

SCOMM

67:15

Alaska State Legislature

JUDICIARY
CHAIRMAN
907-465-4523

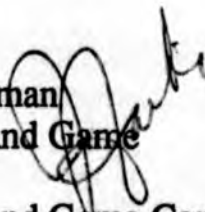
JAN FAIKS
POST OFFICE BOX V
JUNEAU, ALASKA 99811

Senate

August 3, 1989

MEMORANDUM

TO: Legislative Council

FROM: Senator Jan Faiks, Chairman
Task Force on Guiding and Game 

SUBJECT: Task Force on Guiding and Game Contract

On Legislative Council's agenda today is consideration of a contract for the Task Force on Guiding and Game with Birch, Horton, Bittner and Cherot.

At its July 19th meeting, the Task Force discussed proceeding with a contract to obtain professional counsel in its project of developing a big game management plan. The Task Force selected this law firm because of the particular experience of one of its attorneys, Mr. Bill Horn. Mr. Horn is a former Assistant Secretary of the United States Interior Department and has extensive experience involving recreational services franchising, licensing programs, and fish and wildlife allocation arrangements. Because of Mr. Horn's expertise, and that of other members of the law firm is the area of Alaska fish and wildlife law, the Task Force agreed this law firm could best assist in the Task Force's work.

Funding for the Task Force is available from two sources: the FY 90 operating budget included \$24,000 in the fiscal note for SB 139, and a balance of \$15,280 from FY 89 is available (lapse date extended in HB 163). In a unanimous vote at its July 19th meeting, the Task Force approved requesting that the funds available to it be used for this contract.

On behalf of the Task Force, I appreciate the Council's consideration of our request. I welcome the opportunity to answer any questions you may have.

OUT OF SESSION

3111 C STREET ANCHORAGE, ALASKA 99503 907-561-7610

LAW OFFICES

BIRCH, HORTON, BITTNER, CHEROT AND ANDERSON

A PROFESSIONAL CORPORATION

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Writer's Direct Dial No.
(907) 263-7267

July 19, 1989

TO: All Members, Legislative Task Force on Guiding and Big Game

From: William P. Horn and Steven Pradell, Retained Counsel
File No. 100,700.1

Re: Options to the Owsichek decision.

I. INTRODUCTION

To assist the Task Force in developing recommendations regarding a new area management system for allocating guide access to big game, this memorandum sets forth criteria stated by the Court in Owsichek under which leases and exclusive concessions on State lands can be granted. Additionally, an analysis is made of existing State and Federal statutes and regulations concerning leases and exclusive concessions.

II. THE OWSICHEK DECISION: CRITERIA WHICH COULD BE USED
TO CREATE A PROGRAM OF LEASES OR EXCLUSIVE CONCESSIONS.

In Owsichuk v. State, 763 P.2d 488 (Alaska 1988), the Alaska Supreme Court held that AS 08.54.040 (a)(7), and AS.08.54.195, which gave exclusive guide areas and use areas to hunting guides, was unconstitutional under the common use clause of the Alaska Constitution. The common use clause provides:

Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use.

Alaska Const., art. VIII, §3.

The Court found that the common use clause contained trust principals which guaranteed access to Alaska's fish, wildlife, and water resources, and prohibited against monopolistic grants or special privileges. The Court held that statutes authorizing exclusive guide areas and joint use areas fell within the category of grants prohibited by the common use clause.

However, the Court clearly recognized the constitutionality of leases and exclusive concessions on state lands. The Owsichuk opinion outlines the following criteria which could be used to create a program of leases or exclusive concessions which would survive constitutional attack:

1. A lease or concession should not be granted primarily on the basis of seniority. A competitive process should be created to prohibit the favoring of established guides.
2. The grants must be of finite duration.
3. The grant must not be freely transferable without some

form of consent from the State. Grants should not be administered in such a way that guides may transfer them for a profit.

