

527

HRES

HCR 95

STATE OF ALASKA
THE LEGISLATURE

POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99811
907 465-3600

LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM

April 4, 1977

SUBJECT: Guide Board Questions
TO: Representative Joseph McKinnon
FROM: Joel Bennett, Legislative Counsel *JB*

This is in answer to your questions concerning the validity of the Guide Licensing and Control Board's actions to establish "exclusive guiding areas". As background, I should state that the validity of an administrative regulation depends upon a board or agency's authority to adopt it. Regulations "implement, interpret, or make specific" statutes.

The legislature passed ch. 133 in 1976, which took effect January 1, 1977. It reads as follows:

"...The board shall

...(8) 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." (AS 08.54.040(8))

Prior to this statute, under a regulation adopted in June of 1974, the board began to restrict guides to a total of three guide districts, out of the 26 districts established. I find no authority for that regulation until January 1, 1977, when the legislature authorized the above quota to be established. The quota law clearly was the first statute that contemplated a so-called "limited entry" system for guides.

I do not see that AS 08.54.040(8), authorizes exclusive areas within districts, as the guide board apparently does. In my opinion, 12 AAC 38.050, insofar as it awards exclusive areas to guides (prohibiting use by others) has no statutory

authority. The board cites AS 08.54.050 as its authority, but this is a general statutory authority and I think does not contemplate the scheme adopted in 12 AAC 38.050. As evidence of this, the legislature felt it necessary to pass ch. 133 SLA 1976, giving the board authority to adopt a quota restriction, apparently concluding then, that no authority existed under the board's general statutory authority.

You refer to the latest regulatory amendments (Register 50; am 2/25/77) and question their authority as authorizing exclusive areas outside of Units 8, 16, and 20. I question the validity of 12 AAC 38.050 in the first place --- and can find no statutory authority for it creating the initial exclusive areas --- such action goes far beyond the board's general authority to "regulate guiding activity". Even assuming that 12 AAC 38.050 is valid, granting exclusive areas outside of Units 8, 16 and 20 before the date of the recent amendment (2/25/77) would not have been valid. I understand that this is what you feel has happened.

I would summarize by saying that the implementation of "exclusive guiding areas" has no defensible statutory authority, and that an exclusionary application of 12 AAC-38.050 could be successfully challenged.

Incidentally, my initial memorandum of March 18, 1977, dealt with the relationship between AS 08.54.040(8) and 12 AAC 38.040, not with the question of exclusive areas within districts.

I hope this will be of some assistance to you.

JB:lmk

A PERFORMANCE REVIEW OF
GUIDE LICENSING AND CONTROL BOARD
DEPARTMENT OF COMMERCE AND
ECONOMIC DEVELOPMENT

October 14, 1977

Commissioner, Department of Commerce
and Economic Development
Chairman, Guide Licensing and Control
Board

H. Phillip Hubbard

Marcus F. Jensen

A PERFORMANCE REVIEW OF
GUIDE LICENSING AND CONTROL BOARD
DEPARTMENT OF COMMERCE AND
ECONOMIC DEVELOPMENT

October 14, 1977

Commissioner, Department of Commerce
and Economic Development
Chairman, Guide Licensing and Control
Board

H. Phillip Hubbard
Marcus F. Jensen

STATE OF ALASKA

AUDIT DIVISION
POUCH W—ALASKA OFFICE BUILDING

THE LEGISLATURE

FINANCE DIVISION
POUCH WF—STATE CAPITOL

BUDGET AND AUDIT COMMITTEE

JUNEAU 99801


October 14, 1977

Members of the
Legislative Budget and Audit Committee:

In accordance with your request and provisions of Title 24
of the Alaska Statutes, the attached report is submitted for
your review:

A PERFORMANCE REVIEW OF
GUIDE LICENSING AND CONTROL BOARD
DEPARTMENT OF COMMERCE AND
ECONOMIC DEVELOPMENT

October 14, 1977



Gerald L. Wilkerson, CPA
Legislative Auditor
Division of Legislative Audit

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PURPOSE OF THE REVIEW

In accordance with a Budget and Audit Committee request and the provisions of Title 24 of the Alaska Statutes, a performance review of the Guide Licensing and Control Board was conducted to determine if:

1. The Board's organization and operation are in compliance with applicable statutes.
2. Statutory obligations are being met.
3. The Board is effectively aiding the Alaska citizenry.

ORGANIZATION AND FUNCTION

The Guide Licensing and Control Board (GLCB) was established by the 1973 Session Laws of Alaska and succeeds the Board of Fish and Game, Department of Fish and Game, which previously regulated the guiding industry. The seven member GLCB is appointed by the Governor with confirmation by the Legislature and is restricted to having no more than three members as licensed guides.

The GLCB is organized under the Department of Commerce, Division of Occupational Licensing. Two budgeted positions, a Guide Investigator and Administrative Assistant, in the Department of Public Safety, Division of Wildlife Protection, have been provided to assist in the licensure and investigations of guides.

