

2001

# Joseph Bradbury v. State of Utah, Division of Wildlife Resources : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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JOSEPH BRADBURY,

Appellant,

vs.

STATE OF UTAH, DIVISION OF  
WILDLIFE RESOURCES,

Appellee.

Case No. 20010839-CA

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BRIEF OF APPELLEE DIVISION OF WILDLIFE RESOURCES

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PETITION FOR REVIEW OF AN ADMINISTRATIVE ORDER OF THE UTAH  
DIVISION OF WILDLIFE RESOURCES, WILDLIFE BOARD SUSPENDING  
APPELLANT'S PRIVILEGES TO HUNT BIG GAME IN THE STATE OF UTAH  
FOR A PERIOD OF FIVE YEARS

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ORAL ARGUMENT AND PUBLISHED OPINION NOT REQUESTED



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IN THE UTAH COURT OF APPEALS

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JOSEPH BRADBURY,

Appellant,

vs.

STATE OF UTAH, DIVISION OF  
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Appellee.

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Case No. 20010839-CA

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BRIEF OF APPELLEE DIVISION OF WILDLIFE RESOURCES

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JURISDICTION

This petition for review is taken from a final agency action of the Utah Wildlife Board administratively suspending Appellant's big game hunting privileges for a period of five years pursuant to Utah Code Ann. § 23-19-9 (1998) and Utah Admin. Code R657-26 (1999). The Utah Court of Appeals has jurisdiction of this case pursuant to Utah Code Ann. § 63-46b-16(1) (1997) and Utah Code Ann. § 78-2a-3(2)(a). (Supp. 2001).

ISSUES PRESENTED AND STANDARDS OF REVIEW

1. Whether the Utah Wildlife Board correctly interpreted the statutory definition of "resident" found in Utah Code Ann. § 23-13-2(37)(a) (1998).

Standard of review: Typically, the standard of review under Utah Code Ann. § 63-46b-16(4) (1997) for an agency's interpretation of statute is a correction-of-error standard. Uintah Oil Assoc. v. County Board of Equalization of Uintah County, 853 P.2d 894, 896 (Utah 1993). Nevertheless, the Legislature often grants agencies explicit or implicit discretion in dealing with statutory terms. Morton Int'l, Inc. v. Auditing Division of the Utah State Tax Commission, 814 P.2d 581, 587-88 (Utah 1991). In such instances, an agency's interpretation of a statute is granted deference by the reviewing court. Id. Agency discretion in interpreting statute may be implied where the statutory language suggests the Legislature left the question at issue unresolved, or where "there is more than one permissible reading of the statute and no basis in the statutory language or legislative history to prefer one interpretation over another." Id. What constitutes a "resident" as defined in Utah Code Ann. § 23-13-2(37)(a) is subject to varying interpretations, and the Utah Wildlife Board is statutorily granted broad policy making authority in Utah Code Ann. §§ 23-14-3 (1998) and 23-14-18 (1998). Accordingly, the Utah Wildlife Board's interpretation of "resident" should be granted deference by this Court.

2. Whether the Utah Wildlife Board correctly admitted and considered evidence at the hearing in harmony with the administrative Notice of Agency Action and the Division of Wildlife Resources' hearing officer's decision.

Standard of review: Under Utah Code Ann. § 63-46b-16(4)(e) (1997), an agency's compliance with prescribed procedures is a question of law and reviewed for correctness with no deference afforded the agency. Whitewar v. Labor Commission, 973 P.2d 982, 984 (Utah Ct. App. 1998); Krantz v. Utah Dep't of Commerce, 856 P.2d 369, 370 (Utah Ct. App. 1993).

3. Whether the Utah Wildlife Board's factual findings of flagrant and knowing conduct are supported by sufficient evidence in the record.

Standard of review: Under Title 63, Chapter 46b of the Utah Code, administrative findings of fact should be affirmed where they are "supported by substantial evidence when viewed in light of the whole record before the court." Grace Drilling Co. v. Board of Review, 776 P.2d 63, 68 (Utah 1989). Substantial evidence is something less than the weight of the evidence but more than a mere scintilla. Id. "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Id.

4. Whether the Utah Wildlife Board properly considered Appellant's facially valid guilty plea to and criminal conviction of Wanton Destruction of Protected Wildlife.

Standard of review: The standard of review under Utah Code Ann. § 63-46b-16(4) (1997) for an agency's application or interpretation of the law is a correction-of-error standard. Uintah Oil Assoc., 853 P.2d at 896; Morton, 814 P.2d at 588.

## DETERMINATIVE STATUTES, RULES, AND CONSTITUTIONAL PROVISIONS<sup>1</sup>

1. Utah Code Ann. § 23-13-2(12)(a) (1998).
2. Utah Code Ann. § 23-13-2(24) (1998).
3. Utah Code Ann. § 23-13-2(37)(a) (1998).
4. Utah Code Ann. § 23-19-5 (1998).
5. Utah Code Ann. § 23-19-9 (1998).
6. Utah Code Ann. § 23-20-4 (1998).
7. Utah Code Ann. § 63-46b-3(2) (1997).
8. Utah Code Ann. § 63-46b-8 (1997).
9. Utah Code Ann. § 76-2-103(2) (1995).
10. Utah Administrative Code R657-26-2(2)(b) (1999).
11. Utah Administrative Code R657-26-8 (1999).

### STATEMENT OF THE CASE

On June 29, 2000, the Utah Division of Wildlife Resources (“Division”) mailed Notice of Agency Action to Appellant commencing an administrative license suspension proceeding pursuant to Utah Code Ann. § 23-19-9 (1998) and Utah Admin. Code R657-26 (1999). (R. 55 and Addendum C). An informal administrative hearing was held pursuant to the Notice of Agency Action on November 29, 2000 wherein the Division hearing officer heard evidence from

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<sup>1</sup> The statutes and rules listed in this section are included in the Addendum.

Appellant and the Division. (R. 18). After hearing the evidence and legal argument, the hearing officer concluded Appellant “flagrantly and knowingly” killed a bull elk with an invalid license, and the hearing officer suspended his big game hunting privileges for a period of five years. (R. 18).

On January 25, 2001, Appellant appealed the hearing officer’s decision to the Utah Wildlife Board (“Wildlife Board”) pursuant to Utah Code Ann. § 23-19-9(12) and Utah Admin. Code R657-26-8. (R. 11). The Wildlife Board subsequently held a de novo, formal administrative hearing on May 17, 2001 pursuant to Utah Admin. Code R657-26-8(5) to consider the matter of Appellant’s hunting license suspension. (R. 1). Both Appellant and the Division offered evidence and argument at the hearing. (R. 1). On September 26, 2001, the Wildlife Board issued its written Order affirming the five year suspension of Appellant’s big game hunting privileges. (R. 1 and Addendum C).

Appellant appealed the Wildlife Board’s Order to the Utah Court of Appeals on October 24, 2001 pursuant to Utah Code Ann. § 63-46b-16(1).

### STATEMENT OF THE FACTS

Officer Jack Topham is a certified peace officer employed by the Division as a criminal investigator. (R. 118 at 20-21). In the Fall of 1998, Officer Topham received information from a confidential informant that Appellant was domiciled in Utah and killed a six point bull elk in 1997 using an illegally purchased Utah nonresident limited entry bull elk license. (R. 118 at 21). Officer Topham’s

investigation of this matter and evidence offered in subsequent hearings reveals the following.

Appellant admits he has lived in Utah since 1976. (R. 118 at 68). At all relevant times, he has been domiciled in Utah, employed in Utah, registered to vote in Utah, and taxed in Utah. (R. 118 at 25, 69-70). However, in 1993 Appellant unlawfully obtained an Idaho drivers license using his sister's Idaho daycare center's address to facilitate an illegal scheme of obtaining resident Idaho hunting licenses. (R. 118 at 22, 70). In 1997, Appellant applied for and obtained a Utah nonresident limited entry bull elk license. (R118 at 23-24, 67-69). He falsely listed his sister's Idaho daycare center's address as his, a phone number with an Idaho area code as his, and an Idaho drivers license number in his application for the 1997 Utah *nonresident* limited entry bull elk license. (R118 at 23-24, 67-69). He ultimately received a Utah nonresident limited entry bull elk license on the Book Cliffs/Bitter Creek unit, and in 1997 he was successful in killing a mature six point bull elk. (R. 118 at 26, 69). That same year, Appellant fraudulently obtained a resident Idaho hunting license and was ultimately convicted in Idaho for that offense, among others, on or about September 23, 1999. (R. 98 and R. 118 at 33, 84-85).

The Uintah County Attorney's Officer filed criminal charges against Appellant for killing in 1997 the six point bull elk. (R. 118 at 27-28). Appellant was specifically charged with violating Utah Code Ann. § 23-20-4 (1998) by killing



the bull elk with an illegal and invalid nonresident license obtained in violation of Utah Code Ann. § 23-19-5 (1998). (R. 118 at 28-30, 51). Under Section 23-19-5, it is unlawful for any person to obtain a license by fraud, deceit, or misrepresentation, and it is unlawful for a resident to purchase a nonresident license.

Appellant pleaded guilty to the charge of Wanton Destruction of Protected Wildlife (Section 23-20-4), a Class A Misdemeanor, on December 15, 1999 in the Eighth Judicial District Court for Uintah County, State of Utah. (R. 96). The factual basis underlying the conviction was Appellant's killing a six point bull elk on the Book Cliffs limited entry unit with an unlawfully obtained Utah nonresident license. The nonresident license was deemed invalid and the kill consequently illegal since Appellant obtained the license by misrepresenting his actual status as a resident. (R.118 at 52-53). The factual basis supporting the charge was provided to the court and the plea entered thereto. The court accepted the plea and concluded it was knowingly made and had a factual basis. (R. 96).

Based on these facts, the Wildlife Board suspended Appellant's big game hunting privileges for five years, concluding he "flagrantly and knowingly" obtained a Utah nonresident bull elk license in violation of the law and unlawfully used it as ostensible authority to kill a bull elk. (R. 1).

## SUMMARY OF THE ARGUMENT

The Wildlife Board's legal conclusion that Appellant was a resident of Utah in 1997 when he purchased a Utah nonresident bull elk license should be affirmed on the following two grounds. First, Appellant pleaded guilty to the criminal charge of killing a bull elk with an illegally obtained and invalid license. The license was invalid since he obtained a Utah nonresident license while a Utah resident in violation of Utah Code Ann. § 23-19-5. By pleading guilty, Appellant effectively admitted all the essential elements of the crime charged and cannot now attempt to change that admission. Appellant waived whatever rights he had to challenge his residency or nonresidency status when he pleaded guilty to unlawfully killing the bull elk. Second, Appellant was legally a resident of Utah in 1997 when he fraudulently purchased a nonresident bull elk license. For purposes of obtaining a hunting or fishing license in Utah, a "resident" is a person who: 1) has been domiciled in the state for six months immediately preceding the purchase of a license; and 2) does not *claim* residency in any other state for purposes of hunting and fishing. See Utah Code Ann. § 23-13-2(37)(a). The Legislature has not defined the word "claim," but states elsewhere in Title 23 of the Utah Code ("Wildlife Code") that fraud, deceit, or misrepresentation may not be used to obtain a license. The code further states a resident may not purchase a nonresident license. See Section 23-19-5. Construing "claim" in context with these Wildlife Code provisions demonstrates the Legislature's intent to exclude

false or fraudulent claims of residency in another state from forming the basis of nonresidency. In other words, a person domiciled in Utah cannot legally purchase a nonresident license solely on a false claim of residency in another state. To hold otherwise would allow Utah residents to transform into nonresidents with nothing more than a spurious claim of residency in another state. The Wildlife Board properly concluded that the “claim of residency in another state,” as used in the definition of “resident,” must be a bona fide claim.

In its de novo review of Appellant’s five year hunting license suspension, the Wildlife Board properly considered evidence pertaining to his domicile in Utah, his unlawful acquisition of an Idaho drivers license for purposes of fraudulently obtaining resident Idaho hunting licenses, his unlawful purchase of resident Idaho hunting licenses, his Idaho conviction for purchasing resident Idaho hunting licenses, and the false information used to unlawfully obtain a Utah nonresident bull elk license. The evidence is all within the scope of the administrative Notice of Agency Action and the Division’s suspension order under review. The evidence is further probative of the issue of whether Appellant’s conduct in unlawfully obtaining a Utah nonresident elk license and killing an elk with it was committed “flagrantly and knowingly,” a necessary element under Utah Code Ann. § 23-19-9(1)(a) for suspending a hunting license. Appellant’s challenge to the Wildlife Board’s authority to conduct a de novo review of the Division’s suspension order was never raised below and cannot now be raised on

appeal. Nevertheless, the de novo review was within the Wildlife Board's authority, necessary, and proper.

The Wildlife Board properly found that Appellant's conduct in unlawfully obtaining a Utah nonresident bull elk license was committed "flagrantly and knowingly." Appellant deceived the Division and obtained the nonresident license by intentionally providing a false Idaho address and phone number, listing an illegal Idaho drivers license number, and fraudulently claiming nonresident status. Appellant literally stole the opportunity to receive the permit and take a trophy bull elk from a legitimate nonresident. The fraud was committed knowingly and is conspicuously bad or offensive to ethical sportsmen that wait years to receive such licenses. Appellant's assertion that the definition of "knowingly" found in Utah Admin. Code R657-26-2(2)(b) is inconsistent with the criminal culpability definition of "knowingly" in Utah Code Ann. § 76-2-103(2) (1995) was not raised at the hearing before the Wildlife Board and is, therefore, waived. Nevertheless, the Wildlife Board and the Division have the statutory authority and need to define "knowingly" as used in Section 23-19-9(1)(a) since the term is not defined in the Wildlife Code or linked to any other definition in the code. The fact the definition differs slightly from that in the criminal code does not compromise its validity.

A criminal conviction on a violation of the Wildlife Code is necessary before an administrative suspension order may be entered against a violator's hunting privileges. Guilty pleas are criminal convictions and presumed valid unless set

aside or overturned by a court of competent jurisdiction. Appellant's guilty plea in the Eighth Judicial District Court for Uintah County, State of Utah, to Wanton Destruction of Protected Wildlife has never been challenged on direct appeal or collaterally. Any defect in the criminal information upon which Appellant entered his guilty plea was waived when the plea was entered. Moreover, the Wildlife Board did not err in considering the conviction since it lacks authority to disregard or invalidate a facially valid conviction.

### ARGUMENT

**I. THE WILDLIFE BOARD'S CONCLUSION THAT APPELLANT WAS A UTAH RESIDENT AND THAT HE UNLAWFULLY OBTAINED A UTAH NONRESIDENT BULL ELK LICENSE SHOULD BE SUSTAINED.**

Appellant asserts the Wildlife Board erred in its interpretation of the definition of "resident" found in Utah Code Ann. § 23-13-2(37)(a) (1998) when it concluded he unlawfully obtained a Utah nonresident limited entry bull elk license in 1997. Specifically, Appellant challenges the Wildlife Board's conclusion that a fraudulent or spurious claim of residency in another state is insufficient under the statutory definition of "resident" to render a person domiciled in the State of Utah a nonresident for purposes of hunting.

A. Appellant Waived the Right to Challenge His Status as a Utah Resident When He Pleaded Guilty to Wanton Destruction of Protected Wildlife.

