinois*, 146 U.S. 387 (1892)).

<sup>46</sup> *Id.* at 494 (“[T]he Constitutional Convention underscored its intent that the public retain broad access to [natural] resources, and that these resources not be the subject of private grants.”).

<sup>47</sup> *Id.* at 496.

<sup>48</sup> *Id.*

designed to promote “wildlife management concerns.”<sup>49</sup> Rights to an area were “not limited in duration” and could be sold “as if [they] were a property interest.”<sup>50</sup> All this made the right more like a private grant the framers sought to prohibit, and less like management of uses for the public good.<sup>51</sup>

This Court in *State v. Ostrosky* described limited entry rights—“exclusive rights to fish [for] a select few who may continue to exercise that right season after season”—as another quintessential violation of common use.<sup>52</sup> Limited entry gives special access to individuals, excluding others entirely.<sup>53</sup> Such regulations would therefore be unconstitutional but for the constitutional amendment authorizing limited entry.<sup>54</sup>

Monopolies for closed user groups, like monopolies for individuals, also violate the common use clause. Cassell relies heavily on *McDowell v. State*. [At. Br. 21, 25, 30] There the Court struck down a statute that, as Cassell explains, “allow[ed] a subsistence priority *only* to rural residents.” [At. Br. 21 (emphasis added)] Extending priority access for subsistence fishing and hunting to rural residents alone created an “exclusionist”

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<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 497 (“[T]he EGA program cannot be justified as a wildlife management tool like other restrictions on common use, such as hunting seasons and bag limits.”).

<sup>52</sup> *State v. Ostrosky*, 667 P.2d 1184, 1188-89 (Alaska 1983) (discussing Alaska Const., Art. VIII §§ 3, 15).

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*; accord *CWC Fisheries v. Bunker*, 755 P.2d 1115, 1120 (Alaska 1988) (holding that a fee interest in tidelands must include a public trust easement for fishing because an exclusive right of fishery would be “inconsistent with the plain wording of” the common use clause).



“special privilege”<sup>55</sup> because Alaskans residing in urban communities simply could not participate.<sup>56</sup> Although “[t]he state may, indeed must, make allocation decisions between sport, commercial, and subsistence users,” its authority “does not imply a power to limit admission to a user group” entirely.<sup>57</sup> “The equal access clauses are not implicated by a regulation that applies equally” to all Alaskans.”<sup>58</sup> Rather, “[t]be invalid under these clauses, a regulation must place “limits . . . on the admission to resource user groups.”<sup>59</sup>

Cassell mischaracterizes the Kodiak brown bear draw hunt allocation as a “nonresident preference” or “exclusive grant” similar to the unconstitutional rural priority. [At. Br. 25, 30] It is not. Nothing about the permit system for the Kodiak brown bear draw hunt creates exclusive access for individuals like the exclusive guide areas struck down in *Owsichek*. Nor does it create a “monopoly or special privilege” for a closed group, like the statute struck down in *McDowell*. Rural residents in *McDowell* did not receive a percentage of subsistence access, they received *all* of it, with urban

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<sup>55</sup> *McDowell*, 785 P.2d at 1, 8-9.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 8 (quoting *Kenai Peninsula Fisherman’s Co-op. Ass’n, Inc. v. State*, 628 P.2d 897, 904 (Alaska 1981)); accord *State v. Kenaitze Indian Tribe*, 894 P.2d 632, 638 (Alaska 1995) (explaining that the common use doctrine “afford[s] protection against the creation of a ‘closed class’ of fish and game users.”).

<sup>58</sup> *Alaska Fish & Wildlife Conservation Fund*, 347 P.3d at 102.

<sup>59</sup> *Id.*

Alaskans left out.<sup>60</sup> The opposite is true here. Alaska residents have preferred access, to the tune of two out of every three permits.<sup>61</sup>

**B. The 60/40 allocation of Kodiak brown bear hunting permits operates like regulation schemes that comply with the common use clause.**

By allocating at least 60 percent of permits to residents, the Board drew a non-exclusionary allocation line between user groups of the type this Court has repeatedly approved. In *Kenai Peninsula Fisherman’s Co-op. Ass’n, Inc. v. State*, for example, the Court rejected a common use challenge to regulations “establish[ing] certain priorities of use between commercial and recreational fisheries.”<sup>62</sup> Such regulations do not trigger common use clause scrutiny because the clause “was not meant to prohibit differential treatment of . . . diverse user groups . . . .”<sup>63</sup>

Similarly in *Tongass Sport Fishing Ass’n v. State*, a regulation that “allocate[d] a percentage of the Treaty chinook salmon quota to commercial trollers” was upheld against a common use challenge.<sup>64</sup> Just as Cassell argues that allocating a percentage of the draw hunt opportunity to nonresidents amounts to a “special privilege” for that group

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<sup>60</sup> *McDowell*, 785 P.2d at 1 (“The [unconstitutional] act defines subsistence fishing and hunting as activities which can be undertaken *only* ‘by a resident domiciled in a rural area of the state.’”) (emphasis added)).