4. A grant of exclusivity must have a nexus to a bonafide wildlife objective. The regulation should make it clear that this is a primary consideration.
5. The State must be paid valuable consideration for providing such a grant.
6. The court recognized the validity of leases and exclusive concessions on State lands.

In light of these criteria, an examination of existing statutes and regulations granting leases and exclusive concessions has been provided to serve as a model for a task force recommendation.

III. SUMMARY OF EXISTING OPTIONS

The Owsichuk Court cited specific statutes and regulations authorizing leases and exclusive concessions on State lands. The Court may uphold a statutory scheme which more closely resembles those procedures.¹

The Court recognized statutes and regulations of the Department of Natural Resources which authorize leases and exclusive concessions on state lands of limited duration, subject to competitive bidding procedures and valuable consideration. For example, under AS.38.05.070, land may be leased for a period of up to 55 years if the commissioner determines that is in the best

¹In a letter of February 14, 1989, to Senator Fahrenkamp, Assistant Attorney General Stephen M. White concluded that any statutory land based system that remotely resembles the EGA scheme would be declared unconstitutional without the adoption of a constitutional amendment. While a constitutional amendment would most easily solve the problem, the Owsichuk decision does not require that alternative.

interest of the State. The commissioner may void a lease if he determines that the land is not being used for the purpose issued. AS.38.05.075 provides for public auctions of leases to the highest qualified bidder. The commissioner may prequalify bidders and aggrieved persons may appeal to the superior court. The commissioner may grant a lessee an exclusive right to use and access tide and submerged land. See AS.38.05.075(d).

The Court also recognized AS.41.21.027, which authorizes concession contracts in State parks. Before a concession contract may be issued, the commissioner must make numerous findings. For example, he must identify community concerns, assess existing visitor uses, and assess the effect of the contract on park wildlife, water, scenic values or other uses. For certain concession contracts, a commissioner must find that the proposed contract is based on public need, will implement the purpose of the park unit, will enhance public use and enjoyment of the park, and will not create an unacceptable adverse environmental effect. The State must receive a fair portion of the contractor's receipts and public review and comment is required before concession contracts may be granted, renewed or extended.

Fees for competitive and exclusive commercial use permits are authorized by AS.41.21.026. Before setting fees, the Department of Natural Resources must consider at public hearings the State's operating costs, the normal fees charged for similar

facilities, administration costs and the public interest.²

The Owsichек decision also recognized the constitutionality of Alaska's Shore Fisheries Leasing Program. Successful applicants are entitled to lease fishing sites and up to three tracks of tide land for a renewal period not exceeding ten years. Lessees pay an annual rental to the State based upon the costs of administering the program, and all leases are subject to cancellation upon the lessee's failure to regularly fish the leased tract.³

Federal statutes regulate the granting of leases and concession contracts in National Parks. Although these regulations probably would not survive a constitutional challenge under Alaska's common use clause, the task force may incorporate some of these provisions in its recommendations. The National Park Service may grant privileges, leases and permits for the use of land under 16 USC §3. See also 16 USC §20 et seq. Grants are based on resource concerns, which include the appropriate number of grants to meet visitors' needs. Competitive bidding is not required, and assignments or transfers of grants require written approval of the Secretary of the Interior. Permits are granted to hunting guides

²The Owsichек decision also referred to the provisions of 11 A.A.C Chapter 14, which establishes procedures for awarding concession contracts. Chapter 14, Repealed July 1, 1989, has been superseded by AS.41.21.026, AS.41.21.127, and AS.36.

³See 11 A.A.C. 64.080-.391, C.W.C. Fisheries, Inc. v. Bunker, 755 P.2d 1115, 1120 (Alaska 1988). See also letter of Assistant Attorney General, supra, fn 1 at p.4 [Opinion that concession based on Shore Fisheries Lease Program would be found unconstitutional].

under two circumstances. First, if there are a limited number of guide positions available, a competitive offering is made based upon the qualifications of the applicants. Concessionaires may be granted a preferential right to provide new or additional accommodations under 16 USC §20c. To promote continuity in operation of facilities and services, preference may be given to concessionaires who have satisfactorily performed to renew contracts or permits. 16 USC §20d. Although concessions may be granted for periods up to 30 years under 16 USC §3, generally concessions are granted for periods of up to 10 years.