The function of the Board is primarily regulatory, mandated by AS 08.54.040. Accordingly, the Board has the capacity to administer examinations; determine qualifications of guides; establish performance standards and regulate activities; maintain guide registers; prohibit harmful guiding activities; conduct hearings regarding licensure; and establish quotas of guides for specified geographical areas.

FINDINGS AND RECOMMENDATIONS

Recommendation No. 1

In the assignment of Exclusive Guiding Areas (EGA's), the Guide Licensing and Control Board (the Board) should uniformly apply the criteria established for the Game Management Unit under consideration.

AS 08.54.040(8) requires that an equitable and reasonable procedure be followed in assigning Exclusive Guiding Areas. In the March 25-27, 1977 Board meeting, the following criteria was established for the assignment of EGA's in Unit 9:

1. Permanent Area. At least three years of Statements of Financial Remuneration (contracts) and/or three Bear Camp Registrations on file within five (5) years as of November 1, 1976.
2. Temporary Area. Same as above except only two years of contracts and/or Bear Camp Registrations are required.

We found three applicants who were denied temporary EGA's in Unit 9 on the basis of an insufficient number of contracts on file. From the records on file at the Guide Investigator's Office we determined that these individuals had the required number of Bear Camp Registrations to qualify for a temporary EGA. There are several similar cases where other applicants did not have contracts on file, but did receive a temporary EGA solely on the basis of having the required number of Bear Camp Registrations.

The lack of uniform applications of the established criteria creates the following problems:

1. Affected individuals may initiate legal action against the State of Alaska.
2. The Board's credibility and fairness in the exercise of its authority may be questioned.

Recommendation No. 2

The Guide Licensing and Control Board (the Board) should obtain adequate documentation of previous experience to insure that only qualified applicants are being issued Class-A Assistant Guide Licenses.

We found no record to document that several individuals licensed by the Board in 1976 were qualified to serve as Class-A Assistant Guides.

AS 08.54.120 states in part that to qualify for a Class-A Assistant Guide License, the applicant must have served at least one season as a Licensed Assistant Guide. An applicant may also qualify if previously issued a permit in lieu of a Registered Guide License by the Department of Fish and Game.

A Class-A Assistant Guide may essentially perform the same service that a Registered Guide performs, except he is unable to contract for hunts. Therefore, it is essential for the protection of the public that a Class-A Assistant Guide possess the required experience to conduct a hunt in a competent and safe manner. The Board did not obtain the adequate documentation necessary to determine that the aforementioned applicants meet the experience requirement.

Recommendation No. 3

The Department of Law should take prompt action against Guides who violate Guide Board Statutes and Regulations.

The Department of Law has not timely processed accusations against Guides who have been accused of violating Guide Board Statutes or Regulations; or taken action against Guides who have not filed Statements of Financial Remuneration (contracts), as required by Regulation 12 AAC 38.060. This has resulted in the following problems:

1. Several of these accusations are quite old and recently a Hearing Officer recommended dismissal of an accusation because of its age.
2. A large number of Guides are not filing their contracts.

The enforcement of Guide Board Statutes and Regulations are necessary to ensure that:

1. Guide Board Statutes and Regulations are consistently applied.
2. The Guiding Industry is adequately regulated.
3. The public is adequately protected.

Recommendation No. 4

The Guide Licensing and Control Board (the Board) should develop program objectives that state specifically what is to be accomplished in quantitative terms.

Program objectives describe what a Board is seeking to accomplish during a specific fiscal year. Well formulated

objectives are capable of measurement and should include numeric targets so that actual accomplishments can be compared with stated targets.

The State Statutes identify what the goals of the Board are, but the Board has not formulated the objectives necessary to meet these goals or stated them in quantitative terms.

Effective program management and control is best achieved when comparisons can be made between predetermined objectives and actual performance. Variations that result can be analyzed and the necessary corrective action can be taken so that desired program objectives can be obtained.

CURRENT ISSUES

Legality of Exclusive Guiding Areas

The question has been asked, does the Guide Licensing and Control Board (the Board) have the authority to establish exclusive guiding areas?

The Attorney General issued an opinion in April, 1977 stating that the Board has the authority to establish exclusive guiding areas.

In order to clarify this matter, we requested a legal opinion from Legislative Affairs. Legislative Affairs issued an opinion which stated that section one of 133 SLA 1976 - AS 08.54.040(a)(8) - gives the Board the authority to establish exclusive guiding areas.

Game Violations by Guides

We were informed by Investigators for the Department of Public Safety (DPS) and Guides that game violations by certain Guides is a significant problem. They allege that a common practice among certain Guides is the hunting of brown bears the same day airborne, which is prohibited by Regulation 5 AAC 81.070.(a)(6).

We recommend the Guide Licensing and Control Board study the problem of game violations by Guides and take appropriate action to solve the problem.