<sup>61</sup> 5 AAC 92.061(a)(1).

<sup>62</sup> *Kenai Peninsula*, 628 P.2d at 904. The challenge rejected in *Kenai Peninsula* was brought under Article VIII, section 15, which prohibits exclusive fishery rights. This Court has held that sections 3 and 15 “share at least one meaning: exclusive or special privileges to take fish and wildlife are prohibited.” *McDowell*, 785 P.2d at 6.

<sup>63</sup> *Kenai Peninsula*, 628 P.2d at 904.

<sup>64</sup> *Tongass Sport Fishing Ass’n v. State*, 866 P.2d 1314, 1316-17 (Alaska 1994).

[At. Br. 35], the *Tongass* plaintiff contended that “allocating a fixed quota of chinook to the [commercial] trollers created an unconstitutional ‘special privilege.’”<sup>65</sup> The Court disagreed, reiterating that only a “limitation on admission to a particular user group” triggers common use concerns.<sup>66</sup> Allocations *between* resource user groups do not.<sup>67</sup>

Cassell relies on *Shepherd v. State, Dep’t of Fish and Game*, in which this Court rejected commercial guides’ challenges to statutes and regulations that, as here, created an “allocational preference[.]” in *favor* of “state resident recreational users” over nonresidents.<sup>68</sup> The Court relied in part on Article VIII, including the common use clause, to uphold the exclusion of nonresidents from moose hunting in some areas.<sup>69</sup> *Shepherd* endorses “excluding or limiting the participation of nonresidents” where doing so serves a conservation purpose benefitting Alaskans.<sup>70</sup> Cassell also points to the resident preference amendment to the Alaska Constitution—Article 1, section 23<sup>71</sup>—which, like

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<sup>65</sup> *Id.* at 1317.

<sup>66</sup> *Id.* at 1318 (citing *McDowell*, 785 P.2d at 8 & n.14; *Owsichek*, 763 P.2d at 492; and *Kenai Peninsula*, 628 P.2d at 904).

<sup>67</sup> *Id.* at 1318.

<sup>68</sup> *Shepherd v. State, Dep’t of Fish & Game*, 897 P.2d 33, 35, 39 (Alaska 1995) (rejecting challenges to AS 16.05.255(d)’s “preference” for resident taking of big game for meat “over taking by nonresidents” and corresponding regulations closing and limiting nonresident moose hunting in certain management units).

<sup>69</sup> *Id.* at 35.

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

<sup>71</sup> Alaska Const., Art. 1, § 23 (“This constitution does not prohibit the State from granting preferences, . . . to residents of the State over nonresidents to the extent permitted by the Constitution of the United States.”). The United States Supreme Court has upheld resident preference in game allocation against challenge under the privileges

*Shepherd*, supports the conclusion that “resource allocations favoring residents over nonresidents are consistent with the Alaska Constitution.” [At. Br. 23]

Neither *Shepherd* nor Article 1, section 23 furthers Cassell’s challenge to 5 AAC 92.061. His argument rests on the false characterization that the regulation somehow favors nonresidents. The regulation actually *limits* nonresident participation in multiple ways, including the minority allocation and the financial barriers applicable only to nonresidents.<sup>72</sup> Those resident advantages are indeed constitutional, but it does not follow that the constitution requires *more* preferential treatment for residents.

*Shepherd* held that excluding or limiting nonresident moose hunting in the face of scarcity aligned with Article VIII’s conservation goals.<sup>73</sup> Here, because of the nature of the bear population and hunting impacts on the population, it is the Board’s *inclusion* of nonresidents in the Kodiak brown bear hunt serves the conservation purpose recognized as important in *Shepherd*. [See Exc. 175, 191-92]

Cassell does not seriously contend that the Board actually excludes residents from hunting Kodiak’s brown bears. Nor does he dispute that the Board can allocate the

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and immunities and equal protection clauses of the United States Constitution. *Baldwin v. Fish & Game Comm’n of Mont.*, 436 U.S. 371, 385-91 (1978).

