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# GUIDED INTO JEOPARDY: HOW SOUTH DAKOTA’S FAILURE TO REGULATE THE ACTS OF HUNTING OUTFITTERS CAN INFLICT CRIMINAL LIABILITY AND BODILY HARM ON CLIENT-HUNTERS

SAMANTHA J. MERRILL<sup>†</sup>

*Inexperienced hunters often rely on hunting outfitters to guide a successful hunt. However, some hunting outfitters use illegal tactics, often in violation of the Lacey Act or Migratory Bird Treaty Act, to increase the take of game to satisfy client-hunters. The violations of these federal laws have high criminal consequences, often imposing significant fines and suspending hunting rights. Usually, the illegal act or acts of the hunting outfitter cause the client-hunter to leave with a criminal record. This imposition of criminal liability occurs for one main reason: it is extremely difficult for client-hunters to claim total ignorance about hunting outfitters’ illegal acts. These criminal acts are difficult to conceal from the client-hunters, especially if the client-hunter returns to the outfitter for*

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Tonights like lots of others  
You’ve radioed you’ll be late  
A car on the highway hit a deer  
Theres been a lot of late.  
I put supper in the oven  
To keep it warm for you  
Hot or cold, you don’t complain  
A dry dinners nothing new  
As you sit down to eat  
The phone begins to ring.  
Someone wants a license, or  
Where are the fish biting?  
Seasons come, and seasons go  
They march clear through the year  
You get called out in the night  
Some ones shinning deer.  
You say your works your hobby  
So it makes me happy too  
Cause you enjoy every minute, and  
No one deserves it more than you.

Florence Binger, *The Warden*, in *BACKROADS LAW: TRUE STORIES OF SOUTH DAKOTA GAME WARDENS 7, 7* (Jona Ohm, ed., 2018). *BACKROADS LAW* is a fun book containing the stories of people who made wildlife law enforcement their career, including a few stories contributed by my grandfather, Owen Meadows, who served South Dakota Game Fish and Parks for over thirty years. *See generally id.* (providing stories of South Dakota wardens). The stories of my grandfather, my father, and their many friends in this profession gave me a unique view into this largely underappreciated realm of law enforcement and inspired the writing of this piece. Thank you to all the Game Wardens, federal and state, who have and continue to serve South Dakota; this piece is dedicated to you.

*subsequent hunts, and thus provide an adequate basis for violations of the law. In addition to the risk of becoming a felon, hunting, especially with an inexperienced client-hunter in unfamiliar terrain, can be dangerous and lead to serious physical harm. Unfortunately, despite the hunting industry being one of South Dakota's primary sources of income, South Dakota has few regulations relating to the hunting outfitter business. This comment will outline the dangers to client-hunters, both criminally and in the context of health and safety, and explain why all states, including South Dakota, must regulate this industry to protect the client-hunters, lawfully operating outfitters, and the value generated by wildlife within the state.*

## I. INTRODUCTION

Hunting and fishing contribute billions of dollars to the national economy.<sup>1</sup> Nationwide, ninety million United States residents participate in outdoor or wildlife-related activities, spending \$145 billion annually.<sup>2</sup> Each year, some of those ninety million hunters make their way to South Dakota.<sup>3</sup> South Dakota's natural resources make it ideal for hunting, fishing, and other outdoor recreation.<sup>4</sup> Based on a study commissioned in 2016, residents and non-residents alike spent a total of 18.6 million days enjoying these resources in South Dakota, spending \$1.3 billion to hunt, fish, view wildlife, or otherwise enjoy South Dakota's many state and national parks.<sup>5</sup>

Each dollar brought in by hunters and fishers boosts the businesses geared towards accommodating those activities, from small local businesses to manufacturers of hunting-related goods.<sup>6</sup> In fact, the \$1.3 billion from hunting generates another \$1.9 billion in economic activity for South Dakota in the form

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1. S.D. GAME, FISH & PARKS, *Economic Contributions*, <https://gfp.sd.gov/economic/> (last visited Nov. 18, 2021) [hereinafter *Economic Contributions*]. These outdoor activities support 6.5 million jobs while contributing \$730 billion to the U.S. economy. *Id.*

2. *Id.*

3. *Id.*

4. S.D. DEP'T. OF TOURISM, *Hunting South Dakota: See why people come from all over to hunt in SD*, <https://www.travelsouthdakota.com/recreation/hunting> (last visited Nov. 18, 2021).

5. *Economic Contributions*, *supra* note 1.

6. *Id.* In addition to the economic benefits, hunting is also an essential tool in wildlife conservation. Andrew Moore, *The Role of Hunting in Wildlife Conservation, Explained*, COLL. NAT. RES. NEWS (Feb. 24, 2021), <https://cnr.ncsu.edu/news/2021/02/the-role-of-hunting-in-wildlife-conservation-explained/>. While unregulated hunting and killing of animals damage ecosystems and species, that is not the case with regulated hunting. *Id.* Instead, the purchase of the proper documents to hunt legally raises money for conservation and conservation efforts have come to rely on that funding. *Id.* In 2017 alone, "over \$500 million in revenue" was raised for conservation by the purchases of hunting licenses, making the majority of conservation programs funded by hunters, not taxpayers. *Id.* In addition to the funding provided, "[r]egulated hunting is one of the most effective tools that state wildlife agencies can use to address the overpopulation of a species." *Id.* The limits and season lengths are based on the population rates of game animals. *Id.* If game is overpopulated, seasons are lengthened and takes are limited, while if a game animal's population needs to grow, more restrictions will be placed on those animals. *Id.* Additionally, requiring hunters to report their takes to wildlife agencies "allows biologists to evaluate long-term wildlife population and distribution changes." *Id.* Put simply, rather than hunters being unethical or cruel, "[they] do more to help wildlife than any other group in America." *Id.*

of revenue from restaurants, hotels, and other hospitality-based industries.<sup>7</sup> This form of income makes outdoor tourism an essential part of the South Dakotan economy.<sup>8</sup> Specifically, hunting and fishing bring in most outdoor tourism revenue, with \$683 million attributed to hunting and \$271 million attributed to fishing.<sup>9</sup> Even during the pandemic, with tourism losses that will substantially affect South Dakota for years,<sup>10</sup> outdoor recreation activities increased in popularity.<sup>11</sup>

As hunters enter South Dakota, non-residents of all experience levels often seek guides to have a better hunting experience.<sup>12</sup> This demand creates eighteen thousand full and part-time jobs, hunting-related and otherwise, each hunting season.<sup>13</sup> It also creates competition among guiding services and outfitters to get hunting or fishing clients to support their businesses.<sup>14</sup> Hunting outfitters often compete through the level of accommodations and their success in getting the goal of every hunt—a game animal.<sup>15</sup>

Hunting outfitters and guides try their best to get their clients a trophy worth bragging over.<sup>16</sup> However, some resort to criminal activity to ensure that client-hunters leave with a memorable take.<sup>17</sup> Unfortunately, these actions by outfitters expose not only themselves to criminal liability but also their client-hunters.<sup>18</sup> Because federal law requires that there be, for the most serious violations, a

7. *Economic Contributions*, *supra* note 1.

8. *Id.*

9. *Id.*

10. Makenzie Huber, *Tourism Losses Likely to Impact South Dakota for Years*, U.S. NEWS ASSOCIATED PRESS (Dec. 19, 2020, 1:01 AM), <https://www.usnews.com/news/best-states/south-dakota/articles/2020-12-19/tourism-losses-likely-to-impact-south-dakota-for-years>.

11. Nick Lowrey, *Outdoor recreation in S.D. sees big boost during pandemic*, S.D. NEWS WATCH (Dec. 22, 2020), <https://www.sdnewsWatch.org/stories/outdoor-recreation-in-s-d-sees-big-boost-during-covid-19-pandemic/>.

12. See Southwick Associates, *Economic Impact of Hunting, Fishing, Trapping, Boating, and Wildlife Viewing in South Dakota*, S.D. GAME, FISH, & PARKS at ii (Mar. 30, 2017), <https://gfp.sd.gov/userdocs/docs/FishWildlifeBoatingEconomics.pdf> (finding twenty-seven percent of outdoor tourism spending comes from non-residents); see also Stefan Wilson, *How are hunting guides and outfitters governed?*, GOHUNT (Sept. 27, 2016), <https://www.gohunt.com/read/life/how-are-hunting-guides-and-outfitters-governed#gs.cobalc> (discussing how hunting guides are beneficial for hunting experiences).

13. *Economic Contributions*, *supra* note 1.

14. See generally Laura J. Ireland, *Canning Canned Hunts: Using State and Federal Legislation to Eliminate Unethical Practice of Canned “Hunting,”* 8 ANIMAL L. 223, 223 (2001), <https://www.animallaw.info/article/canning-canned-hunts-using-state-and-federal-legislation-eliminate-unethical-practice-canned> (addressing the ethical issues behind “canned” hunting); THE HUNT CLUB, <https://www.animallaw.info/article/hunt-club> (last visited Oct. 5, 2021) (advertising its services to potential client-hunters).

15. *How to Start an Outfitter Business*, AEGIS INS. MKTS. (Feb. 11, 2019), <https://aegisinsurancemarkets.com/Blog/PostId/292/how-to-start-an-outfitter-business>; Ireland, *supra* note 14, at 223-24.

16. See Josh Verges, *Pay hunting corrupts*, REFUGE FORUMS (May 29, 2008), <https://www.refugeforums.com/threads/pay-hunting-corrupts.625311/> (discussing the pressure faced by professional outfitters to secure clients); Ireland, *supra* note 14, at 223-24 (discussing the goal of having a successful “hunt”).

17. Verges, *supra* note 16. “Take” is a term of art meaning “captured, killed, or collected . . .” 16 U.S.C.A. § 3371(j) (West 2013).

18. Verges, *supra* note 16.

“knowing” violation of either the Lacey Act<sup>19</sup> or the Migratory Bird Treaty Act,<sup>20</sup> it is practically impossible for even an inexperienced client-hunter to escape the criminal liability.<sup>21</sup> Thus, some client-hunters who paid a guide to lead them through a legal hunt may end up criminally indicted if, unbeknownst to them, a guide advises illegal hunting practices.<sup>22</sup>

In addition to the risks imposed by criminal outfitters, there are health and safety risks that client-hunters are exposed to while hunting.<sup>23</sup> While hunting, client-hunters can be exposed to bouts of intense weather, unfamiliar and hard-to-navigate terrain, dangerous animals, and, most obviously, deadly weapons.<sup>24</sup> Thus, having a guide knowledgeable about basic first aid and other safety measures can be essential to a hunter’s wellbeing and ability to make it through the excursion unharmed.<sup>25</sup> Despite these dangers to client-hunters, South Dakota allows anyone to guide hunts or operate a hunt outfitting business.<sup>26</sup>

This comment will outline the dangers to client-hunters and the economic devastation that could follow if outfitters are allowed to continue to act unlicensed and unregulated.<sup>27</sup> First, the comment will go through the common charges under the Lacey Act and the Migratory Bird Treaty Act in sections II.A and II.B to understand the potential criminal liability.<sup>28</sup> To aid in understanding these consequences, each section discussing these laws will also include examples of prosecutions brought under these acts.<sup>29</sup> Then, after outlining the criminal liability guides can expose their client-hunters to, the comment will explain the physical danger faced by client-hunters who hunt with an unlicensed, untrained hunting guide in section II.C.<sup>30</sup>

Next, in section III, the comment will discuss South Dakota’s specific hunting regulations and the limited control of hunting outfitters.<sup>31</sup> This approach

19. 16 U.S.C.A. §§ 3371-78 (West 2013).

20. 16 U.S.C.A. §§ 703-12 (West 2013 & Supp. 2022).

21. *See infra* Part II.A; 16 U.S.C.A. §§ 707, 3373.

22. *See infra* Parts II.A-B.

23. *See infra* Part II.C.

24. *See Preparing for Risks*, HUNTER-ED, [https://www.hunter-ed.com/national/studyGuide/Preparing-for-Risks/201099\\_93082/](https://www.hunter-ed.com/national/studyGuide/Preparing-for-Risks/201099_93082/) (last visited Oct. 12, 2021) (discussing the risks that injuries can occur when in unfamiliar terrain); *Top Five Risks Hunting Guides Guard Against with a Good Hunting Guide Insurance Plan*, OUTDOOR INS. GRP. (Oct. 4, 2016), <https://oigcorp.com/blog/top-five-risks-hunting-guides-guard-good-hunting-guide-insurance-plan/> (discussing risk of animal attacks); *Main Causes of Hunting Incidents*, HUNTER-ED, [https://www.hunter-ed.com/national/studyGuide/Main-Causes-of-Hunting-Incidents/201099\\_92997/](https://www.hunter-ed.com/national/studyGuide/Main-Causes-of-Hunting-Incidents/201099_92997/) (last visited Oct. 12, 2021) (discussing risks due to firearms); *Clothing*, HUNTER-ED, [https://www.hunter-ed.com/national/studyGuide/Clothing/201099\\_93086/](https://www.hunter-ed.com/national/studyGuide/Clothing/201099_93086/) (last visited Oct. 12, 2021) (discussing clothing hunters should wear to avoid injury and prepare for poor weather); *Unit 8, Topic 4: Coping with Extreme Weather*, HUNTER-ED, <https://www.hunter-ed.com/national/studyGuide/> (last visited Oct. 12, 2021) (discussing risks associated with extreme weather and treatment).

25. *See infra* notes 306-310 and accompanying text.

26. *See infra* notes 188-191 and accompanying text.

27. *See infra* Parts II-V.

28. *See infra* Parts II.A-B.

29. *See infra* Parts II.A-B.

30. *See infra* Part II.C.

31. *See infra* Part III.

will be contrasted with Colorado and Wyoming's hunting regulations, in addition to the rules of the four representative sovereign tribes within the Oceti Sakowin Nation<sup>32</sup> within South Dakota that require licensing of hunting outfitters and guide training.<sup>33</sup> Finally, in section IV, this comment will outline potential regulations for South Dakota to consider implementing to protect its economy and the client-hunters.<sup>34</sup>

## II. DANGERS TO CLIENT-HUNTERS

To understand the dangers risked by client-hunters, it is crucial to know the criminal and the potential health and safety consequences their untrained, and sometimes criminal, guides expose them to.<sup>35</sup> Therefore, this section will first discuss the federal laws that these client-hunters are often charged with, the Lacey Act and the Migratory Bird Treaty Act in parts A and B.<sup>36</sup> Then, part C will discuss the health and safety concerns that arise while hunting.<sup>37</sup>

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32. The Oceti Sakowin Nation is the proper name for the people of the Sioux Nation. AM. INDIAN SMITHSONIAN INST., *Nation: Oceti Sakowin*, <https://americanindian.si.edu/nk360/plains-belonging-nation/oceti-sakowin> (last visited Nov. 10, 2021) [hereinafter *Nation: Oceti Sakowin*]. Oceti Sakowin Oyate translates to "People of Seven Council Fires." *Id.* The Seven Council Fires are the "Mdewakanton[,] Dwellers by the Sacred Lake[;] Wahpekute[,] Shooters Among the Leaves[;] Sisitowan/Sisseton[,] People of the Marsh[;] Wahpetonwan[,] Dwellers Among the Leaves[;] Ihanktonwan/Lower Yanktonai[,] People of the End[;] Ihanktowana/Upper Yanktoni[,] People of the Little End[; and] Tetonwan[,] People of the Plains." *Oceti Sakowin*, AKTA LAKOTA MUSEUM & CULTURAL CTR., <http://aktalakota.stjo.org/site/News2?page=NewsArticle&id=8309> (last visited Oct. 20, 2021). There are seven bands within the Tetonwan, also called Teton, Council. *Id.* Those include the "Hunkpapa[,] Camps at the Horn . . . [;] Sicangu/Brule'[,] Burnt Thigh . . . [;] Itazipo/Sans Arc[,] Without Bows . . . [;] Sihasapa[,] Blackfeet . . . [;] Oglala[,] Scatters His Own . . . [;] Oohenumpa[,] Two Kettles . . . [; and] Mniconjou[,] Planters by the River . . . ." *Id.* South Dakota's nine reservations have people from these bands. *South Dakota Reservations*, ST. JOSEPH'S INDIAN SCH., <https://www.stjo.org/native-american-culture/oceti-sakowin-seven-council-fires/south-dakota-reservations/> (last visited Oct. 20, 2021). The Cheyenne River Reservation, headquartered in Eagle Butte, South Dakota, is a part of the Teton Council, made up of the Mnicoujou, Oohenumpa, Itaipco, and Siha Sapa bands. *Id.* The Crow Creek Reservation, headquartered in Fort Thompson, South Dakota, is a part of the Mdewakanton and Ihanktonwan Councils. *Id.* The Flandreau Santee Sioux Reservation, headquartered in Flandreau, South Dakota, is part of the Mdewakantonwan and Wahpekute Councils. *Id.* The Lower Brule Reservation, headquartered in Lower Brule, South Dakota, is part of the Teton Council, specifically the Sicangu band. *Id.* The Pine Ridge Reservation, headquartered in Pine Ridge, South Dakota, is also part of the Teton Council, but comprised of the Oglala band. *Id.* The Rosebud Reservation, headquartered in Rosebud, South Dakota, is also part of the Teton Council, but comprised of the Sicangu band. *Id.* The Lake Traverse Reservation, headquartered in Agency Village, South Dakota, is comprised of the Sisseton and Wahpeton Councils. *Id.* The Standing Rock Reservation, headquartered in Fort Yates, North Dakota, is part of the Ihanktonwan, Ihantonwanna, Siha Sapa, and Teton Councils, comprised of the Hunkpapa Teton band. *Id.* Standing Rock is unique because it spans two states, South Dakota and North Dakota. *Id.* Finally, the Yankton Reservation is made up of the Ihanktonwan Council. *Id.* Between these Councils, three different dialects of the same language are spoken. *Nation: Oceti Sakowin*, *supra* note 32. Those are the Dakota, Nakota, and Lakota dialects. *Id.*

33. See *infra* Part III.

34. See *infra* Part IV.

35. See *South Dakota v. Tuttle*, 2002 S.D. 94, ¶ 41, 650 N.W.2d 20, 37-38 (Gilbertson, J., concurring) (discussing the need to know consequences to make an intelligent decision in certain situations).