Concessionaires have a possessory interest in their structures, which does not end at the expiration of their term. That interest may be assigned and transferred under 16 USC §20e. Franchise fees are determined upon consideration of the probable value to the concessioner of the privileges granted. Protecting the park and providing adequate visitor services at reasonable rates are the primary concerns of the franchise fee agreement, over and above the consideration of revenue to the United States. Concessions exist in approximately 45 states.

In compliance with the National Park Service's Concessions Act, limited entry programs have been established which regulate the number of commercial guides at Mt. McKinley, the number of cruise ships at Glacier Bay, and the number of jetboats at American Creek. In 1986, the American Creek Sportsfishing Guide Service and Jetboat Permit System was adopted in response to excessive numbers of jetboats on the river. Seven permits are

issued for two year periods and give owners the right to store jetboats on the creek. Guides must attend a park service course. The National Park Service, in compliance with ANILCA, must consider the existence of historical operators and allow them to continue. Information regarding concessions in Alaska's National Parks may be found in publication NPS 48. After Owsichuk, special permits have been granted to guides hunting in national parks in Alaska. Under an Interim Emergency Act, these permits expire after two years and are not renewable or transferable. The Park Service would like to interface with Alaska law and create a cooperative agreement for regulating guides, but will issue its own permits if a suitable game management plan is not adopted by the state.

The second method of providing permits to hunting guides is through a commercial use license.⁴ Licenses are generally granted if the Secretary of the Interior does not wish to limit the number of guides in a certain area, and are issued to guides who use the park only as a resource.

IV. CONCLUSION

The Owsichuk opinion suggests that a resource-based management system for allocating access to big game hunting opportunities among guide outfitters may be developed through the use of leases and exclusive concessions. By incorporating criteria outlined in Owsichuk and applicable provisions found in existing statutes and regulations, the task force may propose a system which

⁴See 16 USC §3.

would survive constitutional challenge.

Alaska State Legislature

JUDICIARY
CHAIRMAN
907-465-4523



JAN FAIKS
POST OFFICE BOX V
JUNEAU, ALASKA 99811

Senate

July 13, 1989

MEMORANDUM:

TO: Warren Endicott, Director
Legislative Affairs Agency

FROM: Senator Jan Faiks, Chairman
Legislative Task Force on Guiding And Game

SUBJECT: Justification of Sole Source Contract

The firm of Birch, Horton, Bittner and Cherot will assist the Task Force on Guiding and Game as the panel works to develop of new resource-based, big game management plan including a district guide program which conforms with the Alaska Supreme Court's Owsichuk decision.

Birch, Horton has substantial expertise in a wide variety of areas. Bill Horn is a former Assistant Secretary of the U.S. Interior Department and has extensive experience involving recreational services franchising and licensing programs. His background also includes fish and wildlife allocation arrangements, all of which will prove valuable to the task force membership. The firm includes other individuals who have extensive knowledge of Alaska fish and wildlife law in addition to experience with State administrative statutes.

The task force has a very limited time in which to develop its report to the Legislature next January. As a result, it is necessary to seek legal counsel which already has the necessary expertise and knowledge. Mr. Horn is a recognized expert with vast knowledge of the fish and wildlife issues which the task force will be addressing.

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Alaska State Legislature

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CHAIRMAN
907-465-4523



JAN FAIKS
POST OFFICE BOX V
JUNEAU, ALASKA 99811

Senate

July 14, 1989

MEMORANDUM:

TO: Warren Endicott, Director
Legislative Affairs Agency

FROM: Senator Jan Faiks, Chairman
Legislative Task Force on Guiding and Game

SUBJECT: Request for Professional Services Contract

The Legislative Task Force on Guiding and Game requests that a professional services contract be drawn up with the law firm of Birch, Horton, Bittner and Cherot.

