

**BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL
FROM THE BIG GAME COMMERCIAL SERVICES BOARD**

In the Matter of:)	
)	
JERRY J. CATES)	
)	
Applicant.)	OAH No. 23-0190-GUI
)	Agency No. 2023-000225
_____)	

FINAL DECISION

I. Introduction

Jerry Cates holds Assistant Guide License GUIA7591. For a number of years he has been trying to upgrade to a Registered Guide-Outfitter License. After various obstacles were raised and then resolved, his application came before the Board on February 28, 2023, where it was denied for a single reason, which the Board succinctly communicated as follows:

Due to your history of felony convictions, under 18 USC Section 922(g), you are not permitted to be in possession of a firearm. You have not demonstrated to the Board that your right to be in possession of a firearm has been restored. . . . The board determined that your ineligibility to carry a firearm under federal law would not allow you to be capable of performing the essential duties associated with guiding and outfitting, including, but not limited to, safely caring for clients while in the field and the ethical dispatch of game when necessary.¹

Mr. Cates was offered, and accepted, the opportunity to contest the denial in an evidentiary hearing. The hearing was held on May 17 and 19, 2023.

The Division of Corporations, Business and Professional Licensing began the hearing with the firm position that Mr. Cates could not legally fulfil the responsibilities of a guide. However, unexpected turns in the evidence and better understanding of the law have led even the Division to conclude that the Board should reconsider its denial. This decision reaches the same conclusion.

Mr. Cates has shown that he possesses, and is legally permitted to carry, a weapon fully adequate to protect his clients, ethically dispatch game, and serve his clients in a manner equivalent to other guides. Because the final basis for denying his application has been removed, his application is granted.

¹ Letter from Thomas Bay, Executive Administrator, Big Game Commercial Services Board, to Jerry Cates (March 10, 2023).

II. Background

Jerry Cates is presently active as a licensed assistant guide, having held the license since 2015. His license was on probation for three years for a non-fraudulent but incorrect statement on his 2015 application (which he self-reported in 2017), but the probation has been successfully completed.² By all accounts, he has become a highly skilled assistant guide with a good work ethic, and is well regarded in the profession.³

Mr. Cates has not always been an upstanding citizen. After a young adulthood of petty crime, he had five theft-related felony convictions in 2008 that sent him to the Texas penitentiary for two years.⁴ Mr. Cates has since turned his life around. Although there is a process underway that may eventually expunge these felonies from his record, there is no immediate prospect of success.⁵ The felony convictions interfere with his firearm rights, as more fully discussed in Part V.

Nonetheless, Mr. Cates owns three guns. Two of them are of limited relevance to this case: a .50 caliber air rifle suitable for taking deer and caribou in Alaska,⁶ and a replica .72 caliber double-barreled muzzle-loading percussion cap rifle of a type used in the 1800s for very large African wildlife. The third is a .45-70 Caliber Winchester Model 1886 “Government” Rifle. Mr. Cates is proficient in the use and care of all three.⁷

Mr. Cates’s .45-70 Winchester was manufactured in 1898.⁸ It is in good condition overall, with the bore in excellent condition, possibly having been re-barreled since its original manufacture.⁹ Mr. Cates hand-loads his own black powder centerfire cartridges with 405-grain bullets for use in the Winchester.¹⁰ The rifle has a “TKO” (Taylor Knockout Factor) of about 55, higher than some magnum rifles. It is a type of gun that was famously used to hunt large game

² *In re Cates*, OAH No. 19-0192-GUI (Big Game Commercial Services Board 2020). He also paid a small strict-liability fine in connection with a client having taken a sublegal ram that had the right number of annuli but one of which was turned out to be a “false annuli.” *Id.*

³ *Id.*; testimony of Arthur Hirschel and Mark Nelson.

⁴ OAH No. 19-0192-GUI.

⁵ Cates testimony.

⁶ *See* 5 AAC 92.085(19).

⁷ Videos and other materials admitted into evidence indicate that he is especially accurate with the Winchester.

⁸ Ex. J.

⁹ *Id.* Of significance for classification as an “antique firearm,” the gun’s receiver is original. Cates testimony.