36. See *infra* Parts II.A-B.

37. See *infra* Part II.C.

## A. LACEY ACT

In 1900, the Lacey Act (“the Act”) became the first federal law designed to protect wildlife.<sup>38</sup> This law helps states enforce their wildlife protection policies in addition to promoting actions that “conserve and restore wildlife and birds in the United States.”<sup>39</sup> The Lacey Act imposes criminal and civil liability on those who act in contradiction to the Act.<sup>40</sup> This Act criminalizes a great deal of conduct relating to fish, wildlife, and plants;<sup>41</sup> however, this comment will only focus on a small subset of Lacey violations.<sup>42</sup>

The Lacey Act makes it unlawful to “import, export, transport,<sup>43</sup> sell, receive, acquire or purchase any . . . wildlife . . . taken, possessed, transported, or sold in violation of any law, treaty, or regulation of the United States or in violation of any Indian tribal law.”<sup>44</sup> The act also criminalizes the use of interstate commerce for any wildlife taken, possessed, transported, or sold in violation of any state or foreign law.<sup>45</sup> The Lacey Act is also explicit in that providing any consideration for guiding, outfitting, other services, or a hunting or fishing permit constitutes a sale or purchase because the cost of the hunting outfitter services logically includes the “wildlife that is the ultimate object of the hunt.”<sup>46</sup>

A felony violation of the Act is a two-prong analysis.<sup>47</sup> Specifically, the prohibited conduct “must be committed in the context of commercial activity [and] the market value of the wildlife must exceed \$350.”<sup>48</sup> If one of these prongs is not present, it becomes a misdemeanor violation.<sup>49</sup>

Thus, in the hypothetical case of a person who kills an elk in violation of Montana law without the use of a paid guide and transports the animal to another state, no felony violation has occurred absent proof of some commercial activity and wildlife

38. U.S. FISH & WILDLIFE SERV., *Lacey Act*, <https://www.fws.gov/international/laws-treaties-agreements/us-conservation-laws/lacey-act.html> (last visited Nov. 18, 2021) [hereinafter *Lacey Act*] (on file with author due to website redesign).

39. 38 C.J.S. *Game* § 48 (2022).

40. 16 U.S.C.A. § 3373. *See also Lacey Act, supra* note 38 (noting the penalties associated with the Lacey Act).

41. *See generally* 16 U.S.C.A. § 3372 (criminalizing conduct relating to fish, wildlife, and plants).

42. *See infra* Part II.A.

43. Under the Lacey Act, “‘transport’ means to move, convey, carry, or ship by any means, or to deliver or receive for the purpose of movement, conveyance, carriage, or shipment.” 16 U.S.C.A. § 3371(k).

44. 16 U.S.C.A. § 3372(a)(1). *See also Lacey Act, supra* note 38 (discussing what is prohibited by the Lacey Act).

45. 16 U.S.C.A. § 3372(a)(2). *See also Lacey Act, supra* note 38 (discussing what is prohibited by the Lacey Act).

46. 16 U.S.C.A. § 3372(c); 38 C.J.S. *Game* § 50 (2022); Robert S. Anderson, *The Lacey Act: America’s Premier Weapon in the Fight Against Unlawful Wildlife Trafficking*, 16 PUB. LAND L. REV. 27, 65 n.273 (1995).

47. Anderson, *supra* note 46, at 69.

48. *Id.*

49. *Id.*

market value in excess of \$350. However, if the same hunter pays \$500 for the services of a guide, both the commercial conduct element and wildlife market value element are satisfied, and a felony has been committed.<sup>50</sup>

The hunter does not need to purchase both guiding services and a hunting license to violate the Act.<sup>51</sup> Instead, the Lacey Act prohibits the illegal sale of wildlife “as long as it is an integral part of the interstate transfer of illegally taken wildlife.”<sup>52</sup> However, the transaction’s order does not matter so long as the criminal action is “directly related to the transaction.”<sup>53</sup> The transaction can occur after the hunt is complete and the illegal take is taken back across state lines where the client-hunter lives.<sup>54</sup> However, this can also happen when one crosses into or off of tribal land, which can be complicated in South Dakota.<sup>55</sup>

Due to the nine reservations within South Dakota, just over twelve percent of South Dakota is Indian Country.<sup>56</sup> In other words, approximately six million acres within South Dakota are actually tribal land.<sup>57</sup> These six million acres create several complex jurisdictional issues.<sup>58</sup> “[S]ales of [‘]surplus lands[’] and the practice of fee patenting and selling allotted lands have transformed many Indian

50. *Id.* See generally *United States v. Atkinson*, 966 F.2d 1270 (9th Cir. 1992) (providing the valuation analysis used in Lacey Act cases).

51. 38 C.J.S *Game* § 50.

52. *Id.*

53. *Id.*

54. See 16 U.S.C.A. § 3372.

55. See *id.*

56. U.S. ATT’YS OFF. DIST. OF S.D., *Indian Country* (Aug. 2, 2021), <https://www.justice.gov/usao-sd/indian-country#> hereinafter *Indian Country*. See also 18 U.S.C.A. § 1151 (West 2013) (defining Indian Country). As a brief aside regarding terminology, there is no consensus regarding the appropriate terminology used to reference the indigenous people of North America. Merrill, *supra* note †, at 363. Several commonly used terms include Indian, American Indian, Native American, Indigenous, and others. *Id.* However, “Indian” is the term used within the legal community as a term of art. See 25 U.S.C.A. Title 25 (West 2013) (“Indians”). The majority of Indian Country in South Dakota is a part of the Oceti Sakowin Nation. *Indian Country*, *supra* note 56; *Nation: Oceti Sakowin*, *supra* note 32. This percentage of Indian Country should be higher because, in 1979, the Supreme Court found that the land within the Great Sioux Reservation had been illegally seized. LORETTA FOWLER, *THE COLUMBIA GUIDE TO AMERICAN INDIANS OF THE GREAT PLAINS* 207 (2003). While the Supreme Court found the Black Hills to be illegally seized, the sovereign tribes have refused to accept the compensation offered by the federal government, instead insisting on the return on their land. *Id.* This demand is likely because the

He Sapa (the Black Hills) holds memories and stories of Lakota history from the time of creation . . . and at the center of *He Sapa* is its foundation – *Inyan*, the Rock. Lakotas believe that countless generations later, [Lakota] ancestors left the underworld and emerged onto this earth through a hole, or connecting cave, in *Inyan*. . . . He Sapa is a precious resource that Lakotas have held in trust for the coming generations. *He Sapa* to Lakotas is a *wizipan*, a repository from which [they] can draw physical and spiritual sustenance. It is a place of prayer and ceremony. [Lakotas] cannot look upon it without thinking about the power that created it. [Lakotas] are part of it, as it is part of [Lakotas].

AM. INDIAN SMITHSONIAN INST., *Homelands: Oceti Sakowin Nation*, <https://americanindian.si.edu/nk360/plains-belonging-homelands/oceti-sakowin> (last visited Apr. 15, 2022). For proper pronunciations of the terms above, visit the Smithsonian Institute website. *Id.*

57. S.D. GAME, FISH & PARKS, *Tribal Relations*, <https://gfp.sd.gov/tribal-relations/> (last visited Nov. 18, 2021).

58. ROBERT R. ANDERSON ET AL., *AMERICAN INDIAN LAW: CASES AND COMMENTARY* 104-09, 273-94, 409 (West Academic Publishing, 4th ed. 2008).



reservations from contiguous territories into ‘checkerboards’ of trust land, Indian fee patent land, and non-Indian land.”<sup>59</sup> This checkerboard can make it difficult, though not impossible, for those unfamiliar with South Dakota to understand whether they are hunting on tribal or state ground.<sup>60</sup> Thus, client-hunters who illegally took game, relying on their guide, can be led across Indian country and transport wildlife within the meaning of the Lacey Act.<sup>61</sup> Dangers also arise when a client-hunter enters onto Indian country with a valid state hunting license and takes wildlife in Indian country.<sup>62</sup> This take violates the Lacey Act because, even though the state granted the client-hunter a license, the specific sovereign tribe did not, which means the client-hunter took wildlife in violation of tribal law.<sup>63</sup>

The checkerboard caused by the United States’ assimilationist policies towards Native Americans causes out-of-state hunters to rely heavily on their guides and suffer federal criminal consequences.<sup>64</sup> Generally, client-hunters who

59. *Id.* at 109. Allotment was an essential part of Indian policy between 1880 and 1920. *Id.* at 104. Through this policy, “[t]ribal reservations would be broken up and divided among individual heads of households” and would open lands to non-Indian settlers. *Id.* This policy was “quickly proved [to be] disastrous for the Indians.” *Id.*; *Hodel v. Irving*, 481 U.S. 704, 707 (1987). Within forty-seven years, allotment cut Indian land by two-thirds. *ANDERSON ET AL.*, *supra* note 58, at 107. Modernly, allotment’s most important legacy is land ownership on reservations. *Id.* at 109.

60. *See* *Wilson*, *supra* note 12 (discussing how guides are essential because of their familiarity with the area and how client-hunters often do not have time upon arrival to become familiar with the land they have never seen before arriving to hunt). Despite the difficulty of understanding what is tribal land and what is state land, there is technology available, such as mapping apps, to help people figure out if they are hunting in the proper area. *See* ONX HUNT, <https://www.onxmaps.com/hunt/app> (last visited Mar. 9, 2022) (providing a land ownership map designed for hunters). Even though a client-hunter can enter tribal land while relying on their guide, through the exercise of due care, they should have known where they were located before taking any game and thereby violate the Lacey Act. 16 U.S.C.A. § 3373.

61. 16 U.S.C.A. §§ 3371-72.

62. 16 U.S.C.A. § 3372.

63. *Id.*

64. *See supra* notes 55-63 and accompanying text (discussing the effect of the checkerboard on the Lacey Act); *ANDERSON ET AL.*, *supra* note 58, at 317. *But see* 25 U.S.C.A. § 1304 (West 2022) (providing tribal criminal jurisdiction over non-Indians in limited circumstances through the Violence Against Women Act). *See generally* *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) (finding that sovereign tribes do not have criminal jurisdiction over non-Indians). It should be noted that the Court in *Oliphant v. Suquamish Indian Tribe* based its ruling, in part, on the racist reasoning of *Ex parte Crow Dog* (*Ex parte Kan-Gi-Shun-Ca*), 109 U.S. 556 (1883). Specifically, the Court found that the following quotation “applied . . . to the non-Indian rather than Indian offender, speak equally strongly against the validity of respondents’ contention that Indian tribes, although fully subordinated to the sovereignty of the United States, retain the power to try non-Indians according to their own customs and procedure.” *Oliphant*, 435 U.S. at 211. The quote which the Court relied on, in its true form, reads:

[L]aw, by argument and inference only, is sought to be extended over aliens and strangers; over the members of a community, separated by race, by tradition, by the instincts of a free though savage life, from the authority and power which seeks to impose upon them the restraints of an external and unknown code, and to subject them to the responsibilities of civil conduct, according to rules and penalties of which they could have no previous warning; which judges them by a standard made by others, and not for them, which takes no account of the conditions which should except them from its exactions, and makes no allowance for their inability to understand it. It tries them not by their peers, nor by the customs of their people, nor the law of their land, but by superiors of a different race, according to the law of a social state of which they have an imperfect conception, and which is opposed to the traditions of their history, to the habits of their lives, to the strongest prejudices of their savage nature; one which measures the red man’s revenge by the maxims of the white man’s morality.

violate an underlying state game law are often charged with criminal violations under state, rather than federal, law for their actions.<sup>65</sup> Sovereign tribes, however, do not have the option to punish non-Indians criminally and cannot prosecute the non-Indian client-hunters for the harm they caused the tribe.<sup>66</sup> Thus, federal prosecution is the only avenue for sovereign tribes to punish the client-hunters criminally, who, relying on their guide, violated tribal hunting laws.<sup>67</sup>

However, that does not stop some non-Indians, or nonmembers generally, from claiming that applying the Lacey Act based on tribal law is improper, as seen in *United States v. Big Eagle*.<sup>68</sup> In this case, the defendant argued that because the tribe did not have the jurisdiction to prosecute him, he did not, within the meaning of the Lacey Act, violate tribal law.<sup>69</sup> However, the Eighth Circuit found that the defendant was within the purview of the Lacey Act.<sup>70</sup> Finding that it was

Congress's purpose in the 1981 Lacey Act amendments . . . to provide "comprehensive enforcement of wildlife laws and regulations established by state and local entities." Noting that the Lacey Act's definition of Indian tribal law includes all such laws or regulations within Indian country, the court stated, "Whether the Indian tribe maintains complete jurisdiction to enforce or not—so long as the land is within the Reservation—it is also within the jurisdiction of the United States Government."<sup>71</sup>

The Lacey Act bases violations on applicable law so long as the underlying law is valid<sup>72</sup> and has a "sufficient nexus to wildlife protection . . ." <sup>73</sup> Generally,

*Ex parte Crow Dog*, 109 U.S. at 571 (emphasis added). In *Oliphant* itself, the Court had the good sense to remove the racist language. See *Oliphant*, 435 U.S. at 211 (quoting the excerpt but removing "by the instincts of a free though savage life," "which takes no account of the conditions which should except them from its exactions, and makes no allowance for their inability to understand it[,] "superiors," and "and which is opposed to the traditions of their history, to the habits of their lives, to the strongest prejudices of their savage nature; one which measures the red man's revenge by the maxims of the white man's morality."). Nevertheless, its reliance on this ignorant, hateful, and racist language should be troubling for all who rely on its ultimate holding. See *supra* note 64 (noting the disturbing racist background and reasoning of the *Oliphant* case).

65. Verges, *supra* note 16.

66. See *supra* note 64 (noting the troubling racist background and reasoning of the *Oliphant* case). See generally *Oliphant*, 435 U.S. 191 (providing that sovereign tribes do not have criminal jurisdiction over non-natives); ANDERSON ET AL., *supra* note 58, at 317, 322.

67. See *supra* note 64 (noting the troubling racist background and reasoning of the *Oliphant* case). See generally *Oliphant*, 435 U.S. 191 (providing that sovereign tribes do not have criminal jurisdiction over non-natives); BUREAU OF INDIAN AFFS., *Indian Affairs Manual: Fish, Wildlife and Recreation Authority and Responsibilities* 1 (2017), <https://www.bia.gov/sites/bia.gov/files/assets/public/raca/manual/pdf/idc2-060922.pdf> (discussing wildlife management on reservations); Arielle Zoints, *Whitewood man to admit guiding illegal deer hunts*, OGLALA SIOUX PARKS & RECREATION: LATEST NEWS (June 20, 2019), <http://www.oglalasiouxparksandrec.net/latest-news/whitewood-man-to-admit-guiding-illegal-deer-hunts/> (discussing the federal prosecution after it was brought to the attention of federal authorities by a tribal officer).

68. 881 F.2d 539 (8th Cir. 1989); Anderson, *supra* note 46, at 80.

69. Anderson, *supra* note 46, at 80.

70. *Id.*

71. *Id.* (quoting *Big Eagle*, 881 F.2d at 540-51).

72. *Id.* at 68.