Appellant entered a plea of guilty to the charge of Wanton Destruction of Protected Wildlife on December 15, 1999 in the Eighth Judicial District Court for Uintah County, State of Utah. (R. 96). The factual basis underlying the conviction was Appellant's killing a six point bull elk on the Book Cliffs/Bitter Creek limited entry unit with an unlawfully obtained Utah nonresident license. The nonresident license was deemed void and the kill consequently illegal since Appellant obtained the license by misrepresenting his actual status as a resident. (R.118 at 52-53).

Appellant pleaded guilty to a criminal charge which had as an element the killing of a bull elk with an invalid nonresident license. He had the opportunity in the criminal proceeding to raise the legal defense of being a Utah nonresident by virtue of his claim of residency in Idaho, but he instead elected to plead guilty to the offense. "The general rule applicable in criminal proceedings, and the cases are legion, is that by pleading guilty, the defendant is deemed to have admitted all the essential elements of the crime charged and thereby waives all nonjurisdictional defects. . . ." State v. Parsons, 781 P.2d 1275, 1278 (Utah 1989). Appellant's status as a "resident" or "nonresident" as defined in Utah Code Ann. § 23-13-2(24) and (37) is an issue of statutory construction and cannot be construed as a jurisdictional defect in any circumstance. Appellant

pleaded guilty and thereafter cannot attempt in an administrative license suspension proceeding to collaterally attack his plea and the elements of the offense he admitted. The plea and conviction has never been appealed or challenged in a court of competent jurisdiction, and Appellant cannot now attempt to interpret the definition of "resident" different from that which he pleaded guilty to. (R. 118 at 87-88).

B. Alternatively, Appellant's Fraudulent Claim of Residency in Idaho for Purposes of Hunting While Domiciled in Utah is Legally Insufficient Under Utah Code Ann. § 23-13-2(37)(a) (1998) to Qualify Him as a Nonresident Hunter in Utah.

Appellant frankly admits that all relevant times, he has been domiciled in Utah, employed in Utah, registered to vote in Utah, and taxed in Utah. (R. 118 at 25, 68-70). In 1997, however, Appellant applied for and obtained a Utah *nonresident* limited entry bull elk license. (R. 118 at 23-24, 67-69). Appellant listed his sister's Idaho daycare center's address as his, a phone number with an Idaho area code as his, and an Idaho drivers license number in his application for the 1997 Utah nonresident limited entry bull elk license. (R. 118 at 23-24, 67-69). He ultimately received a Utah nonresident limited entry bull elk license on the Book Cliffs/Bitter Creek unit, and in 1997 he was successful in killing a mature six point bull elk. (R. 118 at 26, 69). Appellant's claim of residency in Idaho for purposes of hunting was fraudulent. (R. 98 and R. 118 at 33, 84-85).

On the basis of his fraudulent claim of Idaho residency in 1997, Appellant asserts he was a nonresident hunter in Utah under the definition of “resident” found in Utah Code Ann. § 23-13-2(37)(a). Appellant asks this Court to validate his Utah nonresident limited entry application solely on the basis of the fraud he perpetrated in Idaho.

“‘Resident’ means a person who: (i) has been domiciled in the state of Utah for six consecutive months immediately preceding the purchase of a license; and (ii) does not claim residency for hunting, fishing, or trapping in any other state or country.” Id. “‘Nonresident’ means a person who does not qualify as a resident.” See Utah Code Ann. § 23-13-2(24). Appellant maintains the word “claim,” as used in Section 23-13-2(37)(a)(ii), includes not only bona fide claims of residency in other states but also spurious claims. Such an interpretation, however, is inconsistent with other sections of Title 23 of the Utah Code and contrary to the rules of statutory construction.

The primary objective in construing statutory enactments is to give effect to the Legislature’s intent. Lyon v. Burton, 5 P.3d 616, 622 (Utah 2000). “The plain language of a statute is generally the best indication of that intent.” Id. Nevertheless, “[t]he plain language of a statute is to be read as a whole, and its provisions interpreted in harmony with other provisions in the same statute and ‘with other statutes under the same and related chapters.’” Id. (quoting Roberts v. Erickson, 851 P.2d 643, 644 (Utah 1993)).



In interpreting the critical words, we follow basic principles of statutory construction. First, terms of related code provisions should be construed in a harmonious fashion. Grayson Roper Ltd. Partnership v. Finlinson, 782 P.2d 467, 471-72 (Utah 1989). Second, statutory terms should be interpreted and applied according to their commonly accepted meaning unless the ordinary meaning of the term results in an application that is either “unreasonably confused, inoperable, [] or in blatant contradiction of the express purpose of the statute.” Morton Int’l., Inc. v. Auditing Div. Of the Utah State Tax Comm’n, 814 P.2d 581, 590 (Utah 1991). . . . Third, “[i]f there is doubt or uncertainty as to the meaning or application of the provisions of an act, it is appropriate to analyze the act in its entirety, in light of its objective, and to harmonize its provisions in accordance with its intent and purpose.” Clover v. Snowbird Ski Resort, 808 P.2d 1037, 1045 (Utah 1991) (quoting Osuala v. Aetna Life and Casualty, 608 P.2d 242, 243 (Utah 1980)).

State v. Souza, 846 P.2d 1313, 1317 (Utah Ct. App. 1993).

The word “claim,” as used in Section 23-13-2(37)(a)(ii), is undefined and subject to varying interpretation as evidenced by this very issue being appealed. Appellant disregards related code provisions and attempts to construe the word “claim” in isolation. However, the meaning of a statutory term should not be determined in isolation, but must be drawn from the context in which it is used. Brixen & Christopher Architects v. State, 29 P.3d 650, 655 (Utah Ct. App. 2001). Courts should interpret statutory terms as a comprehensive whole and not in a piecemeal fashion. Id. In construing the word “claim,” it must be read and interpreted in harmony with Utah Code Ann. § 23-19-5 (1998), which states:

It is unlawful for any person to obtain or attempt to obtain a license, permit, tag or certificate of registration by fraud, deceit, or misrepresentation. It is unlawful for a nonresident to purchase a resident license. It is unlawful for a resident to purchase a

nonresident license. Any person violating provisions of this section is guilty of a class B misdemeanor.

Appellant's asserted definition of "claim" to include fraudulent and spurious claims blatantly contradicts and renders inoperable the terms of Section 23-19-5 in two respects.

First, the Utah Legislature has specifically expressed its intent regarding the issue of residents purchasing nonresident hunting licenses. "It is unlawful for a resident to purchase a nonresident license." Id. It is recognized that the term "resident," as used in this section, is defined in Section 23-13-2(37)(a) to exclude persons domiciled in Utah that "claim" residency in another state. Nevertheless, interpreting "claim" of residency to include patently false claims completely guts the purpose and intent of Section 23-19-5. If "claim" is interpreted as Appellant suggests it should, any person domiciled in Utah could transform from resident into nonresident by simply making a spurious claim of residency in another state or country. Such an interpretation would render the prohibition against residents purchasing nonresident licenses found in Section 23-19-5 absolutely meaningless and unenforceable. Although Appellant acted upon his false claim of residency in Idaho by fraudulently purchasing a resident Idaho hunting license, his proposed interpretation of "claim" would not require such action. A mere false claim to oneself would suffice. The claim of residency described in Section 23-13-2(37)(a)

must be interpreted and confined to bona fide claims in order to give meaning and effect to Section 23-19-5.

Second, Section 23-19-5 expressly prohibits any person from obtaining a license or permit by fraud, deceit or misrepresentation. Interpreting “claim” to include false claims allows a person domiciled in Utah to obtain a nonresident license by deceitfully claiming residency in another state. But for the deceit, that person would be ineligible to obtain a Utah nonresident license. Therefore, Appellant’s interpretation of “claim” is in direct conflict with Section 23-19-5 and inconsistent with the rules of statutory construction.

Construing the definition of “resident” in Section 23-13-2(37)(a) in harmony with other provisions of Title 23 of the Utah Code and in accord with the rules of statutory construction requires the interpretation that any claim of residency in another state or country by a person domiciled in Utah must be actual and bona fide before a Utah nonresident license may legally be purchased.

**II. THE WILDLIFE BOARD DID NOT ERR IN THE MANNER IT CONDUCTED THE ADMINISTRATIVE HEARING ON APPEAL OR IN THE SCOPE OF EVIDENCE CONSIDERED.**

Appellant charges the Wildlife Board with a number of procedural deficiencies in the manner it conducted his administrative hearing on appeal and in the evidence considered. Specifically, he alleges the Wildlife Board did not have authority to conduct a de novo review of the Division of Wildlife Resources administrative order and it considered evidence beyond the scope of the Notice of

Agency Action. A brief overview of the Division's license suspension process may be helpful in understanding the issues.

The Division's administrative license suspension proceedings are initiated with a Notice of Agency Action prepared and served on the licensee as required in Utah Code Ann. § 63-46b-3(2) (1997) and Utah Admin. Code R657-26-3 (1999).<sup>2</sup> The licensee may request and receive an informal hearing before the Division's administrative hearing officer. See Utah Code Ann. § 63-46b-5 (1997); Utah Admin. Code R657-26-4 and 5 (1999). Upon conclusion of the informal hearing, the hearing officer issues an administrative order stating the decision with a notice of the right to appeal to the Wildlife Board. See Utah Code Ann. § 63-46b-5 (1997); Utah Admin. Code R657-26-6 (1999). The Wildlife Board considers all license suspension appeals from orders of the Division's administrative hearing officer by conducting a de novo, formal adjudicative hearing pursuant to Utah Code Ann. § 63-46b-8 (1997) and Utah Admin. Code R657-26-8 (1999). The Wildlife Board's decision and order may be appealed to the Utah Court of Appeals for a review of the record. See Utah Code Ann. § 63-46b-16 (1997).

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<sup>2</sup> Utah Admin. Code R657-26 was amended effective October 17, 2001. The rule effective during Appellant's administrative license suspension proceedings before the Division and the Wildlife Board is attached as Addendum B. All future references to this rule chapter, unless otherwise stated, will refer to that attached as Addendum B.

A. The Wildlife Board's De Novo Review of the Division's Initial Administrative Order Should be Upheld.

1. To the Extent Appellant Challenges the Wildlife Board's Authority to Conduct a De Novo Review of the Division's Administrative Suspension Order, He Failed to Object to this Issue Below and has Waived the Right to Appeal it.

"The general rule is that objections or questions not raised or urged in an agency proceeding are considered waived and will not be considered by a court on review." Esquivel v. Labor Commission of Utah, 7 P.3d 777, 783 (Utah 2000); Brown & Root Indus. Service v. Industrial Commission, 947 P.2d 671, 677 (Utah 1997); Alvin G. Rhodes Pump Sales v. Industrial Commission, 681 P.2d 1244, 1249 (Utah 1984).

At the beginning of the Wildlife Board's May 17, 2001 formal hearing on Appellant's license suspension appeal, the Board Chairman specifically stated that the hearing would be formal and conducted pursuant to the Administrative Procedures Act. (R. 118 at 4). He further stated that both parties would be afforded the opportunity to present evidence, call witnesses, call rebuttal witnesses, and cross-examine adverse witnesses. (R. 118 at 5-6). Moreover, counsel for the Division argued at the hearing on Appellant's objection to the introduction of certain evidence and in closing argument that the Wildlife Board's hearing was a de novo review of the Division's administrative hearing officer's decision. (R. 118 at 78, 98). However, the record is void of any objection by

Appellant challenging the Wildlife Board's legal authority to conduct a de novo review of the Division's administrative order. Appellant's failure to raise this issue before the Wildlife Board at his May 17, 2001 hearing precludes him from now raising it on appeal.

2. The Wildlife Board's Review of the Division's Initial Administrative Order was Appropriately Conducted as a De Novo Review.

Appellant asserts Utah Code Ann. § 23-19-9(12)(b) (1998) and Utah Admin. Code R657-26-8(8) (1999) confine the Wildlife Board's administrative review of the Division's license suspension proceedings to a review of the record. However, the two sections simply direct the Wildlife Board to review the basis underlying the Division's decision to suspend hunting privileges. Nothing in these sections explicitly dictates the manner of review.

The Division's authority to suspend hunting privileges is found in Utah Code Ann. §23-19-9 (1998).<sup>3</sup> The Wildlife Board is specifically charged with responsibility in Section 23-19-9(12)(b) to "review the [division] hearing officer's findings and conclusions and any documentation submitted at the hearing." The Wildlife Board is further granted authority in Section 23-19-9(13) to "make rules to implement this section in accordance with Title 63, Chapter 46b, Administrative

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<sup>3</sup> Utah Code Ann. § 23-19-9 was amended by the Legislature effective April 30, 2001. The section effective during Appellant's administrative hearings and appeals is attached as Addendum A. All future references to this code section, unless otherwise stated, will refer to that attached as Addendum A.

Procedures Act.” Pursuant to its rule making authority, the Wildlife Board promulgated a rule designating its review proceedings as formal adjudicative hearings to be conducted in accordance with the Utah Administrative Procedures Act. See Utah Admin. Code R657-26-8(5). Although the rule does not specifically identify the review proceeding as de novo,<sup>4</sup> the nature of a formal hearing envisions, if not necessitates it.

Formal adjudicative proceedings grant the parties the right to present evidence, argue, respond, conduct cross-examination, and submit rebuttal evidence. See Utah Code Ann. § 63-46b-8(1). The presiding officer is further charged to “regulate the course of the hearing to obtain full disclosure of relevant facts and to afford all parties reasonable opportunity to present their positions.” Id. The presiding officer may exclude irrelevant or immaterial evidence, shall exclude privileged evidence, may receive documentary evidence, and may take official notice of evidence capable of judicial notice under the Utah Rules of Evidence. Id. Lastly, formal hearings must be recorded to preserve a record for appeal to the Utah Court of Appeals. Id. A formal adjudicative hearing, as described in Section 63-46b-8, in no way resembles a review of the record.

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<sup>4</sup> The amended Utah Admin. Code R657-26, effective October 17, 2001, codifies the former practice of de novo hearings by specifically stating in R657-26-8(5) that Wildlife Board license suspension review proceedings are formal and de novo.

Indeed, a transcript of the Division's administrative hearing is not provided to the Wildlife Board for review at its formal appeal hearing.

This Court in a similar case, Cordova v. Blackstock, 861 P.2d 449 (Utah Ct. App. 1993), concluded that judicial review of an informal administrative hearing required a de novo review as opposed to a review of the record. Among the reasons cited in support of the decision, was the need to prepare a complete record at the district court level since the next level of appeal went to the Court of Appeals. Id. at 452. Informal proceedings are less likely to result in an adequate record. Id. De novo review of an informal agency proceeding ensures that an adequate record will be created and further provides an opportunity to correct deficiencies. Id. "Only then can this state's appellate courts properly review an informal administrative proceeding." Id. For the reasons stated in Cordova, the Wildlife Board must likewise conduct its review of the Division's informal license suspension proceedings de novo in a formal hearing to prepare an adequate record for review by the appellate courts of this state.<sup>5</sup>

B. The Wildlife Board Did Not Consider Matters Beyond the Scope of the Notice of Agency Action.

The Notice of Agency Action commencing the Division's informal license suspension proceeding against Appellant states in part:

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<sup>5</sup> Judicial review of formal adjudicative proceedings is made to the Utah Supreme Court or the Court of Appeals pursuant to Utah Code Ann. § 63-46b-16 (1997).