The firm will assist the task force in developing options for a big game management plan which conforms to the Alaska Supreme Court's Owsichuk decision. Birch Horton will perform research for the task force, such as comparisons of game management plans used in other locations. Additionally, Birch Horton will assist in the preparation of a final report to the Legislature and will provide assistance as required in the drafting of legislation.

The contract shall be in effect from August 1, 1989 through January 15, 1990. The contract amount shall be \$30,000. A \$4000 monthly retainer will be paid as well as travel and related costs in an amount not to exceed (\$6000).

OUT OF SESSION

3111 C STREET

ANCHORAGE, ALASKA 99503

907-561-7610

CONTRACT INFORMATION

1. Contractor's or Consultant's

- A. Name Birch, Horton, Bittner and Cherot
- B. Address 1155 Connecticut Ave. N.W. Suite 1200
Washington, D.C. 20036
- C. Social Security No. or Tax ID No. _____
- D. Business License No. _____

2. Is the Contractor:

- A. Individual or sole proprietorship _____
- B. Partnership _____
- (1) General partnership _____
- (2) Limited partnership _____
- (3) Partner who will sign contract Ronald G. Birch
(If a limited partnership, must be 'general partner')
- C. Corporation _____
- (1) State of incorporation _____
- (2) President _____
- (3) Secretary _____
- (4) If not an Alaska corporation, does it have certificate of authority to transact business in Alaska? _____ If not, why not? _____

3. Is the contract:

- A. Between Legislative Affairs only _____
- B. Between Legislative Affairs Agency on behalf of:
- (1) Legislative Council X _____
- (2) Legislative Council subcommittee _____
- (3) Senate Leadership _____

- (4) House Leadership_____
- (5) Senate Leadership_____
- (6) House Committee_____
- (7) Senate Advisory_____
- (8) House Research_____
- (9) Other_____

4. Description of work to be performed:

To Assist Task Force on Guiding & Game in developing options for big game
management plan which conforms to Alaska Supreme Court decision (Owsichuk
To perform research for Task force such as comparisons of management
plans used in other locations. To assist in preparation of report to
legislature and to assist in preparation & drafting of legislation.

5. Dates of performance:

Beginning date August 1, 1989

Last day of Contract January 15, 1990

6. Amount of contract \$30,000.00

A. Method of Compensation:

(1) Hourly_____

(2) Weekly_____

(3) Bi-monthly_____

(4) Monthly \$4,000.00 for 6 months

(5) Other_____

7. Procurement Officer Representative Mike Davis

8. Will the following expenses be provided by:

A. The Agency at no cost to the consultant/contractor
(and in what amount)

B. The Consultant/Contractor at no cost to the Agency

(Indicate A or B. If A, indicate amount)

Travel	^{related costs} up to \$6000.00	Office Space	_____ \$_____
Per diem	_____ \$_____	Personnel	_____ \$_____
Telephone	_____ \$_____	Equipment	_____ \$_____
Other Expenses	_____ \$_____	(Explain)	_____

RECEIVED

JUL 12 1989

LAW OFFICES

BIRCH, HORTON, BITTNER AND CHEROT

A PROFESSIONAL CORPORATION

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July 11, 1989

The Honorable Jan Faiks
Chairman
Legislative Task Force
on Guiding and Game
3111 C Street, Suite 525
Anchorage, Alaska 99503

Dear Senator Faiks:

On behalf of our firm, we would be honored to assist you and the Legislative Task Force on Guiding and Game in your efforts to develop a new guide district program in conformance with the recent Owsichuk decision (763 P2d 488 (1988)).

We possess substantial expertise in a variety of areas and are prepared to provide counsel to the committee. As a former Assistant Secretary of the U.S. Department of the Interior, I have extensive experience involving recreational services franchising and licensing programs as well as fish and wildlife allocation arrangements. Other members of the firm are knowledgeable regarding Alaska fish and wildlife law as well as State administrative statutes.