73. *Id.* at 74.

when there is a state or tribal hunting law violation, there is a solid basis for a Lacey prosecution to occur.<sup>74</sup> While the “Lacey Act does not require knowledge of [which] particular law [was] violated by possession or other predicate act, so long as [the] defendant knows of [the act’s] unlawfulness,” the conviction will be valid.<sup>75</sup> To act “knowingly,” the actor must be aware of the act and not act, or fail to act, through ignorance, mistake, or accident.<sup>76</sup>

To act with knowledge does not mean that the actor has to know the act is illegal; instead, “the knowledge requisite to [a] knowing violation of a statute is factual knowledge as distinguished from knowledge of the law.”<sup>77</sup> In addition to not requiring actual knowledge of the law, knowledge does not include an intent to violate the law.<sup>78</sup> Put another way, the charged person just needs to be aware of the conduct that resulted in the violation.<sup>79</sup> However, to be convicted of a misdemeanor Lacey Act violation, the government need only prove that the hunter “*in the exercise of due care should [have] known*” that their actions violated the Lacey Act.<sup>80</sup> Like the felony level of the Lacey Act, the misdemeanor violation counts each violation as a separate offense.<sup>81</sup> Because of this, each time inexperienced client-hunters notice what happen to be illegal acts, a violation of the Lacey Act occurs.<sup>82</sup>

An example of a Lacey Act violation is the case of Brent and Dawn Barton, which has been called “one of the most significant Lacey Act, game-type violations.”<sup>83</sup> On eleven separate occasions, the Bartons and their co-conspirators arranged to ship animals across reservation and state lines from their outfitting business in the Mobridge area.<sup>84</sup> In this scheme, the Bartons guided thirty-six client-hunters from twelve states into criminal conduct by blatantly disregarding tribal law.<sup>85</sup> At one point, the Bartons even instructed a guide to continue hunting

74. *United States v. Lewis*, 240 F.3d 866, 869 (10th Cir. 2001).

75. *United States v. Santillan*, 243 F.3d 1125, 1129 (9th Cir. 2001).

76. *7:03 Knowingly*, in MODEL CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE EIGHTH CIRCUIT 528 (2011), <https://juryinstructions.ca8.uscourts.gov/instructions/criminal/Criminal-Jury-Instructions.pdf>.

77. *Bryan v. United States*, 524 U.S. 184, 192 (1998). *See also 7:03 Knowingly*, *supra* note 76, at 528 (citing *Bryan v. United States*).

78. *See United States v. Hutzell*, 217 F.3d 966, 968 (8th Cir. 2000) (finding that a statute requiring a “knowing” violation does not require knowledge of the law nor intent to violate the law); *see also 7:03 Knowingly*, *supra* note 76, at 528 (citing *United States v. Hutzell*).

79. *United States v. Sinskey*, 119 F.3d 712, 715-16 (8th Cir. 1997). *See also 7:03 Knowingly*, *supra* note 76, at 528 (citing *United States v. Sinskey*).

80. 16 U.S.C.A. § 3373 (emphasis added).

81. *Id.* Under the Lacey Act violation, a felony-level conviction exposes hunters to up to \$20,000 in fines and five years in prison. *Id.*

82. *7:03 Knowingly*, *supra* note 76, at 528. *See also United States v. Fountain*, 277 F.3d 714, 717 (5th Cir. 2001) (discussing the requirement that the act be committed “knowingly”); 38 C.J.S. *Game* § 50 (“The Lacey Act, which makes it unlawful to import fish, wildlife, or plants taken, possessed, transported, or sold in violation of law, does not require knowledge of the particular law violated by the possession or other predicate act, so long as defendant knows of its unlawfulness.”).

83. Verges, *supra* note 16.

84. *Id.*

85. *Id.*

with a client-hunter after being ticketed by a game warden<sup>86</sup> and lying to client-hunters that “[a] game warden said it was OK to hunt without licenses.”<sup>87</sup> Even though the Bartons orchestrated criminal activity, some of their client-hunters were not saved from the state prosecution of their illegal actions.<sup>88</sup>

Unlike the Barton case, *United States v. Rodebaugh*<sup>89</sup> was a rare win for client-hunters because none were indicted.<sup>90</sup> In this case, Dennis Eugene Rodebaugh and his assistant guide, Brian Kunz, illegally placed hundreds of pounds of bait near established tree stands that his clients used to archery hunt elk.<sup>91</sup> Then, through his company, D&S Guide and Outfitter, Rodebaugh would remove the bait before the out-of-state hunters arrived for their guided hunt.<sup>92</sup> Because the hunters only ever hunted from fixed tree stand locations, none could see that D&S Guide and Outfitter had used bait after they removed it.<sup>93</sup> Even after D&S Guide and Outfitter removed the bait, elk would return to the site seeking food or eating the dirt because Rodebaugh and Kunz had conditioned them to do so.<sup>94</sup> Thus, Rodebaugh and Kunz misled the hunters coming to claim a trophy elk into thinking their stand was in a prime location.<sup>95</sup> Ultimately, because of the investigation conducted by the U.S. Fish and Wildlife Service and the Colorado Parks and Wildlife, a jury convicted Rodebaugh of six violations of the Lacey Act.<sup>96</sup> The Rodebaugh case is a rare example of client-hunters not having the requisite knowledge to violate the Lacey Act; however, some were still charged with minor state law violations.<sup>97</sup>

86. Game Wardens are more modernly referred to as Conservation Officers, however, for consistently throughout the piece “game warden” will be used. See BACKROADS LAW: TRUE STORIES OF SOUTH DAKOTA GAME WARDENS, *supra* note †, at 1 (referencing “game warden” as a dated term).

87. Verges, *supra* note 16.

88. *Id.* Tribal members involved in the scheme were also prosecuted by the tribal courts. *Id.*

89. 798 F.3d 1281 (10th Cir. 2015).

90. See U.S. DEP’T OF JUST., *Environmental Crimes Section: Monthly Bulletin* 1, 14 (Jan. 2014), [https://www.justice.gov/sites/default/files/enrd/legacy/2015/04/13/public\\_bulletin\\_FI\\_NAL\\_508\\_version\\_January\\_2014.pdf](https://www.justice.gov/sites/default/files/enrd/legacy/2015/04/13/public_bulletin_FI_NAL_508_version_January_2014.pdf). [hereinafter *Environmental Crimes Section: Monthly Bulletin*] (sentencing the client-hunters for violating the Lacey Act); U.S. DEP’T OF JUST., *Colorado Big Game Outfitter Sentenced to Prison for Six Lacey Act Felonies* (Feb. 13, 2013), <https://www.justice.gov/opa/pr/colorado-big-game-outfitter-sentenced-prison-six-lacey-act-felonies> [hereinafter *Colorado Big Game Outfitter Sentenced to Prison for Six Lacey Act Felonies*].

91. Associated Press, *Colorado hunting outfitter fined, sentenced to prison*, DENVER POST (Feb. 13, 2013, 10:59 AM), <https://www.denverpost.com/2013/02/13/colorado-hunting-outfitter-fined-sentenced-to-prison/>. In Colorado, it is illegal to take big game over bait. *Id.*

92. *Colorado Big Game Outfitter Sentenced to Prison for Six Lacey Act Felonies*, *supra* note 90; Associated Press, *supra* note 91.

93. *Rodebaugh*, 798 F.3d at 1288.

94. *Id.*; Answering Brief for the United States at 33, *Rodebaugh*, 798 F.3d 1281 (No. 13-1081), 2015 WL 222760, at \*25.

95. *Colorado Big Game Outfitter Sentenced to Prison for Six Lacey Act Felonies*, *supra* note 90. Because of his illegal activity, Rodebaugh was able to claim “very high success rates” and reported that “the opportunity to take a shot at an animal[] was in ‘the high 80s or low 90s.’” *Rodebaugh*, 798 F.3d at 1288.

96. *Colorado Big Game Outfitter Sentenced to Prison for Six Lacey Act Felonies*, *supra* note 90; Associated Press, *supra* note 91.

97. See Appellant’s Opening Brief at 19, 54-55, *Rodebaugh*, 798 F.3d 1281 (No. 13-1081), 2015 WL 7006834, at \*19 (describing how even an undercover special agent with the U.S. Fish and Wildlife

A case with a more stereotypical result is the case of John and Kathryn Chauncey.<sup>98</sup> The Chaunceys owned and operated the Rock Creek Ranch in Todd County, South Dakota.<sup>99</sup> Over five years, the Chaunceys and their clients illegally took fifty-six animals, including mule deer, white-tailed deer, hawks, owls, badgers, and turkeys.<sup>100</sup> These animals were valued at over \$70,000.<sup>101</sup> Clients from Michigan, Texas, New Jersey, and elsewhere came to the Rock Creek Ranch and “paid Chauncey thousands of dollars per hunt to participate in illegal hunts at the ranch.”<sup>102</sup> Despite Chauncey knowing that none of the hunters had the proper hunting licenses, he guided hunts, which led to illegal takings of game from South Dakota and the Rosebud Sioux Tribe.<sup>103</sup>

Through the comments of concerned citizens, an investigation into the Rock Creek Ranch began.<sup>104</sup> The investigation by U.S. Fish and Wildlife, South Dakota Game, Fish and Parks, Rosebud Sioux Tribe Wildlife Department, and the Iowa Department of Natural Resources revealed a “large-scale illegal commercial exploitation of South Dakota wildlife resources.”<sup>105</sup> Due to this operation, the U.S. Government indicted nine people with Lacey Act and conspiracy violations.<sup>106</sup> Sixteen other defendants pled guilty to state and federal wildlife violations, some of whom were client-hunters.<sup>107</sup> This criminal operation harmed the sportsmen and the valuable resources of South Dakota.<sup>108</sup> Further, the Chauncey’s illegal actions harmed the client-hunters who relied on them as guides.<sup>109</sup> The client-hunters came into the state to hunt deer, and several left with a criminal record.<sup>110</sup>

## B. MIGRATORY BIRD TREATY ACT

Generally, the Migratory Bird Treaty Act (“MBTA”) “prohibits the take (including killing, capturing, selling, trading, and transport) of protected migratory

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Service did not find evidence of salt on the ground past the animals eating the dirt that had absorbed it, so hunters could not “know” within the meaning of the Lacey Act).

98. *Environmental Crimes Section: Monthly Bulletin*, *supra* note 90, at 14. This case is more stereotypical than *Rodebaugh* because the client-hunters in this case were prosecuted based on their reliance on their guide’s illegal acts, *id.*, due to the scienter requirement discussed above. *See supra* notes 72-82 and accompanying text.

99. *Environmental Crimes Section: Monthly Bulletin*, *supra* note 90, at 14; U.S. ATT’YS OFF. DIST. S.D., *Wildlife Investigation Yields Over \$235,000 in Penalties* (Feb. 12, 2014), <https://www.justice.gov/usao-sd/pr/wildlife-investigation-yields-over-235000-penalties> [hereinafter *Wildlife Investigation Yields Over \$235,000 in Penalties*].

100. *Environmental Crimes Section: Monthly Bulletin*, *supra* note 90, at 14.

101. *Wildlife Investigation Yields Over \$235,000 in Penalties*, *supra* note 99.

102. *Environmental Crimes Section: Monthly Bulletin*, *supra* note 90, at 14.

103. *Id.*

104. *Wildlife Investigation Yields Over \$235,000 in Penalties*, *supra* note 99.

105. *Id.*

106. *Environmental Crimes Section: Monthly Bulletin*, *supra* note 90, at 14.

107. *Wildlife Investigation Yields Over \$235,000 in Penalties*, *supra* note 99.

108. *Id.*

109. *See id.*; *Environmental Crimes Section: Monthly Bulletin*, *supra* note 90, at 14.

110. *See Environmental Crimes Section: Monthly Bulletin*, *supra* note 90, at 14.

bird species without prior authorization by the Department of Interior U.S. Fish and Wildlife Service.”<sup>111</sup> Under the MBTA a “taking” is a deliberate act done “directly and intentionally to migratory birds.”<sup>112</sup> While Congress designed the MBTA to be a strict liability law, some circuits have found that provision to be unconstitutionally vague; however, courts can constitutionally apply the MBTA “to impose criminal penalties on those who did not intend to kill migratory birds.”<sup>113</sup>

There are several punishments under the MBTA based on the conduct involved.<sup>114</sup> Anyone who violates the MBTA is guilty of a misdemeanor and subject to, at most, both a \$15,000 fine and six months imprisonment.<sup>115</sup> However, if a person *knowingly* takes “by any manner whatsoever any migratory bird . . . “ with the intent to, or actually does, sell, offer, or barter that bird, they are guilty of a felony and can be punished by up to \$2,000 and face up to two years imprisonment.<sup>116</sup> If someone is convicted of a baiting violation by instructing the placement of bait, then they can be fined and imprisoned for up to one year.<sup>117</sup> Any equipment used in the illegal taking of migratory birds, including equipment and vehicles, shall be forfeited based on any of these violations.<sup>118</sup>

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111. U.S. FISH & WILDLIFE SERV., *Migratory Bird Treaty Act of 1918*, <https://www.fws.gov/law/migratory-bird-treaty-act-1918> (last visited Mar. 10, 2022) [hereinafter *Migratory Bird Treaty Act*]; 16 U.S.C.A. §§ 703, 705. The MBTA also gives the Secretary of the Interior the power to implement regulations to ensure the MBTA meets its stated purpose. 38 C.J.S. *Game* § 29 (2022). In doing this, the Fish and Wildlife Service must comply with the National Environmental Policy Act (“NEPA”). *Id.* NEPA requires the preparation of an Environmental Impact Study (“EIS”) in certain circumstances; however, in the context of the MBTA, it may be reasonable for the Fish and Wildlife Service not to develop a supplemental EIS or a new Environmental Assessment without unique circumstances or information. *Id.* So long as the regulation enacted under the MBTA is made in compliance with the Administrative Procedures Act (APA), it can only be invalidated if found to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the applicable statutory factors.” 38 C.J.S. *Game* § 30 (2022).

112. 38 *Game* § 28 (2022). *See also* United States v. CITGO Petroleum Corp., 801 F.3d 477, 488-89 (5th Cir. 2015) (applying the Eighth Circuit’s definition of “take”). This can include killing a migratory bird by poisoning. *Id.* at 491-92.

113. 38 C.J.S. *Game* § 26 (2022). Similarly, the portion of the MBTA prohibiting possession of bird feathers of a protected species is a valid provision even though it does not contain a scienter requirement. *Id.* This finding is because “the plain language of the section renders simple possession of the protected feathers unlawful, and like other regulatory acts where the penalties are small and there is no grave harm to offender’s reputation, conduct alone is sufficient.” *Id.* *See also* United States v. Engler, 806 F.2d 425, 435-36 (3d Cir. 1986) (finding that the lack of scienter requirement did not violate Due Process clause because the [MBTA] is “‘a regulatory measure in the interest of public safety’ . . . [and] capture and sale of species protected by the MBTA is not ‘conduct that is wholly passive,’ but more closely resembles conduct ‘that one would hardly be surprised to learn . . . is not innocent.’”); Jamie Auslander et al., *Migratory Bird Treaty Act Liability Rule Finally Is Here, But for How Long*, BEVERIDGE & DIAMOND (Jan. 8, 2021), <https://www.bdlaw.com/publications/migratory-bird-treaty-act-liability-rule-finally-is-here-but-for-how-long/> (discussing the strict liability aspect of the MBTA).

114. 16 U.S.C.A. § 707.

115. 16 U.S.C.A. § 707(a).

116. 16 U.S.C.A. § 707(b).

117. 16 U.S.C.A. § 707(c).

118. 16 U.S.C.A. § 707(d).

When Congress enacted the MBTA, it transferred regulatory authority over migratory birds from the states to Congress.<sup>119</sup> This authority remains whether or not the bird actually migrates.<sup>120</sup> The MBTA covers an extensive list of over one thousand bird species.<sup>121</sup> This list was recently updated in 2020, adding sixty-seven new species.<sup>122</sup> The Secretary of the Interior has authority through the MBTA to create regulations; these regulations largely govern the taking of Migratory *game* birds covered by the MBTA.<sup>123</sup> Even with the federal regulations, the MBTA does not prevent states from regulating migratory birds; states still have the right to implement any regulation that is not inconsistent with the MBTA.<sup>124</sup> For example, South Dakota governs the taking of several species covered by the MBTA and imposes its own rules upon hunters who come to hunt those species.<sup>125</sup> However, many of South Dakota's regulations and comments

119. 38 C.J.S. *Game* § 24 (2022). Notably, the MBTA does not apply to the federal government. *Id.* It also allows the U.S. Fish and Wildlife service to “issue permits for the removal of birds to be ‘used for scientific purposes,’ allows the removal of birds of one species, even if the intent is principally to benefit another species; nothing in the Act or the international conventions it implemented limited ‘scientific purposes’ to only the species taken.” 38 C.J.S. *Game* § 28.

