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ALASKA'S BIG GAME

**A Report on the Commercial Aspects of
its Uses and Users**

**A Final Report to
the 16th Legislature**

**Legislative Task Force on
Guiding and Game
January 1989**

VOLUME III OF III

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THE SUPREME COURT OF THE STATE OF ALASKA

KENNETH D. OWSICHEK,
Appellant,
v.
STATE OF ALASKA, GUIDE
LICENSING AND CONTROL BOARD,
Appellee.

File No. S-1650

O P I N I O N

[No. 3389 - October 21, 1988]

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, Milton Souter, Judge.

Appearances: Charles E. Tulin, Anchorage, for Appellant. Michael G. Hotchkin and Sarah E. McCracken, Assistant Attorneys General, Anchorage, Ronald W. Lorensen, Acting Attorney General, Juneau, for Appellee.

Before: Rabinowitz, Chief Justice, Burke, Matthews, Compton, and Moore, Justices.

RABINOWITZ, Chief Justice.

We are called upon to decide whether two statutes, AS 08.54.040 (7) & .195, comport with article VIII, section 3 of the

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Alaska Constitution. These statutes authorize the Guide Licensing and Control Board to grant hunting guides "exclusive guide areas," geographic areas in which only the designated guide may lead hunts and from which all other guides are excluded. Licensed hunters, including other guides, may hunt recreationally in these areas, but only the holder of the exclusive guide area may lead hunts professionally.

I.

In 1973 the legislature created the Guide Licensing and Control Board ("GLCB" or "the Board"). Ch. 17, § 1, SLA 1973. This act set forth the composition, powers and duties of the Board, established guidelines for different classes of guide licenses, defined unlawful acts, and provided for the disciplining of guides. Id. It also authorized the Board generally to "regulate activity" of guides, AS 08.54.040(a)(3), and to adopt regulations "required by this chapter or reasonably necessary for its administration." Id. at 08.54.050. The legislative history reveals that the purposes of the act were "to protect fish and game management" and "to get competent people as guides in Alaska." Alaska Legislative Committee Minutes Microfiche No. 37, House Judiciary Committee, H.B. 1, at 20 (Feb. 2, 1973).

One of the first activities of the Board was to establish a scheme of "exclusive guide areas" (EGAs) and "joint use areas." Under this system, a guide would be able to register his

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camp and be entitled to exclusive guiding privileges in a designated area surrounding it. "Joint use areas" would be assigned where the areas used by two or more guides overlapped.¹ The Board first voted in April 1974 to implement this scheme for Game Management Units 16 and 20.² Shortly thereafter, in July 1974, the Board voted to extend the program to Unit 8 (Kodiak Island).

For the following year, the Board considered applications for EGAs but took no action. In July 1975, the Board granted dozens of exclusive and joint use areas in the three Units for which the regulation was passed. The Board further resolved at that time to extend the program to eleven more Units, including Unit 19. In January 1976, the Board voted to grant EGAs to qualified guides anywhere in the state. Applications were to be based on "occupancy, use, financial value, and such other qualifications as the Board may prescribe." The Board set

1. EGAs and joint use areas will be referred to collectively as EGAs.

2. The Board of Game has divided the state into twenty-six Game Management Units, primarily for purposes of establishing hunting seasons and bag limits for different species. For these purposes, many Units are divided into several subunits with different applicable regulations. See AS 16.05.255; 5 AAC 78.001-.600, 80.001-.600, 83.001-.600, 86.001-.910, 88.001-.910. The Guide Licensing and Control Board has adopted these Units for purposes of licensing hunting guides. 12 AAC 38.200(b) (Eff. 6/28/74). Each licensed guide may be certified to practice in up to three Units. 12 AAC 38.200(d) (Eff. 6/28/74). Unit 16 is in South Central Alaska, near Anchorage, and Unit 20 occupies a large part of Interior Alaska, including Fairbanks.

a deadline of November 1, 1976, for receipt of applications for EGAs. The Board began granting EGAs in Units other than 8, 16 and 20 in December 1976, starting with Units 23-26. EGAs for other Units were granted gradually over the following months.

The Board conducted all of this activity without specific statutory authorization, relying only on the general grant of regulatory power in the 1973 legislation. In 1976 the legislature enacted AS 08.54.040(a)(8) (now AS 08.54.040(a)(7)), which authorized the Board to:

establish a quota of licensed operating guides who may operate within designated geographical game units or subunits of the state and provide for an equitable and reasonable procedure for limiting the number of guides to that quota; preference shall be given to qualified available and willing licensed guides who reside within the designated game unit or subunit.

Ch. 133, § 1, SLA 1976. This provision took effect January 1, 1977. Id. at § 5. The legislative history reveals that the intent of this section was to ratify the Board's EGA program. Transcript of Senate Resources Committee Hearing on S.B. 661, at 1, 14-15 (March 12, 1976); Transcript of House Resource Committee Hearing on S.B. 661, at 33-34 (April 27, 1976).

Finally, in 1986 the legislature enacted AS 08.54.195.³ This statute for the first time imposed procedures and criteria

3. Alaska Statute 08.54.195 provides:

(footnote continued)

on the Board with respect to the EGA program. This reform was

(footnote continued)

Restricted guide areas. (a) Under AS 08.54.040(a)(7), the board may establish and assign restricted guide areas for master guides or registered guides. The board shall adopt regulations that establish uniform and consistent criteria, including a point system, to be used by the board when it establishes and assigns a restricted guide area.

(b) The board shall consider the following factors before it assigns a restricted guide area:

(1) the extent to which the guide who has applied for the area has guided in the game management unit in which the area is located;

(2) the extent to which the guide occupied and invested in the area;

(3) the effects, including the economic effect, on other guides that would result from creation of the area;

(4) big game populations in the area;

(5) the land ownership status of the area; and

(6) other relevant facts or circumstances.

(c) The board may adopt regulations limiting the number of clients with which a guide may contract for hunts in a restricted guide area used by more than one guide.

(d) Unless the board determines after a public hearing that it is not in the public interest to do so, the board may transfer a restricted guide area to a person qualified for assignment who has been recommended by the guide to whom the area is assigned, or by a person authorized to represent the guide, if the recommendation is made

(1) after five years have elapsed from the date of the assignment of the guide area; or

(2) during the first five years after the date of assignment and the guide has died or suffered a major disability, as defined by the board.

(footnote continued)

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enacted in response to a "sunset report" on the GLCB by the Division of Legislative Audit, which was harshly critical of the Board's implementation of the EGA program.⁴ See Division of Legislative Audit, A Performance Report on the Department of Commerce and Economic Development Guide Licensing and Control Board, Audit Control No. 08.01253-86-R (Nov. 21, 1985).

II.

Kenneth D. Owsichuk is a registered guide who was licensed to lead hunts in Game Management Units 17, 18 and 19 in February 1976.⁵ He alleges that he had worked as an assistant guide in this area from 1972 to 1976. He claims that in January 1976, upon passing his guide license examination, he invested

(footnote continued)

(e) A guide may not sell or lease a restricted guide area. A guide may sell or otherwise transfer a lodge, camp, or other lawful improvement to property located in a restricted guide area. Sales price may not exceed fair market value.

4. The 1986 legislation also modified AS 08.54.045 (S) in response to the sunset report. Specifically, the legislation (1) renumbered it subsection .045(7), (2) required "an equitable, reasonable, and consistent procedure" (emphasized language added in 1986), and (3) provided that "preference may be given" to local resident guides (instead of shall). Ch. 71, § 6, SLA 1986.

5. Units 17, 18 and 19 occupy a large area overlapping parts of Southwest, Western and Interior Alaska. See 5 AAC 83.005(d) (Eff. 7/5/85), 86.005(a) (Eff. 7/5/85), 88.005(b) (Eff. 7/5/85).

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\$300,000 to build a lodge and several cabins together with other facilities for a full-scale guiding operation on Lake Clark. He also claims to have spent \$150,000 on four aircraft to fly in clients.

Owsichuk's licensing and concurrent investments occurred at approximately the same time the GLCB decided to extend the EGA program on a statewide basis.⁶ Accordingly, Owsichuk submitted an application for EGAs in Units 17 and 19 before the November 1, 1976, deadline established by the Board. The Board considered applications for EGAs in Units 17 and 19 in its December 1977 meeting. Owsichuk's application was denied on the ground that he had not submitted "evidence of contracts for guided hunts in the area for two of the five years preceding the application."

Owsichuk petitioned for review of this decision. In November 1978, the Attorney General's office found that, based on contracts submitted for hunts in 1976, 1977 and 1978, he was qualified to receive an EGA in Units 17 and 19, and recommended that the Board adopt this decision. In its December 1978 meeting, the Board resolved "that the portion of Mr. Owsichuk's

6. As discussed above, the Board had decided to grant EGAs in Unit 19 in July 1975, but did not vote to extend the program to the remainder of the state, including Units 17 and 18, until January 1976, the month Owsichuk passed his guide licensing exam and allegedly began building his improvements.

application that is not in conflict with presently granted gide [sic] areas be allowed. That no portion of the application that overlaps or is presently in joint use be granted." By letter dated February 5, 1979, the Board informed Owsichuk of its decision and assigned him area 19:33, in Unit 19. Owsichuk objected to this decision because he was unable to land his planes within the areas granted to him, rendering them "unhunnable."

On April 6, 1979, Owsichuk filed a complaint in superior court challenging the Board's actions. His amended complaint alleged that: (1) prior to January 1, 1977, the Board lacked authority to promulgate regulations creating EGAs; (2) the actions of the Board violated due process and equal protection under the federal and state constitutions; (3) the actions of the Board were an unconstitutional taking of property; (4) AS 08.54.040(a)(8) was an unconstitutional delegation of authority because of the lack of standards; (5) the statutes and regulations constituted an unlawful impairment of contracts under the Alaska Constitution; (6) the regulations did not comply with what standards existed in the statute; and (7) he suffered damages. By way of relief Owsichuk sought a declaration that the Board's assigning of EGAs is unconstitutional and that he is entitled to recover damages against the state in an amount in excess of \$100,000 as a consequence of the state's illegal and unconstitutional actions.

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After considering the briefs and hearing oral arguments,⁷ the superior court affirmed the actions of the Board, holding "that the Board did not commit any error or abuse of discretion, that its regulations comport with the governing statutes, and that no constitutional infirmity exists in the statutes, regulations or Board decision."

This appeal followed.⁸

III.

A.

Owsichuk argues that the EGA statutes and regulations violate the common use clause of the Alaska Constitution, which provides:

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

7. Before considering the case on the merits, the superior court had dismissed the action as an untimely appeal. This court reversed and remanded, holding that the claim for declaratory relief should have been treated as an independent action rather than an appeal, and that due to surprise and excusable neglect the time limit for appeals should have been relaxed as to the claims for damages and an injunction. *Owsichuk v. State, Guide Licensing and Control Board*, 627 P.2d 616 (Alaska 1981).

8. After the parties filed their initial briefs, we requested supplemental briefing on the question of whether AS 08.54.040(7) and AS 08.54.195 violated article VIII, section 3, of the Alaska Constitution.

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Alaska Const., art. VIII, § 3. The state argues that this clause is a broad grant of authority to the state to manage these resources, and that it places no limitations on this authority greater than those contained in other constitutional provisions, such as equal protection.⁹

We observe initially that, in guaranteeing people "common use" of fish, wildlife and water resources, the framers of the constitution clearly did not intend to prohibit all regulation of the use of these resources. Licensing requirements, bag limits, and seasonal restrictions, for example, are time-honored methods of conserving the resources that were respected by delegates to the constitutional convention. Questions presented by this case concern the type and extent of permissible regulation consistent with common use.

9. The state also argues that Owsichuk has no standing to challenge the system as it existed before January 1, 1977, when AS 08.54.040(1)(7) went into effect, because the Board did not establish any EGAs in Owsichuk's Units before that date. In light of our holding that Owsichuk is not entitled to damages, see infra Part IV, we need not address this issue. The declaratory relief to which he is currently entitled is unaffected by the date on which he attained standing.

The state does not argue that Owsichuk lacks standing under the common use clause. We note that we would reject such an argument. We believe that a professional hunting guide's "use" of the wildlife resource is sufficiently direct that he falls within the protection of the common use clause. See infra note 15.

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This court has never considered these questions before. However, in four cases, we have indicated an intent to apply the common use clause in a way that strongly protects public access to natural resources. First, with respect to article VIII generally, we have written, "A careful reading of the constitutional minutes establishes that the provisions in article VIII were intended to permit the broadest possible access to and use of state waters by the general public."¹⁰ Wernberg v. State, 516 P.2d 1191, 1198-99 (Alaska 1973). Given the text of the common use clause, the same policy should apply to wildlife as well.

In CWC Fisheries v. Bunker, 755 P.2d 1115 (Alaska 1988), we addressed the question of whether a state tidelands grant included an exclusive right of fishery, or whether it was subject to a public trust easement. In holding the latter, we relied in part on the common use clause. While specifically declining to determine whether this clause imposed a higher duty than that imposed by common law public trust principles, id. at

10. Similarly, it has been stated:

The common use clause necessarily contemplates that resources will remain in the public domain, and will not be ceded to private ownership. Since the right of common use is guaranteed expressly by the constitution, it must be viewed as a highly important interest running to each person within the state.

State v. Ostrosky, 667 P.2d 1184, 1196 (Alaska 1983) (Rabinowitz, J., dissenting).

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1120 n.10, we stated, "At least in the absence of some clear evidence to the contrary, we will not presume that the legislature intended to take an action which would, on its face, appear inconsistent with the plain wording of this constitutional mandate." Id. at 1120.