The Division alleges that on December 15, 1999, Respondent pled guilty and was convicted in the Uintah County Justice Court of violating Utah Code Ann. § 23-20-4, a Class A Misdemeanor, Criminal Case Number 991800274. Respondent shot and killed a bull elk with a Non-resident Limited Entry Book Cliffs Elk Permit when he was a resident of Utah.

The purpose of this proceeding is to determine whether the facts underlying the criminal conviction were committed knowingly and flagrantly.

Under Rule 8(e)(1) of the Utah Rules of Civil Procedure, “pleadings shall be simple, concise, and direct.” Technical forms of pleading are not required. Id. Moreover, “[a]ll pleadings shall be so construed as to do substantial justice.” See Rule 8(f) of the Utah Rules of Civil Procedure. “In a notice pleading jurisdiction like Utah, rule 8(a) ‘is to be liberally construed when determining the sufficiency of plaintiff’s complaint.’” Consolidated Reality Group v. Sizzling Platter, Inc., 930 P.2d 268, 275 (Utah Ct. App. 1996) (quoting Gill v. Timm, 720 P.2d 1352, 1353 (Utah 1986)). “The days of strict adherence to draconian formalities at the pleading stage are over.” Id. The fundamental purpose of the liberalized pleading rules is to afford the opposing party fair notice of the claims lodged against him and the facts upon which the claims rest. Id. ; Williams v. State Farm Ins. Co., 656 P.2d 966, 971 (Utah 1982). Although the Utah Rules of Civil Procedure may not specifically apply to pleadings in administrative adjudications, applying a more stringent pleading requirement in less formal

administrative proceedings than in a formal judicial adjudication is counterintuitive.

Moreover, the Utah Supreme Court has recognized liberal pleading requirements in administrative proceedings. “Generally, administrative pleadings are to be liberally construed. . . .” Pilcher v. State Dept. of Social Services, 663 P.2d 450, 453 (Utah 1983).

Appellant asserts the Wildlife Board erred by allowing the introduction of and considering evidence regarding his Utah conviction of Wanton Destruction of Protected Wildlife, Idaho convictions of unlawfully purchasing resident hunting licenses, acquiring an Idaho drivers license, and listing a false Idaho address and phone number on his 1997 Utah nonresident limited entry elk license application. Appellant alleges all these facts are beyond the scope of the Notice of Agency Action.

The Notice of Agency Action succinctly summarizes its scope in stating; “[t]he purpose of this proceeding is to determine whether the facts underlying the criminal conviction were committed knowingly and flagrantly.” Appellant’s conviction in the Eighth Judicial District Court of Utah for violating Utah Code Ann. § 23-20-4 is an essential element prerequisite to suspending his hunting privileges. See Utah Code Ann. § 23-19-9(5). The Notice clearly identifies the Utah criminal conviction as a matter pertinent to the administrative action. The Notice further identifies the other element necessary before suspension of

hunting privileges is permitted. The Division must establish that the facts underlying the criminal conviction were committed “knowingly” and “flagrantly”.  
See Utah Code Ann. § 23-19-9(1)(a).

Appellant maintained in the hearing before the Wildlife Board that his purchase of a Utah nonresident bull elk license was innocent, that he was not aware it was illegal. (R. 118 at 42,85). The Division carries the burden of proof in license suspension proceedings before the Wildlife Board and must establish the criminal violation was committed “knowingly” and “flagrantly.” Moreover, Appellant’s Utah conviction of illegally killing a bull elk in 1997 is premised upon using an unlawfully obtained and invalid nonresident license. The nonresident license was obtained in violation of Utah Code Ann. § 23-19-5 which prohibits using fraud, deceit or misrepresentation in obtaining a license and further enjoins residents from purchasing nonresident licenses.

Evidence pertaining to Appellant’s Idaho convictions of fraudulently acquiring resident hunting licenses was relevant and necessary to establish that his claim of residency in that state was spurious. Otherwise, his claim of Idaho residency would be presumed valid and his purchase of a Utah nonresident hunting license deemed legal. The evidence further shows a scheme of deception in both states which goes to the knowing and flagrant requirement.

Evidence pertaining to Appellant’s unlawful acquisition of an Idaho drivers license also shows he was not an Idaho resident. It further shows a scheme to

defraud both states in obtaining hunting licenses. Appellant frankly admits that he acquired the Idaho drivers license to facilitate obtaining Idaho resident hunting licenses. (R. 118 at 70).

Lastly, evidence of Appellant listing a false Idaho address and phone number on his 1997 Utah nonresident limited entry bull elk license application strikes right to the heart of his defense. Listing an Idaho address, phone number and drivers license number on his Utah application supports the conclusion that Appellant was attempting to avoid raising red flags and conceal from the Division his true Utah residency status. These acts are inconsistent with Appellant's testimony that he believed obtaining a nonresident hunting license in Utah was legitimate. Appellant offered no explanation why he listed a false address and phone number in violation of Section 23-19-5.

The Wildlife Board did not err in admitting and considering the evidence complained of by Appellant. The hearing was administrative where relaxed rules of evidence and procedure apply, the Notice of Agency Action fairly and adequately put Appellant on notice of the claims lodged against him, and the evidence was relevant to the issues before the Wildlife Board.

C. The Wildlife Board Did Not Consider Matters Beyond the Scope of the Division's Administrative Decision.

Appellant asserts the Wildlife Board erroneously admitted and considered the evidence discussed in Section II. B. of this Brief since it was outside the

Division's administrative decision. This assertion is simply inaccurate. The Division's January 2, 2001 administrative decision suspending Appellant's big game hunting privileges for a period of five years makes the following findings and conclusions: 1) Appellant obtained an Idaho drivers license and claimed to be an Idaho resident for purposes of hunting and fishing; 2) he was domiciled in Utah; 3) he applied for and obtained in 1997 a Utah nonresident limited entry bull elk license; 4) he took a six point bull elk in 1997; 5) he was prosecuted and convicted in Idaho for purchasing resident hunting licenses; and 6) he obtained the Utah 1997 nonresident limited entry bull elk license by fraud, deceit and misrepresentation in violation of Section § 23-19-5. (R. 18).

The evidence complained of by Appellant was all referenced in the Division's January 2, 2001 administrative decision. Furthermore, the evidence was relevant to the Wildlife Board's decision and properly considered for the same reasons specified in Section II. B. of this Brief. The Wildlife Board's formal de novo hearing on the Division's decision reviewed its findings and conclusions and strictly confined itself to the matters specified therein in accordance with Utah Code Ann. § 23-19-9(12)(b) and Utah Admin. Code R657-26-8(8).

### **III. THE WILDLIFE BOARD PROPERLY FOUND APPELLANT'S CONDUCT KNOWING AND FLAGRANT.**

Appellant challenges two aspects of the Wildlife Board's determination that his conduct in unlawfully acquiring a 1997 Utah nonresident limited entry

bull elk license was knowing and flagrant. First, the Wildlife Board is charged with error in relying upon the definition of “knowingly” found in Utah Admin. Code R657-26-2(2)(b) (1999). Second, the Wildlife Board is charged with having insufficient evidence in the record to conclude Appellant’s conduct was knowing and flagrant.

A. The Definition of “Knowingly” in Utah Administrative Code R657-26-2(2)(b) Should be Sustained as Valid.

Appellant correctly notes the definition of “knowingly” in Utah Admin. Code R657-26-2(2)(b) is not identical to the definition of “knowingly” in the criminal code, Utah Code Ann. § 76-2-103(2) (1995). The assertion that this difference in definition is reversible error, however, was not raised to the Wildlife Board at hearing and is substantively without merit in any event.

1. Appellant Waived the Right to Challenge the Validity of Utah Administrative Code R657-26-2(2)(b) by Failing to Raise the Matter at His Hearing with the Wildlife Board.

Appellant’s challenge to the definition of “knowingly” found in Utah Admin. Code R657-26-2(2)(b) was not raised or argued to the Wildlife Board at the hearing on May 17, 2001. Three references exist in the entire record relating to this matter: 1) Appellant’s Demand for the Return of Personal Property filed with the Division (R. 37) attaches copies of the relevant code and rule provisions without discussion or argument (R. 41); 2) the same Demand appearing as an

Exhibit to the Wildlife Board hearing<sup>6</sup> (R. 113, 117); and 3) Appellant's written Appeal to the Wildlife Board from the Division's January 2, 2001 decision briefly raises the issue. (R. 13). Nevertheless, the matter is never raised, discussed or argued to the Wildlife Board at its May 17, 2001 hearing by Appellant or anyone else.

As stated in Section I of this Brief, "[t]he general rule is that objections or questions not raised or urged in an agency proceeding are deemed waived and will not be considered by a court on review." Esquivel, 7 P.3d at 783; Brown & Root Indus. Service, 947 P.2d at 677; Alvin G. Rhodes Pump Sales, 681 P.2d at 1249. The fact Appellant challenged the definition of "knowingly" in his written appeal to the Wildlife Board does not itself entitle him to raise the issue now on appeal. The Utah Supreme Court in Zions First National Bank v. National American Title Insurance Company, 749 P.2d 651, 657 (Utah 1988) held that a defense raised in pleadings but not argued to the trial court is waived on appeal. "This Court will not consider on appeal issues which were not submitted to the trial court and concerning which the trial court did not have the opportunity to make any findings of fact or law." Id. (quoting Turtle Management, Inc. v. Haggis Management, Inc., 645 P.2d 667, 672 (Utah 1982)).

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<sup>6</sup> This document was admitted upon Appellant's request to make all the Division hearing officer's file an exhibit in the Wildlife Board hearing. (R. 118 at 58). No further discussion took place at the Wildlife Board hearing regarding it.

Likewise, Appellant's challenge to the definition of "knowingly" found in Utah Admin. Code R657-26-2(2)(b) should not be considered on appeal since it was not raised at the Wildlife Board hearing on May 17, 2001.

2. Alternatively, the Definition of "Knowingly" in Utah Administrative Code R657-26-2(2)(b) is Valid.

Ordinarily, the standard of review under Utah Code Ann. § 63-46b-16(4) (1997) for an agency's interpretation of statute is a correction-of-error standard. Uintah Oil Assoc., 853 P.2d at 896. However, the Legislature often grants agencies explicit or implicit discretion in dealing with statutory terms. Morton, 814 P.2d at 588. In such instances, an agency's interpretation of a statute is granted deference by the reviewing court. Id. Agency discretion in interpreting a statute may be implied where the statutory language suggests the Legislature left the question at issue unresolved, or where "there is more than one permissible reading of the statute and no basis in the statutory language or legislative history to prefer one interpretation over another." Id.

The Division and Wildlife Board are granted authority to administratively suspend or revoke hunting and fishing privileges where a person is convicted of violating a provision of Title 23 and found to have committed the violation "flagrantly and knowingly." See Utah Code Ann. § 23-19-9(1) and (5) (1998). The terms "flagrantly" and "knowingly" are not defined in Title 23 of the Utah Code nor are they linked to any other definition in the Utah Code. Specifically,



the term “knowingly” is not linked or otherwise referenced to the definition found in Utah Code Ann. § 76-2-103(2). The definition in Section 76-2-103(2) describes “knowingly” in the context of criminal culpability while Utah Code Ann. § 23-19-9(1)(a) uses the word to articulate an element for administrative license suspensions. The mere fact the term appears in both contexts does not itself establish the Legislature’s intent for it to share a common definition. Indeed, there is no evidence in Title 23 of the Utah Code or elsewhere suggesting such an intent.

Instead, the Legislature manifested its intent in Utah Code Ann. § 23-19-9(13) for the Wildlife Board to flesh out the procedural and substantive details of the license suspension process. “The Wildlife Board may make rules to implement this section in accordance with Title 63, Chapter 46b, Administrative Procedures Act.” *Id.* (Emphasis added). “[I]n the absence of a discernable legislative intent concerning the specific question in issue, a choice among permissible interpretations of a statute is largely a policy determination.” *Morton*, 814 P.2d at 589. The Wildlife Board’s determination to incorporate within the regulatory definition of “knowingly” an element of criminal negligence is within its scope of statutory authority granted in Section 23-19-9(13) and not an abuse of discretion. This point is particularly cogent, considering the definition is used in

administrative proceedings to temporarily suspend<sup>7</sup> recreational hunting and fishing privileges rather than to impose fines and incarceration. The definition in Utah Admin. Code R657-26-2(2)(b) should be granted deference and sustained since “knowingly” is not defined in Title 23 of the Utah Code and is subject to varying interpretations. “The agency granted authority to administer the statute is the appropriate body to make such a determination.” Id. The Wildlife Board did not err in adopting and applying the definition of “knowingly” found in Utah Admin. Code R657-26-2(2)(b).

B. The Wildlife Board’s Finding that Appellant’s Conduct was Knowing and Flagrant is Supported by Substantial Evidence and Should be Sustained.

Appellant petitions this Court to set aside the factual findings of the Wildlife Board as not supported by substantial evidence. Specifically, he asserts insufficient evidence was presented at the hearing for the Wildlife Board to conclude he knowingly and flagrantly<sup>8</sup> purchased a Utah nonresident limited

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<sup>7</sup> The maximum period of time that hunting and fishing privileges may be suspended is five years. Utah Code Ann. § 23-19-9(8) (1998).

<sup>8</sup> “‘Flagrantly’ means an act in violation of Title 23, Wildlife Resources Code committed in a manner that, in the opinion of the presiding officer, is conspicuously bad or offensive.” Utah Admin. Code R657-26-2(2)(a) (1999).

“‘Knowingly’ means, with respect to the nature or the result of a person’s conduct, that the person was aware, or should have been aware, that the conduct was reasonably certain to cause the result.” Utah Admin. Code R657-26-2(2)(b) (1999).

entry bull elk license in 1997 in violation of Utah Code Ann. § 23-19-5 which prohibits a Utah resident from purchasing a Utah nonresident license.<sup>9</sup> Under Title 63, Chapter 46b of the Utah Code, administrative findings of fact should be affirmed where they are “supported by substantial evidence when viewed in light of the whole record before the court.” Grace Drilling Co., 776 P.2d at 68.

Substantial evidence is something less than the weight of the evidence but more than a mere scintilla. Id. “Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” Id.

Appellant carries the affirmative burden to “marshal all of the evidence supporting the findings and show that despite the supporting facts, and in light of the conflicting or contradictory evidence, the [Wildlife Board’s] findings are not supported by substantial evidence.” Nelson v. Department of Employment Security, 801 P.2d 158, 161 (Utah Ct. App. 1990).

Appellant fails to marshal the evidence. He identifies two points of evidence in support of the Wildlife Board’s findings and one matter of evidence contradicting it. The only evidence offered in Appellant’s Brief potentially contradicting the Wildlife Board’s findings is his own self-serving statement of

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<sup>9</sup> Although Appellant pleaded guilty to killing a bull elk in violation of Utah Code Ann. § 23-20-4, Wanton Destruction of Protected Wildlife, the act was illegal on account of killing the animal with an unlawfully obtained and invalid nonresident license.

innocence. Appellant claims he was unaware that purchasing a Utah nonresident elk license under the circumstances was unlawful.