120. 16 U.S.C.A. § 711; 38 C.J.S. *Game* § 27 (2022).

121. See 50 C.F.R. § 10.13(c) (2021) (listing the 1,093 birds protected by the MBTA).

122. See *Migratory Bird Treaty Act*, *supra* note 111 (noting the 2020 updated and providing access to the “10.13” list); Revised List of Migratory Birds, 85 Fed. Reg. 21,282, 21,284-88 (May 18, 2020) (to be codified as 50 C.F.R. pt. 10). The MBTA applies if the bird meets one or more of three criteria:

1. It occurs in the United States or U.S. territories as the result of natural biological or ecological processes and is currently, or was previously listed as, a species or part of a family protected by one of the four international treaties or their amendments. . . .
2. Revised taxonomy results in it being newly split from a species that was previously on the list, and the new species occurs in the United States or U.S. territories as the result of natural biological or ecological processes. . . .
3. New evidence exists for its natural occurrence in the United States or U.S. territories resulting from natural distributional changes and the species occurs in a protected family.

*Migratory Bird Treaty Act*, *supra* note 111. See also Revised List of Migratory Birds, 85 Fed. Reg. at 21,283 (discussing how to determine which species are added to the 10.13 list). Despite its expansive coverage the MBTA does not cover exotic birds. 38 C.J.S. *Game* § 27. Exotic birds, also called “wild birds,” are covered by their own act, the Wild Bird Conservation Act (“WBCA”). 16 U.S.C.A. §§ 4901-16 (West 2013); U.S. FISH & WILDLIFE SERV., *Wild Bird Conservation Act*, <https://www.fws.gov/international/laws-treaties-agreements/us-conservation-laws/wild-bird-conservation-act.html#> (last visited Nov. 18, 2021) [hereinafter *Wild Bird Conservation Act*]. The WBCA was passed “to ensure that exotic bird species are not harmed by international trade and encourages wild bird conservation programs in countries of origin.” *Wild Bird Conservation Act*, *supra* note 122.

123. 38 C.J.S. *Game* § 29; 50 C.F.R. § 20.1 (2022).

124. 38 C.J.S. *Game* § 25 (2022); 16 U.S.C.A. § 708. See generally *Carey v. South Dakota*, 250 U.S. 118 (1919) (finding that South Dakota's law forbidding the shipment by a wild duck carrier is valid regardless of the season's status or whether or not the ducks were lawfully taken, and is not inconsistent with the MBTA because the MBTA does not regulate shipping); *South Dakota v. Kemp*, 44 N.W.2d 214 (S.D. 1950) (finding that the South Dakota statute providing that no license would be granted to a non-resident for hunting, taking, or killing waterfowl within the MBTA was within the state's authority to further protect migratory birds); *Calipatria Land Co. v. Lujan*, 793 F. Supp. 241 (S.D. Cal. 1990) (finding that a regulation allowing hunters to hunt near grain feeding clubs was inconsistent with the MBTA); *Noe v. Henderson*, 456 F.3d 868 (8th Cir. 2006) (finding that states can require a permit for the possession or sale of a migratory bird protected by the MBTA).

125. SOUTH DAKOTA GAME, FISH, & PARKS, *SOUTH DAKOTA HUNTING AND TRAPPING HANDBOOK* 1, 7 (2021), [https://gfp.sd.gov/userdocs/docs/2021\\_huntingandtrappinghandbook\\_flip.pdf](https://gfp.sd.gov/userdocs/docs/2021_huntingandtrappinghandbook_flip.pdf) [hereinafter *SOUTH DAKOTA HUNTING AND TRAPPING HANDBOOK*].

within their hunting and trapping handbook mirror these federal regulations regarding the hunting of migratory game birds.<sup>126</sup>

While the MBTA does not cover South Dakota's famous pheasant, other birds such as dove, snipe, sandhill crane, ducks, geese, coot, and tundra swan<sup>127</sup> all require Migratory Bird Certification<sup>128</sup> in addition to a habitat stamp and a variation of licenses.<sup>129</sup> Each of these birds has a limited daily take.<sup>130</sup> Within the limits of each type of bird, the limitations are further restricted based upon the specific animal taken through the hunt.<sup>131</sup> For example, through South Dakota's "traditional tier 1 daily limit," you can take up to six ducks per day.<sup>132</sup> However, that six duck limit cannot be comprised of more than "5 mallards, which may include no more than 2 hens[,] 3 wood ducks[,] 1 scaup[,] 2 redheads[,] 2 canvasback[,] 1 pintail[, or] 2 - bonus blue-winged teal (first 16 days of the season only)," all of which are protected by the MBTA.<sup>133</sup> These rules are the same as the federal requirements for take limits.<sup>134</sup> However, the duck species' limitations within the larger ducks limit are relatively straightforward compared to restrictions on geese.<sup>135</sup> Because of the complexity of the MBTA, South Dakota provides a

126. Compare *id.* at 36-41 (explaining federal laws regarding hunting migratory game birds), with 50 C.F.R. § 20 (regulating migratory bird hunting).

127. A tundra swan must be applied for and received through the lottery drawing. SOUTH DAKOTA HUNTING AND TRAPPING HANDBOOK, *supra* note 125, at 7.

128. A migratory bird certification is a part of the U.S. Fish and Wildlife's Harvest Information Program ("HIP"). U.S. FISH & WILDLIFE SERV., *Harvest Information Program*, <https://www.fws.gov/birds/surveys-and-data/harvest-surveys/harvest-information-program.php> (last visited Nov. 18, 2021) [hereinafter *Harvest Information Program*]. The HIP is used to generate estimates of the hunting activity of migratory birds. *Id.* It is also helpful to determine when hunting seasons should be, the bag limits on those species, and population management. *Id.* HIP was launched in 1999 and requires duck, geese, coot, brant, swan, dove, woodcock, rails, snipe, sandhill crane, band-tailed pigeon, or gallinule hunters to participate. *Id.* The hunter must keep their certification with them whenever they hunt migratory birds. *Id.* This certification includes the hunter's identity, address, and other identifying information in addition to questions about the previous year's hunting experience, including the type of birds that were hunted and how many of those birds were taken. *Id.* In South Dakota specifically, the migratory bird certification, a form of HIP registration, costs five dollars for hunters to acquire. SOUTH DAKOTA HUNTING AND TRAPPING HANDBOOK, *supra* note 125, at 13.

129. SOUTH DAKOTA HUNTING AND TRAPPING HANDBOOK, *supra* note 125, at 7. These licenses can include either a small game license, one-day small game license, combination license, or youth small game license. *Id.* In addition to the Migratory Bird Certification and a license, hunters sixteen and older wanting to hunt ducks, geese, or tundra swan require a federal waterfowl stamp. *Id.*

130. *Id.* at 32-35, 47.

131. *Id.*

132. *Id.* at 32.

133. *Id.*

134. Migratory Bird Hunting; Proposed 2021-22 Frameworks, and Special Procedures for Issuance of Annual Hunting Regulations, 86 Fed. Reg. 10,622, 10,634 (Feb. 22, 2021) (to be codified as 50 C.F.R. § 20). The Central Flyway manages South Dakota. *About*, CENTRAL FLYWAY COUNCIL, <https://centralflyway.org/about/> (last visited Mar. 12, 2022) [hereinafter *Flyways*]. Each Flyway creates a data book with the results of several monitoring programs. U.S. FISH & WILDLIFE SERV., *Migratory Bird Flyway Data Books*, <https://www.fws.gov/library/collections/migratory-bird-flyway-data-books> (last visited Mar. 12, 2022) [hereinafter *Flyway Data Books*]. See generally James A. Dubovsky, *Central Flyway: Harvest and Population Survey Data Book*, U.S. FISH & WILDLIFE SERV. (2020), [https://www.fws.gov/sites/default/files/documents/central\\_flyway\\_databook\\_2020.pdf](https://www.fws.gov/sites/default/files/documents/central_flyway_databook_2020.pdf) (discussing the data generated by the monitoring programs for the central flyway).

135. SOUTH DAKOTA HUNTING AND TRAPPING HANDBOOK, *supra* note 125, at 32-35. Like ducks, the different subspecies of geese are managed individually; however, more complexly. *Id.* The light goose



section of its hunting and trapping handbook explaining how South Dakota's regulations relate to the MBTA.<sup>136</sup> These pages include popular subjects relating to the MBTA, including definitions, rules, and even list "illegal hunting methods" in plain language.<sup>137</sup>

Another violation of the MBTA is to hunt on or over bait.<sup>138</sup> The MBTA prohibits taking migratory birds by the aid of bait, over a baited area, and placing or directing the placing of bait before allowing the hunting of that area.<sup>139</sup> A baited area is "[a]ny area on which salt, grain or other feed has been placed, exposed, deposited, distributed or scattered, if that salt, grain or other feed could serve as a lure or attraction for migratory game birds to, on or over areas where hunters are attempting to take them."<sup>140</sup> Even after removing bait from the area, the area is still considered baited for another ten days.<sup>141</sup> While there is an exception for bona fide agricultural operations, including but not limited to planting and harvesting,<sup>142</sup> this exception is limited.<sup>143</sup> So limited, in fact, that

has a daily limit of fifty, the white-fronted goose has a daily limit of three, and Canada geese, including the brant and cackling geese, have the most complicated limit system, with variations depending on the time of year and the area of the hunt. *Id.* at 32-34. There are three times, called units, where residents and non-residents can hunt Canada geese. *Id.* However, the August Management take is available for residents only and has a limit of fifteen geese per day. *Id.* at 32. The daily take is further divided during the first unit, September 1 – December 16. *Id.* at 33. During September, Canada goose has a daily limit of fifteen, while the remainder of the first unit has a limit of eight. *Id.* During the next unit, November 1 - February 13, taking place in areas not included in unit one or three, the daily limit is four Canada goose. *Id.* Finally, during unit three, January 8 - 16, taking place only in Bennett County, the daily limit is four geese. *Id.* at 34. *See id.* (depicting counties covered by the three different units of Canada goose season).

136. *See id.* at 36-41 (describing the federal laws for hunting migratory game birds); *see also id.* at 42-45 (discussing the transportation and storage requirements of small game and waterfowl, including migratory bird species).

137. *Id.* at 36-41. One entire page is dedicated to the illegal methods to hunt migratory game birds. *Id.* at 38.

138. 16 U.S.C.A. § 704.

139. 38 C.J.S. *Game* § 28; 16 U.S.C.A. § 704.

140. SOUTH DAKOTA HUNTING AND TRAPPING HANDBOOK, *supra* note 125, at 37. *But see* United States v. Manning, 787 F.2d 431, 438 (8th Cir. 1986) (noting that a "baited area" will "vary depending on such factors as wind and terrain" and, thus, is "not subject to [an] exact definition").

141. SOUTH DAKOTA HUNTING AND TRAPPING HANDBOOK, *supra* note 125, at 37.

142. 38 C.J.S. *Game* § 28. Generally, normal agricultural operation is "normal agricultural planting, harvesting, post-harvest manipulation or agricultural practice that is conducted in accordance with official recommendations of State Extension Specialists of the Cooperative Extension Service of the U.S. Department of Agriculture." SOUTH DAKOTA HUNTING AND TRAPPING HANDBOOK, *supra* note 125, at 40. Each of these terms is defined in more detail. *Id.* at 39-40. "Manipulation" within that definition is defined as "[t]he alteration of natural vegetation or agricultural crops by activities that include but are not limited to mowing, shredding, disking, rolling, chopping, trampling, flattening, burning or herbicide treatments." *Id.* at 39. Manipulation does not include scattering grain or seed or other feed "after removal from or storage on the field where grown." *Id.* Additionally, "normal planting, harvesting, post-harvest manipulation" is defined as "[a] planting or harvesting undertaken for the purpose of producing and gathering a crop or manipulation after such harvest and removal of grain, that is conducted in accordance with official recommendations of State Extension Specialists of the Cooperative Extension Service of the U.S. Department of Agriculture." *Id.* at 40.

143. 38 C.J.S. *Game* § 28.

the Eighth Circuit determined a late corn harvest was not “normal harvesting,” meaning the field was considered a baited area under the MBTA.<sup>144</sup>

Baiting can be devastating.<sup>145</sup> Not only can baiting negatively affect other hunters who try to hunt lawfully, but baiting can also contribute to changes in migratory flight patterns.<sup>146</sup> In the case of one Idaho man, Gregory Obendorf, that was precisely what happened.<sup>147</sup> Over the course of a seven-year conspiracy to bait migratory game birds, Obendorf contributed to changes in the migratory flight patterns of ducks and geese.<sup>148</sup> Because of these violations, Obendorf was convicted and sentenced for violations of the MBTA.<sup>149</sup> More recently, in New York, William Saiff III, a host of a popular hunting program, admitted to leading hunters on illegal waterfowl hunts by baiting ponds.<sup>150</sup> Saiff charged seventeen hunters \$300 per day to take part in his illegal baiting operation.<sup>151</sup> While this scheme occurred, Saiff was on probation for a 2017 MBTA conviction, also for unlawful baiting.<sup>152</sup> Saiff was convicted and sentenced under the MBTA.<sup>153</sup>

Finally, there were also several MBTA violations in addition to the Lacey Act violations involved in the Chauncey case.<sup>154</sup> Kathryn Chauncey faced federal and state charges for her actions, ultimately pleading guilty to violating the MBTA.<sup>155</sup> Seven client-hunter defendants were also charged and sentenced to misdemeanor violations of the Lacey Act and the MBTA because of the Chaunceys’ services.<sup>156</sup> Altogether, fines in this case totaled over \$235,000.<sup>157</sup>

### C. HEALTH AND SAFETY RISKS TO HUNTERS

Hunting comes with a variety of health and safety risks.<sup>158</sup> When it comes to health risks, hunters can face a wide range of injuries, from something as small

144. *Id.* See generally *Falk v. United States ex rel. Dep’t of Interior*, 452 F.3d 951 (8th Cir. 2006) (finding that the Fish and Wildlife Service did not abuse its discretion in finding that hunting over a cornfield that was harvested late was prohibited).

145. U.S. FISH & WILDLIFE SERV., *Idaho Man Sentenced to Jail in Waterfowl Baiting Case* (Aug. 1, 2016), <https://www.fws.gov/press-release/2016-08/idaho-man-sentenced-jail-waterfowl-baiting-case> [hereinafter *Idaho Man Sentenced to Jail in Waterfowl Baiting Case*].

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. *Henderson hunting guide pleads guilty to hunting waterfowl over bait*, 7 NEWS (June 9, 2021, 5:06 PM), <https://www.wnnytv.com/2021/06/09/henderson-hunting-guide-pleads-guilty-hunting-waterfowl-over-bait/>.

151. *Id.*

152. *Id.*

153. *Henderson hunting guide ordered to pay fine, wear ankle bracelet*, 7 NEWS (Oct. 7, 2021, 2:33 PM), <https://www.wnnytv.com/2021/10/07/henderson-hunting-guide-ordered-pay-fine-wear-ankle-bracelet/>. Saiff was also convicted of a violation of the Lacey Act. *Id.*

154. *Wildlife Investigation Yields Over \$235,000 in Penalties*, *supra* note 99.

155. *Id.*

156. *Environmental Crimes Section: Monthly Bulletin*, *supra* note 90, at 14.

157. *Wildlife Investigation Yields Over \$235,000 in Penalties*, *supra* note 99.

158. *Preparing for Risks*, *supra* note 24.

as a twisted ankle to something as serious as death.<sup>159</sup> As one would expect, hunting mandates a large amount of outdoor physical activity that can worsen or cause attacks of certain medical conditions, like asthma or heart conditions.<sup>160</sup> Hunters also risk infections or diseases through either insect bites or the improper handling of animal tissue after a successful take.<sup>161</sup> Further, shooting the animal in the wrong spot can contaminate the meat and cause illness to whoever eats the meat.<sup>162</sup>

Hunting also carries a risk of accidental injury.<sup>163</sup> While some of these injuries can be minor,<sup>164</sup> other mishaps can be more devastating.<sup>165</sup> These unexpected injuries commonly happen when using motorized vehicles to get to hunting locations or using a tree stand.<sup>166</sup> The game being hunted or encountered on the excursion can also harm hunters.<sup>167</sup> Any of these causes can lead to injuries demanding hospitalization.<sup>168</sup> Risks of accidents and injury to client-hunters only increase when trekking unfamiliar terrain in isolated areas, especially in extreme weather.<sup>169</sup>

In South Dakota, the weather can cause hunters severe injury if they are not prepared.<sup>170</sup> Most hunting seasons in South Dakota extend between September and February.<sup>171</sup> For example, January, the coldest month of the year, sees an average high of thirty-three degrees and an average low of two degrees

159. See *Hidden dangers: Can hunting be hazardous to your health?*, CUSTOM TURRET SYS. (Apr. 2, 2013), <http://customturretssystems.com/hidden-dangers-can-hunting-be-hazardous-to-your-health/> (discussing the risk of injury and disease while hunting).