In State v. Ostrosky, 667 P.2d 1184 (Alaska 1983), appeal dismissed, 467 U.S. 1201, 81 L. Ed. 2d 339 (1984), we addressed the constitutionality of limited entry fishing. Limited entry fishing bears an obvious similarity to the EGA scheme in that both place restrictions on the commercial harvesting of a natural resource by giving a special status to a limited number of licensees. In Ostrosky we stated:

[W]e have difficulty squaring the section 3 reservation of fish to the people for common use with a system which grants an exclusive right to fish to a select few who may continue to exercise that right season after season. We accept, therefore, at least for the purposes of this case, the proposition that limited entry is inconsistent with the command of article VIII, section 3.

Id. at 1189. In Ostrosky we held that the Limited Entry Act was not unconstitutional because of a 1972 constitutional amendment explicitly permitting limited entry to fisheries, notwithstanding section 3. Id. at 1190.

In a subsequent limited entry fishing case, Johns v. Commercial Fisheries Entry Comm'n, 758 P.2d 1256 (Alaska 1988), we stated:

In State v. Ostrosky, 667 P.2d 1184 (Alaska 1983), we noted that there is a tension

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between the limited entry clause of the state constitution and the clauses of the constitution which guaranty open fisheries. [Citing sections 3 and 15 of article VIII] We suggested that to be constitutional, a limited entry system should impinge as little as possible on the open fishery clauses consistent with the constitutional purposes of limited entry, namely, prevention of economic distress to fishermen and resource conservation.

Id. at 1266.

Since there is no constitutional amendment authorizing EGAs, we must in this case address a common use question similar to that which was not addressed in Ostrosky. We do so, however, in light of our observations in Wernberg, CWC Fisheries, Ostrosky, and Johns that the common use clause was intended to guarantee broad public access to natural resources.

B.

We begin by examining constitutional history to determine the framers' intent in enacting the common use clause. This was a unique provision, not modeled on any other state constitution. Its purpose was anti-monopoly. This purpose was achieved by constitutionalizing common law principles imposing upon the state a public trust duty with regard to the management of fish, wildlife and waters.¹¹

11. Responding to a question about this provision on
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The framers' reliance on historic principles regarding state management of wildlife and water resources is evident from a written explanation in the committee materials for the term "reserved to the people for common use." This discussion also highlights an intent to prohibit "exclusive grants or special privilege[s]."

Ancient traditions in property rights have never recognized that a private right and title can be acquired by a private person to wildlife in their natural state or to water in general. The title remained with the sovereign, and in the American system of government with its concept of popular sovereignty this title is reserved to the people or the state on behalf of the people. The expression "for common use" implies that these resources are not to be subject to exclusive grants or special privilege as was so frequently the case in ancient royal tradition. Rather rights to use are secured by the general laws of the state. In all English and American legal systems ownership of water cannot be asserted, rights acquire only to the use of water. Once wildlife is captured and removed from their natural state possessory right accrues to the captor, provided that the wildlife was captured in conformity with provisions of law.

Alaska Constitutional Convention Papers, Folder 210, paper prepared by Committee on Resources entitled "Terms" (emphasis

(footnote continued)

the floor of the convention, a member of the Resources Committee explained, "The language here has a lot of history behind it. . . . The language in this section harks back to the old tradition whereby wildlife in its natural state was in the presumed ownership of the sovereign until reduced to possession." 4 Proceedings of the Alaska Constitutional Convention 2492 (Jan. 18, 1956).

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added, except to "use"). Because an EGA is clearly a type of monopoly, "exclusive grant," or at least a "special privilege," this history strongly suggests that the statutes at issue here are unconstitutional. However, this history also states that "rights to use are secured by the general laws of the state," clearly giving the legislature some leeway in regulating use of the resources.

The state finds support for its position in a debate that occurred at the convention over registered trap lines. This debate is significant because, like EGAs, registered trap lines would allow a prior existing user to exclude newcomers from the privilege of harvesting the wildlife resource. On the floor of the convention, a delegate asked whether the common use clause would prohibit registered trap lines, and the spokesman for the Resources Committee responded that it would be "arguable." 4 Proceedings of the Alaska Constitutional Convention 2462-63 (Jan. 17, 1956). In response to this concern, the Resources Committee inserted language in the commentary to the common use clause authorizing registered trap lines: "This provision does not apply to the domestication of fur-bearing animals or other animals subject to intensive culture, to fish in private ponds, or to registered trap lines if authorized by law." 6 Proceedings of the Alaska Constitutional Convention app. V, at 98 (Commentary on Article on State Lands and Natural Resources, Jan. 16, 1956)

(emphasized language added after first draft; cf. id. at 83 (Dec. 16, 1955)).

Resolution of the trap line issue begs the question in the instant case. One might argue that addition of the language excluding registered trap lines from the effect of the common use clause was intended to authorize the legislature to enact this type of regulation generally, and that the reasoning should extend to EGAs. However, the language in the commentary is highly specific, which more likely suggests that the common use clause would prohibit all similar regulation, with registered trap lines as a narrow exception in response to the political pressures of the moment.

In a discussion about fishing in lakes, the Constitutional Convention underscored its intent that the public retain broad access to fish, wildlife and water resources, and that these resources not be the subject of private grants. In floor debates, a question arose about the status of a natural lake falling within the boundaries of someone's private property. The delegates agreed that the common use clause guaranteed the public's right to use the lake for fishing, although it did not authorize a trespass across the landowner's property to get to the lake. 4 Proceedings of the Alaska Constitutional Convention 2460 (Jan. 17, 1956). The Convention made it clear that only fish in small private ponds may be owned free of the public's right of access. See id. at 2460-61; 6 Proceedings of the Alaska

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Constitutional Convention app. V, at 98 (Commentary on Article on State Lands and Natural Resources, Jan. 16, 1956). This confirms the view of the common use clause and the public trust expressed in CWC Fisheries v. Bunker, 755 P.2d 1115 (Alaska 1988), holding that a grant of a fee interest in tidelands remains impressed with a public trust easement. It also reinforces our conclusion that grants of exclusive rights to harvest natural resources listed in the common use clause should be subjected to close scrutiny.

C.

As we have noted, the drafters of the common use clause apparently intended to constitutionalize historic common law principles governing the sovereign's authority over management of fish, wildlife and water resources. A review of the history of wildlife law will therefore shed further light on the central issue in this case.

The Supreme Court traced the history of wildlife law from its roots in ancient Rome through its English common law development and transfer to this country in Geer v. Connecticut, 161 U.S. 519, 522-29, 40 L.Ed. 793, 794-97 (1896). In that case, the Court affirmed the defendant's conviction, upholding a state statute forbidding transportation of certain game birds killed in Connecticut across state lines. The Court noted that in England, the right to hunt and fish "[was] vested in the King alone and

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from him derived to such of his subjects as [had] received the grants of a chase, a park, a free warren, or free fishery." Id. at 527, 40 L.Ed. at 796 (quoting 2 W. Blackstone, Commentaries *410). As a recent authority explains:

Stripped of its many formalities, the essential core of English wildlife law on the eve of the American Revolution was the complete authority of the king and Parliament to determine what rights others might have with respect to the taking of wildlife.

M. Bean, The Evolution of National Wildlife Law 12 (rev. ed. 1983).

The Geer court asserted that this authority to regulate taking of wildlife passed to the states upon separation from England. 161 U.S. at 528, 40 L.Ed. at 796. However, unlike the authority vested in the King, the authority of the states, with their guarantees of democratic government, was not plenary.

Whilst the fundamental principles upon which the common property in game rests have undergone no change, the development of free institutions has led to the recognition of the fact that the power or control lodged in the state, resulting from this common ownership, is to be exercised like all other powers of government as a trust for the benefit of the people, and not as a prerogative for the advantage of the government as distinct from the people, or for the benefit of private individuals as distinguished from the public good.

Id. at 529, 40 L.Ed. at 797 (emphasis added). The Court held that the state's "ownership" of wildlife, in trust for the people, authorized the statute at issue in that case. Id.

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The framers of the common use clause probably relied heavily on Geer. The following statement from the constitutional papers, as quoted above, closely tracks the reasoning of Geer:

The title remained with the sovereign, and in the American system of government with its concept of popular sovereignty this title is reserved to the people or the state on behalf of the people. The expression "for common use" implies that these resources are not to be subject to exclusive grants or special privilege as was so frequently the case in ancient royal tradition.

Alaska Constitutional Convention Papers, Folder 210, paper prepared by Committee on Resources entitled "Terms."

Thus, common law principles incorporated in the common use clause impose upon the state a trust duty to manage the fish, wildlife and water resources of the state for the benefit of all the people.¹² We have twice recognized this duty in our prior

12. The Court overruled Geer's state ownership doctrine in Hughes v. Oklahoma, 441 U.S. 322, 60 L. Ed. 2d 250 (1979). That case involved facts almost identical to Geer: the Oklahoma statute at issue forbade the export of minnows taken from the waters of the state. See id. at 323, 60 L. Ed. 2d at 254. The Court struck down the statute as violative of the commerce clause. Id. at 338, 60 L. Ed. 2d at 263. The Court found the state ownership doctrine to be a legal fiction that created anomalies and did not conform to "practical realities." Id. at 335, 60 L. Ed. 2d at 261. Nothing in the opinion, however, indicated any retreat from the state's public trust duty discussed in Geer. Indeed, the Court stated, "[T]he general rule we adopt in this case makes ample allowance for preserving, in ways not inconsistent with the Commerce Clause, the legitimate state concerns for conservation and protection of wild animals underlying the 19th century legal fiction of state ownership." Id. at 335-36, 60 L. Ed. 2d at 261. As one U.S. District Court

(footnote continued)

decisions. In Metlakatla Indian Community, Annette Island Reserve v. Egan, 362 P.2d 901, 915 (Alaska 1961), aff'd, 369 U.S. 45, 7 L. Ed. 2d 562 (1962), we stated:

These migrating schools of fish, while in inland waters, are the property of the state, held in trust for the benefit of all the people of the state, and the obligation and authority to equitably and wisely regulate the harvest is that of the state.

(Emphasis added.) Similarly, in Herscher v. State, Department of Commerce, 568 P.2d 996, 1003 (Alaska 1977), we noted that the state acts "as trustee of the natural resources for the benefit of its citizens."

The extent to which this public trust duty, as constitutionalized by the common use clause, limits a state's discretion in managing its resources is not clearly defined. The state argues that it imposes no limit at all. While

(footnote continued)

noted in a post-Hughes case:

Under the public trust doctrine, the State of Virginia and the United States have the right and the duty to protect and preserve the public's interest in natural wildlife resources. Such right does not derive from ownership of the resources but from a duty owing to the people.

In re Steuart Transp. Co., 495 F. Supp. 38, 40 (E.D. Va. 1980) (allowing federal and state governments to recover damages for migratory waterfowl killed in oil spill).

After Hughes, the statements in the Alaska Constitutional Convention regarding sovereign ownership, quoted supra, are technically incorrect. Nevertheless, the trust responsibility that accompanied state ownership remains. 3399

acknowledging that the common use clause constitutionalizes the state's trust duty, the state asserts, "The sovereign's power to allow and control use of the resources is broad, and restricted only by other constitutional limitations such as equal protection." This assertion clearly overstates the extent of the state's authority under the public trust duty and the common use clause.

First, as noted above, this court has stated in at least four cases that the common use clause is intended to provide independent protection of the public's access to natural resources. See Johns v. Commercial Fisheries Entry Comm'n, 758 P.2d 1256, 1266 & n.12 (Alaska 1988); CWC Fisheries v. Bunker, 755 P.2d 1115, 1120 (Alaska 1988); State v. Ostrosky, 667 P.2d 1184, 1189, 1191 (Alaska 1983), appeal dismissed, 467 U.S. 1201, 81 L. Ed. 2d 339 (1984); Wernberg v. State, 516 P.2d 1191, 1198-99 (Alaska 1973); see also Ostrosky, 667 P.2d at 1196 (Rabinowitz, J., dissenting).

Second, under the state's interpretation, the common use clause would be a nullity. "It is a well accepted principle of judicial construction that, whenever reasonably possible, every provision of the Constitution should be given meaning and effect, and related provisions should be harmonized." Park v. State, 528 P.2d 785, 786-87 (Alaska 1974). To give meaning and effect to the common use clause, it must provide protection of

the public's use of natural resources distinct from that provided by other constitutional provisions.

Third, the history of the common use clause, as noted above, reveals an anti-monopoly intent to prohibit "exclusive grants" and "special privilege[s]," wholly apart from the limits imposed by other constitutional provisions.

Finally, cases applying the public trust doctrine in navigable waters have frequently struck down state actions in violation of the trust without any reference to either federal or state constitutions. A good example is the lodestar of American public trust law, Illinois Central Railroad Co. v. Illinois, 146 U.S. 387, 36 L.Ed. 1018 (1892). In that case, the Illinois legislature purported to grant to a railroad more than 1,000 acres of land underlying Lake Michigan in the harbor of Chicago. The Court applied the doctrine of the public trust in navigable waters to uphold the legislature's later revocation of the grant:

A grant of all the lands under the navigable waters of a State has never been adjudged to be within the legislative power; and any attempted grant of the kind would be held, if not absolutely void on its face, as subject to revocation. The State can no more abdicate its trust over property in which the whole people are interested . . . than it can abdicate its police powers in the administration of government and the preservation of the peace.

Id. at 453, 36 L.Ed. at 1043.

In light of this historical review we conclude that the common use clause was intended to engraft in our constitution

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certain trust principles guaranteeing access to the fish, wild-life and water resources of the state. The proceedings of the Constitutional Convention, together with the common law tradition on which the delegates built, convince us that a minimum requirement of this duty is a prohibition against any monopolistic grants or special privileges. Accordingly, we are compelled to strike down any statutes or regulations that violate this principle.

D.