Equal Opportunity for Alaskan Natives

We found that the Guide Licensing and Control Board has made an effort to increase participation of Alaskan Natives in the Guiding Industry. For example, the Board has:

1. Created two sub-districts in the Arctic (Nunvikak Island and St. Lawrence, King and Little Diomedé Island). Before this action, Guides had to qualify for all the Arctic.
2. Visited Native Villages and explained what the Guiding Industry was about.
3. Gave special oral examinations to Alaskan Natives.

However, the Board should increase its effort to ensure that qualified Alaskan Natives are given an opportunity to participate in the Guiding Industry.

**DEPARTMENT OF COMMERCE &
ECONOMIC DEVELOPMENT**

DIVISION OF OCCUPATIONAL LICENSING

POUCH D - JUNEAU 99811

November 29, 1977

RECEIVED
DEC 1 1977
LEGISLATIVE
AUDIT

Mr. Gerald L. Wilkerson, CPA
Legislative Auditor
Division of Legislative Audit
Pouch W, Alaska Office Building
Juneau, Alaska 99811

Dear Mr. Wilkerson:

I have received your preliminary report on the Guide Licensing & Control Board. I appreciate this opportunity to make a few comments on the review. My comments will refer to the recommendations that you have made, and I will start by commenting on Recommendation No. 1:

Your concern in this recommendation is that three individuals who had the required number of bear camp registrations did not receive a temporary permit. The reason they did not receive their temporary permit at our first hearing on Unit 9 was because they had over-filed on areas being used by older guides. In examining some of these individual cases the Board's concern was a possible building up of too much hunting impact in a small given area. We told these applicants to continue to examine the map on Unit 9 and see if they could find some areas that would be open and usable in that Unit. At a later meeting, areas for these individuals were being developed. The problem was not a lack of uniform application. I think the problem was the Board's concern of being realistic in trying to protect the resource from over-harvest. In most cases the guides themselves recognize this, although it seems that each man does everything possible to try and improve his own situation, which is probably to his credit.

Recommendation No. 2: In the matter of issuing several Class A guide licenses in 1976 I wish to report that this is certainly a special case that needs clarifying. The normal procedure for an applicant to receive a Class A license is to have it handled by our investigator, William Bellinger, who checks out the necessary requirements for the license. Normally, this takes anywhere from three to six months.

The case you are referring to relates to St. Lawrence Island. Back two years ago the Guide Licensing and Control Board was studying the impact of establishing individual guide areas. It was decided at that time not to include the Arctic Coast under individual cases but leave it open. The Board had a three-point approach:

1. leave Arctic Coast open;
2. meet with the Natives on the village level and explain the guide program;
3. give oral tests to some Native guides to the extent they could come under the class of registered guide.

All three of these points have been accomplished. We now have Native registered guides, Ed Shavings, Sr., at Nunivak, Winfred James at Gambell and Hakie at Savoonga.

I authorized one of our Board members, Charles Keim, to travel to St. Lawrence Island, with a Fish and Game Protection Officer, to meet with the Natives in regard to giving them a license for guiding walrus hunts, which had just been approved by the State Department of Fish and Game. Our Act permits our Board to give oral exams for licenses under certain circumstances. We felt that the situation at St. Lawrence Island was unique, in that all those given a Class A license were Native residents, had lived and hunted there all their lives. Mr. Keim is very much of a perfectionist in giving exams and he personally checked each one of these men out before issuing him a license. Because this was the first year of guiding activity for walrus the Board felt it did not want to be put in the position of making it difficult for resident Natives to share in this vocation. We, therefore, extended ourselves in expediting this type of license. It should in NO way reflect in an adverse way against the thoroughness that is normally practiced by our Fish and Game Protection Division in issuing these licenses. I think this is another example of the Board extending its right hand to help the Native population under emergency timing.

Recommendation No. 3: With reference to the Department of Law and the time it takes to process accusations, I think that in this area the Office of the Attorney General and the Board should have some open dialog. I believe that in many cases the Board itself could help expedite some of the minor violations and help relieve the load that continually builds up in the Attorney General's Office. I think it would be helpful if we could write up some procedural steps that can be followed both by our Board and by the Attorney, in processing the violations.

Recommendation No. 4: The recommendation is that our Board should develop program objectives. I would agree with this recommendation as I personally, and I know the other Board members do too, like to have our future programs well established. We have tried to do this in the past, and I think very successfully. If you were to examine the minutes for the past two years you would find that our program has been aimed toward strengthening our guide standards. This has been accomplished by passing our 16-point Code of Ethics, in addition to our main program of giving exclusive guide areas in the 26 game units. We have proceeded with this program as expeditiously as possible, holding long hearings and working many hours each day. At our upcoming December meeting in Anchorage, we have listed for allocation the last five game units and when these are completed, we will have finished allocating all the game units in Alaska.

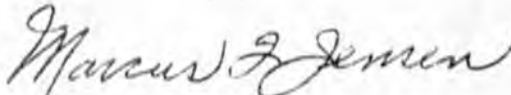
November 29, 1977

Our Board, at this next meeting, will set up a new program for the coming year. There is much yet to be done in smoothing out the rough spots and we will attempt to do this. We have had excellent cooperation from the Department of Commerce and Economic Development's Occupational Licensing Division under Mrs. Sharon Andrew. Also, I am proud to say that our staff in Anchorage has turned in an excellent record of dedication and efficiency. When one considers that a filing system had to be set up for 450 registered guides and 500 assistant guides, plus keeping track of all the mail and questions that come in, one can see that the staff certainly has been very busy.