On the other hand, a plethora of direct and circumstantial evidence demonstrates Appellant knowingly and flagrantly acquired the 1997 Utah nonresident license in violation of the law.

a. Appellant has lived in Utah since 1976. (R. 118 at 68). At all relevant times, he was domiciled in Utah, employed in Utah, registered to vote in Utah, and taxed in Utah. (R. 118 at 25, 69-70). Appellant has no bona fide belief or claim to residency in Idaho or nonresidency in Utah.

b. Appellant unlawfully obtained an Idaho drivers license in 1993 using his sister's Idaho daycare center's address to facilitate a scheme for illegally obtaining resident Idaho hunting licenses. (R. 118 at 22, 70).

c. Appellant thereafter fraudulently obtained resident hunting licenses in Idaho. On September 23, 1999, Appellant pleaded guilty to three counts of illegally purchasing Idaho resident hunting licenses and was convicted of the same in the Seventh Judicial District Court of Idaho, Bonneville County. (R. 98 and R. 118 at 33, 84-85). The conviction conclusively demonstrates Appellant's claim of residency in Idaho for purposes of hunting was fraudulent. The Idaho drivers license and resident Idaho hunting licenses are evidence of a scheme to defraud Idaho and, more particularly, Utah.

d. In 1997, Appellant applied for and obtained a Utah nonresident Book Cliffs/Bitter Creek limited entry bull elk license. (R. 118 at 23-24, 67-69). The application for the license prepared by Appellant identified a false Idaho address and phone number as his own, and an Idaho drivers license number. (R. 118 at 23-24, 67-69). Appellant listed the false information in violation of Utah Code Ann. § 23-19-5, which prohibits using fraud, deceit or misrepresentation in obtaining a license and in violation of application's verification clause. (R. 118 at 91-92). Fraudulently listing an Idaho address, phone number and drivers license number on his Utah application in violation of the law supports the conclusion that Appellant was attempting to avoid raising red flags and conceal from the Division his true Utah residency status. These acts demonstrate Appellant understood he could not lawfully obtain a Utah nonresident hunting license.

e. Appellant pleaded guilty in the Eighth Judicial District Court for Uintah County, State of Utah on December 15, 1999 to Wanton Destruction of Protected Wildlife (Utah Code Ann. § 23-20-4). (R. 96 and R. 118 at 86-87). The factual basis underlying the conviction was the killing of a bull elk with an invalid Utah nonresident license that was obtained through fraud and deceit in violation of Utah Code Ann. § 23-19-5. (R. 118 at 29-30, 52-53). "A plea of guilty is a confession of the correctness of the accusation which dispenses with the necessity of proof thereof." State v. Stewart, 110 Utah 203, 171 P.2d 383,

385 (Utah 1946). Appellant admitted by his guilty plea the elements of Wanton Destruction of Protected Wildlife, one of which is that the offense was committed with "intentional, knowing or reckless conduct." Utah Code Ann. § 23-20-4(1)(c)(i) (1998).

Appellant's vague, self-serving and predictable defense of ignorance to violating any laws in Utah or elsewhere by using false information to obtain an Idaho drivers license, Idaho resident hunting licenses, and a Utah nonresident hunting license while residing in Utah lacks credibility. (R. 118 at 68-72). The Wildlife Board had the opportunity to observe the witnesses and judge their credibility and found the weight of evidence rested against Appellant's assertions of ignorance and good faith. Considering the administrative record as a whole, the Wildlife Board's conclusion that Appellant flagrantly and knowingly violated Section 23-19-5 in obtaining a Utah 1997 nonresident limited entry bull elk license is supported by substantial evidence.

**IV. APPELLANT'S GUILTY PLEA IN THE EIGHTH JUDICIAL DISTRICT COURT FOR UINTAH COUNTY, STATE OF UTAH, IS VALID AND MAY NOT BE CHALLENGED IN THIS PETITION FOR REVIEW.**

Appellant challenges the validity of his negotiated guilty plea to Wanton Destruction of Protected Wildlife, Utah Code Ann. § 23-20-4, in the Eighth Judicial District Court for Uintah County, State of Utah. He asserts the conviction is invalid because the criminal information misidentifies the actual

date the offense was committed, and as such, it cannot serve to form the basis of his hunting license suspension.

Appellant pleaded guilty to and was convicted of Wanton Destruction of Protected Wildlife on December 15, 1999. (R. 96 and R. 118 at 86-87). The conviction is facially valid, and Appellant has never attempted to invalidate it on direct appeal or collaterally. (R. 118 at 87-88).

“Administrative agencies are statutory creatures that have no more power than that which is expressly or impliedly granted by statute.” Nielson v. Division of P.O.S.T., 851 P.2d 1201, 1204 (Utah Ct. App. 1993) (citing Williams v. Public Service Commission, 754 P.2d 41 (Utah 1988)). Appellant’s guilty plea is presumptively valid, State v. Thurston, 781 P.2d 1296, 1301 (Utah Ct. App. 1989), and places him legally in the same position as a verdict of a jury finding him guilty. Stewart, 171 P.2d at 385. Neither the Division nor the Wildlife Board have statutory authority to invalidate Appellant’s plea or to disregard it.

Moreover, Appellant’s guilty plea waives any right or opportunity he may have possessed to challenge any defect in the Information. “The general rule applicable in criminal proceedings, and the cases are legion, is that by pleading guilty, the defendant is deemed to have admitted all of the essential elements of the crime charged and thereby waives all nonjurisdictional defects. . . .”

Parsons, 781 P.2d at 1278. “When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he

may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea.” Id. Nonmaterial defects in a criminal information, such as the date of the offense, are nonjurisdictional and may not be raised on appeal where an objection is not made at the trial level. State v. Marcum, 750 P.2d 599, 601-02 (Utah 1988). “A [defect] is material if it actually prejudices the accused with respect to a substantial right, or where the information is so defective that it results in a miscarriage of justice.” Id. at 601.

Appellant was fully aware when he pleaded guilty that the date of the charged offense occurred in the Fall of 1997. The investigation focused on one criminal episode of killing a six point bull elk on the Book Cliffs/Bitter Creek unit in 1997 with an invalid nonresident license. Appellant pleaded guilty to the offense, was placed on two years probation, and ordered to pay \$ 5610.00 in restitution. (R. 96-97). Appellant admits he killed a six point bull elk in 1997 in Utah with a nonresident license. (R. 118 at 69). Moreover, he has never asserted confusion or prejudice over the substantive elements of the offense he pleaded guilty to in relation to the offense date specified in the criminal information. Indeed, Appellant acknowledges that the defective date in the information was an issue that no one picked up on at the hearing when he entered his guilty plea. (R. 118 at 50). The defective date in the information did not substantially prejudice Appellant or result in a miscarriage of justice.



Accordingly, Appellant waived his right to challenge the information when he pleaded guilty on December 15, 1999.

STATEMENT CONCERNING ORAL ARGUMENT AND PUBLISHED OPINION

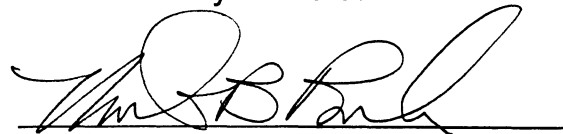
Appellee does not request oral argument or a published opinion in this case.

CONCLUSION

Based upon the record and the foregoing arguments, Appellee respectfully requests this Court to affirm the Wildlife Board's September 26, 2001 Order suspending Appellant's big game hunting privileges for a period of five years.

DATED this 22 day of May, 2002.

MARK SHURTLEFF  
Utah Attorney General


A handwritten signature in black ink, appearing to read 'M. B. Bushman', written over a horizontal line.

MARTIN B. BUSHMAN  
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that on the 22 day of May, 2002, I caused to be mailed, postage prepaid, two true and exact copies of BRIEF OF APPELLEE DIVISION OF WILDLIFE RESOURCES to:

ROBERT C. FILLERUP (#1070)  
Attorney at Law  
1107 South Orem Boulevard  
Orem, Utah 84058  
Attorney for Appellant

  
Martin B. Bushman

# ADDENDA

# ADDENDUM A

### 23-13-1. Short title — “Wildlife Resources Code of Utah.”

This act shall be known and may be cited as the “Wildlife Resources Code of Utah.”

**History:** C. 1953, 23-13-1, enacted by L. 1971, ch. 46, § 1.

**Meaning of “this act.”** — The phrase “this act,” as used in this section, means L. 1971, ch. 46, which repealed Chapters 1 to 12 and enacted Chapters 13 to 21 and 22 of this title.

**Legislative Intent.** — Laws 1994, ch. 208,

which amended §§ 23-13-3 and 23-20-25, provides in § 3: “The Legislature finds that wildlife is pervasively regulated for management and preservation and that the standards articulated in this title are necessary to protect this resource.”

#### COLLATERAL REFERENCES

**Am. Jur. 2d.** — 35 Am. Jur. 2d Fish and Game § 1 et seq.

**C.J.S.** — 36A C.J.S. Fish § 1 et seq.; 38 C.J.S. Game § 1 et seq.

### 23-13-2. Definitions.

As used in this title:

(1) “Activity regulated under this title” means any act, attempted act, or activity prohibited or regulated under any provision of Title 23 or the rules, and proclamations promulgated thereunder pertaining to protected wildlife including:

- (a) fishing;
- (b) hunting;
- (c) trapping;
- (d) taking;
- (e) permitting any dog, falcon, or other domesticated animal to take;
- (f) transporting;
- (g) possessing;
- (h) selling;
- (i) wasting;
- (j) importing;
- (k) exporting;
- (l) rearing;
- (m) keeping;
- (n) utilizing as a commercial venture; and
- (o) releasing to the wild.

(2) “Aquatic animal” has the meaning provided in Section 4-37-103.

(3) “Aquatic wildlife” means species of fish, mollusks, crustaceans, aquatic insects, or amphibians.

(4) “Aquaculture facility” has the meaning provided in Section 4-37-103.

(5) “Bag limit” means the maximum limit, in number or amount, of protected wildlife that one person may legally take during one day.

(6) “Big game” means species of hoofed protected wildlife.

(7) “Carcass” means the dead body of an animal or its parts.

(8) “Certificate of registration” means a document issued under this title, or any rule or proclamation of the Wildlife Board granting authority to engage in activities not covered by a license, permit, or tag.

(9) “Closed season” means the period of time during which the taking of protected wildlife is prohibited.

(10) "Conservation officer" means a full-time, permanent employee of the Division of Wildlife Resources who is POST certified as a peace or a special function officer.

(11) "Division" means the Division of Wildlife Resources.

(12) (a) "Domicile" means the place:

(i) where an individual has a fixed permanent home and principal establishment;

(ii) to which the individual if absent, intends to return; and

(iii) in which the individual and the individual's family voluntarily reside, not for a special or temporary purpose, but with the intention of making a permanent home.

(b) To create a new domicile an individual must:

(i) abandon the old domicile; and

(ii) be able to prove that a new domicile has been established.

(13) "Endangered" means wildlife designated as such pursuant to Section 3 of the federal Endangered Species Act of 1973.

(14) "Fee fishing facility" has the meaning provided in Section 4-37-103.

(15) "Feral" means an animal which is normally domesticated but has reverted to the wild.

(16) "Fishing" means to take fish or crayfish by any means.

(17) "Furbearer" means species of the Bassariscidae, Canidae, Felidae, Mustelidae, and Castoridae families, except coyote and cougar.

(18) "Game" means wildlife normally pursued, caught, or taken by sporting means for human use.

(19) (a) "Guide" means a person who receives compensation or advertises services for assisting another person to take protected wildlife.

(b) Assistance under Subsection (a) includes the provision of food, shelter, or transportation, or any combination of these.

(20) "Guide's agent" means a person who is employed by a guide to assist another person to take protected wildlife.

(21) "Hunting" means to take or pursue a reptile, amphibian, bird, or mammal by any means.

(22) "Intimidate or harass" means to physically interfere with or impede, hinder, or diminish the efforts of an officer in the performance of the officer's duty.

(23) "License" means the primary document granting authority to engage in activities under:

(a) this title; or

(b) a rule or proclamation of the Wildlife Board.

(24) "Nonresident" means a person who does not qualify as a resident.

(25) "Open season" means the period of time during which protected wildlife may be legally taken.

(26) "Pecuniary gain" means the acquisition of money or something of monetary value.

(27) "Permit" means a secondary document, including a stamp, which:

(a) requires a license as a prerequisite to its issuance; and

(b) grants authority to engage in specified activities under this title or a rule or proclamation of the Wildlife Board.

(28) "Person" means an individual, association, partnership, government agency, corporation, or an agent of the foregoing.

(29) "Possession" means actual or constructive possession.

- (30) "Possession limit" means the number of bag limits one individual may legally possess.
- (31) (a) "Private fish installation" means a body of water where privately owned, protected aquatic wildlife are propagated or kept.  
(b) "Private fish installation" does not include any aquaculture facility or fee fishing facility.
- (32) "Private wildlife farm" means an enclosed place where privately owned birds or furbearers are propagated or kept and which restricts the birds or furbearers from:  
(a) commingling with wild birds or furbearers; and  
(b) escaping into the wild.
- (33) "Proclamation" means the publication used to convey a statute, rule, policy, or pertinent information as it relates to wildlife.
- (34) (a) "Protected aquatic wildlife" means aquatic wildlife as defined in Subsection (3), except as provided in Subsection (b).  
(b) "Protected aquatic wildlife" does not include aquatic insects.
- (35) (a) "Protected wildlife" means wildlife as defined in Subsection (49), except as provided in Subsection (b).  
(b) "Protected wildlife" does not include coyote, field mouse, gopher, ground squirrel, jack rabbit, muskrat, and raccoon.
- (36) "Released to the wild" means to turn loose from confinement.
- (37) (a) "Resident" means a person who:  
(i) has been domiciled in the state of Utah for six consecutive months immediately preceding the purchase of a license; and  
(ii) does not claim residency for hunting, fishing, or trapping in any other state or country.  
(b) A Utah resident retains Utah residency if that person leaves this state:  
(i) to serve in the armed forces of the United States or for religious or educational purposes; and  
(ii) complies with Subsection (a)(ii).  
(c) (i) A member of the armed forces of the United States and dependents are residents for the purposes of this chapter as of the date the member reports for duty under assigned orders in the state if the member:  
(A) is not on temporary duty in this state; and  
(B) complies with Subsection (a)(ii).  
(ii) A copy of the assignment orders must be presented to a wildlife division office to verify the member's qualification as a resident.  
(d) A nonresident attending an institution of higher learning in this state as a full-time student may qualify as a resident for purposes of this chapter if the student:  
(i) has been present in this state for 60 consecutive days immediately preceding the purchase of the license; and  
(ii) complies with Subsection (a)(ii).  
(e) A Utah resident license is invalid if a resident license for hunting, fishing, or trapping is purchased in any other state or country.  
(f) An absentee landowner paying property tax on land in Utah does not qualify as a resident.

(38) "Sell" means to offer or possess for sale, barter, exchange, or trade, or the act of selling, bartering, exchanging, or trading.

(39) "Small game" means species of protected wildlife:

(a) commonly pursued for sporting purposes; and

(b) not classified as big game, aquatic wildlife, or furbearers.