160. *Physical Conditioning*, HUNTER-ED, [https://www.hunter-ed.com/national/studyGuide/Physical-Conditioning/201099\\_93085/](https://www.hunter-ed.com/national/studyGuide/Physical-Conditioning/201099_93085/) (last visited Oct. 12, 2021).

161. *Disease precautions for hunters*, AM. VETERINARY MED. ASS'N, <https://www.avma.org/resources/public-health/disease-precautions-hunters> (last visited Oct. 12, 2021).

162. *Id.*

163. *Preparing for Risks*, *supra* note 24.

164. *Hidden dangers: Can hunting be hazardous to your health?*, *supra* note 159.

165. *Common Injuries Suffered In Hunting Accidents*, MONSEES & MAYER, P.C. (Nov. 28, 2017), <https://monseesmayer.com/common-injuries-suffered-hunting-accidents/>.

166. *Id.*; *Top Five Risks Hunting Guides Guard Against with a Good Hunting Guide Insurance Plan*, *supra* note 24.

167. *Top Five Risks Hunting Guides Guard Against with a Good Hunting Guide Insurance Plan*, *supra* note 24. For example, hunting in the early fall can lead to encounters with the poisonous prairie rattlesnake. *Snakes and Early Season Hunting – Things to Watch Out For*, WINCHESTER, <https://winchester.com/Blog/2016/09/snakes-and-early-season-hunting-things-to-watch-out-for> (last visited Jan. 26, 2022). Additionally, injured animals can be dangerous to hunters who do not kill the animal with their first shot. *Top Five Risks Hunting Guides Guard Against with a Good Hunting Guide Insurance Plan*, *supra* note 24.

168. See *Common Injuries Suffered In Hunting Accidents*, *supra* note 165 (discussing severe injuries that can occur while hunting).

169. *Preparing for Risks*, *supra* note 24.

170. See *Clothing*, *supra* note 24 (discussing clothing hunters should wear to avoid injury and prepare for poor weather); *Unit 8, Topic 4: Coping with Extreme Weather*, *supra* note 24 (discussing risks associated with extreme weather and treatment); *Preparing for Risks*, *supra* note 24 (discussing the need to prepare for hunts).

171. See SOUTH DAKOTA HUNTING AND TRAPPING HANDBOOK, *supra* note 125, at 118-19 (listing seasons for various game).

Fahrenheit.<sup>172</sup> Additionally, hunters rarely hunt during the heat of the day, with prime hunting hours being when temperatures are typically lower.<sup>173</sup> To put the danger of those temperatures into perspective, frostbite becomes a risk when temperatures drop below thirty-two degrees Fahrenheit,<sup>174</sup> and hypothermia, while at the most significant risk at very low temperatures, can begin to occur at forty degrees Fahrenheit if the person is chilled in any way.<sup>175</sup>

This chill can quickly occur depending on the snow accumulated throughout the winter season;<sup>176</sup> however, this danger is exceptionally significant when hunting waterfowl from boats in frigid water.<sup>177</sup> If a boat were overturned, client-hunters would be dumped into freezing waters, often somewhat covered with ice.<sup>178</sup> Not only does this expose hunters to risks of hypothermia, but also the immediate risk of drowning.<sup>179</sup> In addition to the health risks severe weather can impose on client-hunters, severe weather can also decrease visibility and increase the risk of client-hunters becoming lost.<sup>180</sup> Getting lost in South Dakota's terrain is a risk to hunters, even those from South Dakota, due to the vastness of the millions of acres within South Dakota.<sup>181</sup> No matter how experienced the person, hunters go missing in South Dakota each year.<sup>182</sup>

In addition to the risks imposed by the environment, there are also risks from the hunters themselves.<sup>183</sup> Hunters risk mishandling deadly weapons, putting themselves and the rest of their hunting party at risk.<sup>184</sup> The four leading causes of hunting-related shooting accidents are judgment mistakes, safety violations,

172. *Monthly weather forecast and Climate: South Dakota, USA*, WEATHER ATLAS, [https://www.weather-us.com/en/south-dakota-usa-climate#climate\\_text\\_16](https://www.weather-us.com/en/south-dakota-usa-climate#climate_text_16) (last visited Oct. 12, 2021).

173. *The Best Hunting Times*, ONX (July 28, 2021), <https://www.onxmaps.com/hunt/blog/best-hunting-times>.

174. Jennifer Earl, *At what temperature can you get frostbite? Signs, symptoms and everything else to know*, FOX NEWS (Jan. 11, 2022), <https://www.foxnews.com/health/how-long-does-it-take-to-get-frostbite-5-ways-to-prevent-the-condition-in-freezing-temperatures>.

175. U.S. FOREST SERV., *Hypothermia*, <https://www.fs.usda.gov/visit/know-before-you-go/hypothermia> (last visited Nov. 18, 2021).

176. *Monthly weather forecast and Climate: South Dakota, USA*, *supra* note 172.

177. *Trip Preparation When Hunting with Boats*, HUNTER-ED, [https://www.hunter-ed.com/national/studyGuide/Trip-Preparation-When-Hunting-With-Boats/201099\\_93041/](https://www.hunter-ed.com/national/studyGuide/Trip-Preparation-When-Hunting-With-Boats/201099_93041/) (last visited Oct. 12, 2021).

178. *Surviving Water Emergencies*, HUNTER-ED, [https://www.hunter-ed.com/national/studyGuide/Surviving-Water-Emergencies/201099\\_93044/](https://www.hunter-ed.com/national/studyGuide/Surviving-Water-Emergencies/201099_93044/) (last visited Oct. 12, 2021).

179. *Id.*

180. See John McLaughlin, *After two days stuck in a blizzard, missing elderly hunters found alive*, RAPID CITY J. (Apr. 30, 2014), [https://rapidcityjournal.com/news/local/after-two-days-stuck-in-a-blizzard-missing-elderly-hunters-found-alive/article\\_41d79bd3-bea2-57e5-b73b-2388980d0ad1.html](https://rapidcityjournal.com/news/local/after-two-days-stuck-in-a-blizzard-missing-elderly-hunters-found-alive/article_41d79bd3-bea2-57e5-b73b-2388980d0ad1.html) (discussing how two local hunters became lost when a spring blizzard hit while two brothers were hunting and their vehicle broke down).

181. *Hunters go missing in the Black Hills yearly, this is how hunters can stay safe*, NEWS CTR. 1 (Oct. 12, 2020), <https://www.newscenter1.tv/hunters-go-missing-in-the-black-hills-yearly-this-is-how-hunters-can-stay-safe2/>.

182. *Id.*

183. *Hunting Incidents*, HUNTER-ED, [https://www.hunter-ed.com/national/studyGuide/Hunting-Incidents/201099\\_92996/](https://www.hunter-ed.com/national/studyGuide/Hunting-Incidents/201099_92996/) (last visited Oct. 12, 2021).

184. *Preparing for Risks*, *supra* note 24; *Hunting Incidents*, *supra* note 183.

lack of control and practice, and mechanical failures of weapons.<sup>185</sup> These lead to the most common accidents: inability to identify the target, swinging on game,<sup>186</sup> careless weapon handling, and hitting a victim out of a shooter's sight.<sup>187</sup>

### III. REGULATING HUNTING GUIDES AND OUTFITTERS

South Dakota has no licensing laws or regulations related to hunting guides or outfitters.<sup>188</sup> In all of South Dakota's laws, hunting outfitters or hunting guides are mentioned a grand total of four times between the administrative regulations and the South Dakota Codified Laws.<sup>189</sup> However, in South Dakota, hunting guides and outfitters qualify as a "recreational service."<sup>190</sup> Even searching "recreational service," the code lists no licensing requirements.<sup>191</sup> Instead, any mention of outfitters, guides, or recreational services within South Dakota's regulations or code provisions relate to taxation or prohibiting areas where guides can lead hunters.<sup>192</sup> Because of South Dakota's non-existent licensing

185. *Main Causes of Hunting Incidents*, *supra* note 24.

186. Swinging on game is a technique to lead targets at long distances. *Leading the Target: Swing-Through Method*, HUNTER-ED, [https://www.hunter-ed.com/national/studyGuide/Leading-the-Target-Swing-Through-Method/201099\\_92901/](https://www.hunter-ed.com/national/studyGuide/Leading-the-Target-Swing-Through-Method/201099_92901/) (last visited Nov. 18, 2021). This technique is performed by pointing the weapon, often a shotgun, at the moving target and moving, or "swinging" with it. *Id.* "In other words, literally 'swing through' the target and fire at a blank space in front of the target." *Id.* The danger with using this technique occurs when the hunter allows another person to enter the zone of fire. *Maintaining Your Safe Zone-of-Fire*, HUNTER-ED, [https://www.hunter-ed.com/national/studyGuide/Maintaining-Your-Safe-Zone-of-Fire/201099\\_93021/](https://www.hunter-ed.com/national/studyGuide/Maintaining-Your-Safe-Zone-of-Fire/201099_93021/) (last visited Nov. 18, 2021).

187. *Main Causes of Hunting Incidents*, *supra* note 24.

188. South Dakota Outfitter and Guide Laws, WESTLAW, <https://1.next.westlaw.com> (search "(hunt! or fish!)/s (guide or outfit!)" with the jurisdiction limited to "South Dakota" while searching for materials "regulations," "statutes & court rules," and "administrative decisions & guidance") (last visited Feb. 2, 2022); South Dakota Recreational Service Laws, WESTLAW, <https://1.next.westlaw.com> (search "recreational service" with the jurisdiction limited to "South Dakota" while searching for materials "regulations," "statutes & court rules," and "administrative decisions & guidance") (last visited Feb. 2, 2022).

189. South Dakota Outfitter and Guide Laws, *supra* note 188. Notably, when searching the one administrative rule that came up in the search, neither regulation has guiding within their language; however, guides are mentioned in the example portion. *See* S.D. ADMIN. R. 64:09:01:19 (1995) (regulating boats but using the delivery of a boat to a fishing guide as an example).

190. SDCL § 10-45D-1 (2020).

191. South Dakota Recreational Service Laws, *supra* note 188.

192. *See supra* note 188 (discussing search parameters). From these searching parameters, seventeen results were statutes and court rules, five were regulations, and none were in the form of an administrative decision and guidance; however, not all were related to guiding or outfitting services. *See* S.D. ADMIN. R. 64:06:02:99 (2010) (stating that, for tax purposes, a fitness club is not a recreational service); S.D. ADMIN. R. 70:04:07:01 (2013) (stating that as it applies to highway signs, a recreational service is a tourist-oriented business); S.D. ADMIN. R. 67:16:41:10 (2021) (stating that the department of social services does not cover claims for mental health services that involve recreational services); S.D. ADMIN. R. 64:09:01:19 (stating that boats are not subject to use tax if it is used for promotional or demonstrational purposes, providing an example as it relates to a fishing guide); S.D. ADMIN. R. 41:06:61:06 (2021) (stating requirements, restrictions, conditions, and procedures that apply to mountain lion hunting, cross referencing SDCL § 41-4-13 (2004 & Supp. 2022), which says that hunting guide activities are barred from certain state owned or managed areas); SDCL §§ 10-45-69.1 to -69.10 (repealed 2002) (repealed measures relating to recreational services); SDCL § 10-45D-1 (defining guiding and outfitting services as recreational services for the purpose of gross taxes on visitor related businesses); SDCL § 42-2-4 (2004)

requirements, this section will focus on the regulatory schemes found within Colorado, the four representative sovereign tribes of the Oceti Sakowin Nation, and Wyoming.<sup>193</sup>

While some of these regulations can seem rigorous compared to South Dakota's hands-off approach, none of the state or tribal laws summarized are the most stringent regulations in the nation.<sup>194</sup> Instead, each jurisdiction was chosen because of its proximity to South Dakota and the variation of regulatory styles.<sup>195</sup> Colorado was chosen because it generates more than \$3.25 billion in revenue through hunting and fishing and provides a regulatory scheme that is less rigorous than Wyoming's.<sup>196</sup> The representative sovereign tribes of the Oceti Sakowin Nation were chosen because they prove that the regulation of guides and outfitters is possible within South Dakota.<sup>197</sup> Finally, Wyoming was chosen because of its similarity to South Dakota, both in its political beliefs and in the fact that hunting and fishing generate over one billion dollars in revenue for the state.<sup>198</sup>

While these governmental bodies have their unique regulatory system, which will be examined in more detail below, they have several provisions in common.<sup>199</sup> For example, in every jurisdiction examined below, the person

(stating that public corporations or boards operating recreational systems can accept gifts for recreational services); SDCL § 10-45D-2 (2020) (imposing a one and a half percent tax on gross receipts from recreational services); SDCL § 41-23-13 (2004 & Supp. 2022) (stating that after an owner of private property notifies the department of game, fish, and parks on a nonmeandered lake marked by the owner the department will identify the marked area on any map, guide, or website they maintain to assist the public in hunting or fishing); SDCL § 41-4-13 (stating that a hunting guide cannot guide hunts in certain areas within the state and that a violation of this provision is a class 1 misdemeanor); SDCL § 41-4-12 (2004) (defining hunting guide for the purposes of SDCL § 41-4-13); SDCL § 53-1-2 (2017) (providing the essential elements of a contract, citing two cases related to hunting guiding services). Thus, only four relevant laws apply to guiding and outfitting services from that list of results. *See* SDCL § 41-4-13 (stating that a hunting guide cannot guide hunts in certain areas within the state and that a violation of this provision is a class 1 misdemeanor); SDCL § 41-4-12 (defining hunting guide for the purposes of SDCL § 41-4-13); SDCL § 10-45D-1 (defining guiding and outfitting services as recreational services for the purpose of gross taxes on visitor related businesses); SDCL § 10-45D-2 (imposing a one and a half percent tax on gross receipts from recreational services).

193. *See infra* Parts III.A-C.

194. *See, e.g.*, ALASKA STAT. §§ 08-54-10 to -790 (West 2021) (providing twenty-three enforceable statutes regarding the licensing of guide, outfitter, and game transportation businesses, which is more than Wyoming's fourteen enforceable statutes); ALASKA ADMIN. CODE tit. 12, §§ 75.100-990 (West 2022) (providing thirty-four regulations regarding the licensing of guide, outfitter, and game transportation businesses, which is more than Colorado's ten or Wyoming's thirty-one regulations).

195. *See infra* Parts III.A-C.

196. *Benefits for All*, COLORADO WILDLIFE COUNCIL, <https://cowildlifecouncil.org/benefits> (last visited Jan. 25, 2022). *Compare* Part III.A (discussing Colorado's regulatory scheme), *with* Part III.C (discussing Wyoming's regulatory scheme).

197. *See supra* note 56-57 and accompanying text; *see also infra* Part III.B.

198. Melodie Edwards, *Hunting And Fishing Generate Over \$1 Billion A Year In Wyoming*, WYO. PUB. RADIO (Dec. 9, 2016, 4:06 PM), <https://www.wyomingpublicmedia.org/natural-resources-energy/2016-12-09/hunting-and-fishing-generate-over-1-billion-a-year-in-wyoming>. *Compare Wyoming, 270TOWIN*, <https://www.270towin.com/states/Wyoming> (last visited Jan. 25, 2022) (noting that Wyoming is a Republican controlled state with 69.9% of voters voting Republican in the last presidential election), *with South Dakota, 270TOWIN*, [https://www.270towin.com/states/South\\_Dakota](https://www.270towin.com/states/South_Dakota) (last visited Jan. 25, 2022) (noting that South Dakota is a Republican controlled state with 61.8% of voters voting Republican in the last presidential election).