In closing, there are a few observations that I can make that might be interesting. In assigning individual guide areas, it has brought to a minimum violations by aircraft. For example, no more is it necessary for a guide to cover the lower peninsula looking for brown bear when he knows the only area he can hunt in is his own assigned area. I have been surprised at how protective and jealous the individual guides have become, after assigning them their own area. The guides themselves have shown great cooperation in making this new program work. The one area that is still somewhat "tender", and we are working at it constantly, is the action of the few new guides who over-file in trying to establish areas for themselves. We will be working constantly with these people to satisfy their needs to the best of our ability.

I think it has been very helpful to have had a review by the Audit Department and I certainly appreciate the high caliber of men in the Department and the open manner in which they go about their business.

Respectfully yours,



Marcus F. Jensen, Chairman
Guide Licensing & Control Board

MFJ:cw2/10

STATE OF ALASKA

JAY S. HAMMOND, GOVERNOR

DEPARTMENT OF COMMERCE & ECONOMIC DEVELOPMENT

OFFICE OF THE COMMISSIONER

POUCH D - JUNEAU 99811

December 2, 1977

RECEIVED

DEC 7 1977

LEGISLATIVE
AUDIT

Mr. Gerald L. Wilkerson, CPA
Legislative Auditor
Division of Legislative Audit
Pouch W
Juneau, Alaska 99811

Dear Mr. Wilkerson:

In accordance with provisions of Alaska Statutes and procedures established for the implementation of Legislative Budget and Audit Committee Review of executive agencies, the attached is submitted:

CONSOLIDATED AGENCY RESPONSE TO:
A PERFORMANCE REVIEW OF
GUIDE LICENSING AND CONTROL BOARD
DEPARTMENT OF COMMERCE AND
ECONOMIC DEVELOPMENT

Unless otherwise stated, the sections have been prepared separately by the agencies named and the positions stated in each do not necessarily represent those of the other contributors.

Sincerely,

H. Phillip Hubbard
H. Phillip Hubbard
Commissioner
W. J. Cook

CONSOLIDATED AGENCY RESPONSE TO
A PERFORMANCE REVIEW OF
GUIDE LICENSING AND CONTROL BOARD
DEPARTMENT OF COMMERCE AND
ECONOMIC DEVELOPMENT

DECEMBER 1, 1977

Commissioner, Department of Commerce
and Economic Development
Chairman, Guide Licensing and Control
Board
Attorney General, Department of Law

H. Phillip Hubbard

Marcus F. Jensen
Avrum Gross

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SECTION I

COMMENTS OF DEPARTMENT OF COMMERCE AND ECONOMIC DEVELOPMENT

A. ORGANIZATION AND FUNCTION

Presented on page 4 of A Performance Review of Guide Licensing and Control Board Department of Commerce and Economic Development (Report), is a brief analysis of the organization and function of the Guide Licensing and Control Board (Board). The analysis is accurate, however, no reference is made to the overall purpose of regulation of this industry.

While no stated Legislative objective is found in AS 08.54, it is the department's understanding that regulation of the game guide industry is primarily for the enhancement of the State's game management, as well as the protection of the consumer. The continued utilization of this important renewable resource is contingent upon controlled harvesting, in order to avoid depletion of the resource.

B. FINDINGS AND RECOMMENDATIONS

Recommendation No. 1

In making this recommendation, it appears, the auditors relied solely upon the minimum usage requirements established by the Board in order for an applicant to be eligible for either a temporary or permanent Exclusive Guiding Area (EGA), to determine that the criteria established were not being applied uniformly.

It is the Department's understanding that the Board has always considered additional factors such as the number of minimally qualified applicants for a specific EGA in relation to the harvestable resource available. This is consistent with the overall purpose of the regulatory effort in this industry. Since the review of the Board's records did not reveal this information, the Department will recommend that the Board take action to more clearly delineate its criteria.

Recommendation No. 2

The circumstances surrounding the issuance of certain Class A Assistant Guide Licenses in 1976 were unusual. The management of some marine mammals was returned to the State after a number of years under federal jurisdiction. As a result, a limited number of walrus were to be harvested within a short time frame, the Board determined it to be in the public interest to assure that Alaska Natives, familiar with the local terrain and hunting of walrus be licensed.

The Department concurs with Recommendation No. 2, but recognizes the legitimacy of the Board's concerns in this instance and will work with the Board to develop an appropriate procedure for fulfilling this recommendation when unique circumstances are present.

Recommendation No. 3

The Board's relationship with this Department is different from that of the other occupational boards which are organized under it. The Legislature has funded two positions in the Department of Public Safety, Division of Wildlife Protection to assist the Board in its investigative enforcement capacity. Therefore, the Division of Occupational Licensing has only been involved in this aspect to a very limited degree and the Department has insufficient information upon which to base a response.