<sup>72</sup> 5 AAC 92.061.

<sup>73</sup> *Shepherd*, 897 P.2d at 35, 41, 43 (explaining that the nonresident limitations were justified by “depressed moose populations” that “could not sustain the demand for moose by both residents and nonresidents,” and approving of resident preference because “excluding or limiting the participation of nonresidents” aligns with the state’s trustee obligations to protect the population).

resource between residents and nonresidents.<sup>74</sup> Yet he insists that the Board’s allocation somehow deprives Alaskans of “access to Alaska’s game” and creates “exclusive access” for nonresidents. [At. Br. 25] He does this by redefining the resource to be each *permit* rather than the *wildlife*, complaining that the existence of any nonresident permits “excludes [residents] from accessing *those permits*.” [At. Br. 25 (emphasis added)] Whatever number of permits the Board makes available to nonresidents—be it 1 percent or 100 percent—Cassell maintains that residents must be eligible to apply for each and every one of them. [At. Br. 28-30]

A permit is not a “harvestable resource.” Permits are tools for regulating access to the resource, which is the bears. Residents are not excluded from hunting Kodiak brown bears the way urban Alaskans were “conclusively exclude[d]” from subsistence use of natural resources before *McDowell*.<sup>75</sup> To the contrary, residents receive two-thirds of the trophy hunting opportunities. Every legally harvestable bear in every Kodiak management unit can be hunted by a permit holder, two-thirds of whom are residents.

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<sup>74</sup> See At. Br. 17 (Cassell explicitly does not claim the Board “should modify its allocation among users to a different percentage split.”); At. Br. 27 (“Dr. Cassell was clear before the superior court that he was not challenging the specific percentage division between residents and nonresidents or arguing for any specific resident preference”).

<sup>75</sup> *McDowell*, 785 P.2d at 9. For the same reason, Cassell is wrong that the regulation he challenges “would be impermissible if a certain percentage of” permits “were reserved solely for Kodiak residents.” [At Br. 25] If *only* Kodiak residents could hunt, excluding other Alaskans, that would be plainly unconstitutional. But allocating a percentage of permits excludes no one from the harvestable resource. If the Board had Article VIII-compliant reasons to allocate some permits to locals, and others were not excluded, that might not create a constitutional concern.

Cassell’s true argument is not a common use complaint that nonresidents have a monopoly, but rather, his perception that an individual nonresident has higher statistical odds of drawing a Kodiak brown bear permit than does a resident. [At. Br. 1, 10-11, 30-31] The record does not support Cassell’s characterization of the supposedly extreme differential between the two groups. He far understates residents’ odds of success as “miniscule” and overstates nonresidents’ odd as “more likely than not” under the current system. [Exc. 11] He does this by comparing drawing odds for *individual applications*, not individual hunters. Residents can submit six applications per year, making their odds six times higher than Cassell says. [Exc. 12, 243, 302]

By contrast, nonresidents can apply just once for one hunt in fall and spring and cannot submit an application at all until they secure a contract with a guide.<sup>76</sup> [Exc. 12] The record therefore does not reflect demand for nonresident permits from those unable to secure guide contracts. Guides fill their client rosters *years* in advance.<sup>77</sup> [Exc. 302] Conversely, Cassell himself has not maximized his own odds as a resident. [See Exc. 12, 17, 177] Resident hunters’ chances of securing a permit with persistence likely do not differ nearly so much as Cassell suggests with the chances of an interested nonresident.

Moreover, if nonresidents’ chances are in fact better, the primary reason is not their residency, but their access to sufficient resources to overcome Alaska’s nonresident-

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<sup>76</sup> 5 AAC 92.061(a)(3).

<sup>77</sup> [Exc. 99] “Individual guides are limited in the number of guide-client agreements they may submit per area [and] [m]any of the hunt areas in the Kodiak Archipelago are within [federal] exclusive guide areas which may already be booked years in advance.”

specific hurdles to big game hunting.<sup>78</sup> Resident demand is high because *only residents* can hunt inexpensively. [Exc. 12-13]

Cassell makes no equal protection claim. He does not argue that residents and nonresidents must be treated the same.<sup>79</sup> He certainly does not argue that residents should be required to hire guides or pay higher fees, even though imposing such barriers would greatly improve drawing odds for wealthy Alaskans like him. Nor does Cassell argue that residents who hire guides should have access to permits in the guided nonresident pool.