We conclude that exclusive guide areas and joint use areas fall within the category of grants prohibited by the common use clause. These areas allow one guide to exclude all other guides from leading hunts professionally in "his" area. These grants are based primarily on use, occupancy and investment, favoring established guides at the expense of new entrants in the market, such as Owsichuk. To grant such a special privilege based primarily on seniority runs counter to the notion of "common use."

Moreover, the grants are not limited in duration. The statutes allow holders of EGAs to sell their "improvements," and the GLCB routinely transfers the EGA to the purchaser of the improvements or to the guide's designated successor. This practice allows a guide to effectively sell his EGA as if it were a property interest. See Division of Legislative Audit, A

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Performance Report on the Department of Commerce and Economic Development Guide Board 10-11, Audit Control No. 08-1305-88-R (Dec. 11, 1987) [hereinafter "1987 Report"].

Although the Board justified the program to the legislature as a means of improving wildlife management, see Transcript of Senate Resources Committee Hearing on S.B. 661 (March 12, 1976); Transcript of House Resource Committee Hearing on S.B. 661 (April 27, 1976), it is apparent that area assignments are not based primarily on wildlife management concerns. Rather, as authorized by AS 08.564.195(b) and 12 AAC 38.220(c) & (d) (eff. 5/12/78, am. 10/15/82), the Board bases its decisions on use, occupancy and investment.¹³ See 1987 Report at 9-10. Thus, the EGA program cannot be justified as a wildlife management tool like other restrictions on common use, such as hunting seasons and bag limits.¹⁴

13. Both the statute and the regulations require the Board also to consider "big game populations in the area." AS 08.54.195(b)(4); see 12 AAC 38.220(d)(1). The regulations make it clear that this is a secondary consideration. Id. Moreover, the context of this requirement in both the statute and the regulation suggests that it was enacted only to determine how many guides the game would support economically, not to benefit the game resource directly. Finally, it is clear that the Board simply does not pay much attention to this criterion. A recent legislative report concluded, "Use of independent game information for specific regions of the State no longer appears to be a significant factor in the Board's decision-making process." 1987 Report at 10.

14. We acknowledge that the EGA program may facilitate
(footnote continued)

The state argues that EGAs do not deny Owsichuk common use of the wildlife resources because he, like any other member of the public, may hunt recreationally in these areas. We reject this argument. In CWC Fisheries v. Bunker, 755 P.2d 1115, 1121 n.14 (Alaska 1988), we noted that the public trust doctrine guaranteed fishermen access to public resources for "private commercial purposes" as well as for recreation. The same rationale applies to professional hunting guides under the common use

(footnote continued)

wildlife management by giving each guide having an EGA an incentive to conserve wildlife. However, without a specific constitutional provision allowing EGAs, mere usefulness in wildlife management does not suffice to save the EGA program from unconstitutionality under the anti-monopolistic common use clause. In the analogous area of limited entry in commercial fisheries, one purpose of limited entry has always been conservation related. However, this was not sufficient to save precursors to the present limited entry system from findings of unconstitutionality prior to the constitutional amendment allowing limited entry. This history is detailed in State v. Ostrosky, 677 P.2d at 1188, 1189 (Alaska 1983).

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clause.¹⁵ The common use clause makes no distinction between use for personal purposes and use for professional purposes.¹⁶

Nothing in this opinion is intended to suggest that leases and exclusive concessions on state lands are unconstitutional. The statutes and regulations of the Department of Natural Resources authorize leases and concession contracts of limited duration, subject to competitive bidding procedures and valuable consideration. See AS 38.05.070-.075 (authorizing leases and setting forth procedures); AS 41.21.027 (authorizing concession contracts in state parks); 11 AAC 14.200-.260, 14.010-.130 (establishing procedures for awarding concession contracts); see also Alyeska Ski Corp. v. Holdsworth, 426 P.2d 1006, 1009-11 (Alaska 1967) (discussing procedures required by

15. Admittedly, there is a difference between commercial fishermen and professional guides: a commercial fisherman takes his catch himself before selling it to others for consumption, while a hunting guide does not actually take the game, a privilege reserved for the client. We view this as an insignificant distinction that does not remove professional hunting guides from protection under the common use clause. The work of a guide is so closely tied to hunting and taking wildlife that there is no meaningful basis for distinguishing between the rights of a guide and the rights of a hunter under the common use clause.

16. The right to lead hunts professionally is a significant one. Nonresidents of Alaska are required to hire a guide in order to hunt brown bear, polar bear, and sheep, AS 16.05.407, and nonresident aliens must hire a guide to hunt any big game. AS 16.05.408. Thus, the holder of an EGA has a monopoly over this market, which is a substantial one in Alaska, for his geographic area.

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law for leasing of state lands); CWC Fisheries v. Bunker, 755 P.2d 1115, 1120-21 (Alaska 1988) (stating in dictum that shore fisheries leasing program would not violate public trust, in part because leases were of finite duration and required annual rental). In contrast, EGAs are not subject to competitive bidding, provide no remuneration to the state, are of unlimited duration, and are not subject to any other contractual terms or restrictions. Rather, as discussed above, they are granted essentially on the basis of seniority, with no rental or usage fee, for an unlimited duration, and are administered in such a way that guides may transfer them for a profit as if they owned them. In these respects the EGAs resemble the types of royal grants the common use clause expressly intended to prohibit. Leases and concession contracts do not share these characteristics.

For these reasons, we hold that AS 08.54.040(7), AS 08.54.195, and the regulations of the Board permitting the assignment of exclusive guide areas are in contravention of article VIII, section 3 of the Alaska Constitution.¹⁷

17. We note that EGAs may also violate article VIII, section 17. This section of Alaska's constitution provides:

Laws and regulations governing the use or disposal of natural resources shall apply equally to all persons similarly situated with reference to the subject matter and purpose to be served by the law

(footnote continued)

Accordingly, Owsichuk is entitled to relief declaring the EGAs that have been granted by the Board to be without legal force.¹⁸

IV.

In addition to declaratory relief, Owsichuk seeks damages against the state. Because the superior court did not reach this issue, we would ordinarily remand for further proceedings. However, when an issue is raised in the trial court and is adequately briefed by all concerned parties on appeal, this court may consider it. Mullen v. Christiansen, 642 P.2d 1345, 1350-51 (Alaska 1982).

Owsichuk bases his claim for damages on allegations that the Board acted without authority in enacting the EGA

(footnote continued)

or regulation.

In Gilman v. Martin, 662 P.2d 120, 126 (Alaska 1983), we noted that this provision may require "more stringent review" of a statute than does the equal protection clause in cases involving natural resources. There is much less constitutional history of this clause than of the common use clause. The commentary states in full, "This section is intended to exclude any especially privileged status for any person in the use of natural resources subject to disposition by the state." 6 Proceedings of the Alaska Constitutional Convention app. V, at 99 (Commentary on Article on State Lands and Natural Resources, Jan. 16, 1956) (emphasis added). Because the parties have not briefed the issue and since we are able to decide the case on other grounds, we need not decide this question.

18. Our resolution of this issue makes it unnecessary for us to decide Owsichuk's other challenges to the statutes and to the actions of the Board.

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regulations initially and that the regulations failed to comply with the legislation that was later passed.¹⁹ We need not decide whether these allegations are true. Even if the Board acted without authority or failed to comply with statutory standards, it is immune from suit under the discretionary function exception provided for in the Tort Claims Act,²⁰ as interpreted by our prior decisions.

In at least two cases, we have held that acts of public officials who in good faith misinterpret the law and act in excess of their authority are immune from suit. Earth Movers of Fairbanks, Inc. v. State, 691 P.2d 281, 283-84 (Alaska 1984)

19. Owsichuk does not base his claim for damages on the legislature's enactment of an unconstitutional statute. We note that such a claim would fail under our holding in Vest v. Schafer, 757 P.2d 588, 598 (Alaska 1988), where we wrote, "[W]e do not believe it proper for the judiciary to assess damages against the State on the ground that the legislature enacted a law later held unconstitutional, in the absence of a statute allowing or requiring such damages."

20. Alaska Statute 09.50.250 provides in part:

A person or corporation having a contract, quasi-contract, or tort claim against the state may bring an action against the state in the superior court. . . . However, no action may be brought under this section if the claim

(1) . . . is an action for tort, and based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a state agency or an employee of the state, whether or not the discretion involved is abused. . . .

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(police officer lacked authority to temporarily reduce speed limit); Bridges v. Alaska Housing Authority, 375 P.2d 696, 698, 702 (Alaska 1962) (housing authority lacked power to use declaration of taking). We have also held that decisions involving the formulation of basic policy are entitled to immunity. See Industrial Indemnity Co. v. State, 669 P.2d 561, 563 (Alaska 1983).

The EGA program was a major policy initiative of the GLCB. Therefore, even if the Board acted in excess of its authority or failed to comply with the requirements of the statute, it is immune from suit under the discretionary function exception provided for in AS 09.50.250. Furthermore, there is no evidence that the Board acted in bad faith.

V.

Owsichuk argues that it was improper for the superior court to assess attorney's fees against him, on the ground that he is a public interest litigant. See Southeast Alaska Conservation Council v. State, 665 P.2d 544, 553-54 (Alaska 1983). Because the state is no longer the prevailing party, the fee award must be vacated and remanded for redetermination.

We note, however, that successful public interest litigants may be entitled to full attorney's fees. City of Anchorage v. McCabe, 568 P.2d 986, 993-94 (Alaska 1977). Thus, the question of whether Owsichuk is a public interest litigant may be

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relevant on remand. Since the parties have fully briefed the issue, we will address it here.²¹

We have consistently held that a party will not be deemed a public interest litigant where the party had sufficient economic incentive to bring the lawsuit without regard to the public interest. E.g., Rosen v. State Board of Public Accountancy, 689 P.2d 478, 480 (Alaska 1984). As discussed above, Owsichuk claims that the EGAs in his Units jeopardized the \$450,000 he had invested in his guiding operation, and that he suffered over \$100,000 in damages. This was clearly sufficient economic incentive to bring the suit. Therefore, we conclude that he is not a public interest litigant.

REVERSED and REMANDED.

Appellant 1000.00
Appellant
10-31-88
Rabinowitz
S. Beck
10-19-88

21. The parties' briefing assumes that the state was the prevailing party, which is no longer true. However, we have never distinguished between successful and unsuccessful parties in applying our standards for determining whether a party is a public interest litigant, and we see no reason to make such a distinction. Thus, the public interest analysis does not change if Owsichuk, rather than the state, is viewed as the prevailing party.

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RECEIVED NOV 4 1988
STEVE COWPER, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

November 1, 1988

Senator Jan Faiks
3111 C Street, Suite 525
Anchorage, Alaska 99503

REPLY TO:

☐ 1031 W 4th AVENUE
SUITE 200
ANCHORAGE, ALASKA 99501-1994
PHONE: (907) 276-3550

☐ 1st NATIONAL CENTER
100 CUSHMAN ST.
SUITE 400
FAIRBANKS, ALASKA 99701-4679

☒ P.O. BOX K—STATE CAPITOL
JUNEAU, ALASKA 99811-0300
PHONE: (907) 465-3600

Dear Senator Faiks:

In response to a request from Mark Riehle of your staff, I am writing to give you a synopsis of the recent Owsichek decision and my initial thoughts on its implications. I am including a copy of the decision and will be referring to particular pages in it.

In Owsichek, the Alaska Supreme Court decided that the statutes and regulations¹ that underlie the state's exclusive guide area system ("EGA")² are unconstitutional. As of the date of the decision, October 21, 1988, this system has no legal force. (Page 27, last paragraph).

The court based the decision on its interpretation of the "common use clause," i.e., article VIII, section 3 of the Alaska Constitution. This clause says, "Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use."

This was the first time the court was called on to interpret the common use clause with respect to wildlife. In earlier decisions, it had discussed the clause in the context of state waters (Wernberg and CWC Fisheries) and in the context of fish (Ostrosky and Johns).³ In light of its earlier decisions, the

¹/The court uses the term "exclusive guide areas" to describe not only joint use areas but also "restricted guide areas," a term used to describe EGA's since 1986 when the term appeared in AS 08.54.195.

²/In Ostrosky, the court stated that fisheries limited entry was inconsistent with the common use clause, but that this system was saved by a 1972 constitutional amendment that specifically provided for it. (Page 12, first complete paragraph.) The fisheries limited entry amendment is Article VIII, § 15 of the Alaska Constitution.

court declared that the "common use clause was intended to guarantee broad public access to natural resources." (Page 13, first complete paragraph).

In order to further clarify the meaning of the common use clause, the court looked to the constitutional history of this clause (Part B. of the decision, pp. 13-17) and to the historic development of wildlife law in general (Part C. of the decision, pp. 17-23). Concerning the constitutional history, the court said that the purpose of the clause was "anti-monopoly." It also found that the framers of the constitution intended to prohibit "exclusive grants or special privileges" and intended that the public "retain broad access to fish, wildlife and water resources." (Pages 13, second full paragraph through end of section B. on page 17).

In discussing the development of wildlife law, the court said that the common use clause "constitutionalized" the state's public trust duty toward wildlife. This is a duty to manage these resources for the benefit of all the people. (Page 19, last paragraph through end of page 20.)

The court summarized its interpretation of the common use clause by stating that the clause was intended to put into the constitution "certain trust principles guaranteeing access to the fish, wildlife and water resources of the state" and, at a minimum, this meant a "prohibition against any monopolistic grants or special privileges." (Page 22, last paragraph through end of section on page 23.) It also stated that the clause makes no distinction between use for personal purposes and use for professional purposes; common use applies to commercial guiding as well as recreational hunting. (Page 25, first paragraph.)