It should be noted, however, that in recent months, the Department of Law has developed written procedures for uniform management of administrative proceedings by its staff and written guidelines for agency use which will result in more efficient handling of these proceedings.

Recommendation No. 4

The Department concurs with this recommendation and will within existing constraints work with the Board in an effort to identify quantifiable objectives.

CURRENT ISSUES

This section of the Report (see page 8) identifies correctly some major current concerns for effective regulation of the Guiding Industry.

SECTION II
COMMENTS OF GUIDE LICENSING
AND CONTROL BOARD

**DEPARTMENT OF COMMERCE &
ECONOMIC DEVELOPMENT**

DIVISION OF OCCUPATIONAL LICENSING

POUCH D - JUNEAU 89811

December 2, 1977

Mr. Gerald L. Wilkerson, CPA
Legislative Auditor
Division of Legislative Audit
Pouch W, Alaska Office Building
Juneau, Alaska 99811

Dear Mr. Wilkerson:

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Recommendation No. 2: In the matter of issuing several Class A guide licenses in 1976 I wish to report that this is certainly a special case that needs clarifying. The normal procedure for an applicant to receive a Class A license is to have it handled by our investigator, William Bellingar, who checks out the necessary requirements for the license. Normally, this takes anywhere from three to six months.

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Respectfully yours,

Marcus F. Jensen, Chairman
Guide Licensing & Control Board

MFJ:cw2/10

SECTION III
COMMENTS OF DEPARTMENT OF LAW

STATE OF ALASKA

JAY S. HAMMOND, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

POUCH K - STATE CAPITOL
JUNEAU 99811

December 2, 1977

Mr. Gerald L. Wilkerson, CPA
Legislative Auditor
Division of Legislative Audit
Pouch W - Alaska Office Building
Juneau, Alaska 99811

Dear Mr. Wilkerson:

This letter is in response to your preliminary audit entitled "A Performance Review of Guide Licensing and Control Board, Department of Commerce and Economic Development, October 14, 1977.

This audit finds shortcomings with the Department of Law in two respects: (1) failure to timely process accusations against guides for violation of the licensing statutes; (2) failure to take action against guides who have not filed Statements of Financial Remuneration required by 12 AAC 38.060. Let me briefly respond to each in turn.

Failure to Timely Process Accusations Against Guides for Violation of the Licensing Statute

The audit is correct in stating that several accusations are quite old and that, in one case, a hearing officer recommended dismissal because of the remoteness of the events which were the subject of the accusation. The audit, I believe, errs in attributing these facts to deficiencies in the Department of Law.

A review of the guide board docket and our own files discloses that, with respect to the oldest case, there is no record that the department received investigatory reports for which accusations might have been filed. Had they been received, it is fair to presume that action would have been taken immediately, since particularly in the occupational licensing field our department has acted swiftly to initiate disciplinary proceedings. Other cases have been active for varying lengths of time. Any delays have been the result of attempting to serve papers on the respondents, scheduling by the hearing officers, and final action on proposed decisions.

10(1)

Gerald L. Wilkerson, CPA

December 2, 1977

Page 2

With respect to the specific allegation regarding dismissal of one case by a hearing officer for staleness, I would simply refer you to my response of October 10, 1977, a copy of which is attached. I believe the explanation contained in it adequately characterizes the events.

Contrary to the implications of the audit, I believe the department has been expeditious in its handling of these licensing matters. When the evidence is there, we move with all deliberate speed.

Failure to Take Action Against Guides
Who Have Not Filed Statements of Financial Remuneration

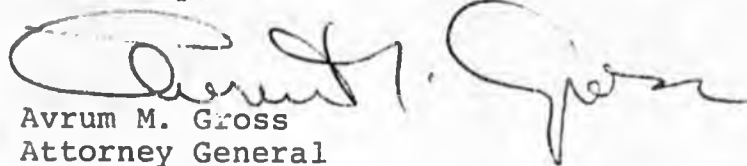
The Department of Law has never refused to initiate administrative proceedings against licensed guides for violation of 12 AAC 38.060. In fact, department personnel have encouraged the Guide Board Investigator to prepare cases based on violations of this regulation.

The department has declined to criminally prosecute guides for violation of 12 AAC 38.060. There are several reasons why prosecutions are not initiated, but they boil down to this: it is nearly impossible to convict a guide under that regulation. Let me elaborate. When a district attorney evaluates a case, he or she views it against the standard of proof required in criminal cases: proof beyond a reasonable doubt. To be successful in prosecuting a guide will require that either the client (hunter) or an employee of the guide testify, against the guide, that a hunt was conducted. Since over 80 percent of guided hunters are nonresidents, it is extremely expensive to procure their testimony. Their appearance cannot be required in our courts. The testimony of a guide's employees is difficult to procure. But even if the State can overcome those hurdles and can prove the hunt occurred, the guide can always say that he mailed the Statement of Financial Remuneration to the appropriate office, but that it was "lost in the mail". The jury returns a verdict of not-guilty; the prosecutor has wasted valuable and limited resources; and a smug and no less unscrupulous guide goes about his business-as-usual.