The Board has selected an allocation procedure—two thirds of permits in one pool for residents, the rest in a pool for nonresidents, that serves its constitutional responsibility to maximize benefit and achieve sustained yield. Cassell’s unprecedented approach, lumping all applicants into a single pool, would not necessarily improve drawing odds for residents. [Exc. 176, 292] The fact would remain that just 180 bears can be harvested in the drawing hunt annually, and demand will always far exceed the supply of permits. [See Exc. 176]. His preferred method would leave the resident/nonresident allocation largely to chance, increasing year-to-year harvest variability.<sup>80</sup> That would obstruct the Board’s management task with little gain to resident hunters. [Exc. 176]

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<sup>78</sup> 5 AAC 92.061(a)(3).

<sup>79</sup> See *Shepherd*, 897 P.2d at 44 (“Resident and nonresident recreational users of Alaska fish and game are not similarly situated,” constitutionally speaking, and additional burdens on nonresidents therefore easily pass equal protection scrutiny).

<sup>80</sup> See Exc. 193 “[U]ncertainty from year to year . . . would really be destructive to the manager’s ability to predict the harvest . . . . So that’s really problematic.”

Fundamentally, the common use clause simply does not require the State to “guarantee access to a natural resource by” Cassell’s “preferred means or method.”<sup>81</sup> The legislature, not Cassell or the courts, is responsible for “determin[ing] the procedures necessary for ensuring . . . the State’s resources are used ‘for the maximum benefit of its people.’”<sup>82</sup> Far from creating a monopoly or special privilege for nonresidents, the Board’s allocation includes both personal and commercial hunting uses. It heavily favors resident access by offering inexpensive, unguided hunting to Alaskans alone and setting aside two-thirds of the permits for them. The regulation raises no common use problem.

**III. The allocation selected in the regulation appropriately implements the “sustained yield principle,” taking into account a range of “beneficial uses” for “maximum benefit” to Alaskans, as Article VIII requires.**

Cassell expressly disclaims any challenge to the Board’s specific allocation, characterizing his claim as a pure facial challenge based on exclusion of residents from accessing some permits. Yet much of his argument sets forth a general Article VIII challenge; he argues that 5 AAC 92.061(a)(1) rests on a constitutionally unacceptable balancing of interests. Specifically, Cassell argues that the Board could not weigh the economic benefits of nonresident use in selecting the current allocation. [At. Br. 31-37]

This part of Cassell’s argument also fails. “[T]o accomplish its designated purposes,” the Board “is necessarily going to make decisions concerning utilization of the

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<sup>81</sup> *Alaska Fish & Wildlife Conservation Fund v. State*, 347 P.3d 97, 103 (Alaska 2015).

<sup>82</sup> *Sagoonick v. State*, 503 P.3d 777, 788 (Alaska 2022) (quoting *Sullivan v. REDOIL*, 311 P.3d. 625, 634-35 (Alaska 2013), citing Alaska Const. Art. VIII, §§ 1-2).



resources it is charged with managing.”<sup>83</sup> And because courts are “singularly ill-equipped to make natural resource management decisions,”<sup>84</sup> this Court limits its role to “ensuring that the agency has taken a hard look at all factors material and relevant to” managing the resource in the public interest as required by Article VIII.<sup>85</sup>

The allocation takes into account the range of Article VIII natural resources management considerations, of which “common use” is just one. Others—“maximum use,” “maximum benefit,” “sustained yield,” and “preferences among beneficial uses” all must inform the State’s management as well.<sup>86</sup> Cassell ignores all management principles other than maximizing hunting opportunities for residents. To him, excluding residents from even one draw hunt permit is the same as denying residents *use* of the resource, [At. Br. 28], as if the bears have no value to Alaskans except resident sport hunting.

The value of the Kodiak brown bear population is not so constrained. As this Court recognized in *Owsichek*, “professional hunting guides” fall within the protection of the common use clause.<sup>87</sup> On Kodiak, 97 percent of licensed guides are Alaska residents. [Exc. 513] Statewide, around 85 percent are Alaskans. [Exc. 447] “Use” of wildlife

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<sup>83</sup> *Kenai Peninsula*, 628 P.2d at 903.

<sup>84</sup> *Cook Inlet Fisherman’s Fund v. State, Dep’t of Fish & Game*, 357 P.3d 789, 801 n.40 (Alaska 2015) (citing *Native Vill. of Elim v. State*, 990 P.2d 1, 8 (Alaska 1999)).

<sup>85</sup> *Sagoonick*, 503 P.3d at 788 (internal quotation marks omitted).

