



Senate Fiscal Agency
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BILL



ANALYSIS

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Senate Bill 773 (as passed by the Senate)
Sponsor: Senator Dale W. Zorn
Committee: Outdoor Recreation and Tourism

Date Completed: 11-17-16

RATIONALE

Part 487 (Sports Fishing) of the Natural Resources and Environmental Protection Act prescribes fishing seasons and allowable fishing devices, and establishes a framework for licenses and permits to deal in bait or take fish for scientific or other purposes. Part 487 also includes a provision that prohibits certain nonresidents from acting as commercial fishing guides on Michigan's inland waters. Some have raised concerns that this prohibition is not conducive to developing the State's outdoor recreation and tourism industries and that it is likely unconstitutional. To address those concerns, it has been suggested that the provision be repealed.

CONTENT

The bill would repeal Section 48714 of the Natural Resources and Environmental Protection Act, which limits the ability of nonresidents to act as commercial fishing guides.

Specifically, Section 48714 prohibits a nonresident who resides in a state or country that prohibits this State's residents from acting as commercial fishing guides within that state or country from acting as a commercial fishing guide on the inland waters of this State. The section also prohibits a nonresident from acting as a commercial fishing guide on the inland waters of Gogebic County or Iron County.

As used in Section 48714, "commercial fishing guide" means a person who, for a fee or other consideration of value, regardless of whether the fee or consideration is paid directly or indirectly, is present and provides assistance to another person in pursuing, capturing, catching, killing, taking, or attempting to take fish.

MCL 324.48714

ARGUMENTS

(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)

Supporting Argument

Laws that restrict the ability of nonresidents to conduct business in a state are generally unconstitutional. First, they violate the implied restriction in the U.S. Constitution's Commerce Clause (Article I, Section 8, cl. 3) against state laws that improperly burden or discriminate against interstate commerce. A state law violates the Commerce Clause if it requires "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter".¹ In *Granholm v. Heald*, 544 U.S. 460 (2005), the U.S. Supreme Court held that a Michigan statute that allowed only in-State wineries to sell directly to consumers violated the Commerce Clause. Laws such as the one in *Heald*, and the one that this bill would address, deprive residents of access to other states' markets on equal terms.

¹ *Oregon Waste Systems, Inc. v. Department of Environmental Quality of Ore.*, 511 U.S. 93 (1994).

Such laws also violate the U.S. Constitution's Privileges and Immunities Clause (Article IV, Section 2, cl. 1), which specifies that "the Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States". The Supreme Court has held that a state must treat residents and nonresidents equally only with respect to those "privileges" and "immunities" that are fundamental to the promotion of interstate harmony. These have tended to include laws related to means of livelihood and commerce. For example, the Court held in *Supreme Court of New Hampshire v. Piper* (470 U.S. 275 (1985)) that the practice of law was a "privilege" protected by the Clause. The Supreme Court also has invalidated statutes containing resident hiring preferences (*Hicklin v. Orbeck*, 437 U.S. 518 (1978)) or preferential occupational licensing fee structures for residents (*Ward v. Maryland*, 79 U.S. 418 (1870)). Making a living as a commercial fishing guide also is likely a "privilege" within the meaning of the Clause.

The Privileges and Immunities Clause does not prohibit discrimination against nonresidents if there is a substantial reason for the difference in treatment, and if the discrimination bears a substantial relationship to the state's objective. Reportedly, the reason for the ban on out-of-State fishing guides was to discourage those guides from bringing their customers into Michigan. However, it is unlikely that this reason is substantial enough to satisfy the Supreme Court's Privileges and Immunities test. Furthermore, it is unclear whether the ban is narrowly tailored enough to bear a substantial relationship to its stated objective. Thus, it is likely that the provision improperly discriminates on the basis of residency.

By eliminating the ban, the bill would allow Michigan to attract more visitors, including anglers, into the State to enjoy its abundant natural resources. The State should continue efforts to protect its waters and fisheries, which could be done more effectively through efforts to join neighboring states in creating a regulatory structure for resident and nonresident commercial fishing guides.

Legislative Analyst: Jeff Mann

FISCAL IMPACT

The bill would have no fiscal impact on State or local government.

Fiscal Analyst: Josh Sefton

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.