Gerald L. Wilkerson, CPA
December 2, 1977
Page 3

In this light I believe that the department's decision to deal with these violations through disciplinary proceedings is a wise one. The department has dealt with these cases diligently. Accordingly, I urge you to review and revise your audit in that regard.

Sincerely,



Avrum M. Gross
Attorney General

AMG:BB:cb

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

POUCH K - STATE CAPITOL
JUNEAU 99811

Recording File
JAY S. HAMMOND, GOVERNOR

October 10, 1977

Mr. Roger LaVine
Audit Manager
Division of Legislative Audit
Pouch W - Alaska Office Bldg.
Juneau, Alaska 99811

Re: Interim Letter No. 2
Guide Licensing & Control
Board Audit

Dear Mr. LaVine:

I am in receipt of your letter dated October 6, 1977, regarding your audit of the Guide Licensing and Control Board, and expressing your concern with the Department of Law's processing of accusations for that board. Before reviewing this matter on a case by case basis, I feel that some initial observations are in order.

The history of some of the cases does reflect the fact we were extremely short staffed in 1976 with regard to Guide Board matters, because the attorney position assigned to these matters was not filled for most of the year. In addition, there have been a few cases which have not moved as quickly as they might have. But, in many instances, this has not been the fault of this office. Moreover, review of those cases filed with our office in 1977 will reveal, I believe, that in recent months any problems which existed with respect to the processing of accusations has been resolved.

It has been alleged that the Department of Law has not taken action against guides who have not filed Statements of Financial Remuneration (contracts), as required by 12 AAC 38.060. First of all, criminal prosecution of a guide for failure to file a Statement of Financial Remuneration should be differentiated from administrative action, initiated by accusation, against the guide's guiding privileges, i.e.

proceedings to suspend or revoke the guide's license, taken for this type of violation.

With regard to criminal prosecution of a guide for violation of 12 AAC 38.060, it appears that certain attorneys in various district attorneys' offices have declined to prosecute guides under this regulation. For the reasons outlined below, their decision seems to be reasonable. The evidentiary problems associated with criminal prosecution of a guide under this regulation are substantial, especially when considered in light of the standard of proof applied in criminal proceedings, i.e. proof beyond a reasonable doubt. In most cases, successful prosecution of a guide under this regulation will require that either the client (hunter) or an employee of the guide testify, against the guide, that a hunt was conducted. Since 80 percent of guided hunters are nonresidents, it is extremely expensive to procure their testimony. Furthermore, we have no way of requiring their appearance in our courts. The testimony of a guide's employees is difficult to procure for obvious reasons. In addition, even if we can prove the hunt occurred, the guide can always say that he mailed the Statement of Financial Remuneration to the appropriate office, but that it was "lost in the mail", thereby defending himself. While 12 AAC 38.060 is a valuable enforcement tool, of the many guiding regulations, it is one of the least significant in terms of furthering the Guide Board's statutory purpose to "prohibit guiding activities which are unsportsmanlike, unethical, unsafe, against principles of conservation, degrading to the guiding profession, or which adversely effect the natural resources," as set forth in AS 08.54.040(6). In light of the evidentiary problems, the expense, and the relative significance of 12 AAC 38.060, it would seem that violations of this nature would be more properly pursued in administrative proceedings.

This was discussed with the Guide Board Investigator early this year. It was agreed at that time that the Department of Law would deal with violations of 12 AAC 38.060 administratively through license revocation or suspension proceedings. The Department of Law has never refused to prosecute guides under this regulation by the latter means. To the contrary, the Guide Investigator has been encouraged to prepare cases based on violations of this regulation for administrative treatment via accusation. The Department of Law has just recently prepared an accusation based on the charge of failure to file a Statement of Financial Remuneration.

It has also been alleged that the Department of Law has not processed accusations in a timely fashion against guides who have been accused of violating guiding statutes

or regulations. By telephone conversation of October 7, 1977, you have specifically requested information on the status of the following cases. They are referred to by case number to protect the identity of the accused guides. The dates following the case number indicate the date on which the Guide Board Investigator believes an accusation request was filed with the Department of Law:

1. C 77-5084 (04-29-76) A hearing was held on this case four or five months ago. It was to be held earlier, but the guide, who resides in the State of Washington in the winter, requested that it be held later, so that it would be convenient for him to attend. The Hearing Officer requested supplemental briefing, following the hearing. The Hearing Officer has issued his proposed decision, however the Department of Law intends to request reconsideration of it. Therefore, the matter is still "open". In any event, the Board will not meet until December of this year, and their final approval is necessary for proposed disciplinary action to become effective.