¹⁰ Cates testimony.

at the turn of the 20th century, and that remains in fairly common use in hunting camps in Alaska today.¹¹

III. A Registered Guide-Outfitter Must be Able to Carry a Suitable Weapon

The Board's regulations require guides to take reasonable measures to assure the safety of clients, including avoidance of exposing them to undue hazards.¹² They also require guides to use all lawful means to kill a wounded animal while it is in danger of escaping, or to do so in a serious emergency endangering human life or well-being.¹³ The Board has interpreted these regulations to require guides to possess a firearm adequate for these purposes.¹⁴ This policy accords with the view of experienced master, registered, and assistant guides who testified in this case, who uniformly believe an adequate firearm is essential equipment for a guide, at least when guiding bear hunts.¹⁵

IV. Mr. Cates's .45-70 Caliber Winchester Model 1886 Government Rifle is a Suitable Weapon

This case probably would not have gone to hearing had it been understood, from the beginning, that Mr. Cates could legally carry his .45-70 Caliber Winchester Model 1886 Government Rifle into the field. The evidence received was overwhelming that this particular weapon, when well-maintained and in competent hands as is the case with Mr. Cates, is a suitable weapon for a guide to carry in all types of Alaska big game hunts. For example, Division expert and 36-year Master Guide Virgil Umphenour described it as "fine" for this purpose.¹⁶ Division expert Don Hunley used the same word to characterize it, having himself used an equivalent .45-70 to back up clients. Registered Guide Arthur Hirschel would have "no hesitation" relying on this gun in a guiding role.¹⁷

¹¹ Testimony of Joel Boniek, Arthur Hirschel, Jerry Cates.

¹² 12 AAC 75.340(c)(1) and (2).

¹³ 12 AAC 75.340(d)(2).

¹⁴ Ex. 6 (Board policy adopted March 17, 2020).

¹⁵ Testimony of Don Hunley, Joel Boniek, Mark Nelson, Arthur Hirschel, Frank Bishop, Virgil Umphenour. It is clear that a number of guides at least occasionally guide sheep without carrying a firearm of their own, but the circumstances in which a big game guide could appropriately be unarmed are, at best, exceptional.

¹⁶ Testimony on cross-examination.

¹⁷ Mr. Cates's other two weapons may have limited use in guiding. The .50 caliber air rifle could be helpful as a close-range weapon for situations where there is a bear in camp, and the .72 caliber double-barreled muzzle-loader could be an effective backup when hunting from a canopied stand over bait (although it would not be a good choice if a wounded animal had to be followed into wet brush). *E.g.*, testimony of Virgil Umphenour (cross-exam). However, the preponderance of the evidence indicates that neither is sufficiently reliable in a wide range of situations to be an adequate guide's firearm on its own.

V. It is Legal for Mr. Cates to Possess the .45-70 Caliber Winchester Model 1886 Government Rifle that he Owns

Although his felonies occurred long ago, Mr. Cates remains a felon who has been convicted of crimes punishable by imprisonment exceeding one year. His efforts to obtain a pardon to alter that status have not yet borne fruit. So long as this remains the case, it is illegal under federal law for him to “possess” (in any way that affects commerce) a weapon fitting the description of “firearm” under the applicable chapter of the Gun Control Act of 1968 (GCA).¹⁸

The key question in this case, therefore, is whether Mr. Cates’s Winchester .45-70 falls under the definition of “firearms” that are illegal for him to possess. And critically for that determination, the GCA does not prohibit felons from possessing an “antique firearm.”¹⁹

Is Mr. Cates’s Winchester .45-70 an “antique firearm?” This case has resolved that issue in Mr. Cates’s favor by two means.

First, Division witnesses made it clear that wildlife law enforcement personnel would defer to the judgment of the federal Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) to determine if a particular weapon was prohibited to Mr. Cates.²⁰ Much to its credit, the Division contacted ATF and, during the hearing, obtained an opinion from its legal department that Mr. Cates’s Winchester .45-70 is an “antique firearm” under the applicable definition in the GCA.²¹

Second, the parties and the administrative law judge independently explored the proper interpretation of the GCA’s definition of “antique firearm.” Preliminarily, we should note that the GCA contains two definitions of “antique firearm,” and they are not the same. The one that applies to determinations of what felons may possess is the one in the first part of the act, codified at 18 U.S.C. § 921(a)(16).²² It defines an “antique firearm” as:

- (A) any firearm (including any firearm with a matchlock, flintlock, percussion cap, or similar type of ignition system) manufactured in or before 1898; or
- (B) any replica of any firearm described in subparagraph (A) if such replica—

¹⁸ 18 U.S.C. § 922(g)(1).