In deciding that the EGA's violated these principles, the court noted the following features of the system:

1. The EGA system gave one guide the right to exclude all other guides from conducting hunts in his or her EGA. This right was based on the area holder's seniority, that is, his or her use, occupancy, and investment in the area. (Page 23, first complete paragraph.)
2. EGA rights had no time limit, and the system of transferring them, based as it was on the selling of "improvements" and a holder's designation of his or her successor, allowed the selling of areas as if they were a property interest. (Page 23, second complete paragraph.)

3. The assignment of EGA's was not based primarily on wildlife management concerns. (Page 24, first complete paragraph.) The system could not be justified as a game management tool and therefore was unlike licensing requirements, bag limitations, and seasonal restrictions which were proper and "time-honored methods of conserving the resources." (Page 10, first complete paragraph.) In this regard, it is important to note that the court said that even if used as a wildlife management tool, this would not "save the EGA system from unconstitutionality under the anti-monopolistic common use clause." (Page 24, footnote 14.)

Finally, the court made a distinction between the EGA's on one hand and state leases and exclusive concessions on the other. The latter are permissible because they are of limited duration, because they are subject to competitive bidding, because they are limited by contract terms and restrictions, and because the state receives compensation for them. (Page 26, first complete paragraph).

This part of the decision has prompted proposals for enacting a new area system that has some of the features of a lease or concession. For example, it has been suggested that area permits be issued for a limited duration, based on competitive bidding, and with fees paid to the state.

I believe, however, that any system which allows some but not all qualified guides to have access to game resources will not satisfy the principle of common use as expressed by Owsichuk. Even if a limited entry system served a game management purpose and not just the economic stability of the guiding industry, it would still have monopolistic features that are contrary to the concept of "common use." (See again footnote 14, beginning on page 24.) It would be a misinterpretation of Owsichuk to believe that the common use clause will be satisfied by merely modifying the exclusive area system by adding several features that characterize other state concessions. Unlike wildlife, land leases and other uses of public resources are not listed in the common use clause. Thus, they are freer to allow access by one user and exclude all others.

The Department of Law has been asked to request the court to reconsider the decision or to postpone its effect until June 1 of next year.

Concerning a request for reconsideration, the court will not rehear a case on matters that it has already considered. We would have to point out a law, principle, or important fact that it did not already look at. (Appellate Rule 506). To date,

neither I nor any other assistant attorney general who is familiar with the case believes that there is a ground for requesting a rehearing. Because the court's decision was unanimous and was published after such a long period of deliberation, it is likely that any lingering doubts about the case have been resolved. For the same reasons, it is highly unlikely, even if the court agreed to rehear the case, that it would reverse its decision.

I believe that unless we can show that the decision will have definite, significant, and adverse consequences, the court will not take the extraordinary step of postponing the effect of its decision. One consequence may be a short-term overharvesting of game resources. I have been communicating with the Director, Division of Game to determine whether Owsichuk will cause undue resource pressure that cannot be managed by the Board of Game. Another consequence may be the canceling of client contracts and refund of deposits paid to guides who booked hunts in reliance on the EGA system. I have asked the Division of Occupational Licensing and the Alaska Professional Hunters Association to provide me with information about the number of guides who have existing contracts and the number of persons who now will be eligible to guide in former EGA's.

This information will assist the Department of Law in deciding whether a sound case can be made for postponement of the effective date of the decision. In any event, we have several weeks to gather and analyze data and to make this decision. Mr. Owsichuk's attorney and I have asked the court to extend until November 18 the deadline for filing such requests, and I expect that this extension will be granted.

I hope this letter assists your understanding of the Owsichuk decision. If you have additional questions, please do not hesitate to contact me.

Sincerely,

GRACE BERG SCHAIBLE
ATTORNEY GENERAL

Stephen M. White by bt
By: Stephen M. White
Assistant Attorney General

SW/bt

Encl.

Senator Jan Faiks
Anchorage, Alaska

November 1, 1988
Page 5

cc: Rep. Heinrich Springer, Chairman
Alaska Legislative Task Force on Guiding
and Big Game

Randall Burns, Director
Division of Occupational Licensing

Ray McNutt, Chairman
Guide Licensing and Control Board

Rod Swope, Special Staff Assistant
Office of the Governor

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12-15-88

IN THE SUPREME COURT OF THE STATE OF ALASKA

KENNETH D. OWSICHEK,)
)
Appellant,)
)
v.)
)
STATE OF ALASKA, GUIDE)
LICENSING AND CONTROL BOARD,)
)
Appellee.)
)

Supreme Court No. S-1650

ORDER

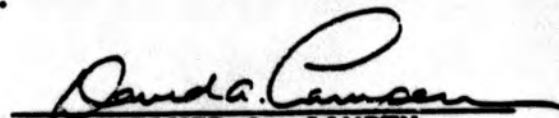
Trial Court No. 3AN 79-2387 Civil

On consideration of the motion for stay of decision, filed on November 18, 1988, and the opposition to the motion, filed on November 28, 1988,

IT IS ORDERED:

The motion for stay is granted. The portion of Opinion No. 3389, filed on October 21, 1988, which declares that the exclusive guide areas granted by the appellee State of Alaska Guide Licensing and Control Board are without legal force is stayed until June 1, 1989.

Entered by direction of Justice Jay A. Rabinowitz at Anchorage, Alaska on December 8, 1988.


DAVID A. LAMPEN
Clerk of the Supreme Court

STATE OF ALASKA

STEVE COWPER, GOVERNOR

DEPARTMENT OF COMMERCE &
ECONOMIC DEVELOPMENT

DIVISION OF OCCUPATIONAL LICENSING

P.O. BOX D-LIC
JUNEAU, ALASKA 99811-0800
PHONE: (907) 465-2534

RESOLUTION - TO TASK FORCE

WHEREAS: The recent Supreme Court decision (Owsichuk) has thrown the guiding industry and its regulation into an unfortunate chaotic state; and

WHEREAS: The implications of wholesale commercial use, unrestricted to areas on certain wildlife populations, will probably force the Board of Game to adopt restrictive regulations; and

WHEREAS: Localized overharvest and more restrictive regulations on wildlife harvest will have a detrimental effect on all wildlife user groups, including guides, resident hunters and subsistence hunters; and

WHEREAS: The Governor's Interim Task Force on Game and Guiding is currently evaluating this situation and will make its recommendations to the next Legislature in January 1989.

THEREFORE, it is hereby resolved that: the Guide Board meeting in Anchorage on December 1, 1988 respectfully requests the Task Force to consider ways to limit providers of commercial big-game hunting services to geographic areas for conservation purposes.

FURTHER, be it resolved that: the Guide Board encourages the Task Force to recommend that service providers be limited to licensed guides and licensed transporters, leaving no "gray area" between them as does the current law that compounds conservation problems.

Proposed regulation: that a guide's license or others under the Guide Board's jurisdiction shall be revoked or suspended for guiding on land held by any state, federal or any private group or corporation without receiving prior permits and/or permission.

Unanimously adopted by the Guide Board, December 1, 1988.

KW/djd9329W
121288a

JUN 8 1988

Senate Research Committee
Pouch 5
State Capital
Juneau, AK 99519

Dear Sirs:

Recently in the June issue of "Hunting" magazine they made reference to proposed legislation HB331 and 451. According to this article these bills will effectively eliminate do-it-yourself hunts.

I wish to express my opposition. As the article went on to state we in the southern states have not given our input so I felt compelled to write. I'm sure my arguments have been discussed for years and I will not dwell on them. I have spent thousands of dollars in your state and will continue to do so as will my friends until the passage of this type of bill. I feel the money I've spent in your state has gone not only for the purchase of permits, motels, food, supplies, gifts and etc but I've also paid for the assistance I've got from local inhabitants. Personally I would rather save some money myself and help a villager rather than line the pockets of a guide service. Guides provide a excellent service for those who would like to use them but I enjoy lining up the experinece myself. I enjoy being alone and enjoy hunting or photographing by myself or with a close companion. I have done enough research and spent enough funds to line up caribu bow hunts on two occassions and I had planned on going again this year or in 89.

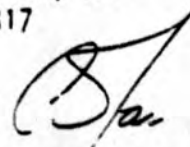
I have enjoyed making arrangements with the native alaskans. I feel I've made friends in some of the villages and enjoy in seeing these people and talking about our lives. Although not yet successful in taking a trophy the experiances I have had have made it worth it.

With prohibitive legislation being passed in southern states I've always felt a sense of pride in Alaska's policy's.

Please do not close the door to us who wish to research do-it-yourself trips. I speak not only for myself but my many friends.

Thank you for your concern,

C. Starr
Box 71
Bennet, Ne
68317



STEVE COWPER, GOVERNOR

**DEPARTMENT OF COMMERCE &
ECONOMIC DEVELOPMENT**

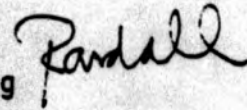
DIVISION OF OCCUPATIONAL LICENSING

P.O. BOX D-LIC
JUNEAU, ALASKA 99811-0800
PHONE: (907) 465-2534

DATE: September 8, 1988

TO: All Members, Subcommittee
Interim Task Force on Guiding and Game

FROM: Randall P. Burns, Director
Division of Occupational Licensing



SUBJECT: Locations and Times of Rural Hearings

Below are the times and locations of our public hearings
in Kotzebue and King Salmon:

Kotzebue City Council Chambers
3rd and Mission
Kotzebue
1:00 p.m. to 3:30 p.m.

Comserfac (for the FAA's Community Service Facility)
King Salmon
2:00 p.m. to 5:00 p.m.

Please let me know if you have any comments or problems
with the times or locations. Nancy Peterson of Senator
Fahrenkamp's office will publish notices of these times
and locations.

RPB/sa4384s
90988a

cc: Members, Interim Task Force

June 14, 1988

Honorable Steve Cowper
Governor
State of Alaska
P.O. Box A
Juneau, AK 99811

Re: HCS CSSB 191(Rls) am H -- big
game guiding; interim task
force on guiding and commer-
cial take of big game
Our file: 883-88-0157 -
0151

Dear Governor Cowper:

At Judy Fleming's request on your behalf, we have reviewed HCS CSSB 191(Rls) am H, which relates to the Guide Board; big game guiding, transporting, outfitting, and hunting; and establishes an interim task force on guiding and the commercial taking of big game. We understand that the main thrust of the bill's provisions relating to what constitutes lawful guiding is to make those provisions more enforceable in order to curb the proliferation of what are, essentially, "guiding" services provided under the guise of "outfitting."

Under present law, the Guide Board is scheduled to terminate on June 30, 1988. AS 08.03.010(c)(20). Section 1 of this bill extends this termination date for an additional one year, until June 30, 1989, rather than the more-or-less standard four-year extension referred to as the maximum in AS 08.03.020(c). Proposed AS 08.03.010(c)(20). Because the existing termination date is so close, the bill provides for an immediate effective date for the extension (sec. 16), although this board is not yet in its wind-down year under AS 08.03.020(a).

In a recent memo to the commissioner of commerce and economic development (DCED), we disapproved regulations that provided for an oral portion of the guide license examination. This disapproval was based upon our finding that the legislature intended to limit oral examinations to only those applicants who have limited ability to read or write English. Memorandum to Commissioner Tony Smith from Assistant Regulations Attorney Peter Froehlich, March 23, 1988 (our file no. 993-87-0133).

Section 2 of the bill provides specific authority for

Hon. Steve Cowper, Governor
Our file: 883-88-0157

June 14, 1988
Page 2

an oral portion of the guide license examination. It also provides authority for an oral examination of guides who seek amendment of their game management unit certification. The examinee must show that he or she is qualified to guide in the selected game management units. Proposed AS 08.54.040(a)(1)(A) and (B).

In the past, we have been concerned by the amount of subjectivity that oral examinations present, as well as their difficulty of review. According to the division of occupational licensing, DCED, the oral portion of the exam has been tape-recorded since 1986. This, plus the focus of sec. 2 on testing local knowledge of game management units as opposed to permitting oral testing on any topic, should reduce the potential abuse of discretion that is inherent in the oral exam method.

In our September 29, 1986, opinion to the director of the division of occupational licensing, we stated that the residency requirements of AS 08.54.210(a)(3) and (a)(6) were unconstitutional and should not be enforced. 1986 Op. Att'y Gen. No. 2 (Sept. 29). These paragraphs state that a person must possess a resident hunting license in order to guide in Alaska. Section 3 of the bill deletes this unconstitutional requirement, and the language that would remain requires only that a guide have a valid guide license and a hunting license (in possession). Proposed 08.54.210(a)(3) and (a)(6).

AS 08.54.210(a)(4) currently prohibits a person who is not a "licensed guide" from advertising as a guide. Section 3 of the bill would amend that paragraph to prohibit persons who are not "registered or master" guides from advertising as "a guide" or "as an outfitter offering big game hunting services." According to testimony by the director of the division of game, Department of Fish and Game, before the Senate Resources Committee on March 2, 1988, licensed guides in other states are commonly referred to as "outfitters." If unlicensed persons who furnish hunting services other than "guiding" are permitted to use this term, there is concern that customers may be misled into believing that they are hiring guiding services. Thus, the purpose of proposed AS 08.54.210(a)(4)(B) appears to be to protect the public from being deceived.

Because a restriction on advertising is a restriction on expression, the proposed language of AS 08.54.210(a)(4) must be examined in light of the right of free speech that is protected by the First Amendment to the U.S. Constitution. Although commercial speech is protected by that amendment, the courts recognize that states have an interest in protecting the public from deceptive advertising and from ads that offer illegal services.

Friedman v. Rogers 440 U.S. 1 (1979); State v. O'Neill Investigations, 609 P.2d 520 (Alaska 1980). Thus, it is unlikely that this prohibition could be successfully challenged under the First Amendment.