2. C 75-1424/C 75-01107 (1975) The hearing in this case is set for October 18, 1977. We have encountered a number of problems attempting to locate the respondent in this matter, and once we were able to do so the hearing was set on immediately for the first time available at which both the Hearing Officer and the respondent could be present. The Department of Law has gone to great lengths in many of these cases to allow the respondent to be present. This is often difficult because the guides spend a great deal of time in the field or are otherwise unavailable. (In this case, the respondent is a commercial fisherman.)

3. C 77-5089 (04-20-74) The Guide Investigator indicates that this matter was filed with the Attorney General's Office in April of 1974. When the Attorney General's Office was requested to take action on this case in the spring of this year, a complete search was made of the office, and no record of such a case was found. The office informed the Guide Investigator that there was no record of any file having been opened on this matter or of any documents pertaining to it in the office. Subsequently, the Investigator supplied the office with a new accusation request and supporting documents. These have been reviewed, and it has been determined that the case is too old for prosecution. It involves incidents which occurred approximately five years ago. Moreover, the Investigator requested that accusations be filed against two guides. One of them is simply not liable under the laws of our state for the activities complained of. Proceedings against the other guide

would entail out-of-state depositions which would be difficult and expensive to obtain. Budget limitations simply do not permit us to proceed in this manner except in the "best" of cases.

4. E 2054 (03-20-75) This office has no record of having received an accusation request against this individual. Informal discussions were held with regard to the possibility of proceeding against him, however supporting documentation was never supplied.

5. C 77-11423 (10-15-76) This is the case referred to in your letter, at the bottom of page one, in which a Hearing Officer recommended dismissal of an accusation because of its age. It should be noted that he also recommended dismissal because he did not believe the guide was guilty of the violations as charged. The incidents giving rise to the accusation occurred in November, 1975. The Department of Law received an accusation request in October, 1976. An accusation was filed shortly thereafter, and a Hearing Officer was assigned to hear the case early in 1977. He was unavailable for a hearing date until May, 1977, when he heard the case. At the hearing, he acknowledged the intervening five-month delay as being his fault. In addition, criminal proceedings were brought against this guide based on the same incidents. It is the practice of the Department of Law, to wait until the criminal proceedings are resolved before proceeding administratively, to avoid duplicative effort on the part of our attorneys, since licenses are often revoked in the course of criminal proceedings.

6. C 77-5092 (04-14-76) This case number references two cases, based on the same incident. Under the Guide Statutes, a registered guide is vicariously liable for the acts of his assistant guide. A hearing was held last March with respect to the assistant guide, and the Hearing Officer recommended a three-year suspension of his license. At the Guide Board meeting in July, the Board affirmed this decision, and the guide's license was officially suspended. At that time, the Board instructed the Assistant Attorney General present to proceed against the registered guide's license also. An accusation is currently being prepared against the registered guide.

7. C 76-18396 (12-08-76) This case is currently being reviewed to see if there is sufficient evidence to proceed with an accusation against the guide.

8. C 76-14769 (12-08-76) A preliminary hearing was held on this case last December based on complaints

filed by various clients of the guide. At that time, the Board instructed the Department of Law to proceed with an investigation of the case and to file an accusation against the guide based on alleged unethical conduct, specifically, taking out clients too early in the season to give them a good hunt, poor food, and double booking aboard the guide's boat. Since that time, the Department of Law has determined that while there may be merit in the complaints, there is not sufficient evidence present to support legal action against the guide, as there are as many letters from clients on file which praise the guide, as criticize him. However, investigation has uncovered one possible violation of a game regulation, which may have occurred on board the guide's boat, to-wit: shooting a deer from the boat. The Division of Fish & Wildlife Protection is currently investigating this charge. When their report is received, the Department of Law will determine whether there is sufficient evidence to proceed against the guide at this time.

9. C 77-11983 (09-23-76) An accusation has been filed against this guide, but he has not returned a Notice of Defense indicating that he intends to defend against it. A Hearing Officer has been requested. The hearing should be held in the near future, and the matter should be ready for final disposition by the Board at their December meeting.

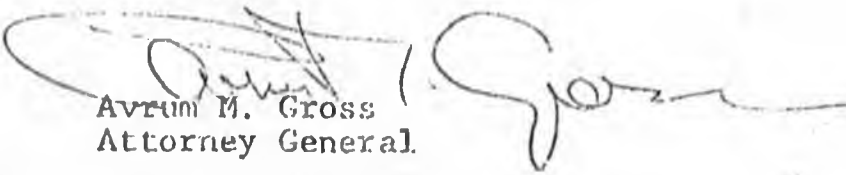
As you know, the Guide Board Investigator has filed a number of accusation requests with the Department of Law this year, all of which have been filed since April. In our telephone conversation of October 7, 1977, you indicated that you would like review of these case to be treated in group form. Eleven such cases have been filed with our office. Accusations have been prepared, and in most cases served, in seven of those cases. Additional information has been requested in two of the remaining cases, and must be received prior to the filing of accusations. An accusation will be drawn up shortly in the tenth case, as it is based simply on the vicarious liability of a registered guide for his assistant guide, against whom an accusation has already been filed. With regard to the eleventh case, the office is reviewing it to see whether an accusation is warranted.