We can offer an array of services including consultation regarding the development of options the committee may wish to consider, comparative research regarding other similar programs, legal drafting, and the preparation of briefing materials. Attorneys including myself would be available to attend such meetings as you deem necessary.

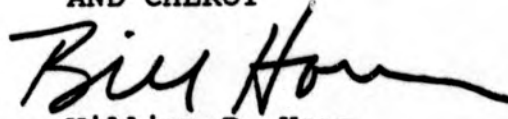
As you described the effort, we estimate that we can provide the requisite services for a monthly retainer of \$4000 for the next six months. Travel costs would be additional, but we would expect such to be minimal.

The Honorable Jan Faiks
July 11, 1989
Page Two

Once again, we would be honored to provide counsel to the committee. Please let me know if you have any questions or we can provide additional information. Thank you for your attention.

Sincerely,

BIRCH, HORTON, BITTNER
AND CHEROT


William P. Horn

WPH:tf

wph22.1tr

PROFESSIONAL SERVICES CONTRACT BETWEEN

BIRCH, HORTON, BITTNER AND CHEROT

AND

ALASKA LEGISLATIVE COUNCIL

CONTRACT AMOUNT: \$27,000

The parties to this contract, made and entered into this 11 day of September, 1989, are the Alaska Legislative Council, (hereinafter referred to as the "Agency,"), and Birch, Horton, Bittner and Cherot, an Alaska corporation (hereinafter referred to as the "Consultant").

THE PURPOSE OF THIS CONTRACT IS TO PROVIDE the Task Force on Guiding and Game with professional services.

IT IS THEREFORE MUTUALLY AGREED THAT:

CLAUSE I - STATEMENT OF WORK

Consultant shall assist the Task Force in developing options for a big game management plan which conforms to the Alaska Supreme Court's Owsichuk decision. Additionally, Consultant will assist in the preparations of a final report to the Legislature and will provide assistance as required in the drafting of legislation.

On behalf of the Consultant, Bill Horn will be working with the Task Force to perform research, such as comparisons of game management plans used in other locations. Mr. Horn is a former Assistant Secretary of the United States Interior Department and has extensive experience involving recreational services franchising, licensing programs, and fish and wildlife allocation arrangements. Mr. Horn's expertise, as well as that of other members of the Consultant's firm in the area of Alaska fish and wildlife law, will be invaluable in the task force's work. For these reasons, this contract was awarded on a sole source basis.

CLAUSE II - PERIOD AND DATES OF PERFORMANCE AND TERMINATION

- (A) The work under this contract shall begin July 14, 1989 and must be completed by January 15, 1990.
- (B) This contract may be terminated by the Agency upon delivery of written notice to the Consultant. If this contract is so terminated and the termination is not based on a breach by the Consultant, the Consultant shall be compensated for services provided under the terms of this contract to the date of termination if the Consultant provides the Agency with a written report containing a description

of the services performed, a statement of the results or conclusions formed based upon the research or analysis performed, and a copy of all documents and reports generated as a consequence of work done under this contract.

CLAUSE III - COMPENSATION AND METHOD OF PAYMENT

- (A) For the work required by this contract, the Consultant shall be:
 - (1) compensated Two Thousand and No/100 Dollars (\$2,000.00) for the last two weeks of July for Consultant's services;
 - (2) compensated Four Thousand and No/100 Dollars (\$4,000.00) a month for August, September, October, November and December for Consultant's services; and
 - (3) compensated Two Thousand and No/100 Dollars (\$2,000.00) for the first two weeks of January for Consultant's services, after submittal and approval of a proper billing; and
 - (4) reimbursed for travel expenses and related costs in an amount not to exceed Three Thousand and No/100 Dollars (\$3,000.00).
- (B) The Project Director must approve a billing before it may be paid.
- (C) If a payment is not made within 90 days after the Agency has received a proper billing, the Agency shall pay interest on the unpaid balance of the billing at the rate of 1.5 percent per month from, and including, the 91st day through the date payment is made. A payment is considered made on the date it is mailed or personally delivered to the Consultant.
- (D) Total payments under this contract, including reimbursement for expenses, may not exceed Twenty-seven Thousand and No/100 Dollars (\$27,000.00).