On the other hand, restrictions on speech are usually strictly applied by the courts. This is because of the danger that overbroad application might prohibit expression that is more fully protected by the constitution. We note that neither the present law nor this bill defines the terms "outfitter" and "big game hunting services." Thus, it is likely that prohibited advertising would be confined to the literal use of these two terms.

Section 3 of the bill also changes the penalty for violating the advertising restriction and for certain other prohibitions that are listed in AS 08.54.210. This section increases the present maximum penalty of \$1,000 for a violation of AS 08.54.210(a)(1) -- (5), to a new maximum of \$2,000. Proposed AS 08.54.210(b).

Existing AS 08.54.210(b) also makes it a felony to violate AS 08.54.210(a)(6) -- (8), as well as to guide while a license is suspended or revoked. That subsection also sets out the fine and term of imprisonment for such a felony. We note that the one-year minimum sentence of imprisonment was removed by floor amendment in the House on May 9, 1988 (the maximum three-year term of imprisonment was retained). 1988 H. Jour., p. 3763. As a result of the wording of the amendment, the deletion, however, was not indicated by capital letters and bracketing; the phrase "less than one year nor" was instead simply deleted on page 4, line 5, of HCS CSSB 191(R1s) am H. (The same deletion of that phrase appropriately occurred in sec. 4 of the bill, on page 5, line 28, which repeals and reenacts AS 08.54.210.) By copy of this letter, we bring this to the attention of the revisor of statutes.

The amendments in sec. 3 are given a delayed effective date and will not be operative until January 1, 1989. Section 18 of the bill. Section 4 of the bill, which takes effect six months later on June 30, 1989, repeals and reenacts AS 08.54.210 to repeat the sec. 3 amendments described above and to make one addition to AS 08.54.210. Section 17 of the bill. The addition is a requirement that persons who transport hunters "for compensation or hire" must hold a valid air taxi commercial operator's certificate issued under 14 C.F.R. Part 135. Violation of this requirement is a misdemeanor and will subject the person to fine and imprisonment and license revocation. Proposed AS 08.54.210-(b), sec. 4 of the bill.

By way of definition, this paragraph says that "for compensation or hire" means "receiving any monetary consideration for the transportation, regardless of whether the consideration is directly attributable to the transportation," but that it does not include being reimbursed for aircraft fuel. Although we believe that the definition could have been stated with more precision, it is clear from testimony before the House Resources Committee on April 29, 1988, that the intent is to prevent a person from avoiding the operator certificate requirement by claiming that compensation is being paid for the food, equipment, and personal services, but that flying to and from the hunting area is being provided without cost to the customer.

Section 5 provides a new definition of "guide" or "guiding" in AS 08.54.240(3), which says, with some exceptions, that merely "accompanying," or being present with a big game hunter in the field, for compensation, constitutes guiding. Under the existing definition, the "accompanying" must take place while the hunter or accompanying person "spots, stalks, pursues, tracks, kills, or attempts to kill big game" for the activity to constitute "guiding."

As under the existing definition, under this bill "in the field" would not include being with a hunter in a base camp, lodge, or boat with permanent living quarters. Under the bill, however, "cabins" are added as an excluded location and, to be excluded, a camp, cabin, or lodge must be one that is "registered" with the division of fish and wildlife protection under proposed AS 16.05.787 (sec. 11 of the bill). For purposes of being in a "base camp," sec. 7 of the bill defines this term to exclude certain types of temporary field camps. The definition is repealed June 30, 1989, by secs. 15 and 17 of the bill, consistent with deletion of that term in secs. 6, 12, and 13, on that date.

Under the new definition in sec. 5, a person is also not "guiding" if he or she is providing transportation to the field and there is no pursuing or killing of big game during the transportation, or if the person is selling or leasing goods and the sale or lease does not occur in the field. This sec. 5 definition of "guide" or "guiding" would have immediate effect under sec. 16 of the bill.

Section 6 redefines "guiding" in a slightly different manner, and it has an effective date that will cause its definition to replace the sec. 5 definition on June 30, 1989. Section 17 of the bill. The only difference between these two definitions is that the latter removes a "base camp" as a permissible

Hon. Steve Cooper, Governor
Our files: 883-88-0157

June 14, 1988
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locale for an unlicensed person who accompanies big game hunters for compensation. After June 30 of next year, therefore, only a licensed guide may be in a base camp in this capacity.

Section 8 of the bill amends AS 16.05.370 by requiring game tag vendors to provide a report form to hunters. The report would give the Department of Fish and Game information about the amount and type of game taken and the location of the hunt. Sections 9 and 10 are directed toward nonresident big game hunters and require them to provide, in an affidavit, information in advance of their hunting trip, concerning where they intend to hunt and what hunting services they will be employing. Failure to comply would be a misdemeanor. Falsification of an affidavit would be a class B felony.

Because secs. 9 and 10 burden only nonresident hunters, we must analyze them under constitutional principles embodied in the privileges and immunities clause, art. IV, sec. 2 of the U.S. Constitution, and the equal protection provisions of art. I of the Alaska Constitution, and of the Fourteenth Amendment to the U.S. Constitution. Concerning the first of these, the U.S. Supreme Court held that recreational hunting is not a protected privilege under the privileges and immunities clause. Baldwin v. Montana Fish and Game Commission, 436 U.S. 371 (1978). Therefore, we do not believe that this requirement would be held invalid under the privileges and immunities clause.

Under a federal equal protection analysis, differential treatment must be based on a governmental interest that is legitimate, and the law must be rationally related to its achievement. Although the analysis under the state constitution is somewhat different, it is also based upon a reasonable means-to-end relationship between the method and the objective. State v. Ostrosky, 667 P.2d 1184 (Alaska 1983).

Testimony before the Senate Finance Committee on March 28, 1988 indicated general concern that a recent influx of nonresident hunters who are served by outfitters is placing a disproportionate pressure on big game resources in certain areas of the state. Thus, the objective here is proper game management and protection, an area where the states have been given great latitude in determining what means are appropriate. Lacoste v. Department of Conservation, 263 U.S. 545 (1924).

There was also testimony that the state lacks specific information that can document the impact of nonresident hunters on big game. Thus, the legislature has chosen a means -- the required completion of a questionnaire by the suspect group --

Hon. Steve Cowper, Governor
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which will provide information upon which future decisions concerning game management and allocation can be made. Because there is a close means-to-end fit and the selected method reasonably serves the objective, we believe that the requirements of secs. 9 and 10 satisfy equal protection requirements.

Section 11 of the bill places several additional duties on unlicensed persons who transport or accompany big game hunters for compensation. Under proposed AS 16.05.786, transporters are required to report to the Department of Public Safety any violation of a fish, game, or guiding statute or regulation committed by a client or employee. Failure to timely make this report would be a misdemeanor. This requirement is the same as the duty of licensed guides under AS 08.54.210, and the penalty would be the same as that provided for guides. Section 3 of the bill.

Under proposed AS 16.05.787(a), a person who is not licensed as a guide may not accompany a hunter for compensation at a base camp, cabin, or permanent lodge unless the person has had no game violations during the preceding five years. Also, at least two weeks in advance of accompanying the hunter, the person must register the camp, cabin, or lodge with the Department of Public Safety by filing an affidavit that specifies the location of the facility, the number of hunters who will use it, and the types of big game that will be hunted. After the hunt, the person filing the affidavit must timely notify the Department of Public Safety of the game taken by each hunter who used the facility. Proposed AS 16.05.787(b).

Proposed AS 16.05.787(a) also states that a person who is not licensed as a guide "may not register more than two base camps." There is no time period, however, placed on this restriction. Thus, it is not clear from the language of the bill whether the restriction means two base camps per hunting party, per season, or forever. Under the first interpretation, a person could conceivably change base camps by filing a new affidavit for each hunting group so long as not more than two base camps were designated at any one time.

This provision was added as a floor amendment in the House of Representatives on May 9, 1988. 1988 H. Jour., pages 3758, 3759. On the floor of the House, the amendment's sponsor, Representative Navarre, stated that the intent of the restriction was to allow no more than two base camps per operator statewide. In further explanation, he referred to the fact that guides are limited to three guide areas, and the amendment would put all the players on a "level playing field."

Hon. Steve Couper, Governor
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Representative Navarre was referring to 12 AAC 38.200, a regulation that, with several exceptions, limits guides to three guiding areas. Guiding areas are not transferable by guides themselves. 12 AAC 38.260(a). To substitute a different area for one already held, a guide must apply to the Guide Board for reassignment of the new area, and the board's decision would be governed by the criteria in 12 AAC 38.260. Because new guide areas cannot be substituted at will by guides, we believe that the legislature, in order to keep all the players on a "level playing field," intended that nonlicensed persons be similarly restricted.

Therefore, we believe that during the period that these persons may legally be in a base camp with their client, that is, until June 30, 1989, a compensated nonguide may designate only two base camps in the state, and once designated, a base camp cannot be changed. This result is also supported by language in proposed AS 16.05.787(a)(2) which specifies what information must be in the registration affidavit. The affidavit must designate "the number of big game hunters in each party that will use the camp, cabin, or lodge" (emphasis added). This implies that a registration affidavit will be used for more than one hunting party, and not that a different affidavit will be filed for each new hunt.

On June 30, 1989, secs. 12 and 13 will replace the provisions of sec. 11. Section 17 of the bill. Except for deleting references to "base camp" (consistent with removal of that term in sec. 6 of the bill), and several other minor changes, the language of secs. 12 and 13 is identical to the language in sec. 11 which it replaces. We note, and call to the attention of the revisor of statutes, however, that although sec. 12's language also deletes the "two base camp" limitation of sec. 11, it does so by simply omitting it rather than properly setting out the sentence in brackets.

Section 14 contains a very significant provision that establishes an interim task force on guiding and game. The task force will consist of the commissioners of the Department of Commerce and Economic Development, Department of Fish and Game, and Department of Public Safety, as well as two senators, two representatives, and six members appointed by you from various interest groups.

The bill requires the task force to review the operations of the guide board and to study the problems concerning the commercial taking of big game in the state. The task force must report to the legislative council its findings and proposed leg-

Hon. Steve Cooper, Governor
Our file: 883-88-0157

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isolation before the task force terminates on January 15th of next year. The bill gives the task force subpoena power to compel the appearance of witnesses before the task force.

The House adopted a lengthy letter of intent that accompanies this bill. 1988 H. Jour., page 3764. The letter expresses a desire that the task force examine several specific issues relating to the transporting and guiding industries and to the operation of the Guide Board. Because the letter of intent does not carry the force of law, the task force is not required to comply with it. We believe, however, that the letter of intent contains valid recommendations that, if followed, could result in a better system of managing the commercial taking of big game in Alaska.

While presenting a couple of points for the revisor of statutes to address, we know of no reason for you not to sign this bill.

Sincerely,

Grace Berg Schaible
Attorney General

GBS:SMW:prm

cc: David Dierdorff
Revisor of Statutes
Legislative Affairs Agency

STATE OF ALASKA

DEPARTMENT OF COMMERCE & ECONOMIC DEVELOPMENT

DIVISION OF OCCUPATIONAL LICENSING

STEVE COWPER, GOVERNOR

P.O. BOX D-LIC
JUNEAU, ALASKA 99811-0800
PHONE: (907) 465-2534

GAME MANAGEMENT UNIT	# OF GUIDES CERTIFIED IN UNIT	# OF GUIDES WITH FORMER EGA IN UNIT	ADDITIONAL # OF GUIDES NOW ABLE TO CONTRACT HUNTS
1	33	13	20
2	31	13	18
3	34	13	21
4	34	13	21
5	35	6	29
6	165	12	153
7	140	5	135
8	139	23	116
9	218	69	149
10	103	2	101
11	164	28	136
12	160	23	137
13	199	44	155
14	149	7	142
15	151	10	141
16	166	24	142
17	130	17	113
18	99	5	94
19	143	27	116

STATE OF ALASKA

DEPARTMENT OF COMMERCE & ECONOMIC DEVELOPMENT

DIVISION OF OCCUPATIONAL LICENSING

STEVE COWPER, GOVERNOR

P.O. BOX D-LIC
JUNEAU, ALASKA 99811-0800
PHONE: (907) 465-2534

GAME MANAGEMENT UNIT	# OF GUIDES CERTIFIED IN UNIT	# OF GUIDES WITH FORMER EGA IN UNIT	ADDITIONAL # OF GUIDES NOW ABLE TO CONTRACT HUNTS
20	112	17	95
21	100	8	92
22	85	8	77
23	91	14	77
24	99	15	84
25	112	14	98
26	107	25	82

NUMBER OF HUNTS CONDUCTED BY MASTER OR REGISTERED GUIDES,
 BY GAME MANAGEMENT UNIT,
 REPORTED ON THE STATEMENT OF FINANCIAL REMUNERATION (SFR),
 AS OF NOVEMBER 30, 1988

Game Management Unit	No. of Hunts Conducted
1	54
2	23
3	51
4	73
5	52
6	115
7	9
8	88
9	484
10	8
11	110
12	138
13	285
14	128
15	25
16	235
17	244
18	39
19	352
20	115
21	23
22	38
23	75
24	23
25	100
26	205

TOTAL GUIDED HUNTS REPORTED AS OF
 NOVEMBER 30, 1988 3,092

STEVE COWPER
GOVERNOR



STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

November 18, 1988

Mr. Robert A. Payne
2221 Muldoon Road, Space 693
Anchorage, AK 99504

Dear Mr. Payne:

Thanks for your letter. I've shared your suggestions on regulation of air taxi operators with Randall Burns. Director Burns will contact you if he has any questions. I've also sent a copy of your letter to Representative Heinrich Springer, who chairs the task force on guides and guiding established by Senate Bill 191 this past legislative session. Air taxis play a significant role in the system of guides, outfitters, transporters and hunters in Alaska. I want Representative Springer to be aware of your concerns as his group looks into problems with the guiding industry.