199. *See infra* notes 200-206.

seeking to be a guide or outfitter must be an adult to apply.<sup>200</sup> Additionally, several jurisdictions require that the guide or outfitter have insurance to protect against injury to a person or property.<sup>201</sup> Another standard provision is that the applicant cannot be a felon and must be certified in CPR and first aid.<sup>202</sup> Finally, many of these jurisdictions also require the guide or outfitter to provide proof of the necessary prerequisites to hunt the land they offer services on and ensure their hunters have the necessary licenses.<sup>203</sup>

In addition to these regulations, it is also common for these regulatory schemes to implement an ethical code or rules of professional conduct.<sup>204</sup> The violation of this code can lead to disciplinary action or revocation of a license.<sup>205</sup> In addition, the ethical code often protects against fraudulent misrepresentation, mandates reporting of illegal activity, maintains standards for the health and safety of hunters, sets requirements for communicating with hunters, and mandates cooperation with hunters, landowners, enforcement agencies, and the relevant regulatory body.<sup>206</sup>

While the above provisions are geared towards regulating guides, many of the same basic requirements apply to outfitters.<sup>207</sup> These requirements are often similar because guides and outfitters offer similar services; however, they are

200. COLO. REV. STAT. § 12-145-106 (West 2022) (requiring the applicant be at least eighteen); ROSEBUD SIOUX TRIBE GAME, & FISH & PARKS DEP'T, *RST Certified/Registered Guide Requirements 1*, 1, [http://www.rstgfp.net/image/cache/guide\\_regs.pdf](http://www.rstgfp.net/image/cache/guide_regs.pdf) [*RST Certified/Registered Guide Requirements*] (last visited Oct. 21, 2021) (requiring that the applicant be at least eighteen); YANKTON SIOUX TRIBAL CODE § 11-13-010 (1995) (requiring the applicant be eighteen); WYO. STAT. ANN. § 23-2-412 (West 2021) (requiring the applicant be at least eighteen).

201. COLO. REV. STAT. § 12-145-108 (West 2019) (requiring insurance); STANDING ROCK GAME & FISH, *Standing Rock Guides*, <http://gameandfish.standingrock.org/standing-rock-guides/> [hereinafter *Standing Rock Guides*] (last visited Oct. 20, 2021) (requiring insurance); WYO. STAT. ANN. § 23-2-413 (West 2021) (requiring insurance).

202. COLO. REV. STAT. § 12-145-106 (requiring first aid training); COLO. REV. STAT. § 12-145-109 (West 2019) (stating that a guide can be punished if they are convicted of a felony); *RST Certified/Registered Guide Requirements*, *supra* note 200, at 1 (requiring that an applicant not be a felon); *Standing Rock Guides*, *supra* note 201 (requiring CPR and first aid certification); 075-2 WYO. CODE R. § 1 (West 2007) (requiring proof of a first aid card). To meet the statutory first aid requirement in Colorado, being certified by “the American Heart Association, any Wilderness First Aid, Wilderness First Responder, Emergency Medical Technician (EMT)—Basic, Intermediate, or Paramedic training or certification, Mountain Oriented First Aid” or the American Red Cross is sufficient. 4 COLO. CODE REGS. § 733-1:1.4 (West 2019 & Supp. 2020).

203. COLO. REV. STAT. § 12-145-108 (requiring that outfitters have all required permits and permission to hunt on the land they provide their services); *RST Certified/Registered Guide Requirements*, *supra* note 200, at 3 (requiring the guide to ensure that any hunters they guide have the proper licenses and the ability to take game lawfully).

204. 4 COLO. CODE REGS. § 733-1:1.6 (West 2019 & Supp. 2020) (providing a code of professional conduct); 075-3 WYO. CODE R. § 2 (West 2007) (providing an ethical code); 075-3 WYO. CODE R. § 1 (West 2007) (providing a code of professional conduct).

205. COLO. REV. STAT. § 12-145-109 (providing grounds for discipline of registrants); 075-3 WYO. CODE R. § 3 (West 2007) (stating that guides or outfitters cannot violate the code, or they will face discipline).

206. 4 COLO. CODE REGS. § 733-1:1.6 (requiring that the guide or outfitter respect the legal rights of others, promote stewardship of natural resources, honor their contracts with clients, promptly refund deposits if they are due, not subject animals to abuse or inhumane treatment under Colorado law, in addition to other requirements of professional conduct, follow all hunting laws).

207. *See* WYO. STAT. ANN. § 23-2-412.

defined differently.<sup>208</sup> A guide is a person who “accompan[ies] and provid[es] assistance to a hunter in a field related to the taking of any big or trophy game animal . . . .”<sup>209</sup> Comparatively, an outfitter is “a person including a hunting club,<sup>210</sup> who advertises or holds himself out to the public for hire for the purpose of financial gain in order to provide guide or packing services for the purpose of taking any big or trophy game animal . . . .”<sup>211</sup> Thus, a guide can work independently or under the supervision of an outfitter while an outfitter uses guides to execute the services they provide.<sup>212</sup> This difference means guides and outfitters are regulated differently.<sup>213</sup>

## A. COLORADO

In addition to the application requirements and general provisions mentioned above, the Colorado Code of Regulations provides further guidance on the registration application and issuance of permits for guide outfitting businesses.<sup>214</sup> To become a registered outfitter, the person seeking to be registered must submit an application, a fee, and any other required documentation to show that the applicant meets the requirements outlined in the statutes, many of which are listed in the introduction to section III.<sup>215</sup> There are also rigorous naming requirements for Colorado registrants.<sup>216</sup> These requirements are to prevent any outfitting service name from being misleading about the services they provide.<sup>217</sup> Within

208. See *infra* notes 209-212 and accompanying text.

209. WYO. STAT. ANN. § 23-2-406 (West 2011). See also COLO. REV. STAT. § 12-145-103 (West 2019) (defining guide). South Dakota’s definition is similar, stating that a “hunting guide is a person who holds himself or herself out to the public as a hunting guide and, for compensation or remuneration, directs or provides services to any person for the purpose of hunting any wild animal.” SDCL § 41-4-12.

210. A “hunting club” is “any person requiring dues or remuneration for providing personal services in the field for the taking of any big or trophy game animal.” WYO. STAT. ANN. § 23-2-406.

211. *Id.* See also COLO. REV. STAT. § 12-145-103 (defining outfitter).

212. See *supra* notes 209, 211 and accompanying text.

Generally, an *outfitter* is considered a business that provides clients with various products and services (which may include food, shelter, horses, equipment, etc.) for a particular outdoor recreational activity. Outfitters often register and employ *guides* to lead clients in these activities. For example, an outfitter may supply clients wishing to engage in a fly - fishing trip with rods, flies, and waders, and it may engage a guide to lead clients to local fishing areas, advise on fishing techniques, and ensure clients’ safety by monitoring local conditions. Guides also may operate independent of outfitters.

Mark K. DeSantis, *Guides and Outfitters on Federal Lands: Background and Permitting Processes*, CONG. RSCH. SERV. 1, 1 n.2 (June 2, 2020), <https://sgp.fas.org/crs/misc/R46380.pdf>.

213. See generally Part III (discussing regulations of guides and outfitters).

214. 4 COLO. CODE REGS. § 733-1:1.4.

215. *Id.*

216. 4 COLO. CODE REGS. § 733-1:1.4(C). A registrant is defined as an “individual or entity registered as an outfitter under section 12-145-108, C.R.S., a regardless of the registration status as active, probated, or suspended.” 4 COLO. CODE REGS. § 733-1:1.3 (West 2020). If an entity is a registrant, it must designate a responsible party and agent upon their application. 4 COLO. CODE REGS. § 733-1:1.4. That party will be responsible for answering the screening questions on the application. *Id.* Additionally, the entity must also identify all individuals who *may* provide outfitting services for the entity on the application, regardless of the individual’s status as either an employee or independent contractor. *Id.*

217. 4 COLO. CODE REGS. § 733-1:1.4.



the regulations, there are examples of what constitute “misleading names.”<sup>218</sup> These include names that imply the existence of a corporation, partnership, limited liability company, or cause a person to be misled about the type of entity.<sup>219</sup> A name is also misleading if it implies influence over any official or regulatory body, guarantees a specific outcome, or will lead to the belief of false or unjustified expectations of a favorable outcome.<sup>220</sup> In addition to these requirements, registrants have specific advertising requirements.<sup>221</sup>

Once the guide gets to the hunt, more regulations come into play.<sup>222</sup> For example, there are specific contracting requirements when client-hunters enter into a guiding agreement with outfitters, requiring disclosure of transportation arrangements and the ratio of clients to guides.<sup>223</sup> Further, any guide or registrant has to carry a field safety kit, which at a minimum “must contain adhesive bandages, sterile pads, flexible gauze bandages, first-aid tape, and antiseptic to dress a minor cut or injury.”<sup>224</sup> Registrants have to provide sufficient equipment that is clean and in good working order, unless the client provides their own equipment.<sup>225</sup> Any equipment supplied by the registrant must be made available for inspection upon the request of an authorized agent.<sup>226</sup> In addition to these requirements, there are further requirements for camp or other housing facilities, including camp size and other sanitation-oriented requirements.<sup>227</sup> A registrant is also responsible for the acts of their employees.<sup>228</sup> Colorado has various remedies to enforce these statutory requirements,<sup>229</sup> including fines,<sup>230</sup> cease and desist orders,<sup>231</sup> equipment seizures,<sup>232</sup> and suspension of registration.<sup>233</sup> If the registrant is suspended, they “must immediately return all documentation of such

218. *Id.*

219. *Id.*

220. *Id.*

221. 4 COLO. CODE REGS. § 733-1:1.6. These restrictions mandate that none of the advertisements be misleading or fraudulent. *Id.* The advertisement must accurately represent the outfitter’s facilities, prices, equipment, services, or hunting opportunities. *Id.* For any internet advertisements, the webpage must include the name of the registrant and the contact information for the outfitter. *Id.*

222. 4 COLO. CODE REGS. § 733-1:1.7 (West 2020).

223. COLO. REV. STAT. ANN. § 12-145-112 (West 2019).

224. 4 COLO. CODE REGS. § 733-1:1.7.

225. *Id.*

226. *Id.*

227. *Id.*

228. 4 COLO. CODE REGS. § 733-1:1.6. In addition to employees, outfitters are responsible for their contracted personnel and booking agents when any of those individuals are acting within the scope of employment, agreement, or the registrant’s direction. *Id.*

229. COLO. REV. STAT. ANN. §§ 12-145-110 to -111, -113 (West 2019).

230. COLO. REV. STAT. ANN. § 12-145-110.

231. COLO. REV. STAT. ANN. § 12-145-111.

232. COLO. REV. STAT. ANN. § 12-145-113. To help with these enforcement efforts, “every peace officer” monitors guides and outfitting services, not just those within the Division of Parks and Wildlife. COLO. REV. STAT. ANN. § 12-145-115 (West 2019).

233. 4 COLO. CODE REGS. § 733-1:1.4.

registration to the Director and shall not work as a guide while revoked or suspended.”<sup>234</sup>

Colorado implemented these statutes and regulations for a variety of reasons, including to prevent injury or danger of non-residents and allow them to enjoy the state’s fish and game.<sup>235</sup> Colorado chose to implement these regulations as an exercise of their police power.<sup>236</sup> The state did not do so “to interfere in any way with the general public’s ability to enjoy the recreational value of Colorado’s mountains, rivers, and streams when the services of commercial outfitters are not utilized nor to interfere with the right of the United States to manage the public lands under its control.”<sup>237</sup>

## B. SOVEREIGN TRIBES OF THE OCETI SAKOWIN NATION

Within South Dakota are nine Indian reservations.<sup>238</sup> These are the Cheyenne River, Crow Creek, Flandreau Santee Sioux, Lower Brule, Pine Ridge, Rosebud, Sisseton Wahpeton, Standing Rock, and Yankton Reservations, which house the sovereign tribes of the Oceti Sakowin Nation.<sup>239</sup> Each of these sovereign tribes have their own laws that apply to hunting and fishing, including laws that apply to guiding services.<sup>240</sup> Several regulations are similar between tribal governments.<sup>241</sup> For example, many sovereign tribes require a valid tribal business license<sup>242</sup> and that the applicant is a tribal member.<sup>243</sup> This section will primarily focus on the regulations of the Rosebud, Standing Rock, Lower Brule, and Yankton Tribes.

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234. *Id.* This is significant because a registrant must carry proof of their registration whenever they provide outfitting services. *Id.*

235. COLO. REV. STAT. ANN. § 12-145-101 (West 2019).

236. *Id.*

237. *Id.*

238. *South Dakota Reservations*, *supra* note 32.

239. *Id.* For more information about the sovereign tribes of the Oceti Sakowin Nation, see *supra* notes 32, 56; see also *South Dakota Reservations*, *supra* note 32 (discussing the nine reservations in South Dakota and what bands live on which reservation); *Oceti Sakowin*, *supra* note 32 (detailing the sovereign tribes of the Oceti Sakowin Nation and the bands within the Tetonwan group, which include five of the sovereign tribes within South Dakota).

240. S.D. GAME FISH & PARKS, *Hunting on Tribal Lands* 1, 1, <https://gfp.sd.gov/userdocs/docs/TribalHunting.PDF> (last visited Oct. 21, 2021). See also *infra* notes 244-267 and accompanying text (detailing guiding requirements for some of the individual sovereign tribes). See generally *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983) (finding that states could not exercise concurrent jurisdiction of non-member hunters on tribal land and could not impose state hunting laws for hunters on tribal lands).

241. See *infra* notes 242-243 and accompanying text.

242. *RST Certified/Registered Guide Requirements*, *supra* note 200, at 1; *Standing Rock Guides*, *supra* note 201.

243. *RST Certified/Registered Guide Requirements*, *supra* note 200, at 1; LOWER BRULE DEP’T OF WILDLIFE, FISH & RECREATION, *2021 Season Guide Regulations and Map*, [http://www.lowerbrulewildlife.com/image/cache/21Brochure\\_Front\\_for\\_Web\\_Site\\_FINAL.pdf](http://www.lowerbrulewildlife.com/image/cache/21Brochure_Front_for_Web_Site_FINAL.pdf) [hereinafter *2021 Season Guide Regulations and Map*] (last visited Oct. 20, 2021); *Standing Rock Guides*, *supra* note 201; YANKTON SIOUX TRIBAL CODE § 11-13-010.

Guides are especially important to the Rosebud Tribe because nonmembers must have a tribal guide to hunt on tribal lands.<sup>244</sup> However, unlike the state of South Dakota, Rosebud does not let just anyone become a guide; rather, it requires all guides to complete the tribe's Guide Course and become certified with the Game, Fish & Parks Department.<sup>245</sup> Further, it limits the number of hunters a guide can lead to ten people per hunt.<sup>246</sup> For pheasant season, however, guides are permitted to take up to twenty hunters at a time.<sup>247</sup> The regulations also limit how close guides can lead hunts to livestock's primary source of water and where they can place traps.<sup>248</sup>

In addition to these regulations, Rosebud also gives guidance on the responsibility and liability of guides.<sup>249</sup> All guides are responsible for:

- i. Ensuring each client has a valid license or permit for the taking of Wildlife.
- ii. Ensuring each client does not exceed bag limits or season date as established by proclamation.
- iii. Ensuring each client understands the rules and regulations prescribed by proclamation, and that they comply with those rules and regulations while under the direction of a guide and while in the field.
- iv. Reporting, in writing, to this Department any problems with lessees and/or access issues to hunting grounds on Tribal Lands.
- v. Ensuring all prairie dog hunters use varmint rounds (V-MAX, BALLISTIC TIPS).
- vi. Ensuring all prairie dog hunters are aware that the use of a rifle over 25 caliber is prohibited.
- vii. Ensuring all hunters pick up spent casings, trash and other disposable materials.
- viii. Reporting any accident or damage caused by their clients while hunting on Tribal lands.
- ix. Ensuring all clients, ages 12-15, have successfully completed a certified Hunter-Safety Course and provide to the guide prior to hunting. This also needs to be presented to the department in order to purchase a hunting license.
- x. Reporting any violations that they personally witness.<sup>250</sup>

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244. ROSEBUD SIOUX TRIBE GAME, & FISH & PARKS DEP'T, *FAQ*, <http://www.rstgfp.net/faq/#> (last visited Oct. 21, 2021).

245. *RST Certified/Registered Guide Requirements*, *supra* note 200, at 1-4.

246. *Id.* at 2.

247. *Id.*

248. *Id.*

249. *Id.* at 3-4.

250. *Id.*

In addition to these responsibilities, guides are also liable for physical damages caused by their client-hunters, any violation of the guiding regulations, knowingly assisting in such a violation, and “knowingly allow[ing] a client to hunt without a processing the requisite license, permit or applicable hunter safety certification.”<sup>251</sup>

The Rosebud Department of Game, Fish & Parks (“the Department”) has discretion in punishing any guide who does not fulfill their obligations.<sup>252</sup> The Department has the power to “suspend, cancel or revoke the certification of any Registered Guide for non-compliance or severe reported complaints.”<sup>253</sup> Depending on the seriousness of the offense, the Director of the Department of Natural Resources can revoke a guide card automatically.<sup>254</sup> Generally, however, the first violation results in a verbal warning, then a written warning, and finally, a third violation will result in the revocation of guiding privileges.<sup>255</sup> All violations are recorded and filed in the Department of Game, Fish, and Parks.<sup>256</sup>

Like Rosebud, Lower Brule and Standing Rock Tribes also have guide requirements.<sup>257</sup> Lower Brule requires guides to be licensed and offers a class to guide candidates, waiving the licensing fee for completing the course.<sup>258</sup> Additionally, if guides complete the class, the tribe then recommends those guides to hunters who request a guided hunt.<sup>259</sup> Lower Brule currently has eleven registered guides.<sup>260</sup> The Standing Rock Tribe also requires a tribal guide license.<sup>261</sup> According to the Standing Rock Game and Fish website, there are five registered guides on the Standing Rock Reservation, two of which have their business in South Dakota.<sup>262</sup>

The Yankton Sioux Tribe also requires that the guide obtain a license before guiding any hunts.<sup>263</sup> However, the number of guides allowed on the Reservation is limited and determined by the Wildlife Conservation Commission depending on “geographical limitations for each guide, the resources available on each part of the Reservation, and minimizing competition with non-guided hunters and

251. *Id.* at 4.