(40) "Spoiled" means impairment of the flesh of wildlife which renders it unfit for human consumption.

(41) "Spotlighting" means throwing or casting the rays of any spotlight, headlight, or other artificial light on any highway or in any field, woodland, or forest while having in possession a weapon by which protected wildlife may be killed.

(42) "Tag" means a card, label, or other identification device issued for attachment to the carcass of protected wildlife.

(43) "Take" means to:

(a) hunt, pursue, harass, catch, capture, possess, angle, seine, trap, or kill any protected wildlife; or

(b) attempt any action referred to in Subsection (a).

(44) "Threatened" means wildlife designated as such pursuant to Section 3 of the federal Endangered Species Act of 1973.

(45) "Trapping" means taking protected wildlife with a trapping device.

(46) "Trophy animal" means an animal described as follows:

(a) deer — any buck with an outside antler measurement of 24 inches or greater;

(b) elk — any bull with six points on at least one side;

(c) bighorn, desert, or rocky mountain sheep — any ram with a curl exceeding half curl;

(d) moose — any bull;

(e) mountain goat — any male or female;

(f) pronghorn antelope — any buck with horns exceeding 14 inches;

or

(g) bison — any bull.

(47) "Waste" means to abandon protected wildlife or to allow protected wildlife to spoil or to be used in a manner not normally associated with its beneficial use.

(48) "Water pollution" means the introduction of matter or thermal energy to waters within this state which:

(a) exceeds state water quality standards; or

(b) could be harmful to protected wildlife.

(49) "Wildlife" means:

(a) crustaceans, including brine shrimp and crayfish;

(b) mollusks; and

(c) vertebrate animals living in nature, except feral animals.

**History:** C. 1953, 23-13-2, enacted by L. 1971, ch. 46, § 2; 1973, ch. 33, § 1; 1975, ch. 60, § 1; 1977, ch. 102, § 1; 1979, ch. 90, § 1; 1981, ch. 112, § 1; 1981, ch. 115, § 1; 1983, ch. 123, § 1; 1986, ch. 76, § 1; 1991, ch. 5, § 31; 1991, ch. 212, § 1; 1992, ch. 27, § 1; 1993, ch. 234, § 15; 1993, ch. 307, § 1; 1994, ch. 153, § 29; 1994, ch. 208, § 1; 1995, ch. 211, § 1; 1996, ch. 265, § 1.

**Amendment Notes.** — The 1994 amend-

ment by ch. 208, effective May 2, 1994, added Subsection (1), defining "activity regulated under this title," and made related designation and reference changes, made several stylistic changes making language gender-neutral, and corrected an internal reference.

The 1994 amendment by ch. 153, effective July 1, 1994, added definitions of "aquatic animal," "aquaculture facility," and "fee fishing facility," renumbering the existing subsections



accordingly and making related internal reference changes; added "mollusk" to the list of "aquatic wildlife"; inserted "or crayfish" in the definition of "fishing"; added the (a) designation in Subsection (30) and added Subsection (30)(b); and added Subsection (47)(b), redesignating former Subsection (47)(b) as (c) and making related changes.

The 1995 amendment, effective May 1, 1995, deleted "or Board of Big Game Control" after "Wildlife Board" in three places and made a stylistic change.

The 1996 amendment, effective April 29, 1996, added Subsection (46), redesignating the other subsections accordingly, and in Subsection (35)(a) substituted "Subsection (49)" for "Subsection (48)."

**Federal Law.** — Section 3 of the federal Endangered Species Act of 1973, cited in Subsections (13) and (44), which defines "endangered species" and "threatened species," is codified as 16 U.S.C. § 1532.

#### NOTES TO DECISIONS

##### **State waters.**

"Waters of this state" meant waters of public streams of state or water flowing in natural channels. *State v. California Packing Corp.*, 105

Utah 182, 141 P.2d 386 (1943), rehearing denied, 105 Utah 191, 145 P.2d 784 (1944) (decided under former similar provisions).

#### COLLATERAL REFERENCES

**C.J.S.** — 36A C.J.S. Fish § 1; 38 C.J.S. Game, Conservation and Preservation of Wildlife § 2.

### **23-13-3. Wildlife declared property of the state.**

All wildlife existing within this state, not held by private ownership and legally acquired, is the property of the state.

**History:** C. 1953, 23-13-3, enacted by L. 1971, ch. 46, § 3; 1992, ch. 27, § 2.

#### COLLATERAL REFERENCES

**Am. Jur. 2d.** — 35 Am. Jur. 2d Fish and Game § 1. **Game, Conservation and Preservation of Wildlife § 3.**

**C.J.S.** — 36A C.J.S. Fish § 2; 38 C.J.S.

### **23-13-4. Captivity of protected wildlife unlawful.**

It is unlawful for any person to hold in captivity at any time any protected wildlife except as provided by this code or rules and regulations of the Wildlife Board.

**History:** C. 1953, 23-13-4, enacted by L. 1971, ch. 46, § 4.

#### COLLATERAL REFERENCES

**Am. Jur. 2d.** — 35 Am. Jur. 2d Fish and Game § 40. **A.L.R.** — Validity, construction, and application of state wildlife possession laws, 50 A.L.R.5th 703.

transporting wildlife or taking a deer for a blind person" from the end of Subsection (2)(a)(ii), and added Subsection (2)(b).

The 1998 amendment, effective January 1,

1999, rewrote Subsection (3) which read "The Wildlife Board may establish each year a free fishing day under rules prescribed by the board."

#### COLLATERAL REFERENCES

**Am. Jur. 2d.** — 35 Am. Jur. 2d Fish and Game § 45.

**C.J.S.** — 36A C.J.S. Fish § 36; 38 C.J.S.

Game, Conservation and Preservation of Wildlife § 51 et seq.

### **23-19-2. License and certificate forms prescribed by Wildlife Board.**

(1) The Wildlife Board shall prescribe the form of license or certificate of registration to be used for hunting, fishing, trapping, seining, and dealing in furs.

(2) Any license issued pursuant to Section 23-19-36 or 23-19-37 shall be designated as such by a code number and shall contain no reference to the licensee's disability.

**History:** C. 1953, 23-19-2, enacted by L. 1971, ch. 46, § 66; 1980, ch. 28, § 3; 1983, ch. 126, § 2; 1996, ch. 145, § 1.

**Amendment Notes.** — The 1996 amendment, effective April 29, 1996, added Subsection (2) and made a related change.

### **23-19-3. Special tags as supplements to licenses and permits.**

The division may issue, as supplements to appropriate licenses and permits, special tags for protected wildlife, as determined by the Wildlife Board.

**History:** C. 1953, 23-19-3, enacted by L. 1971, ch. 46, § 67; 1985, ch. 124, § 1; 1993, ch. 178, § 2; 1995, ch. 211, § 16.

**Amendment Notes.** — The 1995 amendment, effective May 1, 1995, deleted "or the Board of Big Game Control" after "Wildlife Board."

**Amendment Notes.** — The 1995 amend-

### **23-19-4. Alien's right to licenses and certificates.**

An alien resident of the State of Utah may purchase hunting, fishing, trapping, seining, and fur dealer licenses and certificates of registration upon the same terms as a resident citizen. All nonresident aliens may purchase hunting, fishing, trapping, seining, and fur dealer licenses and certificates of registration upon the same terms as nonresident citizens.

**History:** C. 1953, 23-19-4, enacted by L. 1971, ch. 46, § 68; 1980, ch. 28, § 4; 1983, ch. 126, § 3.

### **23-19-5. Fraud, deceit, or misrepresentation in obtaining a license, permit, tag, or certificate of registration unlawful — Violation — Penalty.**

It is unlawful for any person to obtain or attempt to obtain a license, permit, tag, or certificate of registration by fraud, deceit, or misrepresentation. It is

unlawful for a nonresident to purchase a resident license. It is unlawful for a resident to purchase a nonresident license. Any person violating provisions of this section is guilty of a class B misdemeanor.

**History:** C. 1953, 23-19-5, enacted by L. 1971, ch. 46, § 69; 1975, ch. 60, § 8; 1979, ch. 90, § 6; 1986, ch. 76, § 8. **Cross-References.** — Sentencing for misdemeanors, §§ 76-3-201, 76-3-204, 76-3-301.

### **23-19-6. Imitating or counterfeiting license unlawful — Violation — Penalty.**

It is unlawful to imitate or counterfeit any license, permit, tag, or certificate of registration for the purpose of defrauding the state of Utah or for evading the purposes and provisions of this code. Any person who violates any provision of this section is guilty of a class A misdemeanor.

**History:** C. 1953, 23-19-6, enacted by L. 1971, ch. 46, § 70; 1979, ch. 90, § 7. **Cross-References.** — Sentencing for misdemeanors, §§ 76-3-201, 76-3-204, 76-3-301.

### **23-19-7. Licenses issued annually — Exception — Expiration date.**

The licenses required by this chapter, except lifetime licenses, shall be issued annually and shall expire on December 31st each year.

**History:** C. 1953, 23-19-7, enacted by L. 1971, ch. 46, § 71; 1973, ch. 33, § 7; 1975, ch. 61, § 1; 1984, ch. 30, § 1.

### **23-19-8. Signature on documents — Deemed under oath — Prohibition on use of unsigned documents.**

(1) A person's signature on a license, permit, tag, certificate of registration, or habitat authorization is certification of that person's eligibility to use the license, permit, tag, certificate of registration, or habitat authorization for the purpose intended by this title.

(2) The signature need not be notarized but shall be considered to be made under oath.

(3) A person may not use an unsigned license, permit, tag, certificate of registration, or habitat authorization.

**History:** C. 1953, 23-19-8, enacted by L. 1971, ch. 46, § 72; 1975, ch. 60, § 9; 1979, ch. 90, § 8; 1996, ch. 145, § 2.

**Amendment Notes.** — The 1996 amendment, effective April 29, 1996 inserted "permit,

tag, certificate of registration, or habitat authorization" in three places, deleted a provision making violation of the section a misdemeanor, and made several stylistic changes.

### **23-19-9. Revocation of license — Grounds — Notice — Restriction on obtaining new license.**

(1) A license, permit, tag, or certificate of registration shall be revoked by a hearing officer appointed by the division director:

- (a) if the hearing officer determines that a person flagrantly and knowingly:
  - (i) violates or countenances the violation of:
    - (A) this title; or
    - (B) any rule, proclamation, or order of the Wildlife Board; or
  - (ii) while engaged in an activity regulated under this title:
    - (A) kills or injures domestic livestock; or
    - (B) violates Section 76-10-508; or
- (b) upon receiving notice from another state's wildlife agency that a person has:
  - (i) failed to comply with the terms of a wildlife citation; or
  - (ii) been convicted of a violation that would warrant an action taken under Subsection (1)(a).
- (2) A hearing officer may revoke or suspend the certificate of registration of a person who fails to comply with the terms of a certificate of registration.
- (3) All certificates of registration for the harvesting of brine shrimp eggs, as defined in Section 59-23-3, shall be revoked by a hearing officer appointed by the division if the hearing officer determines the holder of the certificates of registration has violated Section 59-23-5.
- (4) The director shall appoint a qualified person as a hearing officer to perform the adjudicative functions provided in this section. The director may not appoint a division employee who investigates or enforces wildlife violations.
- (5) (a) A hearing officer may not revoke a person's license, permit, tag, or certificate of registration if:
  - (i) the person was not charged with a violation in Subsection (1) or (3);
  - (ii) the charges were dismissed; or
  - (iii) the person was found not guilty of the violation in a court of law.
- (b) For purposes of this section, the following shall not be construed as a finding of not guilty:
  - (i) a plea of guilty;
  - (ii) a plea of no contest; or
  - (iii) the entry of a plea in abeyance.
- (6) The hearing officer shall consider any recommendation made by a sentencing court concerning revocation before issuing a revocation order.
- (7) Prior to revocation, a person must be:
  - (a) given written notice of an action the division intends to take; and
  - (b) provided with an opportunity for a hearing.
- (8) A hearing officer may prohibit the person from obtaining a new license, permit, tag, or certificate of registration of the same type for a period of up to five years.
- (9) (a) A person may not obtain a new license, permit, tag, or certificate of registration of the same type while under an order of revocation.
- (b) A violation of Subsection (9)(a) is a class B misdemeanor and a hearing officer shall prohibit the person from obtaining a license, permit, tag, or certificate of registration of the same type for up to an additional five years.
- (10) A hearing officer may construe any subsequent conviction which occurs within the revocation period as a flagrant violation and may prohibit the

person from obtaining a new license, permit, tag, or certificate of registration for up to an additional five years.

(11) A hearing officer may reinstate a license, permit, tag, or certificate of registration revoked under Subsection (1)(b)(i) upon receiving a report that the person has complied with the citation.

(12) (a) A person may file an appeal of a hearing officer's decision with the Wildlife Board.

(b) The Wildlife Board shall review the hearing officer's findings and conclusions and any written documentation submitted at the hearing. The Wildlife Board may:

- (i) take no action;
- (ii) vacate or remand the decision; or
- (iii) amend the period of revocation.

(13) The Wildlife Board may make rules to implement this section in accordance with Title 63, Chapter 46a, Utah Administrative Rulemaking Act.

**History:** C. 1953, 23-19-9, enacted by L. 1971, ch. 46, § 72; 1983, ch. 126, § 5; 1991, ch. 212, § 4; 1992, ch. 260, § 1; 1995, ch. 63, § 1; 1995, ch. 211, § 17; 1997, ch. 179, § 1; 1998, ch. 13, § 18.

**Amendment Notes.** — The 1995 amendment by ch. 63, effective May 1, 1995, rewrote this section, substituting the references to the "hearing officer" for the "Wildlife Board" throughout, adding Subsections (1)(a)(ii), (2), (3), (4)(a)(i) and (ii), (4)(b), (5), (8), (11), and (12), and making numerous related and stylistic changes.

The 1995 amendment by ch. 211, effective

May 1, 1995, deleted "or the Board of Big Game Control" after "Wildlife Board" in Subsection (1)(a) and made a stylistic change.

The 1997 amendment, effective May 5, 1997, added Subsection (3), redesignating subsections accordingly; added "or (3)" to the end of Subsection (5)(a)(i); and substituted "period" for "number of years" in Subsection (12)(b)(iii).

The 1998 amendment, effective May 4, 1998, substituted "Chapter 46a, Utah Administrative Rulemaking Act" for "Chapter 46b, Administrative Procedures Act" in Subsection (13).

**Cross-References.** — Sentencing for misdemeanors, §§ 76-3-201, 76-3-204, 76-3-301.

### **23-19-9.1. Court-ordered action against a license.**

The division shall promptly withhold, suspend, restrict, or reinstate the use of a license issued under this chapter if so ordered by a court.

**History:** C. 1953, 23-19-9.1, enacted by L. 1997, ch. 232, § 1.

**Effective Dates.** — Laws 1997, ch. 232, § 142 makes the act effective on July 1, 1997.

### **23-19-9.5. Warrant outstanding or failure to comply with citation — Person not entitled to license, permit, tag, or certificate.**

(1) A person may not purchase a license, permit, tag, or certificate of registration if:

(a) there is an outstanding Utah warrant against him for failure to appear in answer to a summons for a violation of:

- (i) a provision of this title; or
- (ii) a rule, proclamation, or order of the Wildlife Board; or

(b) he has failed to comply with a wildlife citation in a state which is a party to the Wildlife Violator Compact set forth in Title 23, Chapter 25.