CLAUSE IV - PROJECT DIRECTOR - The Project Director shall be Senator Jan Faiks.

CLAUSE V - EXPENSES AND DUPLICATION

- (A) Except as may be otherwise provided by Clause III, the office space, equipment, supplies, clerical support and other expenses that are necessary for the Consultant to carry out the Consultant's obligations under this contract shall be supplied and paid by the Consultant at no cost to the Agency.
- (B) Duplicates of any report required by this contract may be produced by the Agency; the office space, equipment, supplies, clerical support and other expenses required for the duplication shall be supplied by the Agency.

CLAUSE VI - RECORDS, DOCUMENTS, AUDIT

The Consultant shall accurately maintain those records, including detailed time records, that are required by the Project Director. The records are subject to inspection by the Agency or the Project Director at all reasonable times. All documents and reports generated as a consequence of work done under this contract shall become the property of the State of Alaska, and the State shall own all rights included in any copyright rights for the documents and reports. Upon completion of the work or the termination of this contract, the documents and reports shall be delivered to the Project Director.

CLAUSE VII - INDEMNIFICATION

The Consultant shall indemnify, save harmless, and defend the Agency, and the Agency's officer's, agents and employees from liability for any claim, including costs arising from the claim, arising from Consultant's negligence in the performance of Consultant's obligations under this contract.

CLAUSE VIII - VENUE

In the event that the parties to this contract find it necessary to litigate the terms of the contract, venue shall be the State of Alaska, First Judicial District, at Juneau, and the contract shall be interpreted according to the laws of Alaska.

CLAUSE IX - ASSIGNMENT

This contract may not be assigned to another party unless in accordance with Sec. 160 of the Procurement Procedures of the Alaska State Legislature.

CLAUSE X - WORKERS' COMPENSATION

During the life of this contract, the Consultant shall, in accordance with AS 23.30.045(d), provide and maintain workers' compensation insurance. The Consultant shall require any subcontractor to provide and maintain workers' compensation insurance for the subcontractor's employees. Consultant shall provide the Agency, upon request, with written proof of the coverage required by this clause.

CLAUSE XI - AUTHORIZATION/CERTIFICATION

Execution of this contract was authorized by a majority of the members of the Alaska Legislative Council on August 3, 1989. Execution of this contract by the chair of the Council constitutes the signed authorization required by Procurement Procedures sec. 150 (b) because the committee members who authorized the contract delegated their sec. 150 signature responsibilities to the chair on January 13, 1989.

Execution of this contract by the Legislative Affairs Agency Executive Director or his designee hereby constitutes a certification that funds have been appropriated and encumbered for the amount of this contract.

CLAUSE XII - MODIFICATION AND PREVIOUS AGREEMENTS

This document contains all the terms and conditions agreed upon by the parties. No other understandings, oral or otherwise, regarding the subject matter of this contract shall be deemed to exist or to bind either of the parties to this contract. This contract may not be modified unless in writing and signed by the parties to this contract.

IN WITNESS WHEREOF, the parties have executed this contract on the dates indicated below:

CONSULTANT

Birch, Horton, Bittner
and Cherot

Tax ID No.: 92-0046806

Ronald H. Birch 8/1/89
Ron Birch Date
President

Alaska Legislative Council

Mike Davis
Rep. Mike Davis, Chair Date
Procurement Officer

Accepted:

Jan Faiks 8/28/89
Senator Jan Faiks Date
Chair, Task Force on Guiding
and Game
Project Director

Certifying Authority:

Warren Endicott 9/11/89
Warren Endicott Date
Executive Director
Legislative Affairs Agency

Approved as to form:

Michael L. Ford 7/25/89
Legal Counsel Date