Thanks again for your letter. I'll keep your thoughts in mind as we approach the first session of the Sixteenth Alaska Legislature.

Sincerely,

S/S Steve Cowper

Steve Cowper
Governor

cc: The Honorable Heinrich Springer
Alaska State Representative

Randall Burns, Director
Division of Occupational
Licensing
Department of Commerce
and Economic Development

STATE OF ALASKA
DEPARTMENT OF COMMERCE
& ECONOMIC DEVELOPMENT

NOV 25 1988

DIVISION OF
OCCUPATIONAL LICENSING

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NOV 25 1988

OFFICE OF THE
GOVERNOR

RECEIVED

SEP 23 1988

GOVERNOR'S OFFICE

22 SEP 1988

Governor Steve Cooper
State of Alaska
3601 "C" St., Suite 758
Anchorage, Alaska 99501

Dear Governor Cooper:

I am writing to express my opinion about the air taxi services in Alaska. My hunting partner and I recently flew out of Anchorage with Rust's Flying Service for a hunting trip. While we were giving Rust a deposit for our trip we were told we could fly anywhere in Unit 16B for \$250.00 each. We were also asked where we would like to go. I gave Rust 3 areas that I had read about that were said to have a good population of moose. Rust said that all the areas I gave him were very hard to hunt so we asked him what area he would recommend. He said that Beluga Lake would be a good area for moose. We gave him our deposit and said Beluga Lake would be fine. I talked to another employee where I work who had been a guide in Alaska for many years and he said Beluga Lake should be a good area. My hunting partner called the Alaska Fish and Game and got the same response. I bought some good maps of the area to help us in our hunt. When we arrived on Friday the 9th of September for our flight he then told us that Beluga Lake would be too hard of an area to hunt and recommended Long Lake. He did not explain why Beluga Lake was OK when we made our deposit and not OK now. We told him that if there were moose at Long Lake it would be fine with us to change locations and he assured us that there were moose. We did not see any moose during our flight in, we did not see any moose, sign or tracks of any kind during the 8 nights and 7 days we were there. There were 6 other hunters at this lake and they did not see any moose or any sign of moose during their week long stay. We did not see any moose on the flight out either. The pilot on the way out said that he had shot a moose at this lake last year and one of his last remarks was that "maybe all the moose have been shot out of this area". \$250.00 is a lot of money for me and my vacation time is valuable. I know that a flying service or guide cannot guarantee a moose, but to have someone make a statement like that after spending a week out there and spending that kind of money makes me angry. They fly on a regular basis and they should have known that there were no moose in the area at that time. I am a good hunter, but if there are no animals there it does not matter how good you are. I also feel that they should have taken us to Beluga Lake like was originally agreed upon.

STATE OF ALASKA
DEPARTMENT OF COMMERCE
& ECONOMIC DEVELOPMENT

NOV 25 1988

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Governor Steve Cooper
State of Alaska

I know that nothing can be done about this now. I will just have to learn from this experience. The reason I wanted to explain all this for is because I feel that the flying services in Alaska need to be regulated in some way like guides are if they are going to fly hunters and fishermen out. I feel that if there were some kind of regulations other hunters may not go through what we went through. I also feel that with the proper regulations these trips would be much safer for the public.

I for one will not ever fly with this company again nor will I recommend them to anyone I know.

Thank you for your time and I hope that you will support some legislation on this problem.

Sincerely,

Robert A. Payne

Robert A. Payne
2221 Muldoon Rd., Space 693
Anchorage, Alaska 99504

CC: Rust's Flying Service
Better Business Bureau of Alaska, Inc.

STATE OF ALASKA
DEPARTMENT OF COMMERCE
& ECONOMIC DEVELOPMENT

NOV 25 1988

DIVISION OF
OCCUPATIONAL LICENSING

STEVE COWPER
GOVERNOR



STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

December 2, 1988

Mr. Maurice Keith Harris
392 East 600 South
Logan, UT 84321

Dear Mr. Harris:

Thanks for your letter regarding your experiences with a Soldotna fishing guide. You didn't tell me anything about your dealings with the guide once you discovered what kind of fish were shipped home with you. Did you complain directly to the guide? What, if anything, did he do in response? I encourage you to do what you can to settle your dispute directly with your guide.

If you are unsuccessful, there are several specific avenues of action to take. The first should be to enlist the aid of the Consumer Protection Section of the Department of Law. By copy of this letter, I am alerting Investigator Jim Hayes that you may contact him in the future. Again, I encourage you to first deal directly with the guide.

Fishing guides are licensed by the State of Alaska only in the sense that we require them to have business licenses. They are not subject to regulatory restrictions such as those that apply to big game hunting guides. Still, we are interested in helping visitors to our state get what they expect and pay for. I'll share your letter with Hugh Gellert, Division of Tourism, and Randall Burns, Division of Occupational Licensing, and will ask them for their thoughts on improving the services Alaskan businesses provide to tourists.

I hope you can work out your problems with your guide. If not, Jim Hayes should be able to help. Please let me know how your case progresses.

Sincerely,

S/S Steve Cowper

Steve Cowper
Governor

Mr. Maurice Keith Harris

-2-

December 2, 1988

cc: James C. Hayes, Investigator
Consumer Protection Section
Department of Law

Hubert Gellert, Director
Division of Tourism
Department of Commerce
and Economic Development

Randall Burns, Director
Division of Occupational
Licensing
Department of Commerce
and Economic Development

Fun Fishing with Tex

RECEIVED

SEP 28 1988

392 East 600 South
Logan, UT 84321
September 14, 1988

HAND DELIVERED
GOVERNOR'S OFFICE

CERTIFIED MAIL—RETURN RECEIPT REQUESTED

P 844 952-496

Governor Steve Cowper
State Capitol Building
Anchorage, AK 99502

"Fun Fishing With Tex"
July 23-July 31
Soldotna, Alaska

Fish caught by

Keith Harris:

8 Sockeyes, approx.
64 lbs. undressed
1 10 lb. silver salmon
2 King Salmon
1 50 lbs.
1 44 lbs.
1 16 lb. Halibut
1 72 lb. Halibut

Dear Governor Cowper:

During my recent trip to Soldotna, Alaska, July 23-31, "TEX" our fishing guide, was to take our fish, freeze them, and pack them for shipment home. When I checked in at the Anchorage Airport, there wasn't a Bill of Lading on the boxes of fish so I had no idea what was in the packages. Regretfully, when I arrived in Logan, Utah, this is what I found; the first box contained 5 Sockeyes and 28 pounds of Halibut "Tid Bits", no steaks or filets. The second box contained King Salmon. Some of it was not the King Salmon I caught, however, because when I thawed one large steak it was freezer burned, old, and certainly not the one I caught.

I am at a loss as to what to do. I spent over \$2000 for this trip as I waited a lifetime to fish Alaska. "TEX" received \$1495 of this amount for fishing & lodging. I believe that a large portion of my catch was purloined by "TEX" or some of his associates. Therefore, I am asking you for your aid in investigating this blatant stigma upon the State of Alaska. In fact, 12 of our friends are thinking of going to Alaska in 1989, but await your reply in this most serious matter before they decide.

The Eagle Lodge of Logan, Utah, was the organization that provided the facilities for "TEX" to present the virtues of his ability and integrity. Perhaps it might be a good time to advise the Grand Master of the Eagles of this unfortunate mishap. Perhaps "TEX" made the mistake. I honestly believe that "Fun Fishing with TEX" should refund me half the money, if not all, I gave him. I do not want additional fish at this time, as I only want the fish I personally caught. I'm sure you can understand that. I guess the mistake I made was trusting a licensed guide of the State of Alaska, thinking he would police men like "TEX". I hope this isn't true, as your literature indicates all to the contrary.

I have put a \$750 hold on my Visa card until this matter is resolved to the mutual satisfaction of all parties concerned including officials of the State of Alaska. I anxiously await your reply and solution.

Sincerely,

Maurice Keith Harris

Maurice Keith Harris

MKH/cc

cc First Security Bank VISA
Alaska State Division of Tourism
Grand Marshal of F.O.E.



Official Business

Alaska State Legislature

House

Pouch V
State Capitol
Juneau, Alaska 99811

MEMORANDUM

To: All Task Force Members
Alaska Legislative Task Force on Guiding and Game

From: Representative Heinrich Springer, Chairman *HS*
Alaska Legislative Task Force on Guiding and Game

Date: September 20, 1988

Subject: Public Testimony

Attached is a copy of a letter which I received from Senator Jan Faiks regarding public input to the Task Force and its ramifications on those who testify.

The basic issue, fear of retribution for speaking out, is not new to the legislature. "Whistleblower" legislation, to protect individuals, was introduced during the 14th Legislature but did not pass. It is difficult to prove discrimination or failure to follow guidelines and standards by a governmental agency against someone who has testified. Consequently, beyond proving discrimination, there is no legal precedence at this time for protecting an individual who gives public testimony at a legislative hearing. And the fear of repercussions aimed at the individual who testified can keep an issue that should be considered from being looked at.

As it is important that all angles and views on a subject be heard for a thorough understanding of it, please give the matter your serious consideration and forward all suggestions on this matter of "official public input" vs. "unofficial anonymous information and testimony" to me or to my staff (465-3789). Subcommittee hearings will be conducted in Kotzebue and King Salmon on October 4-5, 1988. Your prompt response would be appreciated.

Attachment

cc: Sen. Jan Faiks
Rep. Mike Navarre
Randall Burns, DCED
Pete Buist, Guide Bd. member
Vernitta Cassidy, public member
Nick Pierskalla, Non-guide member

Sen. Ken Fanning
Capt. Phil Gilson, DPS
Lew Pamplin, ADF&G
Matthew Iya, public member
Gail Ranney, air-taxi member
Paul Johnson, licensed guide member

Alaska State Legislature

PRESIDENT
907-465-3755



Senate

JAN FAIKS
POST OFFICE BOX V
JUNEAU, ALASKA 99811

August 15, 1988

Representative Henry Springer, Chairman
Alaska Legislative Task Force on
Guiding and Game
Post Office Box 1630
Nome, Alaska 99762

Dear Representative Springer:

It has been brought to my attention that some members of the guiding industry fear that publicly offering input to the Guide Task Force may result in retribution to themselves from other industry members. They request alternative forms to public hearings or forums for providing input to the Task Force.

In light of the potentially restrictive impact this situation may have on the Task Force effort, I suggest that an executive session be held to discuss the problem and possible solutions. The Task Force may need to consider gathering public input in a different type of forum in addition to the more conventional public hearing process.

Sincerely,


Jan Faiks
Senator

JF:mr

OUT OF SESSION

3111 C STREET, SUITE 525 ANCHORAGE, ALASKA 99503 907-561-7610

Clearwater Outdoor Services

Peter R. Buist — Registered Guide

P.O. Box 1561 — Fairbanks, Alaska 99707

(907) 457-7189



Senator Bettye Fahrenkamp
515 7th Ave Suite 130
Fairbanks, AK 99701

July 10, 1988

Dear Bettye,

I wanted to take a moment to thank you and your staff for your efforts and support for obtaining a "guide-outfitter" bill this last session. The results were certainly less than outstanding for each faction, but the formation of the Task Force is a critical step in the right direction.

While the battle is far from over, I think that if the Legislature fairly considers the findings of an objective Task Force, this thorny conservation problem will finally be laid to rest.

Again, thanks. Your office was really great in sending out copies of new developments and helping us to remain informed.

Yours truly,

Pete Buist



STATE OF ALASKA

STEVE COWPER, GOVERNOR

DEPARTMENT OF COMMERCE & ECONOMIC DEVELOPMENT

DIVISION OF OCCUPATIONAL LICENSING

P.O. BOX D-LIC
JUNEAU, ALASKA 99811-0800
PHONE: (907) 485-2534

DATE: July 14, 1988

TO: All Members
Task Force on Guiding and Game

FROM: Randall P. Burns, Director *Randall*
Division of Occupational Licensing
Department of Commerce and Economic
Development

Senator Fahrenkamp has asked that the division provide the task force with some background information on the current controversy surrounding the Guide Board, particularly as it relates to recent performance (sunset) audits of the Guide Board by the Legislative Budget and Audit Committee.

I will provide (under separate cover) the 1985 and 1987 audits, as well as the Department of Commerce and Economic Development's responses to those audits. The content of this letter is intended to further elaborate on the problems faced by the Guide Board and to place the often valid criticisms of the board in what I believe to be the appropriate context.

At the outset, I think it is important to draw a distinction between the issues directly affecting the Guide Board as an administrative agency and those issues that directly impact the board but which are more specifically related to the general public policy issues surrounding the regulation of the commercial taking of game. These public policy issues -- issues which this task force is challenged to address -- involve not only licensed big game guides, but resident and nonresident outfitters, transporters, air taxi services, and nonresident hunters (to name but an obvious few). It is these matters that truly confound. Issues regarding the operations of the Guide Board itself, while clearly controversial, are actually far more manageable as a problem than the more difficult issues of how -- and whether -- to regulate the commercial taking of game in a manner different from the present rather imperfect system.

To date, the Guide Board has seemingly been at the center of both the administrative and public policy controversies. In reality, the Guide Board is but one of many players in the public policy debate over the proper management of Alaska's game population and the commercial aspects of the management of that resource. The fact that its well-known and well-publicized administrative difficulties have managed to make the Guide Board an inappropriate focus of much of the public policy debate is, in my opinion, unfortunate.

Not surprisingly, despite the guiding industry's increasingly valid concerns for the viability of their profession under our present economic and statutory configurations, it is clearly very difficult for most legislators and other persons more or less familiar with these issues to work up any real sympathy for the professional guide. People have suggested to me that the recent problems confronting guides are just what the industry deserves after so many economically successful years living off commercial big game hunts.