(2) The division may allow a person referred to in Subsection (1) to purchase a license, permit, tag, or certificate of registration if satisfactory proof is given that:

State v. Chindgren, 777 P.2d 527 (Utah Ct. App. 1989).

Evidence showing that defendant acted recklessly in releasing a falcon in a field full of

ducks was sufficient to support his conviction for violating § 23-13-3. State v. Chindgren, 777 P.2d 527 (Utah Ct. App. 1989).

#### COLLATERAL REFERENCES

**Am. Jur. 2d.** — 35 Am. Jur. 2d Fish and Game §§ 45, 50.

**C.J.S.** — 36A C.J.S. Fish §§ 29, 36; 38 C.J.S. Game, Conservation and Preservation of Wildlife §§ 45 to 58, 74 et seq.

**A.L.R.** — Validity and construction of statute prohibiting sale within state of skin or body of specified wild animals or of the animal itself, 44 A.L.R.3d 1008.

### 23-20-4. Wanton destruction of protected wildlife — Penalties.

- (1) A person is guilty of wanton destruction of protected wildlife if he:
  - (a) commits an act in violation of Section 23-13-4, 23-13-5, 23-13-13, 23-15-6 through 23-15-9, 23-16-5, or Subsection 23-20-3(1);
  - (b) captures, injures, or destroys protected wildlife; and
  - (c) (i) does so with intentional, knowing, or reckless conduct as defined in Section 76-2-103;
    - (ii) intentionally abandons protected wildlife or a carcass;
    - (iii) commits the offense at night with the use of a weapon;
    - (iv) is under a court or division revocation of a license, tag, permit, or certificate of registration; or
    - (v) acts for pecuniary gain.
- (2) Subsection (1) does not apply to actions taken which are in accordance with the following:
  - (a) Title 4, Chapter 14, Utah Pesticide Control Act;
  - (b) Title 4, Chapter 23, Agriculture and Wildlife Damage Prevention Act; or
  - (c) Section 23-16-3.
- (3) Wanton destruction of wildlife is punishable:
  - (a) as a third degree felony if:
    - (i) the aggregate value of the protected wildlife determined by the values in Subsection 23-20-4(4) is more than \$500; or
    - (ii) a trophy animal was captured, injured, or destroyed;
  - (b) as a class A misdemeanor if the aggregate value of the protected wildlife, other than any trophy animal, determined by the values established in Subsection 23-20-4(4) is more than \$250, but does not exceed \$500;
  - (c) as a class B misdemeanor if the aggregate value of the protected wildlife determined by the values established in Subsection 23-20-4(4) is \$250 or less.
- (4) Regardless of the restitution amounts imposed under Subsection 23-20-4.5(2), the following values shall be assigned to protected wildlife for the purpose of determining the offense for wanton destruction of wildlife:
  - (a) \$1,000 per animal for:
    - (i) bison;
    - (ii) bighorn sheep;
    - (iii) rocky mountain goat;
    - (iv) moose;

- (v) bear; or
- (vi) endangered species;
- (b) \$750 per animal for:
  - (i) elk; or
  - (ii) threatened species;
- (c) \$500 per animal for:
  - (i) cougar;
  - (ii) golden eagle;
  - (iii) river otter; or
  - (iv) gila monster;
- (d) \$400 per animal for:
  - (i) pronghorn antelope; or
  - (ii) deer;
- (e) \$350 per animal for bobcat;
- (f) \$100 per animal for:
  - (i) swan;
  - (ii) sandhill crane;
  - (iii) turkey;
  - (iv) pelican;
  - (v) loon;
  - (vi) egrets;
  - (vii) herons;
  - (viii) raptors, except those that are threatened or endangered;
  - (ix) Utah milk snake; or
  - (x) Utah mountain king snake;
- (g) \$35 per animal for furbearers, except:
  - (i) bobcat;
  - (ii) river otter; and
  - (iii) threatened or endangered species;
- (h) \$15 per animal for game birds, except:
  - (i) turkey;
  - (ii) swan; and
  - (iii) sandhill crane;
- (i) \$10 per animal for game fish;
- (j) \$8 per pound dry weight of processed brine shrimp including eggs;
- and
- (k) \$5 per animal for protected wildlife not listed.

(5) For purposes of sentencing for a wildlife violation, a person who has been convicted of a third degree felony under Subsection (3)(a) is not subject to the mandatory sentencing requirements prescribed in Subsection 76-3-203(4).

(6) As part of any sentence imposed, the court shall impose a sentence of incarceration of not less than 20 consecutive days for any person convicted of a third degree felony under Subsection (3)(a)(ii) who captured, injured, or destroyed a trophy animal for pecuniary gain.

(7) If a person has already been convicted of a third degree felony under Subsection (3)(a)(ii) once, each separate further offense under Subsection (3)(a)(ii) is punishable by, as part of any sentence imposed, a sentence of incarceration of not less than 20 consecutive days.

(8) The court may not sentence a person subject to Subsection (6) or (7) to less than 20 consecutive days of incarceration or suspend the imposition of the sentence unless the court finds mitigating circumstances justifying lesser punishment and makes that finding a part of the court record.

**History:** C. 1953, 23-20-4, enacted by L. 1992, ch. 27, § 4; 1993, ch. 4, § 65; 1993, ch. 178, § 3; 1995, ch. 63, § 2; 1996, ch. 265, § 2.

**Repeals and Reenactments.** — Laws 1992, ch. 27, § 4 repeals former § 23-20-4, as last amended by L. 1979, ch. 90, § 11, regarding possession of illegally taken protected wildlife, and enacts the present section, effective April 27, 1992.

**Amendment Notes.** — The 1995 amendment, effective May 1, 1995, substituted “division” for “Wildlife Board” in Subsection (1)(c)(iv).

The 1996 amendment, effective April 29, 1996, added Subsections (3)(a)(ii) and (6) to (8), making related changes; in Subsection (3)(b) added “other than any trophy animal”; in Subsection (4) added “gila monster,” “Utah milk snake” and “Utah mountain king snake” to the list of protected wildlife and moved “cougar” from the list of “\$1,000 per animal” to “\$500 per animal”; and made stylistic changes.

**Cross-References.** — Sentencing for felonies, §§ 76-3-201, 76-3-203, 76-3-301.

Sentencing for misdemeanors, §§ 76-3-201, 76-3-204, 76-3-301.

#### COLLATERAL REFERENCES

**Am. Jur. 2d.** — 35 Am. Jur. 2d Fish and Game §§ 50, 54.

**C.J.S.** — 36A C.J.S. Fish §§ 29, 42; 38 C.J.S.

Game, Conservation and Preservation of Wildlife §§ 51 to 59, 74 et seq.

### **23-20-4.5. Illegal taking, possession, or wanton destruction of protected wildlife — Restitution — Reimbursable damages — Assessment by magistrates — Disposition of monies.**

(1) When a person is adjudged guilty of illegal taking, illegal possession, or wanton destruction of protected wildlife, other than any trophy animal, the court may order the defendant to pay restitution as set forth in Subsection (2), or a greater or lesser amount, for the value of each animal taken, possessed, or destroyed, unless the court finds that restitution is inappropriate.

(2) Suggested minimum restitution values for protected wildlife are as follows:

- (a) \$1,000 per animal for:
  - (i) bison;
  - (ii) bighorn sheep;
  - (iii) rocky mountain goat;
  - (iv) moose;
  - (v) bear; or
  - (vi) endangered species;
- (b) \$750 per animal for:
  - (i) elk; or
  - (ii) threatened species;
- (c) \$500 per animal for:
  - (i) cougar;
  - (ii) golden eagle;
  - (iii) river otter; or
  - (iv) gila monster;
- (d) \$400 per animal for:
  - (i) pronghorn antelope; or
  - (ii) deer;
- (e) \$350 per animal for bobcat;
- (f) \$100 per animal for:
  - (i) swan;
  - (ii) sandhill crane;



(2) This section does not prohibit an agency from designating by rule the names or titles of the agency head or the presiding officers with responsibility for adjudicative proceedings before the agency.

**History:** C. 1953, 63-46b-2, enacted by L. 1987, ch. 161, § 258; 1988, ch. 169, § 42.

#### NOTES TO DECISIONS

**Cited** in Tolman v. Salt Lake County Attorney, 818 P.2d 23 (Utah Ct. App. 1991).

### **63-46b-3. Commencement of adjudicative proceedings.**

(1) Except as otherwise permitted by Section 63-46b-20, all adjudicative proceedings shall be commenced by either:

- (a) a notice of agency action, if proceedings are commenced by the agency; or
- (b) a request for agency action, if proceedings are commenced by persons other than the agency.

(2) A notice of agency action shall be filed and served according to the following requirements:

(a) The notice of agency action shall be in writing, signed by a presiding officer, and shall include:

(i) the names and mailing addresses of all persons to whom notice is being given by the presiding officer, and the name, title, and mailing address of any attorney or employee who has been designated to appear for the agency;

(ii) the agency's file number or other reference number;

(iii) the name of the adjudicative proceeding;

(iv) the date that the notice of agency action was mailed;

(v) a statement of whether the adjudicative proceeding is to be conducted informally according to the provisions of rules adopted under Sections 63-46b-4 and 63-46b-5, or formally according to the provisions of Sections 63-46b-6 to 63-46b-11;

(vi) if the adjudicative proceeding is to be formal, a statement that each respondent must file a written response within 30 days of the mailing date of the notice of agency action;

(vii) if the adjudicative proceeding is to be formal, or if a hearing is required by statute or rule, a statement of the time and place of any scheduled hearing, a statement of the purpose for which the hearing is to be held, and a statement that a party who fails to attend or participate in the hearing may be held in default;

(viii) if the adjudicative proceeding is to be informal and a hearing is required by statute or rule, or if a hearing is permitted by rule and may be requested by a party within the time prescribed by rule, a statement that the parties may request a hearing within the time provided by the agency's rules;

(ix) a statement of the legal authority and jurisdiction under which the adjudicative proceeding is to be maintained;

(x) the name, title, mailing address, and telephone number of the presiding officer; and

(xi) a statement of the purpose of the adjudicative proceeding and, to the extent known by the presiding officer, the questions to be decided.

(b) When adjudicative proceedings are commenced by the agency, the agency shall:

- (i) mail the notice of agency action to each party;
- (ii) publish the notice of agency action, if required by statute; and
- (iii) mail the notice of agency action to any other person who has a right to notice under statute or rule.

(3) (a) Where the law applicable to the agency permits persons other than the agency to initiate adjudicative proceedings, that person's request for agency action shall be in writing and signed by the person invoking the jurisdiction of the agency, or by his representative, and shall include:

- (i) the names and addresses of all persons to whom a copy of the request for agency action is being sent;
- (ii) the agency's file number or other reference number, if known;
- (iii) the date that the request for agency action was mailed;
- (iv) a statement of the legal authority and jurisdiction under which agency action is requested;
- (v) a statement of the relief or action sought from the agency; and
- (vi) a statement of the facts and reasons forming the basis for relief or agency action.

(b) The person requesting agency action shall file the request with the agency and shall send a copy by mail to each person known to have a direct interest in the requested agency action.

(c) An agency may, by rule, prescribe one or more printed forms eliciting the information required by Subsection (3)(a) to serve as the request for agency action when completed and filed by the person requesting agency action.

(d) The presiding officer shall promptly review a request for agency action and shall:

- (i) notify the requesting party in writing that the request is granted and that the adjudicative proceeding is completed;
- (ii) notify the requesting party in writing that the request is denied and, if the proceeding is a formal adjudicative proceeding, that the party may request a hearing before the agency to challenge the denial; or
- (iii) notify the requesting party that further proceedings are required to determine the agency's response to the request.

(e) (i) Any notice required by Subsection (3)(d)(ii) shall contain the information required by Subsection 63-46b-5(1)(i) in addition to disclosure required by Subsection (3)(d)(ii) of this section.

(ii) The agency shall mail any notice required by Subsection (3)(d) to all parties, except that any notice required by Subsection (3)(d)(iii) may be published when publication is required by statute.

(iii) The notice required by Subsection (3)(d)(iii) shall:

- (A) give the agency's file number or other reference number;
- (B) give the name of the proceeding;
- (C) designate whether the proceeding is one of a category to be conducted informally according to the provisions of rules enacted under Sections 63-46b-4 and 63-46b-5, with citation to the appli-

cable rule authorizing that designation, or formally according to the provisions of Sections 63-46b-6 to 63-46b-11;

(D) in the case of a formal adjudicative proceeding, and where respondent parties are known, state that a written response must be filed within 30 days of the date of the agency's notice if mailed, or within 30 days of the last publication date of the agency's notice, if published;

(E) if the adjudicative proceeding is to be formal, or if a hearing is to be held in an informal adjudicative proceeding, state the time and place of any scheduled hearing, the purpose for which the hearing is to be held, and that a party who fails to attend or participate in a scheduled and noticed hearing may be held in default;

(F) if the adjudicative proceeding is to be informal, and a hearing is required by statute or rule, or if a hearing is permitted by rule and may be requested by a party within the time prescribed by rule, state the parties' right to request a hearing and the time within which a hearing may be requested under the agency's rules; and

(G) give the name, title, mailing address, and telephone number of the presiding officer.

(4) When initial agency determinations or actions are not governed by this chapter, but agency and judicial review of those initial determinations or actions are subject to the provisions of this chapter, the request for agency action seeking review must be filed with the agency within the time prescribed by the agency's rules.

(5) For designated classes of adjudicative proceedings, an agency may, by rule, provide for a longer response time than allowed by this section, and may provide for a shorter response time if required or permitted by applicable federal law.

(6) Unless the agency provides otherwise by rule or order, applications for licenses filed under authority of Title 32A, Chapters 3, 4, and 5, are not considered to be a request for agency action under this chapter.

(7) If the purpose of the adjudicative proceeding is to award a license or other privilege as to which there are multiple competing applicants, the agency may, by rule or order, conduct a single adjudicative proceeding to determine the award of that license or privilege.

**History:** C. 1953, 63-46b-3, enacted by 1987, ch. 161, § 259; 1988, ch. 72, § 16.

## NOTES TO DECISIONS

### ANALYSIS

Applicable law.  
Defect in notice.  
— Waiver.  
Dismissal.  
Presiding officer.

statute as adopted by the legislature, not an agency's rules as adopted by the agency. Nielson v. Division of Peace Officer Stds. & Training, 851 P.2d 1201 (Utah Ct. App. 1993).

### Defect in notice.

### — Waiver.

Motorist's failure to object to the manner of notice or type of hearing at the beginning of a driver's license suspension hearing, when he

### Applicable law.

The reference to "law applicable" in Subsection (3)(a) is a reference to an agency's enabling

### **63-46b-8. Procedures for formal adjudicative proceedings — Hearing procedure.**

(1) Except as provided in Subsections 63-46b-3(d)(i) and (ii), in all formal adjudicative proceedings, a hearing shall be conducted as follows:

(a) The presiding officer shall regulate the course of the hearing to obtain full disclosure of relevant facts and to afford all the parties reasonable opportunity to present their positions.