252. *Id.* at 3.

253. *Id.*

254. *Id.* While the card can be revoked immediately, “[e]very guide has the opportunity to contest their violations and/or express any concerns to the RST Land & Natural Resources Committee[.]” *Id.*

255. *Id.*

256. *Id.*

257. *2021 Season Guide Regulations and Map*, *supra* note 243 (detailing the Lower Brule Sioux Tribe’s guiding regulations); *Standing Rock Guides*, *supra* note 201 (detailing Standing Rock Sioux Tribe’s guiding regulations).

258. *2021 Season Guide Regulations and Map*, *supra* note 243.

259. *Id.*

260. LOWER BRULE DEP’T OF WILDLIFE, FISH & RECREATION, *Hunting Guides*, <http://www.lowerbrulewildlife.com/hunting-guides/> (last visited Oct. 20, 2021).

261. *Standing Rock Guides*, *supra* note 201.

262. *Id.*

263. *See* YANKTON SIOUX TRIBAL CODE ch. 11-13 (1995), <https://narf.org/nill/codes/yanktoncode/yanktoncodet11hunting.html> (regulating guides); YANKTON SIOUX TRIBAL CODE § 11-13-020 (Guiding; License Required).

anglers[.]”<sup>264</sup> If a guide violates any portion of the regulations or the tribal code, the Tribe revokes their guiding license.<sup>265</sup> After the initial suspension, the license is revoked for a minimum of one year and cannot be issued until the person has fulfilled all conditions of the court’s order.<sup>266</sup> Finally, after the guide meets those two requirements, they must appear before the commission to “show cause why a guide’s license should be issued.”<sup>267</sup>

### C. WYOMING

Wyoming also regulates its guides.<sup>268</sup> Wyoming provides three levels of guides: resident landowner, resident, and professional.<sup>269</sup> A resident guide must be licensed and is limited to how many hunters they can guide per year.<sup>270</sup> A landowner guide does not need to be licensed and can guide whomever they would like on their property.<sup>271</sup> However, only professional guides can be paid for their services.<sup>272</sup> To become a professional guide, the applicant must meet the general licensing requirements discussed at the beginning of part III and work either as an employee or independent contractor with a licensed outfitter.<sup>273</sup> The status of a guide is essential because, like Rosebud, non-residents cannot hunt in certain areas without a professional or a resident guide.<sup>274</sup> If a guide would like to become a

264. YANKTON SIOUX TRIBAL CODE § 11-13-020.

265. YANKTON SIOUX TRIBAL CODE § 11-13-030. Violations also occur if the guide fails to report any violation by one of their client-hunters “or any other person.” YANKTON SIOUX TRIBAL CODE § 11-13-040. Like Rosebud’s regulatory scheme, the guide is “responsible for [the] conduct of his clients.” *Id.*

266. YANKTON SIOUX TRIBAL CODE § 11-13-030.

267. *Id.*

268. *See* WYO. STAT. ANN. §§ 23-2-401 to -418 (Guides and Outfitters); 075 WYO. CODE R. (Board of Outfitters and Professional Guides); *supra* Parts III.A-B (describing the regulations of Colorado and the sovereign tribes of the Oceti Sakowin Nation).

269. WYO. STAT. ANN. § 23-2-401 (West 2011).

270. *Id.* Resident guides have more restrictions than professional guides. *Id.* Resident guides cannot guide more than two non-resident hunters in any calendar year. *Id.* After guiding a hunt, the resident guide must put the name and license number of the non-resident hunter on the back of their guide license to be stamped or signed by the issuer of the license. *Id.*

271. *Id.* Resident landowners can also authorize the unguided hunting of non-residents on their land. *Id.* In those circumstances, the non-resident hunter’s license must be signed by the owner of the property, or their agent, as evidence of permission to hunt the land. *Id.*

272. *Id.*

273. WYO. STAT. ANN. § 23-2-412. A guide’s license is only valid while working with a licensed outfitter. *Id.* Guides are required to have the outfitter sign the back of their license, including the outfitter’s license number and the time for which the guide is employed. 075-2 WYO. CODE R. § 5 (West 2018 & Supp. 2019). Additionally, the guide must also indicate where they will operate and provide all information required by the operation plan. 075-2 WYO. CODE R. § 1 (West 2018 & Supp. 2019). The operation plan is a nine-page document providing details about the outfitting operation, including contact information, business organization, land permits held, land planned to hunt, previous outfitting operations, services provided to clients, safety information, and more. *See generally New Outfitter Operation Plan*, WYO. STATE BD. OF OUTFITTERS & PRO. GUIDES, <https://www.ntc.blm.gov/krc/uploads/467/WY%20Outfitter%20Operation%20Plan%20Outline.pdf> (last visited Oct. 21, 2021). Further, it requires that all applicants appear personally before the licensing board and may be required to pass an equipment inspection before a license is issued. 075-2 WYO. CODE R. § 1.

274. WYO. STAT. ANN. § 23-2-401. Under this statute, non-residents cannot hunt big or trophy game in designated wilderness areas without a guide. *Id.* In such cases, there must be at least one guide per two

licensed outfitter, the applicant must have at least one year of experience as a professional guide and all the equipment necessary for the services they plan to offer.<sup>275</sup> An outfitter is responsible for the conduct of their guides, even if the guides are independent contractors.<sup>276</sup>

Because guides and outfitters are interlinked, they have the same reporting requirements.<sup>277</sup> Those requirements demand that guides report

- (i) Any conviction or forfeiture of any bond amount for a violation of federal or state law or applicable regulation relating to wildlife, game and fish within five (5) years before the date of filing license application;
- (ii) Any felony conviction; and
- (iii) Any conviction for a violation of federal or state law relating to criminal fraud and occurring within five (5) years prior to the date of filing application.<sup>278</sup>

In addition to these reporting requirements, the applicants for guiding and outfitting services must take a standardized exam before the state issues their licenses.<sup>279</sup> Only after providing this information and being issued a valid license can professional guides hold themselves out as providing guiding or packing services for taking big or trophy game.<sup>280</sup>

Wyoming can punish guides who fraudulently obtain a license, fraudulently advertise, breach contracts, participate in unethical or dishonorable conduct, or violate any statutes or regulations relating to guides.<sup>281</sup> However, some violations warranting punishment are very specific towards game.<sup>282</sup> These include the inhumane treatment of any animal, violating any law relating to game and fish, or

non-resident hunters; however, the Commission may allow guides to hunt with more than two non-resident hunters but no more than six. *Id.* In addition to wilderness areas, the Commission can also designate areas where guides are required for non-resident hunters. *Id.*

275. WYO. STAT. ANN. § 23-2-411 (West 2011). One year of experience amounts to seventy days in the field spent guiding hunters. 075-2 WYO. CODE R. § 1. After an outfitter obtains their license, they do not need a separate guide's license. WYO. STAT. ANN. § 23-2-411.

276. WYO. STAT. ANN. § 23-2-412.

277. WYO. STAT. ANN. §§ 23-2-411 to -412.

278. *Id.*

279. WYO. STAT. ANN. § 23-2-413. For outfitters, the exam covers knowledge of "the Act, Board rules, Game & Fish laws, Forest Service and BLM outfitting and land use policies, first aid, other general hunting/outdoor skills, habits of game sought, hunting techniques, care of meat and trophies and applicable firearm laws." 075-2 WYO. CODE R. § 2 (West 2018 & Supp. 2019). The exam is a closed book written exam. *Id.* The new applicant must make an appointment to take the exam at least fourteen days in advance and must pass with at least a seventy-five percent accuracy rate. *Id.* If an applicant fails to pass, the applicant can retake the exam after thirty days. *Id.* If the applicant passes, the exam is valid for one year. *Id.* The guiding examination is similar. *See* 075-2 WYO. CODE R. § 6 (West 2018 & Supp. 2019) (detailing the guide exam). The guide exam covers the same or similar topics, with the only difference being that the guide must know the "Forest Service and BLM land-use policies," *id.*, rather than the "Forest Service and BLM *outfitting* . . . policies," 075-2 WYO. CODE R. § 2 (emphasis added). The guide exam also requires a seventy-five percent accuracy rate to pass but guides who fail the exam twice in one calendar year must repay the application fees. 075-2 WYO. CODE R. § 6.

280. WYO. STAT. ANN. § 23-2-407 (West 2011).

281. WYO. STAT. ANN. § 23-2-416 (West 2018).

282. *Id.*

a felony that relates to the practice of professional guiding or outfitting.<sup>283</sup> Any violation can lead to a refusal of a license, a suspension, or a revocation of the license.<sup>284</sup> A license can be revoked for up to five years in some cases.<sup>285</sup> Generally, however, the guide can appeal any decision to revoke or suspend a license through an administrative process.<sup>286</sup> Additionally, if the guide injures a client-hunter, the return of their license may be conditioned on paying any court-ordered damages due to the client.<sup>287</sup>

Past the revocation of any license issued, those who violate the law can be subject to fines up to \$5,000.<sup>288</sup> However, if people operate or hold themselves out as guides without professional guide licenses, initiate suit for compensation without professional guide licenses, or improperly advertises their services,<sup>289</sup> they are subject to up to \$7,500 in fines and up to a year in prison.<sup>290</sup> Like other state or tribal regulations, Wyoming requires that its guides and outfitters promptly report any game law violations.<sup>291</sup> Wyoming, however, is unique compared to the other statutory schemes and will punish client-hunters who pay an unlicensed guide.<sup>292</sup> This information is easily accessible, however, because any guide or outfitter must “carry their original license, as issued by the Board, at all times when providing outfitting or professional guide services.”<sup>293</sup>

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283. *Id.*

284. *Id.*

285. WYO. STAT. ANN. § 23-2-417 (West 2017).

286. WYO. STAT. ANN. § 23-2-416. There is only one reason that the decision to suspend or revoke a license cannot be appealed, and it comes in a particular set of circumstances. *Id.*

Upon receipt from the department of family services of a certified copy of an order from a court to withhold, suspend or otherwise restrict a license issued by the board, the board shall notify the party named in the court order of the withholding, suspension or restriction in accordance with the terms of the court order. No appeal under the Wyoming Administrative Procedure Act shall be allowed for a license withheld, suspended or restricted under this subsection.

*Id.*

287. *Id.*

288. WYO. STAT. ANN. § 23-2-417.

289. In Wyoming, guides must include their license number and any other license number of those providing the services on all advertisements. WYO. STAT. ANN. § 23-2-407.

290. WYO. STAT. ANN. § 23-2-417.

291. WYO. STAT. ANN. § 23-2-415 (West 1989).

292. WYO. STAT. ANN. § 23-2-418 (West 1997). “No person shall directly or indirectly compensate a person holding himself out as engaging in the business of or acting in the capacity of an outfitter or a professional guide unless that person provides proof that he is a licensed outfitter or professional guide as required by this act.” *Id.* If the client-hunter does pay without having proof the guide or outfitter is licensed, they commit a misdemeanor, *id.*, and can be punished by a fine up to five thousand dollars, WYO. STAT. ANN. § 23-2-417(a).

293. 075-2 WYO. CODE R. § 8 (West 2018 & Supp. 2022).

#### IV. PROPOSED REGULATIONS TO PROTECT THE CLIENT-HUNTER, LAWFUL OPERATORS, AND SOUTH DAKOTA

This comment has exposed the dangers of untrained and unregulated guides and examined the regulatory schemes of other governing bodies.<sup>294</sup> Now that the consequences to client-hunters have been explained, it is important to remember that the criminal acts of these guides can significantly harm South Dakota as well.<sup>295</sup> As mentioned above, certain illegal practices can change bird migration patterns and would devastate the South Dakotan industries geared toward hunting migratory birds.<sup>296</sup> One way to ensure lawful operations adequately protect those resources is to implement reporting requirements.<sup>297</sup> These reporting requirements would develop crucial biological information about the hunted game.<sup>298</sup> This biological information could help South Dakota set seasons for hunting or set bag limits to avoid overhunting.<sup>299</sup> Overhunting can disrupt specific ecosystems in areas overhunted and cause damage to the environment by impacting the general population of the species.<sup>300</sup>

While federal laws like the Lacey Act and the MBTA properly punish guides and outfitters who act criminally, they harm client-hunters who rely on those guides.<sup>301</sup> If South Dakota adopted the regulatory scheme proposed below, client-hunters could easily distinguish which guides and outfitters are operating legally and which ones are not, thus protecting themselves from the heavy criminal penalties under federal law.<sup>302</sup> This proposal not only protects the client but would funnel business to lawful operators whose advertised success rate is likely not as high as the guides or outfitters who use illegal methods to boost their own.<sup>303</sup> Further, the regulations below would ensure that guides and outfitters are knowledgeable about the law, so they have the information they need to guide hunters on a lawful hunt.<sup>304</sup>

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294. See *supra* Parts II-III (discussing the dangers of client-hunters and the regulatory schemes of other states as it relates to licensing of guides and outfitters).

295. See *supra* Part I (discussing the economic importance of hunting in South Dakota); see also *infra* note 296 and accompanying text (discussing the harm caused by illegal practices).

296. *Idaho Man Sentenced to Jail in Waterfowl Baiting Case*, *supra* note 145.

297. See *supra* note 135 (discussing the Flyaway report); *Flyways*, *supra* note 135 (discussing how Flyaway reports are generated by biologists). See generally Dubovsky, *supra* note 134 (noting that the Flyaway report includes harvest data).

298. See *supra* note 135 (discussing the Flyaway report); *Flyways*, *supra* note 135 (discussing how Flyaway reports are generated by biologists). See generally Dubovsky, *supra* note 134 (noting that the Flyaway report includes harvest data).

299. Moore, *supra* note 6 (discussing how hunting reports help biologists determine seasons and take limits).

300. *Id.*

301. See *supra* Parts II.A-B.

302. See *infra* notes 315-353.

303. See *United States v. Rodebaugh*, 798 F.3d 1281, 1288 (10th Cir. 2015) (noting the advertisement of an over ninety percent success rate caused by illegal hunting methods); Lucius Couloute & Daniel Kopf, *Out of Prison & Out of Work: Unemployment among formerly incarcerated people*, PRISON POL'Y INITIATIVE (July 2018), <https://www.prisonpolicy.org/reports/outofwork.html> (noting the unfortunate, but true, fact that formerly incarcerated people have higher unemployment rates than the general public).

304. See *infra* notes 321-326 and accompanying text.



By regulating guides and outfitters, South Dakota would also protect client-hunters' health.<sup>305</sup> While neither guides nor outfitters can totally remove the risks client-hunters face, they can limit them in several ways.<sup>306</sup> First, by being trained in first aid, they can decrease the risk of serious injury by client-hunters and reduce the risk that client-hunters will worsen their injuries in their efforts to gain treatment.<sup>307</sup> Additionally, as hunting often occurs in rural areas, communication channels can sometimes be unreliable.<sup>308</sup> Through satellite phones or other communications devices, guides can ensure that their hunters will have access to the necessary communication channels in case of an emergency.<sup>309</sup> Further, guides and outfitters can ensure that equipment is adequately maintained and give client-hunters advice on dressing appropriately for the weather.<sup>310</sup> Finally, guides can reduce the possibility of injury by other improper and unsafe hunting techniques by having a safety meeting with their client-hunters before going hunting.<sup>311</sup>

The best regulations to adopt would be ones that have been tested and implemented by other states and sovereign tribes.<sup>312</sup> Thus, this comment proposes a hybrid of the rules implemented by Colorado, Wyoming, Lower Brule Sioux Tribe, Rosebud Sioux Tribe, and Yankton Sioux Tribe.<sup>313</sup> While each of these entities has its unique regulations, several have similarities in their registration and management of hunting outfitters and guides.<sup>314</sup> These standard provisions require licensing, training to various extents, advertisement restrictions, insurance, and limitations on the number of client-hunters per guide.<sup>315</sup>

When it comes to basic license qualifications, South Dakota should require that any guide be at least eighteen years old, not be a felon, and have their hunter's

305. See *supra* Part II.C (discussing health and safety concerns related to hunting).

306. *Hunting Safety Tips for Outfitters*, CBIZ SATTLER ADVENTURE SPORTS (Oct. 8, 2020), <https://sattleradventuresports.cbiz.com/blog/artmid/28541/articleid/106/hunting-safety-tips-for-outfitters>.