Nor does the irony of the guides' current situation escape their critics. The fact that holding a permit to a restricted guide area has now almost become a trap that severely limits a guide's ability to survive in today's economy is seen as some kind of "tit for tat" -- a rough justice. This attitude is perhaps understandable, especially in view of the actions of the Guide Board and the guiding industry in the past, but it does little to assist us in evaluating as objectively as possible, the pros and cons of the current debate over the regulation of the commercial taking of game.

My goal here, then, is to suggest that the hatchet be buried. The Guide Board and its checkered history is fact. We can quite rightfully question the fairness and objectivity of the board's decision-making over the years, as well as its apparent failure to put a stop to the sale of guide areas. These and many other issues are legitimate concerns and must be addressed by the task force. But, in many senses, these issues are not relevant to the current public policy debate over what is the best way to regulate the commercial taking of game in Alaska. The issues surrounding the Guide Board's performance as an administrative agency are probably the easiest ones to which to respond and to correct.

What follows, then, is a brief discussion of the seven (7) administrative areas of most serious concern to the Division of Occupational Licensing regarding the Guide Board's activities.

1. The board lacks any accurate, up-to-date display maps of the guide areas by game management unit.

The current large display maps, created to show the boundaries of each restricted or joint use guide area within a particular game management unit, are over fifteen (15) years old. While once an accurate depiction of existing guide area assignments, the display maps have not been regularly updated to reflect the numerous boundary changes, area transfers, etc., that have occurred since the maps were first created. In addition, the display maps are in a serious state of disrepair. Without accurate maps, the board will never have a solid handle on what areas are -- or are not -- available for selection, nor will the board ever be sure of the areas it has permitted. The fiscal note attached to SB 191 will go for in assisting the division and the board in updating its area data.

2. The board lacks any certainty regarding the validity of each guide's individual file maps.

The only true source of information concerning the actual delineation of a guide's particular area assignment is supposed to be the approved guide area application map found in each guide's individual licensing file. Often, however, there is more than one map in a guide's file, and there is often disagreement over which map in the file accurately represents the guide's currently assigned area. This problem is further complicated by the fact that many guides have more than one area assignment (a guide may have up to three areas), thus increasing the number of disputed maps in a file.

3. There is a need to rewrite and restructure the Guide Board Exam.

The Guide Board presently has a bank of some 200 exam questions, from which we cull a different 100 questions for each exam. Many of these questions are not well-written, require multiple answers, and have never been statistically correlated. Until the last exam, the pass rate on the exam had never been higher than 50% and is usually closer to 33%.

A registered guide applicant must also take an oral exam, should he or she pass the written exam. While the legislative auditors recently found the board's oral exam procedures much improved, the subjectivity involved in grading an oral exam is always an issue and subjects the board to accusations of protectionism.

4. There exists the ongoing controversy over the question of the constitutionality and statutory basis for the creation of restricted (aka "exclusive") guide area permits.

Whenever you restrict persons from entry into any activity or profession, those restrictions are going to be controversial while the justifications must be well-founded. Alaska's current scheme of granting "exclusive" hunting privileges to certain persons in certain areas to guide nonresident hunters in the commercial taking of Alaska's big game has embittered many, including a number of guides who are licensed but have yet to be granted an area in which to guide (be it a joint-use or restricted area). The current system is viewed by many as "limited entry" without the same constitutional basis established for Alaskan fisheries, and critics charge the board with having failed to establish the required criteria and quota systems for evaluating applications for restricted areas.

July 14, 1988

5. The application process for a guide area permit or for the transfer of an already existing guide area permit is seriously flawed.

The current procedures followed by persons applying for a guide area permit or the transfer of a permit are very confusing and the Guide Board has done little to correct acknowledged problems. The regulations in place are poorly written: it is not clear which regulations apply in cases of transfer or original application; the notice provisions are very burdensome and potentially anti-competitive; and, generally, the board has failed to produce the quota and point systems mandated by recent statutory amendments.

Serious delays in the processing of applications and transfers result from the confusing array of regulatory provisions.

6. The division is currently unable to proceed against a guide with potentially serious discipline problems unless we have received at least three complaints against that guide. This provision of the board's statute is not consumer oriented and fails to recognize the division's ability to distinguish between legitimate complaints and harassment of a guide through the filing of unwarranted complaints. We manage to shoulder this responsibility for other boards very well and the three-complaint requirement should be amended.

7. The close ties between the Alaska Professional Hunters Association and the Guide Board have compromised the board's independence.

Until very recently, there existed a very close relationship between the Professional Hunters Association and the Guide Board. The closeness often meant, if nothing else, that it often appeared as if the board was unduly influenced in its decisions and actions by the desires of the officers and members of the association.

The problems listed above are both complex and serious. But it is also true that the Guide Board has basically functioned since its conception with very little administrative oversight or review by the executive branch. Like a wild child, the Guide Board has functioned independently, with very few support staff, since its inception; the only effective administrative checks on its performance have been legislative performance audits and the Department of Law's review of Guide Board regulation projects.

In our opinion, the Guide Board has never received adequate administrative support or direction from the executive branch. While not without responsibility for its past actions, the failure of the state to both provide adequate resources and enforce an acceptable level of administrative consistency and procedure must weigh heavily in the Guide Board's favor. Even after the two other resource boards (the boards of Fish and Game) were brought into line by

July 14, 1988

the efforts of the executive branch, the Guide Board was still allowed to flounder on its own. Had the state properly exerted itself, I believe the cries of unfairness and abuse of process against the Guide Board would have been considerably reduced.

As it is, its "bad rep" continues both to plague the board and hinder the dialogue over the complex public policy considerations involved in trying to find a solution to the regulation of the commercial taking of game. While the board must accept responsibility for many of its unpopular actions and decisions of the past, and the guiding industry must live with the fact that many persons believe that the present economic and resource crisis in which guides find themselves is something the guides somehow deserve, I think it important that policy makers like yourselves have a perspective of the issue that can assist them in more objectively evaluating the extent to which the Guide Board is the true "heavy" in this Alaskan drama.

I look forward to meeting with all of you as we work through the important issues placed before us.

RPB/mst8191m
071488a

Alaska State Legislature

Senate Advisory Council



P.O. Box V
State Capitol
Juneau, Alaska 99811
Phone: (907) 465-3114

July 25, 1988

Mr. C. Starr
P. O. Box 71
Bennet, Nebraska 68317

Dear Mr. Starr:

Thank you for your recent letter regarding guide services in Alaska. I have waited until now to respond to you so that the Guide Task Force could be organized and I could send you more information. I am sending you a copy of the letter of intent for the task force. The chairman of the task force is Representative Heinrich Springer, P. O. Box 1630 Nome, Alaska 99762 or P. O. Box V, Juneau, Alaska 99811. I have forwarded a copy of your letter to Representative Heinrich Springer.

Sincerely,

Sheila Fay Helgath
Sheila Fay Helgath, Ph.D.
Legislative Analyst

Alaska State Legislature

SENATOR BETTYE FAHRENKAMP
CHAIRMAN, LEGISLATIVE COUNCIL
CHAIRMAN, OIL AND GAS COMMITTEE
119 N. CUSHMAN ST., SUITE 201
FAIRBANKS, ALASKA 99701
OFFICE (907) 452-4882
HOME (907) 456-2888



Senate

WHILE IN JUNEAU
P.O. BOX V
JUNEAU, ALASKA 99811
CAPITOL ROOM 125
OFFICE (907) 485-3834
HOME (907) 780-8027

To All members:

June 30, 1988

Representative Mike Navarre
312 Tyee Street
Soldotna, AK 99669

Dear Mike:

While I am not on the Task Force on Guiding and Game, as Chairman of the Legislative Council, through which the task force is funded, and to which the final report is to be made, I wanted to welcome you to the task force.

I consider the job ahead of you an extremely important one, and one which by law, and for practical purposes, needs to be accomplished promptly. Since we are getting a bit of a late start, I have taken the liberty to call an initial meeting and establish a tentative agenda, in order to get the ball rolling.

We will take advantage of the LIO teleconferencing system, legislative staff, House and Senate research organizations, and administrative agency expertise in order to ensure statewide participation, avoid duplication of effort, reduce costs, and provide the necessary research and background information to assist you in your efforts.

One of my assistants, Nancy Petersen, can be made available as staff to the task force for substantive guiding issues and will be available to help coordinate meetings, set up agenda items, post notices and oversee printing of your final report.

The first meeting will be held at the Legislative Information Office in Anchorage, and will of necessity focus on task force organization, research project assignments, agency reports on implementation of the new law, and any other pertinent items you or any member of the task force wishes to bring up. See enclosed agenda. Please contact my office with any additional items you may want to place on it, or any questions you may have.

Once the task force meets, it is my intention that the Legislative Council will help facilitate your efforts in any way possible.

I wish you the best of luck in your deliberations over this highly charged issue. It is of paramount importance to the big game resources of Alaska, and to those who use those resources, that your task force formulate a resolution to our current problems that is as equitable and workable as possible.

Sincerely,

A handwritten signature in cursive script, appearing to read "Bettye".

Senator Bettye Fahrenkamp
Chairman, Legislative Council

Called 8/9/88

9 AM

Willow

7125/88

TO: The Honorable Representative
Heinrich Springer.

From: Siegfried Hummer

36 South Crawford St.

Willows, Ca. 95988

916-934-3800 Home after 4 PM

916-934-7761 Bus.

Dear Representative.

Attached are copies of letters that I sent to the Governor & Commissioner Collingsworth. When I called your office today to inform you of our predicament I was asked to send them. I am sorry I missed you. Your staff was very helpful and listened to my situation. The copies will explain it.

My view is that S.B. 191 was passed with not enough "grace" time to allow those that were legally engaged for this season. I am not in the position to make a unbiased judgment as to why it was passed. Perhaps there are good reasons for it.

My first reaction and opinion is that it will be impossible in the future to engage me, hunting in your state by us little income earners because of "sowed up" sectors & high price tags. Only the super rich will be able to do so. I believe it will turn a back lash and be oppressive to us the people. There must be other means to deal with any other that might have led to the passage of this law.

Please consider my view. You can be proud of your staff for answering my call. She was courteous, listening, polite efficient and very helpful.

I liked that. Hope to hear from you soon.

Respectfully yours,

Siegfried Hummer

12. The Honorable Governor
of the State of California
Mr. Steve Cooper

From: Sigfried Huance 436 South Crawford St. Willow, Ca.
Dear Governor.

I just received a call from John Gaudet our outfitter that with the passage of S.B. 191 we will not be able to visit and hunt in your State as we had planned beginning Sept 18-26-89

Four of us signed a contract for an unguided fly in base camp Caribou hunt. Mr Gaudet is to provide camp and two helpers to do cooking and chores to give us more time to hunt. Also to assist in packing out the meat should we be successful. At no time did Mr. Gaudet imply that he furnish guides. Mr Gaudet was very clear & explicit as to the conditions of this hunt. We do not expect to be guided and intent to hunt on our own & no helpers or guides.

With this sudden and unexpected change in the law, our plans are in great jeopardy. I am a 50 year old citizen of good standing and have dreamed all my life of this hunt in your great State. We all have completed all our reservations and final arrangements. Any change now will cause great anxiety & much additional cost. I can not afford a guided hunt.

We contracted this unguided with our outfitter in the early stages of 1987 when it was legal. It represents at least two years of effort on my part. With the sudden and unusual quick change in the law we ask that all those contracts made last year be honored and grandfathered for the balance of the '88 season under the old rules. We believe this would be a reasonable solution to our dilemma.

Your attention in this matter and a quick reply would give us direction for our options and would be greatly appreciated.

Respectfully Yours,

DICK BIERY

13216 DOWOOD LANE

GRASS VALLEY, CA 9545

916-272-6130 Bx5

BILLY KOSHER

P.O. Box 6447

TAHOE CITY, CA. 95730

916-587-1862

Sigfried Huance

436 S. Crawford Calif 95988

916-934-3800 Home

916-934-7761 EXT 239 Bus.

ED KOSHER

RT6 Box 532

BAKERSFIELD, CA. 93307

805-845-1363

TO: Don W. Collinsworth
Commissioner Fish & Game
State of Alaska.

Willows 7/23/88

From: Siegfried Huane
436. South Crawford St.
Willows, Calif. 95993
916-934-3800 Home
916-934-7761 Bus.

Honorable Commissioner

Please examine the attached copy of the letter that I addressed to the Governor of your State.

It will explain our predicament. We ask that you support our petition for a variance in our case and perhaps of those that the passage of S.B. 191 created.

We believe that we made a valid contract long before the passage of this new & restrictive law and need consideration in the light of these circumstances. We had verbal agreement with Mr. Gandet as early as May of 1987 and paid our deposits before Dec. 1987.

Enclosed is a copy of the note & my check I sent to Mr. Gandet with all the deposits.

Mr. Gandet also on several occasions verbally and in writing stated very specific as to the conditions of this unguided hunt. Camp help only to the extent of cooking & chores. No help in the field during hunting until we were to pack out the meat & assist in processing & the transportation of our meat to King Salmon.

Two members of our group have back impairments and lifting heavy loads would aggravate them. I am one of those.

I feel we are the victims of this unfortunate and thoughtless law and ask for at least a variance for this '88 season.

Respectfully Yours
Siegfried Huane

SIEGFRIED KNAUER
ROBYN KNAUER
436 S. CRAWFORD 934-3800
WILLOWS, CA 95988

11-22-87 0740

PAY TO THE
ORDER OF

JAKE'S ALASKA WILDERNESS OUTFITTERS: 600⁰⁰

PHONE No. - (907)248-0509

SIX HUNDRED & NO DOLLARS



SIERRA CENTRAL CREDIT UNION

WILLOWS OFFICE
COUNTRY ROAD 48 & D
WILLOWS, CA 95988

DEPOSIT ON #4 CARIBOU HUNT

MEMO 9/18-9/26-1988

Siegfried Knauer

⑆321174770⑆0240024268797⑆0740

\$3200.⁰⁰ ea.