¹⁹ 18 U.S.C. § 921(a)(3) (the “term ‘firearm’ . . . does not include an antique firearm”).

²⁰ Testimony of Lt. Ralf Lysdahl (Alaska Department of Public Safety); testimony of Cody Smith (USFWS wildlife officer).

²¹ Division Ex. 8 (email from John Tibbetts, ATF Seattle Field Division Counsel, May 18, 2023).

²² The other one is found at 26 U.S.C. § 5845(g), and applies only to Title 26 provisions relating to registration and importation. The inclusion of two slightly different definitions of the same term in the GCA has been a source of confusion for half a century. The Title 26 definition would not encompass any rifle such as the .45-70 that is designed to use conventional centerfire fixed ammunition, regardless of manufacture date. But the Title 26 definition is irrelevant to the question presented in this case. *Cf.* Pub. L. 90-618 §§ 101 and 201 (Oct. 22, 1968).

- (i) is not designed or redesigned for using rimfire or conventional centerfire fixed ammunition, or
 - (ii) uses rimfire or conventional centerfire fixed ammunition which is no longer manufactured in the United States and which is not readily available in the ordinary channels of commercial trade; or
- (C) any muzzle loading rifle, muzzle loading shotgun, or muzzle loading pistol, which is designed to use black powder, or a black powder substitute, and which cannot use fixed ammunition. For purposes of this subparagraph, the term “antique firearm” shall not include any weapon which incorporates a firearm frame or receiver, any firearm which is converted into a muzzle loading weapon, or any muzzle loading weapon which can be readily converted to fire fixed ammunition by replacing the barrel, bolt, breechblock, or any combination thereof.

Subparts (B) and (C) do not apply to the .45-70 because it is not a replica and is not a muzzle-loader. The question in this case was whether subpart (A) applied.

The challenge in interpreting subpart (A) is the parenthetical. Rifles such as Mr. Cates’s .45-70 do not have “a matchlock, flintlock, percussion cap, or similar type of ignition system.” Thus, the question is whether the parenthetical is meant to limit the definition in some way, or whether it is simply an incomplete list of examples of the types of firearms “manufactured in or before 1898.” Courts, including multiple U.S. Courts of Appeal, have resolved this question firmly in favor of the latter, broader interpretation: subpart (A) encompasses every firearm, regardless of ignition system, “manufactured in or before 1898.”²³ Since the .45-70 in question was manufactured in 1898, it is legal for Mr. Cates to possess it.

It is also legal for Mr. Cates possess the other two weapons he owns. All parties agree that the .50 caliber air rifle does not fall within the definition of “firearm” at all, and the .72 caliber double-barrel muzzle-loader rifle is within the 18 U.S.C. § 921(a)(16)(C) definition of muzzle-loading antique firearms. These two weapons are of less use in guiding, however, and would not independently be adequate to enable the Board to license Mr. Cates.

²³ *United States v. McMillan*, 346 F. App. 945, 947 (4th Cir. 2009) (“any firearm manufactured in or before 1898” is an antique firearm); *United States v. Dorsey*, 272 F. App. 769, 772 (11th Cir. 2008) (same); *United States v. Royal*, 731 F.3d 333, 336 (4th Cir. 2013) (same); *United States v. Lawrence*, 349 F.3d 109, 121 (3d Cir. 2003) (same); *United States v. Mixon*, 457 F.3d 615, 616 (7th Cir. 2006) (accepting that a pre-1899 Hopkins & Allen revolver, which uses centerfire ammunition, is an antique firearm); *In re Wilkinson*, No. 07.50189-C, Mem. Dec. April 10, 2009 (Bkrcy. W.D. Texas) at 4 n.4 (“18 U.S.C §§ 921(a)(3), (a)(16) defines antique firearm as those manufactured prior to 1898.”).

VI. Conclusion

The application of Jerry J. Cates for a Registered Guide-Outfitter License is granted. The Executive Administrator shall issue the license to Mr. Cates.

DATED this 31st day of May, 2023.

BIG GAME COMMERCIAL SERVICES BOARD

By:



Jason Bunch
Board Chair