307. *5 Reasons Why Basic First Aid Knowledge is Essential*, EMERGENCY FIRST RESPONSE, <https://www.emergencyfirstresponse.com/5-reasons-why-basic-first-aid-knowledge-is-essential/> (last visited Oct. 12, 2021). Further, due to the high cardiac risks while hunting, it could be beneficial to require guides to carry an AED. *Physical Conditioning*, *supra* note 160. An AED, also known as an automated external defibrillator, is a lightweight, portable device that can revive someone from a sudden cardiac arrest. *Automated external defibrillators: Do you need an AED?*, MAYO CLINIC, <https://www.mayoclinic.org/diseases-conditions/heart-arrhythmia/in-depth/automated-external-defibrillators/art-20043909> (last visited Oct. 19, 2021). AEDs “can save precious minutes in reviving a person,” and having one around in such an emergency, especially in situations where cardiac issues are of high risk, can be beneficial. *Id.* However, while having an AED while hunting could be advantageous to the hunters, purchasing an AED can be expensive and impose a financial burden on guiding or outfitting operations. *Id.*

308. See *Wireless in the wilderness and why you need to*, GOHUNT (June 23, 2014), <https://www.gohunt.com/read/life/going-wireless-in-the-wilderness#gs.dihd56> (describing why having access to communication devices in rural areas is important).

309. See *id.* (describing why having access to communication devices in rural areas is important).

310. *Hunting Safety Tips for Outfitters*, *supra* note 306.

311. *Id.*

312. See *supra* Part III (discussing hunting guide and outfitter regulations).

313. Compare *supra* Part III (discussing hunting guide and outfitter regulations), with *infra* Part IV (proposing regulations for South Dakota to adopt).

314. See *supra* Part III (discussing hunting guide and outfitter regulations).

315. See *supra* Part III (discussing hunting guide and outfitter regulations).

safety certification.<sup>316</sup> Similarly, any person seeking to become a licensed outfitter must have at least one year of experience as a guide.<sup>317</sup> Additionally, South Dakota should require that any guide have insurance.<sup>318</sup> Specifically, South Dakota should require fifty thousand dollars of insurance for bodily injury to one individual in a single accident and at least one hundred thousand dollars for all individuals in one occurrence.<sup>319</sup> Additionally, South Dakota should require that all its guides and outfitters be trained and certified in CPR and general first aid.<sup>320</sup>

However, it would be best if South Dakota adopted a more stringent training program, like Lower Brule Sioux Tribe, Rosebud Sioux Tribe, or Wyoming.<sup>321</sup> Like Wyoming, South Dakota should require that new guides or outfitters take an exam to become licensed initially.<sup>322</sup> However, like the Lower Brule Tribe, the state should offer a course to help prepare for the exam and allow outfitters or guides who take the course every year to waive their annual registration fee.<sup>323</sup> This incentive would ensure that guides and outfitters remain certified and familiar with the risks their client-hunters face and how they can mitigate those risks.<sup>324</sup> South Dakota should also adopt advertising restrictions that require a true and accurate description of services.<sup>325</sup> However, unlike the governing bodies examined, South Dakota should require that guides or outfitters disclose any past felony-level hunting law violation so that client-hunters can weigh the risk of criminal prosecution when choosing a guide or outfitting service.<sup>326</sup>

To ensure guides and client-hunters know what to expect on hunting trips, South Dakota should adopt Colorado's and the Rosebud Sioux Tribe's contracting and hunting party limitations.<sup>327</sup> By implementing the hunting party size limitation, as demonstrated by the Rosebud Sioux Tribe, guides will be able to

316. See *RST Certified/Registered Guide Requirements*, *supra* note 200, at 1 (requiring that guides be at least eighteen and not be a felon); COLO. REV. STAT. § 12-145-106 (requiring that a guide be at least eighteen years old); WYO. STAT. ANN. § 23-2-412 (requiring that guides be at least eighteen years old); 075-2 WYO. CODE R. § 5 (requiring guides have a valid hunter's safety card).

317. See WYO. STAT. ANN. § 23-2-411 (requiring that those applying to be an outfitter must have at least one year of experience as a guide). South Dakota, in adopting this regulation, should also define one year the same as Wyoming. See 075-2 WYO. CODE R. § 1 (defining one year of experience as seventy days in the field spent guiding hunters).

318. See *Standing Rock Guides*, *supra* note 261 (requiring that guides provide a certificate of insurance); WYO. STAT. ANN. § 23-2-413 (requiring insurance); COLO. REV. STAT. § 12-145-108 (requiring insurance).

319. See COLO. REV. STAT. § 12-145-108 (requiring the same insurance coverage).

320. See *Standing Rock Guides*, *supra* note 261 (requiring guides be certified in CPR and first aid); COLO. REV. STAT. § 12-145-106 (requiring guides be certified in first aid); 075-2 WYO. CODE R. § 1 (requiring that guides be certified in first aid).

321. See *2021 Season Guide Regulations and Map*, *supra* note 243 (discussing classes offered for guides); WYO. STAT. ANN. § 23-2-413 (requiring guides take an exam).

322. WYO. STAT. ANN. § 23-2-413 (requiring guides take an exam).

323. See *2021 Season Guide Regulations and Map*, *supra* note 257 (discussing the waiver of fees for those who take the class offered by the tribe).

324. See 075-2 WYO. CODE R. § 6 (detailing the topics covered by the Wyoming guide's exam).

325. 4 COLO. CODE REGS. § 733-1:1.6 (outlining advertisement requirements); WYO. STAT. ANN. §§ 23-2-407, -416 (outlining advertisement requirements).

326. See *supra* Parts II.A-B (discussing the dangers a criminal guide can impose on client-hunters).

327. See COLO. REV. STAT. § 12-145-112 (providing contract requirements); *RST Certified/Registered Guide Requirements*, *supra* note 200, at 2 (providing hunting party size limits).

monitor their client-hunters adequately to ensure that their hunters are using safe practices and not violating any game law.<sup>328</sup> In addition, the party size limitation will create a baseline for the guide-to-hunter ratio that is required to be in a contract, as seen in Colorado.<sup>329</sup> By implementing Colorado's contracting requirements, client-hunters will not only know what exact level of accommodations the outfitter provides but also what kinds of expectations to set for the hunting trip itself.<sup>330</sup> This expectation setting is also a reason to adopt Colorado's naming requirements.<sup>331</sup> By not allowing misleading names, client-hunters will know that there is no guarantee of success on their hunting trip and ensure that a sole proprietor cannot represent themselves as a corporation in an attempt to dissuade the filing of lawsuits.<sup>332</sup>

South Dakota should also adopt Wyoming's resident guide and resident landowner guide provisions.<sup>333</sup> Adopting these provisions will allow friends or family members to guide each other if they so choose and allow landowners the right to guide hunts on their own properties.<sup>334</sup> In addition, South Dakota should prevent resident and resident landowner guides from receiving any kind of payment, either directly or through gifts or services.<sup>335</sup> This caveat will prevent the resident guide status from being abused by operators avoiding regulation while still allowing South Dakota residents to guide their friends and family on lawful hunts.<sup>336</sup>

A code of professional conduct should also be adopted for guides and outfitters.<sup>337</sup> In addition to the requirements above, these rules can serve as a basis for suspending or revoking a guide or outfitter's license.<sup>338</sup> If a guide or an outfitter license is revoked, South Dakota should, like the Rosebud Tribe, establish clear parameters of what happens on the first, second, and third violations.<sup>339</sup> Additionally, like the Yankton Sioux Tribe, once a guide has made the necessary restitution, if they wish to resume guiding, they must make a case as to why the governing authority should return their license.<sup>340</sup>

328. See *RST Certified/Registered Guide Requirements*, *supra* note 200, at 2 (limiting hunting parties to ten people per guide or twenty people per guide for pheasant season).

329. See COLO. REV. STAT. § 12-145-112 (providing contract requirements).

330. *Id.*

331. See 4 COLO. CODE REGS. § 733-1:1.4(C).

332. See *id.*

333. See WYO. STAT. ANN. § 23-2-401.

334. See *id.*

335. See *id.*

336. See *id.*

337. See 4 COLO. CODE REGS. § 733-1:1.6 (outlining the code of professional conduct for guides and outfitters); 075-3 WYO. CODE R. §§ 1-2 (outlining the ethical code and professional conduct of guides).

338. See WYO. STAT. ANN. § 23-2-416 (discussing how a violation of the regulations can lead to a suspension or revocation of license); COLO. REV. STAT. § 12-145-106 (discussing how a violation of the regulations can lead to a suspension or revocation of license).

339. See *RST Certified/Registered Guide Requirements*, *supra* note 200, at 3 (discussing the progression of discipline based on violations of the code).

340. See YANKTON SIOUX TRIBAL CODE § 11-13-030 (stating that if a guide license is revoked, the applicant must argue why their license should be returned).

Finally, South Dakota should adopt reporting relating to the actual hunt.<sup>341</sup> The guide should be mandated to report the overall harvest of animals,<sup>342</sup> the size of the hunting party,<sup>343</sup> and the area where the hunt took place.<sup>344</sup> This information helps gather the biological information essential to maintaining a healthy ecosystem to hunt.<sup>345</sup> To accomplish this, South Dakota should implement the regulation of the Yankton Sioux Tribe, which limits the number of guides who can operate in a given area based on the biological capabilities of that area.<sup>346</sup>

This regulatory scheme would likely be met with opposition even with the strategy of adopting a hybrid method used in states that generate billions in hunting revenue.<sup>347</sup> One way to ease the transition would be to waive the exam for outfitters or guides who have been operating for more than one year prior to enacting the regulations.<sup>348</sup> Similarly, any outfitters already in operation when

341. SOUTH DAKOTA HUNTING AND TRAPPING HANDBOOK, *supra* note 125, at 51 (noting that hunters must already report certain takes to Game Fish and Parks).

342. *Id.*

343. WYO. STAT. ANN. § 23-2-401 (noting that resident guides have to report the hunters they take out).

344. COLO. REV. STAT. § 12-145-108 (mandating that guides, and outfitters tell the board the area where they hunt and that they have permission to hunt there).

345. *See supra* notes 297-300 and accompanying text (discussing ecological benefits to reporting requirements).

346. *See supra* notes 297-300 and accompanying text (discussing ecological benefits to reporting requirements); YANKTON SIOUX TRIBAL CODE § 11-13-010 (limiting the number of guides per area based on the resources available).

347. *See supra* notes 198-196. This is not only because of the legislative history of South Dakota's approach to game wardens, but also because of the history of South Dakota officials being hostile to wardens. *See, e.g.,* Kevin Woster, *Three cases ignited firestorm over federal game warden*, RAPID CITY J. (Apr. 6, 2007), [https://rapidcityjournal.com/news/local/top-stories/three-cases-ignited-firestorm-over-federal-game-warden/article\\_f3cdc487-61f3-54f7-95f8-1bb151f59018.html](https://rapidcityjournal.com/news/local/top-stories/three-cases-ignited-firestorm-over-federal-game-warden/article_f3cdc487-61f3-54f7-95f8-1bb151f59018.html) (describing how a former Governor, who "wasn't intervening on behalf of family members or close friends," and his Chief-of-Staff conducted a "well-publicized campaign" to "oust [a] federal game warden" who was the lead investigator in a case that "caused trouble for people with political connections . . ."); H.B. No. 1140, 96th Leg., Reg. Sess. (S.D. 2021) (limiting the ability of game wardens to enter onto property); SDCL § 41-2-48 (2004 & Supp. 2022) (codifying House Bill 1140); *see also* Seth Tupper, *Bill Requires Permission For Conservation Officers To Enter Private Land*, S.D. PUB. BROAD. (Feb. 18, 2021), <https://www.sdpb.org/blogs/politics-public-policy/bill-requires-permission-for-conservation-officers-to-enter-private-land/> ("Critics of the South Dakota legislation say it opens the door to poaching and other hunting and fishing violations on private land. Republican Rep. David Anderson . . . said [game wardens] help him keep trespassing hunters off his property. . . . '[The game warden is] the one that could rightly go on and ask to see [hunters'] licenses, ask if there's permission [to hunt the land].'").

348. *See supra* Part III.A (discussing Colorado's regulations, which do not require guides or outfitters to take an exam). Another way to incentivize adopting these regulations, would be to further the reasoning of section 41-1-5.2 of the South Dakota Code. *See* SDCL § 41-1-5.2 (2004 & Supp. 2022). These regulations would benefit schools because any fine for illegal taking of game funds public schools. *Id.* Therefore, to help promote the regulatory scheme, any fines collected from hunting guides or outfitters from violating these regulations could also go to further public school education in South Dakota. *See id.* (providing a model of where and how funds could be allocated towards public schools), while fees collected from the application process could fund the regulatory scheme, *see* 4 COLO. CODE REGS. § 733-1:1.4. (requiring an application fee); WYO. STAT. ANN. § 23-2-412 (requiring an application fee). Providing this funding is important because South Dakota spends less on public education than the majority of other states. *Education Spending by State – How does your state compare*, TEACHING CERTIFICATION.COM, <https://www.teaching-certification.com/teaching/education-spending-by-state.html> (last visited Oct. 27, 2021) (ranking South Dakota forty-fourth in spending per pupil). South Dakota could also help benefit children by adopting Wyoming's provision of withholding a guiding or outfitting license

the regulations go into effect should be assumed to have been professional guides for the required one year.<sup>349</sup>

Despite any opposition, these regulations as a whole will protect client-hunters, lawful operating outfitters, and South Dakota.<sup>350</sup> Because of the increased scrutiny on guides and outfitters, they will become trained in several important aspects of guiding, which will protect the client-hunter.<sup>351</sup> Similarly, by holding all guides and outfitters to the same standard, lawful operators will be rewarded for their high practice standards and not be undercut by criminal operations.<sup>352</sup> Finally, South Dakota will be helped as a whole because the protection of client-hunters will draw more hunters to the state and help protect South Dakota's natural resources.<sup>353</sup>

## V. CONCLUSION

South Dakota must regulate guides and outfitting businesses.<sup>354</sup> The state's failure to regulate this industry exposes client-hunters to health and safety risks in addition to very real legal penalties.<sup>355</sup> As said by South Dakota's former Attorney General, "South Dakota provides sportsman with an abundance of wildlife to enjoy . . . [State officials should be] committed to protecting this valuable resource for all . . . to experience."<sup>356</sup> It is time that the South Dakota legislature regulates outfitting and guiding businesses to protect South Dakota's natural resources, ensure that South Dakota will continue to have an abundance of wildlife, and gather tourism dollars to support the South Dakotan economy.<sup>357</sup>

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after receiving a court order or notice from the department of social services. *See* WYO. STAT. ANN. § 23-2-416.

349. *See supra* Part III.A (discussing Colorado's regulations, which do not require outfitters have one year of experience as professional guides).

350. *See infra* notes 351-353 and accompanying text (discussing why the proposed regulations will benefit the groups listed); *see also supra* Part II (discussing risks to client-hunters).

351. *See* WYO. STAT. ANN. § 23-2-413 (requiring guides take an exam); *2021 Season Guide Regulations and Map, supra* note 257 (discussing the waiver of fees for those who take the class offered by the tribe); *Standing Rock Guides, supra* note 261 (requiring guides be certified in CPR and first aid); COLO. REV. STAT. § 12-145-108 (requiring insurance); *see also supra* Part II.A-C (discussing the risks exposed to hunters). By training guides and mandating certain protections to be in place for hunters, they can mitigate the dangers exposed to client-hunters and protect them from those areas of risk. *See* WYO. STAT. ANN. § 23-2-413 (requiring guides take an exam); *2021 Season Guide Regulations and Map, supra* note 257 (discussing the waiver of fees for those who take the class offered by the tribe); *Standing Rock Guides, supra* note 242 (requiring guides be certified in CPR and first aid); COLO. REV. STAT. § 12-145-108 (requiring insurance); *see also supra* Part II.A-C.

352. *See supra* note 326 and accompanying text (explaining how advertising requirements can benefit client-hunters).

353. *See supra* notes 294-352 and accompanying text.

354. *See supra* Parts I-IV.

355. *See supra* Part II.

356. *Wildlife Investigation Yields Over \$235,000 in Penalties, supra* note 99.

357. *See supra* Parts I-IV; *Wildlife Investigation Yields Over \$235,000 in Penalties, supra* note 99 (discussing the duty of South Dakota officials to protect South Dakota's game resources).