CAMP \$3200.⁰⁰ ea.

\$2700.⁰⁰ ea.

Four or more hunters

\$1500.⁰⁰ ea.

Alaskan Peninsula

#4 CARIBOU HUNT BASE CAMP

Four or more hunters

\$1500.⁰⁰ ea.

\$1200.⁰⁰ ea.

#8 AFOGNAK ISLAND HUNT

& Deer

\$1500.⁰⁰ ea.

WHILE WE OFFER A VARIETY OF EXPERIENCES, WE CAN CUSTOMIZE ANY TRIP. PLEASE LET US
KNOW YOUR IDEAS OR SPECIAL NEEDS. WE WILL PLAN A UNIQUE PACKAGE FOR YOU.

RESERVATIONS: To place any reservation please
send a 50% deposit to Jake's Alaska Wilderness
Outfitters at the address listed on the other side.
A confirmation letter will be sent with a receipt
of your deposit. Final payment is due 60 days
prior to arrival.

All deposits are non-refundable unless
space can be rebooked.

RESPONSIBILITY: Jake's Alaska Wilderness
Outfitters is not responsible for any damage,
injury or loss to persons or property, however
caused. Also, we are not responsible for delays or
cancellations due to weather or other acts of God
beyond our control. All clients realize a prior
responsibility to disclose any physical or dietary
conditions that may affect the trip with Jake's
Alaska Wilderness Outfitters. All prices are
subject to change without notice.

Jake, please find enclosed a deposit in the amount of 600⁰⁰

on our reservation with you for #4 CARIBOU HUNT hunting trips on

the dates of Sept 18 1988 to Sept 26 1988

I understand the deposit & refund policy as stated and agree to such.

I understand the difference between a guided and unguided hunt.

Signed *Siegfried Knauer*

Date 11/21/87

Name SIEGFRIED KNAUER

No. in party 4

Address 436 S. CRAWFORD ST
WILLOWS, CA

State CA Zip 95988

Phone (916) 934-3800 / Bus 916-934-7761

Any special needs that Jake's should know about?

Willows Nov. 22, 1987

Dear Jake

Enclosed the four deposits of our party for the
Caribou hunt #4 as outlined in your prospectus.

This is for Sept 1988 hunt. As per our conver-
sation we may need assistance selecting flight
arrangements from Anchorage to King Salmon on
Sept 18, 1988. Sorry about Nebraska losing to the Hawks
Tues. Field.

King Salmon Outfitters & Sport Fishing

JOHN O. WOOD

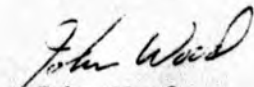
P. O. Box 261 • King Salmon, Alaska 99613 • Phone (907) 246-3474

11 October 1988

Sir

I am providing my input to the Guide and Game meeting held in King Salmon on 5 October 1988. I am firmly against total elimination of outfitters in Alaska. Outfitters fill the void between Air Taxi and Guides. Most people, perhaps yourself would never consider having a guide in camp, they prefer to be alone. Air taxi operators do not provide the necessary equipment to make up a safe camp for people. This will leave those that do not have their own transportation in the hands of guides only. During the past ten years I have outfitted hunters, fishermen, photographers and hikers, does the new law mean I have to cease outfitting all the above? In the meeting it was mentioned that guides would be required to have an air taxi certificate. This requirement is quite strenuous and will add to the problem; however, everyone involved in guiding and outfitting that pilots an aircraft or boat should be required to have a commercial pilot certificate and a U.S. Coast Guard license. This will make a tremendous improvement in the quality of service offered by both guides and outfitters. It was mentioned about out of state people outfitting, what has happened to the resident and local hire concept, this alone will help solve some of Alaska's game woes. Let's not create another fiasco as out limited entry fishing permits that benefit so few Alaska residents.

Sincerely


John Wood

STATE OF OREGON
DEPARTMENT OF COMMERCE
& ECONOMIC DEVELOPMENT

OCT 03 1988

DIVISION OF
OCCUPATIONAL LICENSING

**Idealism Versus Pragmatism
in User Evaluations of Allocation Systems**

Bo Shelby

Associate Professor

Doug Whittaker

Research Assistant

Dept. of Forest Recreation Resources

Oregon State University

Mark Danley

Public Involvement Specialist

Bonneville Power Administration

*In press at
Leisure Services*

Running Head: EVALUATING ALLOCATION SYSTEMS

Author Notes: Research was conducted under a cooperative agreement with the Pacific Northwest Forest and Range Experiment Station, U.S.D.A. Forest Service. The authors thank Rebecca L. Johnson and Jerry J. Vaske for helpful reviews of earlier drafts.

ABSTRACT

Permit allocation systems in recreation settings attempt to distribute resources in a manner which is "socially just," and thus acceptable to users. "Distributive justice," however, is an ideal that can be defined in terms of several competing social goals (equality, equity, need, and social efficiency), and practical allocation alternatives (pricing, reservation, lottery, queuing, and merit mechanisms) may not directly address any of them. In addition, individuals may not evaluate systems based upon such ideals, but rather upon a pragmatic assessment about whether a system is likely to favor them. Data from a survey of river runners on the Snake River in Hell's Canyon is used to explore evaluations of allocation alternatives (willingness to try and acceptability) based on perceived fairness and perceived chances of success. Results suggest that willingness to try a system is a pragmatic evaluation more strongly associated with perceived likelihood of success than with fairness or acceptability. In contrast, acceptability is a more idealistic evaluation strongly associated with fairness, which in turn is associated with likelihood of success. Implications for designing and managing allocation systems under conditions of resource scarcity are discussed.

KEYWORDS: Allocation, Rationing, Equity, Permits

IDEALISM VERSUS PRAGMATISM

IN USER EVALUATIONS OF ALLOCATION SYSTEMS

In the face of increasing demand for limited recreation resources, managers have sometimes set use limits or "carrying capacities" to maintain the quality of natural environments or recreation experiences. Resource users generally accept these limits (Fazio & Gilbert, 1974; Schreyer & Neilson, 1978; Shelby & Colvin, 1981). However, as use increases and demand exceeds capacity, allocation systems are needed to determine who gets to use the scarce resource. These systems and the way in which they select users are often poorly understood (Utter, Gleason, & McCool, 1979), making allocation a difficult and controversial issue. In order to develop allocation systems which are acceptable to users, managers need information about how users perceive and evaluate different allocation alternatives.

THEORY

A general goal of resource allocation is to achieve some form of "distributive justice," an ideal whereby individuals obtain what they "ought" to have based on criteria of fairness (Homans, 1961). What is "fair" to one person, however, may not be "fair" to the next, and several competing concepts or goals have been used to define distributive justice, including equality, equity, need, and efficiency. The first step in designing allocation systems is to understand these goals and determine which is most appropriate for a given situation, taking into account legal guidelines, agency mandates, and the concerns

of different interest groups (Shelby & Danley, 1980; Shelby & Heberlein, 1986).

Equality is perhaps the simplest to understand. It is based on the idea that individuals have the same rights to certain benefits. Equality can be achieved by providing either equal shares of a commodity or an equal chance to obtain a commodity. For example, one might allocate a parcel of land between two heirs by subdividing it into equal portions, or by tossing a coin (or using some other unbiased selection mechanism), winner-takes-all.

Equality, however, is not always "fair" because some individuals need or deserve more. Equity is a term with many meanings, but in an allocation context it refers to balancing individuals' contributions with outcomes (Homans, 1961). Inputs include any factor relevant to receiving some return on an individual's investment (e.g., effort, education, money); outcomes are those returns (Pritchard, 1969). Equitable allocation suggests those who put more in should get more out. For example, in many states non-residents pay more for hunting rights than residents. This clearly unequal treatment may be "fair" or equitable given that residents make additional contributions to maintaining game through taxes.

Need is another goal of distributive justice, and Deutsch (1975) suggests it is the basis of allocation schemes in many social situations. Within families, for example, children are not expected to compete equally with adults for food, medical

care, etc. Similarly, handicapped persons are provided with specialized access to public facilities, again because of particular needs.

Efficiency, which is maximized if a resource is put to its most highly valued use, is another goal of allocation systems. For example, some people place a high value on river running, while others might be just as happy to go backpacking or bike touring. In this case, efficiency would require that those for whom river running is most important have priority in obtaining a permit.

Ideally, managers can choose allocation goals which users will accept and support, but this is only the first step. These theoretical goals are approached through practical alternatives, and here the allocation issue becomes more complex. Mechanisms for rationing recreation resources tend to revolve around five alternatives (pricing, reservation, lottery, queuing, and merit), most of which do not explicitly address any single goal. To further complicate the issue, actual allocation systems usually involve some combination of alternatives (Stankey & Baden, 1977; Shelby & Danley, 1980). Designing a successful allocation system requires some understanding of how specific alternatives affect the broader allocation goals.

Pricing is the mechanism used to allocate resources in a market economy. Sellers raise or lower prices of a commodity until quantity demanded equals quantity supplied. Since some individuals value certain commodities more than others, they are

willing to pay more for them. When demand is great, the price rises and those unwilling or unable to pay withdraw from the market (Stankey & Baden, 1977). Pricing favors those who are willing and able to pay. Pricing does not recognize those who need or deserve a commodity, nor does it take into account unequal distribution of income. As a result, pricing maximizes efficiency (using dollars as the measure of value and assuming equal incomes), but works counter to equality, need, and equity goals.

Outdoor recreation resources are often provided at public expense because of widespread benefits and the difficulty of dividing costs among the population. As a result, user fees or free market mechanisms rarely ration these resources when they become scarce, and managers need to find non-market allocation alternatives which are acceptable to users.

Reservation is commonly used when price alone does not effectively allocate a commodity. For example, simply paying a price may not be sufficient to obtain space at a hotel or on an airline flight; it is often necessary to also reserve the space ahead of others willing to pay the price. The most significant attribute of a reservation system is that it puts a premium on planning ahead and thus discourages spontaneity (Magill, 1976). However, reservation systems tend to be well accepted by users, especially in recreation settings (Shelby, Danley, Gibbs & Peterson, 1982). Theoretically, reservations work to maximize equality since everyone has an equal chance to plan ahead. In a

study of floaters on 26 rivers, Schomaker and Leatherberry (1983) found that reservation systems do not put any identifiable groups at a disadvantage. It is also possible to set aside blocks of reservations for certain groups to serve need and equity goals. However, reservations tend to work against efficiency when "no shows" cause under-utilization of the resource.

Lottery mechanisms are the classic method for allocating scarce resources when equality is the goal and the commodity cannot be sub-divided. In a pure lottery each individual receives an equal chance to obtain something. In modified lotteries, selection probabilities are altered for certain groups to serve equity, efficiency, or need goals. Lotteries can impose costs, however, because they usually are held some time before the commodity is used, and individuals must decide at that time whether they want to enter. In such cases, lotteries are similar to reservations in requiring users to plan ahead.

Queuing, or first-come/first-served, is similar to pricing except time, rather than money, is traded for the commodity. For example, queues (often in conjunction with pricing) commonly ration tickets for sporting events or concerts by forcing those without the time or inclination to stand in line to drop out. Queues may serve equality goals because theoretically everyone has an equal amount of time to spend in a line. However, time may be more valued by those leading structured lives, and queuing may discriminate against them (Schomaker & Leatherberry, 1983). In addition, the remoteness of many recreation resources means

those living far away may not be willing to spend the time and expense to get to the queue with failure still a possibility; locals therefore have an advantage.

Finally, merit can be used to distribute a commodity on the basis of some skill, knowledge, or past behavior. Merit systems assume that a price has been paid in terms of the time or effort expended to acquire merit. Merit systems address equity and efficiency goals by favoring those who have earned merit, perhaps at the expense of equality and need.

With allocation goals clearly described and an allocation system carefully designed to address those goals, one would expect to find a high degree of acceptance for the system among users. Unfortunately, this idea has not been explored empirically, and it may run counter to other social psychological theory. For example, researchers have argued that individuals support "equitable" social systems only if they perceive that those systems will maximize their own outcomes; if they think they can benefit by supporting an inequitable system, they will do so (Walster, Berscheid & Walster, 1976). This theory holds that individuals are more utilitarian than idealistic, but further suggests that selfishness is often held in check by group pressure and individual guilt. Does this notion apply to user evaluations of allocation systems, and if so should it supplant the notion that users support and accept alternatives based on perceptions of fairness?

Another issue is whether individuals evaluate different

allocation alternatives similarly. Theory suggests they should analyze whether a specific system fits their ideal of distributive justice, and then react accordingly. However, this theory may presume too much. People may not closely examine or identify their personal ideals of distributive justice, nor react consistently in every context. For example, an individual may favor pricing to allocate game tags because "hunters can afford it and may obtain valuable meat or a trophy," yet oppose a similar method for allocating wilderness hiking permits because a "a walk in the woods should be free." There may be a number of factors besides fairness which influence how individuals think about allocation systems.

This paper presents research which examines the relationships between perceptions and evaluations to provide more information about these issues. Specifically, the research was designed to explore whether individuals evaluate allocation alternatives based on pragmatic or idealistic concerns, and whether this perception-evaluation process is consistent across each of the allocation alternatives.

HYPOTHESES

To explore these issues, a model was developed to describe the relationships between user perceptions and evaluations of the five common allocation alternatives. The perception variables measured whether users perceived a system as giving them a reasonable chance of success at getting a permit and whether they perceived the system as fair. The evaluation variables measured