<sup>86</sup> *See, e.g., West v. State, Bd. of Game*, 248 P.3d 689, 696 (Alaska 2010) (holding that “the sustained yield clause in Alaska’s constitution applies to both predator and prey populations, including populations of wolves and bears” and that, in creating “preferences among beneficial uses,” “the legislature and the Board have some discretion to establish management priorities for Alaska’s wildlife”).

<sup>87</sup> *Owsichek*, 763 P.2d at 497.

includes those guides' use for "private commercial purposes."<sup>88</sup> Cassell argues that allocation between residents who hunt independently and nonresidents who hunt with commercial guides is not an allocation between uses because both groups are hunting. [At. Br. 39] *Owsichek* rejected that exact argument. The State argued that excluding Alaskans from commercial guiding raised no common use problem because recreational hunting remained available and constituted adequate access.<sup>89</sup> The Court disagreed and held that the common use clause protects access to *both* hunting uses.<sup>90</sup>

The Board must consider financial benefit to Alaskans in making allocation decisions for natural resources. Clients of commercial guides, 96 percent of whom are nonresidents, spend almost \$57 million in guide fees statewide. [Exc. 449] And nonresident participation in the hunt benefits more Alaskans than just the commercial guides and their employees and families. [Exc. 516] Guides spend \$28 million annually in Alaska on goods and services connected with their work, including food, air transportation, fuel, gear, and more. [Exc. 551] Nonresident hunters spend another \$4 million annually during their visits, before and after hunting. [Exc. 449]

Nonresidents also pay steep prices for hunting licenses and big game tags, totaling \$9.7 million annually. [Exc. 454] The guided subset of nonresidents contribute

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<sup>88</sup> *Id.* at 497 n.15.

<sup>89</sup> *Id.* at 497.

<sup>90</sup> *Id.* (rejecting the argument that exclusive guide areas "do not deny *Owsichek* common use of the wildlife resources because he, like any other member of the public, may hunt recreationally in these areas," and recognizing a distinct right to guide commercially).

\$3.8 million of that. Residents pay comparatively nominal fees, generating just \$3 million despite much higher resident user numbers. [Exc. 454] Those funds, combined with federal matching funds, support the Department of Fish and Game’s management, conservation and hunter education programs. [Exc. 456, 554]

Allocating part of the hunting opportunity to nonresidents, and by extension, professional guides, serves Article VIII’s purposes in a second way, perhaps even more constitutionally important than the financial benefits. “The [natural resources] article’s primary purpose is to balance maximum use of natural resources with their continued availability to future generations.”<sup>91</sup> Beneficial uses of natural resources therefore include not only consumptive ones, like hunting and fishing. “The legislature established the Board for the purposes of conserving and developing” resources, and conservation falls within Article VIII “utilization.”<sup>92</sup> Wildlife management must therefore account for “preservation[] and expansion” of wildlife resources.<sup>93</sup> “Conserving scarce wildlife resources for Alaska residents . . . unquestionably represents a legitimate state interest.”<sup>94</sup>

As the Board expressed in 1976, a separate nonresident hunting pool serves the critical conservation function of “stabilizing the harvest at a predictable level.” [Exc. 96] The Board considers achieving modest female harvest numbers “the key” to sustainable population management. [Exc. 174] Professional guides have the experience and skill to

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<sup>91</sup> *Cook Inlet Fisherman’s Fund*, 357 P.3d at 803 (quoting *West*, 248 P.3d at 696).

<sup>92</sup> *Kenai Peninsula*, 628 P.2d at 902-03.

<sup>93</sup> *Sagoonick v. State*, 503 P.3d 777, 783 (Alaska 2022).

<sup>94</sup> *Shepherd*, 897 P.2d at 43.

harvest more of the “right” bears—the older, larger males—and spare younger female ones—to promote healthy cubs and a thriving population. [Exc. 192] Even if Cassell were correct that the financial benefits of guided hunting to Alaskans have no place in a “beneficial uses” analysis, including professional guides in the allocation nevertheless furthers a critical, constitutionally mandated sustainable yield function. [*E.g.*, Exc. 563]

The Board’s longstanding allocation between resident hunting and nonresident commercial hunting appropriately balances private recreational trophy hunting, commercial guiding, and conservation. And the approach has produced impressive results of exactly the sort envisioned by the framers—a sustainable and healthy bear population that provides maximum benefit to Alaskans, hunters and non-hunters alike.

### **CONCLUSION**

The State asks this Court to affirm the superior court’s grant of summary judgment in its favor.