(b) On his own motion or upon objection by a party, the presiding officer:

(i) may exclude evidence that is irrelevant, immaterial, or unduly repetitious;

(ii) shall exclude evidence privileged in the courts of Utah;

(iii) may receive documentary evidence in the form of a copy or excerpt if the copy or excerpt contains all pertinent portions of the original document;

(iv) may take official notice of any facts that could be judicially noticed under the Utah Rules of Evidence, of the record of other proceedings before the agency, and of technical or scientific facts within the agency's specialized knowledge.

(c) The presiding officer may not exclude evidence solely because it is hearsay.

(d) The presiding officer shall afford to all parties the opportunity to present evidence, argue, respond, conduct cross-examination, and submit rebuttal evidence.

(e) The presiding officer may give persons not a party to the adjudicative proceeding the opportunity to present oral or written statements at the hearing.

(f) All testimony presented at the hearing, if offered as evidence to be considered in reaching a decision on the merits, shall be given under oath.

(g) The hearing shall be recorded at the agency's expense.

(h) Any party, at his own expense, may have a person approved by the agency prepare a transcript of the hearing, subject to any restrictions that the agency is permitted by statute to impose to protect confidential information disclosed at the hearing.

(i) All hearings shall be open to all parties.

(2) This section does not preclude the presiding officer from taking appropriate measures necessary to preserve the integrity of the hearing.

**History:** C. 1953, 63-46b-8, enacted by L. 1987, ch. 161, § 264; 1988, ch. 72, § 19.

**Cross-References.** — Judicial notice. Utah R. Evid. 201.

Privileges. Utah R. Evid. 501 et seq.

#### NOTES TO DECISIONS

##### **Cross-examination.**

Agency decision revoking social worker's license was reversed and his case was remanded for a new hearing, because the failure to afford him an opportunity to cross-examine the wit-

nesses against him resulted in "substantial prejudice." D.B. v. Division of Occupational & Professional Licensing, 779 P.2d 1145 (Utah Ct. App. 1989).

**76-2-103. Definitions of “intentionally, or with intent or willfully”; “knowingly, or with knowledge”; “recklessly, or maliciously”; and “criminal negligence or criminally negligent.”**

A person engages in conduct:

(1) Intentionally, or with intent or willfully with respect to the nature of his conduct or to a result of his conduct, when it is his conscious objective or desire to engage in the conduct or cause the result.

(2) Knowingly, or with knowledge, with respect to his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or the existing circumstances. A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result.

(3) Recklessly, or maliciously, with respect to circumstances surrounding his conduct or the result of his conduct when he is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.

(4) With criminal negligence or is criminally negligent with respect to circumstances surrounding his conduct or the result of his conduct when he ought to be aware of a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that an ordinary person would exercise in all the circumstances as viewed from the actor's standpoint.

History: C. 1953, 76-2-103, enacted by L. 1973, ch. 196, § 76-2-103; 1974, ch. 32, § 4.

## NOTES TO DECISIONS

### ANALYSIS

Criminal negligence.

— Expert testimony.

Malice.

Proof of intent and malice.

Recklessness.

Willfulness.

Cited.

### Criminal negligence.

The bending down of a stop sign at an intersection so that it was not visible to traffic was sufficient to constitute criminal negligence. *State v. Hallett*, 619 P.2d 335 (Utah 1980).

The sole difference between reckless manslaughter and negligent homicide is whether the defendant actually knew of the risk of death or was not, but should have been, aware of it. In both cases, a defendant's conduct must be a "gross deviation" from the standard of care exercised by an ordinary person. Thus, ordi-

nary negligence, which is the basis for a civil action for damages, is not sufficient to constitute criminal negligence. *State v. Standiford*, 769 P.2d 254 (Utah 1988).

### —Expert testimony.

While expert testimony is not required to prove the mental state of a criminal defendant accused of homicide, expert testimony is required where criminal negligence is alleged and the nature and degree of risk are beyond the ken of the average layperson. *State v. Warden*, 784 P.2d 1204 (Utah Ct. App. 1989), rev'd on other grounds, 813 P.2d 1146 (Utah 1991).

Trial court committed no abuse of discretion in allowing physicians to testify at defendant physician's trial for negligent homicide involving the death of an infant after a premature home delivery. *State v. Warden*, 784 P.2d 1204 (Utah Ct. App. 1989), rev'd on other grounds, 813 P.2d 1146 (Utah 1991).

# ADDENDUM B

## **R657-26. Adjudicative Proceedings for a License, Permit, Tag, or Certificate of Registration.**

R657-26-1. Purpose and Authority.

R657-26-2. Definitions.

R657-26-3. Commencement of Revocation Proceedings.

R657-26-4. Procedures for Revocation and Suspension Proceedings.

R657-26-5. Hearings.

R657-26-6. Issuance of Decision and Order.

R657-26-7. Default.

R657-26-8. Wildlife Board Review - Procedure.

R657-26-9. Reinstatement of a License, Permit, Tag, or Certificate of Registration.

### **R657-26-1. Purpose and Authority.**

Under authority of Subsection 23-19-9(12), this rule provides the procedures and standards for:

- (1) the revocation of a license, permit, tag, or certificate of registration; and
- (2) the suspension of a certificate of registration.

### **R657-26-2. Definitions.**

(1) Terms used in this rule are defined in Section 23-13-2.

(2) In addition:

(a) "Flagrantly" means an act in violation of Title 23, Wildlife Resources Code committed in a manner that, in the opinion of the presiding officer, is conspicuously bad or offensive.

(b) "Knowingly" means, with respect to the nature or the result of a person's conduct, that the person was aware, or should have been aware, that the conduct was reasonably certain to cause the result.

(c) "Party" means the division, Wildlife Board, or respondent.

(d) "Presiding officer" means the hearing officer appointed by the division director to conduct revocation or suspension proceedings.

(e) "Respondent" means a person against whom a revocation proceeding is initiated.

### **R657-26-3. Commencement of Revocation Proceedings.**

(1)(a) Each adjudicative proceeding shall be commenced by the presiding officer by filing a notice of agency action.

(2) The notice of agency action shall be filed and served according to the requirements provided in Section 63-46b-3(2).

(3) All revocation and suspension proceedings conducted by the presiding officer are designated as informal adjudications. The presiding officer may convert the hearing to a formal hearing anytime before a final order is issued if:

- (a) conversion of the proceeding is in the public interest; and
- (b) conversion of the proceeding does not unfairly prejudice the rights of any party.

#### **R657-26-4. Procedures for Revocation and Suspension Proceedings.**

(1)(a) An answer or other pleading responsive to the allegations in the notice of agency action does not need to be filed by the respondent.

(b) If an answer to the notice of agency action is filed, the answer shall include:

- (i) the name of the respondent;
- (ii) the case number or other reference number;
- (iii) the facts surrounding the allegations;
- (iv) a response to the allegations that the violation was committed knowingly and flagrantly;

and

(v) the date the answer was mailed.

(2) The respondent may access any information contained in the division's files and all materials and information gathered in any investigation of the respondent, to the extent permitted by law.

(3) Discovery and intervention is prohibited.

#### **R657-26-5. Hearings.**

(1)(a) The presiding officer shall provide the respondent with an opportunity for a hearing.

(b) A hearing shall be held if the respondent requests a hearing within 20 days after the date the notice of agency action is issued.

(2) The respondent, or a person designated by the respondent to appear on the respondent's behalf, may testify at the hearing and present any relevant information or evidence.

(3) Hearings shall be open to all parties to the proceeding.

(4) After reviewing all of the information provided by the parties, the presiding officer shall revoke the respondent's license, permit, tag, or certificate of registration if:

(a) the presiding officer determines that the respondent flagrantly and knowingly:

(i) violated or countenanced the violation of any:

(A) provision of Title 23, Wildlife Resources Code; or

(B) rule, proclamation, or order of the Wildlife Board; or

(ii) while engaged in any activity regulated under Title 23, Wildlife Resources Code:

(A) kills or injures domestic livestock; or

(B) violates Section 76-10-508; or

(b) upon receiving notification from another state's wildlife agency that a person has:

(i) failed to comply with the terms of a wildlife citation;

(ii) been convicted of a violation that would warrant an action taken under Subsection (a); or

(c) the person violated Section 23-20-14.

(5) After reviewing all of the information provided by the parties, the presiding officer may revoke or suspend the certificate of registration of a person who fails to comply with the terms of a certificate of registration.

(6)(a) The presiding officer may not revoke a person's license, permit, tag, or certificate of registration if:

(i) the person was not charged with a violation in Subsection (4);

(ii) the charges were dismissed; or

(iii) the person was found not guilty of the violation in a court of law.

(b) For purposes of this section, the following shall not be construed as a finding of not guilty:



- (i) a plea of guilty;
- (ii) a plea of no contest; or
- (iii) the entry of a plea in abeyance.

(7) The presiding officer shall consider any recommendation made by a sentencing court concerning revocation before issuing a revocation order.

#### **R657-26-6. Issuance of Decision and Order.**

(1) Within a reasonable time after the close of the adjudicative proceeding, the presiding officer shall issue a signed, written order that states:

- (a) the decision;
- (b) the reasons for the decision;
- (c) a notice of any right of administrative or judicial review available to the parties; and
- (d) the time limits for filing an appeal or requesting a review.

(2) The decision and order shall be based on facts appearing in division files and on the testimony and facts presented in evidence at the hearing.

(3) A copy of the decision and order shall be promptly mailed to all parties.

#### **R657-26-7. Default.**

(1) The presiding officer may enter an order of default against the respondent if the respondent fails to participate, either in writing or in person, in the adjudicative proceeding.

(2) Upon issuing the order of default, the presiding officer shall complete the adjudicative proceeding without participation of the party in default and shall:

- (a) include a statement of the grounds for default;
- (b) make a finding of all relevant issues required in Sections R657-26-5(4) or (5); and
- (c) mail a copy of the order to all parties.

(3)(a) A defaulted party may seek to have the presiding officer set aside the default order, and any order in the adjudicative proceeding issued subsequent to such default, by following the procedures outlined in the Utah Rules of Civil Procedure.

(b) A motion to set aside a default order and any subsequent order shall be made to the presiding officer.

(c) A defaulted party may seek Wildlife Board Review under Section R657-26-8 only on the decision of the presiding officer on the motion to set aside the default.

#### **R657-26-8. Wildlife Board Review - Procedure.**

(1)(a) A person may file an appeal of a presiding officer's decision with the Wildlife Board.

(b) The appeal must be in writing and the respondent shall send a copy of the appeal by mail to the chair of the Wildlife Board and each of the parties.

(2) The appeal must be filed within 30 days after the issuance of the presiding officer's decision and order.

(3) The appeal shall:

- (a) be signed by the respondent or the respondent's legal counsel;
- (b) state the grounds for appeal and the relief requested; and
- (c) state the date upon which it was mailed.

(4)(a) Within 15 days after the mailing date of the appeal, any party may file a written response with the Wildlife Board.

(b) A copy of the response shall be sent by mail to the chair of the Wildlife Board and each of the parties.

(5) The Wildlife Board shall hold a formal hearing in accordance with the provisions of

Section 63-46b-6 through Section 63-46b-10. The Wildlife Board may convert the hearing to an informal hearing anytime before a final order is issued if:

- (a) conversion of the proceeding is in the public interest; and
- (b) conversion of the proceeding does not unfairly prejudice the rights of any party.
- (6) At the conclusion of the hearing, the Wildlife Board may:
  - (a) take no action;
  - (b) vacate or remand the decision; or
  - (c) amend the duration of revocation or suspension ordered by the presiding officer.
- (7)(a) If the Wildlife Board takes any action to vacate or remand the decision or amend the duration of revocation or suspension, the chair of the Wildlife Board shall, within a reasonable time, issue a written order on review.
- (b) The order on review shall be signed by the chair of the Wildlife Board and mailed to each party.
- (c) The order on review shall contain:
  - (i) a designation of the statute permitting review;
  - (ii) a statement of the issues reviewed;
  - (iii) findings of fact as to each of the issues reviewed;
  - (iv) conclusions of law as to each of the issues reviewed;
  - (v) whether the decision of the presiding officer is to be affirmed, reversed, modified, and whether all or any portion of the adjudicative proceeding is to be remanded;
  - (vi) a notice of any right of further administrative reconsideration or judicial review; and
  - (vii) the time limits applicable to any appeal or review.
- (8) Any review of a presiding officer's decision shall be strictly limited to the matter specified in the order.

#### **R657-26-9. Reinstatement of a License, Permit, Tag, or Certificate of Registration.**

- (1) A presiding officer may reinstate a person's license, permit, tag, or certificate of registration revoked under Subsection 23-19-9(1)(b)(i) upon receiving a written request for reinstatement.
- (2) The person making the request shall include:
  - (a) the person's name, phone number, and mailing address;
  - (b) the number of the license, permit, tag, or certificate of registration that was revoked;
  - (c) the date the violation occurred;
  - (d) the date the request was mailed;
  - (e) the state in which the violation occurred;
  - (f) a copy of a receipt from the court where the violation was processed stating the violation is no longer outstanding; and
  - (g) the person's signature.
- (3) Within a reasonable time of receiving the request, the presiding officer shall issue a written order stating whether the request is granted or denied and the reasons for the decision.
- (4) If a presiding officer denies a person's request for reinstatement, the person may submit a request for reconsideration by following the procedures provided in Section 63-46b-13.

**References:** 23-13-2, 23-14-1, 23-14-19, 23-19-9, 23-20-14, 63-46b-13, 67-46b-5.

**History:** 11718, NEW, 06/01/91; 12752, AMD, 06/15/92; 16884, AMD, 06/14/95; 17439, AMD, 01/16/96; 17936, AMD, 09/09/96; 18313, 5YR, 11/15/96; 18581, AMD, 03/18/97.

# ADDENDUM C

**STATE OF UTAH**  
**DEPARTMENT OF NATURAL RESOURCES**  
**DIVISION OF WILDLIFE RESOURCES**

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In the Matter of the Permit of:	)	<b>NOTICE OF AGENCY ACTION</b>
Joseph Bradbury, Respondent	)	
to Harvest Protected Wildlife in the	)	Case No. 98-0752
State of Utah.	)	

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1. This Notice of Agency Action is to inform Respondent that the Utah Division Of Wildlife Resources is commencing an adjudicative proceeding to consider the revocation and/or suspension of Respondent's privileges to harvest protected wildlife in the State of Utah. This action is initiated as an informal adjudicative proceeding under the jurisdictional and procedural authority of Utah Code Ann. §§ 23-19-9 and 63-46b-5, and Utah Admin. Code R657-26.

2. The Division alleges that on December 15, 1999, Respondent plead guilty and was convicted in the Uintah County Justice Court of violating Utah Code Ann. § 23-20-4, a Class A Misdemeanor, Criminal Case Number 991800274.

Respondent shot and killed a bull elk with a Non-resident Limited Entry Book Cliffs Elk Permit when he was a resident of Utah.

It is further alleged that Respondent knowingly and flagrantly committed the acts that resulted in the aforementioned conviction.

3. The purpose of this proceeding is to determine whether the facts underlying the criminal conviction were committed knowingly and flagrantly. If the Division determines that the illegal acts were committed knowingly and flagrantly, it may revoke any wildlife licenses or permits that Respondent currently holds or may apply for in the future for a period of time up to five (5) years.

4. Respondent is entitled to request a hearing before the Division to contest the allegations in the Notice of Agency Action. The request for hearing must be made in writing and received by the Division no later than 20 days from the date this notice is issued. If Respondent fails to request a hearing or otherwise fails to respond to the Notice of Agency Action within 20 days, an order of default judgement will be entered revoking Respondent's privileges to harvest protected wildlife in the State of Utah.

5. Upon receiving a request for hearing or a response to the Notice of Agency Action, *the Division will schedule a date and time for a hearing where Respondent will have the opportunity* to testify, call witnesses, and present evidence in his behalf. Respondent's personal attendance at the hearing will be required where Respondent can either represent himself or employ the services of a legal advisor. Following the hearing, the Division will issue a written decision and order detailing the legal and factual rationale for the decision.

6. The Division will provide Respondent, upon request, any information and documents in its files relevant to this proceeding and to the extent permitted by law.

7. Pursuant to the Wildlife Violator Compact, Title 23, Chapter 5 of the Utah Code, any order revoking or suspending Respondent's privileges to harvest protected wildlife in Utah may be given reciprocal recognition in the following states: Arizona, Colorado, Idaho, Maryland, Minnesota, Missouri, Montana, Nevada, Oregon, Washington, and Wyoming.

8. All written pleadings and communications concerning this Notice of Agency Action shall be identified by the case name and number reflected in the caption of this notice, and directed to Debbie Sundell, Utah Division of Wildlife Resources, 1594 West North Temple,

Salt Lake City, Utah 84116, Phone: (801) 538-4707. If Respondent has any information or a statement that should be reviewed prior to the hearing, he should submit that information to the Division at the above address so that it may be considered and made a part of the record.

DATED this 29th day of June, 2000.

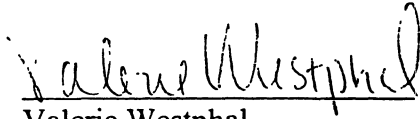
A handwritten signature in cursive script, reading "Debbie Sundell", written over a horizontal line.

Debbie Sundell  
Hearing Officer  
Division of Wildlife Resources

**CERTIFICATE OF MAILING**

I certify that on the 29th day of June, 2000, I caused to be delivered by certified mail, return receipt requested, a true and correct copy of the attached Notice of Agency Action addressed to the following person(s):

Joseph Bradbury  
4606 North 50 West  
Provo UT 84601

  
Valerie Westphal  
Executive Secretary  
Division of Wildlife Resources

Joseph J. Bradbury,

**Appellant,**

**VS.**

STATE OF UTAH, DIVISION  
OF WILDLIFE RESOURCES

Respondent.

## ORDER

Case No.

## BACKGROUND

The Utah Wildlife Board held a formal administrative hearing in the above-captioned matter on May 17, 2001, at the Natural Resource Building located at 1594 West North Temple, Salt Lake City, Utah. Board members Collin Allan, Raymond Heaton, Paul Niemeyer, Curtis Dastrup, Brenda Freeman, Coni Brooks, and Chairman Max Morgan, M.D. were present. All participated in and unanimously agreed to the decision. The Board conducted the formal hearing under provisions of the Utah Administrative Procedures Act, Utah Division of Wildlife Resources ("DWR") Administrative Rules, and other applicable law.

Assistant Attorney General Martin Bushman represented DWR at the Hearing. Appellant Joseph Bradbury was represented by his attorney, Robert C. Fillerup.

DWR Officer Jack Topham testified on behalf of the Division. Appellant Joseph J. Bradbury testified on his own behalf.



After hearing from all parties, receiving full disclosure of relevant facts, reviewing submitted exhibits, and considering the evidence and relevant law, the Board hereby makes the following findings of fact and conclusions of law, offers reasons for its decisions, and issues the order below.

### **FINDINGS OF FACT**

1. Joseph Bradbury is a resident of Utah and he is domiciled in Utah. Mr. Bradbury admitted before the Board and Judge Anderson that he is a resident of Utah. He currently resides at 4606 North 50 West, Provo, Utah, and he has lived in Utah for at least fourteen years. Mr. Bradbury claims Utah residency for business, tax and voting purposes.

2. Mr. Bradbury has never been a legal resident of Idaho.

3. In November of 1993, Joseph Bradbury traveled to Meridian, Idaho, and obtained an Idaho driver's license.

4. Mr. Bradbury obtained the Idaho driver's license using the following address: 1524 Meridian Street, Meridian, Idaho. This address is that of the Almost Home Day Care Center, owned by Mr. Bradbury's sister. Joseph Bradbury has never lived at this address.

5. From 1993 to 1998, Joseph Bradbury obtained Idaho resident hunting licenses using the Idaho address of the Almost Home Day Care Center.

6. In 1996, Joseph Bradbury applied for a nonresident hunting license in Utah. On the application, Mr. Bradbury listed 1524 Meridian Street, Meridian, Idaho, as his address and signed a statement attesting that all information contained in the application was "true and correct."

7. In 1997, Joseph Bradbury applied for and obtained a Utah nonresident limited entry Book Cliffs Elk Permit. He again listed the Meridian, Idaho address of his sister's day care center as his address and signed the application, indicating that all statements therein were "true and correct." Mr.

Bradbury could not be reached at the telephone number or address listed on this application.

9. In the fall of 1998, an anonymous caller contacted DWR Officer Jack Topham through the agency's hotline and reported that Mr. Bradbury had unlawfully obtained a Utah nonresident hunting license for the past five years.

10. On September 29, 1997, Mr. Bradbury shot a six-point bull elk ostensibly under authority of the nonresident limited entry Book Cliffs Bull Elk Permit.

11. On September 23, 1999, Mr. Bradbury was convicted in the Seventh District Court, Bonneville County, Idaho, one count of purchasing the "wrong class license" for hunting, one count of purchasing the "wrong class tag" for elk, and one count of purchasing the "wrong class tag" for bear. All three convictions stemmed from Mr. Bradbury unlawfully purchasing Idaho resident hunting licenses. As a result, Mr. Bradbury's Idaho hunting privileges were revoked for a period of two years.

12. On December 15, 1999, Mr. Bradbury pled guilty at a hearing in the Eighth District Court, Uintah County, Utah, to a violation of Utah Code Annotated § 23-20-4, "wanton destruction of wildlife," a Class A Misdemeanor. The conviction was based on Mr. Bradbury taking a six-point bull elk with an unlawfully obtained Utah nonresident limited entry Book Cliffs Bull Elk Permit in 1997. Defendant was represented at the hearing by his counsel, Joel D. Barrett.

#### **CONCLUSIONS OF LAW and REASONS FOR DECISION**

13. Utah Code Annotated § 23-19-9 requires that a wildlife license, permit, or tag be revoked if a person "flagrantly and knowingly...violates...th[e] title."

14. Utah Administrative Code R657-26-2(2)(a) defines "flagrantly" to mean "an act in violation of Title 23...committed in a manner that...is conspicuously bad or offensive."

15. Utah Administrative Code R657-26-2(2)(b) defines "knowingly" to mean "with respect to the nature or the result of a person's conduct, that the person was aware, or should have been aware, that the conduct was reasonably certain to cause the result."

16. Utah Code Annotated § 23-19-5 makes it unlawful for any person to "obtain a license, permit, tag . . . by fraud, deceit or misrepresentation . . . (i)t is unlawful for a resident to purchase a nonresident license."

17. Utah Code Annotated § 23-13-2(36) defines "resident" as "a person who: (i) has been domiciled in the state of Utah for six consecutive months immediately preceding the purchase of a license; and (ii) does not claim residency for hunting, fishing or trapping in any other state or country."

18. Utah Code Annotated § 23-20-4 provides that a person is guilty of "wanton destruction of protected wildlife" if he "posess[es] protected wildlife . . . unaccompanied by a valid . . . tag."

19. Utah Code Annotated § 23-13-2(34)(a) defines "protected wildlife" to include "vertebrate animals living in nature, except feral animals."

20. Based upon the testimony and exhibits presented by both parties at the hearing, and taking into account the DWR Hearing Officer's previous order relating to this case, the Board finds that Mr. Bradbury was a Utah resident for the purpose of hunting. Utah Code Annotated § 23-13-2(36) defines "resident" as "a person who: (i) has been domiciled in the state of Utah for six consecutive months immediately preceding the purchase of a license; and (ii) does not claim residency for hunting, fishing or trapping in any other state or country." Mr. Bradbury admits that he meets the definition's first criteria because he was domiciled in Utah for six consecutive months immediately before purchasing his license. However, he argues that he did not meet the second

criteria because he claimed residency in Idaho for hunting, fishing, or trapping purposes, and, therefore, he is not a Utah resident for hunting purposes.

In November of 1993, Joseph Bradbury traveled to Meridian, Idaho and obtained an Idaho driver's license using the address of his sister's business located in Meridian, Idaho. Although he has never lived in Idaho, Mr. Bradbury used this address to obtain resident hunting licenses and tags in Idaho and nonresident hunting licenses and tags in Utah. Mr. Bradbury has resided in Utah for at least fourteen years and he claims Utah residency for business, tax and voting purposes.

Mr. Bradbury's use of the Idaho address to obtain hunting licenses has led to misdemeanor criminal convictions in both Idaho and in Utah. On September 23, 1999, Mr. Bradbury was convicted in the Seventh District Court, Bonneville County, Idaho, one count of purchasing the "wrong class license" for hunting, one count of purchasing the "wrong class tag" for elk, and one count of purchasing the "wrong class tag" for bear. Mr. Bradbury's Idaho hunting privileges were revoked for a period of two years. On December 15, 1999, Mr. Bradbury pled guilty at a hearing in the Eighth District Court, Uintah County, Utah, to "wanton destruction of wildlife".

These facts lead the Board to conclude that Mr. Bradbury may have claimed Idaho residency for hunting, fishing or trapping but that his claim was a misrepresentation. Therefore, Mr. Bradbury in effect argues that through his misrepresentation he should maintain his hunting privileges. The Board concludes that Mr. Bradbury's acts do not circumvent the law's intent to prevent a person from obtaining nonresident hunting privileges through misrepresentation. "It is unlawful for any person to obtain or attempt to obtain a license, permit, tag . . . by fraud, deceit, or misrepresentation. It is unlawful for a resident to purchase a nonresident license." Utah Code Annotated § 23-19-5. Therefore, Mr. Bradbury was a resident of Utah for the purposes of obtaining

a license for hunting, fishing, and trapping.

21. The Board concludes that Mr. Bradbury knowingly and flagrantly violated Utah Code Ann. § 23-19-5:

(a) the Board concludes the violation occurred "knowingly" because the evidence presented to the Board demonstrates that Mr. Bradbury knew he was a resident of Utah in 1996 and 1997, but he applied for and obtained a nonresident hunting license and permit. Joseph Bradbury is domiciled in Utah. He currently resides at 4606 North 50 West, Provo, Utah, and he has lived in Utah for at least fourteen years. Mr. Bradbury claims Utah residency for business, tax and voting purposes and he has never lived in Idaho.

(b) the Board determines the violation occurred "flagrantly," or in a conspicuously bad or offensive manner, because:

(1) Mr. Bradbury misrepresented his residence by listing the Idaho address of the Almost Home Day Care Center as his address on his 1997 application for a nonresident limited entry Book Cliffs Elk Permit. Mr. Bradbury has never lived in Idaho. Mr. Bradbury signed a statement on the application indicating that this information was "true and correct," when he knew in fact that it was a misrepresentation.

(2) Mr. Bradbury was prosecuted and convicted in an Idaho court for purchasing an Idaho resident hunting license and tags, indicating that he obtained the license and tags in an unlawful manner and that he was not a resident of Idaho;

(3) Mr. Bradbury was prosecuted and convicted in Utah of wanton

destruction of protected wildlife for harvesting a six-point trophy bull elk without a valid permit.

20. The remedy prescribed below by the Board is appropriate because:

- (a) DWR carefully manages the taking of trophy animals, such as six-point bull elk;
- (b) illegal taking of such trophy animals diminishes an already small population;
- (c) a six-point bull elk cannot be replaced in one or two years;
- (d) hunting is a privilege granted by the State to those willing to obey applicable rules and follow ethical hunting practices established to protect wildlife and allow DWR to implement its management objectives;
- (d) hunting violations harm wildlife resources, DWR's ability to manage that resource, and the expectations of other hunters;
- (e) preventing wildlife law violators from hunting for a period of time redresses harm they have caused by preventing them from committing further violations and provides opportunities to other hunters who have not violated DWR rules; and
- (f) the period of suspension imposed by this Order is consistent with the remedy imposed in other, similar situations.

### **ORDER**

Based upon the foregoing, and in accordance with Utah Code Annotated § 23-19-5 and previous Board actions, the Board orders that:

- (1) The Hearing Officer's January 2, 2001 Decision and Order **suspending Joseph J. Bradbury's** hunting privileges for a period of five years is affirmed. Accordingly, **Mr. Bradbury's** hunting privileges are suspended for a period of five years beginning **November 29, 2000**, and

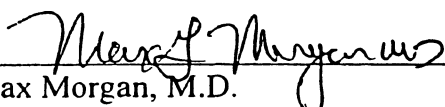
ending November 28, 2005.

(2) During this suspension period, Mr. Bradbury may not obtain or possess any hunting license issued by the State of Utah. Any Utah hunting license obtained during this period is invalid.

(3) Mr. Bradbury is hereby notified that this Order is given reciprocal recognition by all states participating in the Wildlife Violator Compact, including Arizona, Colorado, Idaho, Maryland, Minnesota, Missouri, Montana, Nevada, Oregon, Washington, and Wyoming.

(4) Mr. Bradbury is also notified that if he commits a wildlife-related violation during the suspension period, such violation will, by definition, be considered knowing and flagrant and could lead to a suspension of hunting privileges for an additional five years.

DATED this 26<sup>th</sup> day of September, 2001.

  
\_\_\_\_\_  
Max Morgan, M.D.  
Board Chair

## NOTICE

In accordance with Utah Code Annotated § 63-46b-13, Appellant may seek reconsideration of this Order within 20 days from the issue date. The request must be made in writing to Dr. Max Morgan, Wildlife Board Chairman, 1594 West North Temple, Salt Lake City, Utah 84114-0855. The request should be signed by Appellant, explain the asserted grounds for reconsideration, and contain the date of mailing.

Appellant may seek judicial review of this order in district court by filing a petition for judicial review within 30 days of the date of this Order, in accordance with Utah Code Annotated §§ 63-46b-14, 63-46b-15, and other applicable law.



CERTIFICATE OF MAILING

I, Dana E. Dolsey certify that on the 1st day of <sup>October DED</sup> September, 2001, I placed in the United

States Mail, postage prepaid, copies of the attached Order addressed to:

Joseph J. Bradbury  
4606 N. 50 W.  
Provo, UT 84601

Robert C. Fillerup  
Attorney at Law  
1107 S. Orem Blvd.  
Orem, UT 84058  
Martin Bushman  
Assistant Attorney General  
1594 West North Temple, # 300  
Salt Lake City, Utah 84116

Dana E. Dolsey