Perhaps it will be helpful to explain the general procedure followed by the Department of Law in processing these accusations. First, an accusation request is received from the Guide Board Investigator, along with supplemental material detailing the nature of the violation and the evidence currently available. The Department of Law reviews the request and the material, and determines if additional investigation and evidence is necessary for the state to

October 10, 1977

proceed. If this is so, the Department requests the Guide Board Investigator to make such investigations as are required. When we feel that sufficient evidence has been compiled, an accusation is drawn up. The original is sent to the Department of Commerce & Economic Development, and copies are served upon the guide. Oftentimes it may take four to eight weeks to effect service, as the guides are often difficult to reach. Upon service, the guide has 15 days to return a Notice of Defense indicating that he wishes to defend against the action. Personal service on the guide is attempted, as opposed to service by registered mail, because the guides are often absent from their mailing addresses for periods in excess of two weeks, because of their work. Service by registered mail would therefore often result in a guide losing the option of defending the action. After a Notice of Defense is received, the Department requests a Hearing Officer through the Governor's Office. When a Hearing Officer is assigned, the Hearing Officer, the Department's attorney, and the guide and/or his attorney arrange a mutually-convenient date for the hearing. The Hearing Officer may or may not request supplemental briefing following the hearing. Subsequent to the hearing, the Hearing Officer reviews the facts elicited at the hearing, and issues findings of fact and conclusions of law, along with a proposed decision. At the next Board meeting (which occur about three times a year), the Hearing Officer's findings and proposed decision are read to the Board, at which time the Board either affirms and adopts the proposed decision, or rejects it and orders a new hearing. These proceedings are conducted under the Administrative Procedure Act (AS 44.62).

Sincerely,



Avrum M. Gross
Attorney General

AMG:d1m:CLP -

STATE OF ALASKA

AUDIT DIVISION
POUCH W—ALASKA OFFICE BUILDING

THE LEGISLATURE

FINANCE DIVISION
POUCH WF—STATE CAPITOL

BUDGET AND AUDIT COMMITTEE

JUNEAU 99801

December 13, 1977

Members of the
Legislative Budget and Audit Committee:

We have reviewed the consolidated responses of the Department of Commerce and Economic Development, Guide Licensing and Control Board, and Department of Law and the auditor's comments are listed below:

Recommendation No. 1

In the assignment of Exclusive Guiding Areas (EGA's), the Guide Licensing and Control Board (the Board) should uniformly apply the criteria established for the Game Management Unit under consideration.

Guide Licensing and Control Board Response to Recommendation No. 1:

"Your concern in this recommendation is that three individuals who had the required number of bear camp registrations did not receive a temporary permit. The reason they did not receive their temporary permit at our first hearing on Unit 9 was because they had over-filed on areas being used by older guides. In examining some of these individual cases the Board's concern was a possible building up of too much hunting impact in a small given area. We told these applicants to continue to examine the map on Unit 9 and see if they could find some areas that would be open and usable in that Unit. At a later meeting, areas for these individuals were being developed. The problem was not a lack of uniform application. I think the problem was the Board's concern of being realistic in trying to protect the resource from over-harvest. In most cases the guides themselves recognize this, although it seems that each man does everything possible to try and improve his own situation, which is probably to his credit."

Auditor's Comment:

In a letter dated December 12, 1977, to the Division of Legislative Audit, the Chairman of the Guide Board

stated that in a recent meeting the Guide Board did not uniformly apply the criteria established for assigning Exclusive Guiding Areas (EGA's) in Game Management Unit 4.

We maintain our position that the Guide Board, in the assignment of EGA's, should uniformly apply the criteria established for the Game Management Unit under consideration.

Department of Commerce and Economic Development Response to Recommendation No. 1:

"In making this recommendation, it appears, the auditors relied solely upon the minimum usage requirements established by the Board in order for an applicant to be eligible for either a temporary or permanent Exclusive Guiding Area (EGA), to determine that the criteria established were not being applied uniformly.

It is the Department's understanding that the Board has always considered additional factors such as the number of minimally qualified applicants for a specific EGA in relation to the harvestable resource available. This is consistent with the overall purpose of the regulatory effort in this industry. Since the review of the Board's records did not reveal this information, the Department will recommend that the Board take action to more clearly delineate its criteria."

Auditor's Comment:

It is the position of Legislative Audit that all factors should be considered before the criteria is established for assigning Exclusive Guiding Areas. Otherwise, the Board will not be able to follow AS 08.54.040(8) which requires that an equitable and reasonable procedure be followed in assigning exclusive Guiding Areas.

Recommendation No. 3

The Department of Law should take prompt action against Guides who violate Guide Board Statutes and Regulations.

Department of Law Response in Part:

"This audit finds shortcomings with the Department of Law in two respects: (1) failure to timely process accusations against guides for violation of the licensing statutes; (2) failure to take action against guides who have not filed Statements of Financial Remuneration required by 12 AAC 38.060. Let me briefly respond to each in turn.

Failure to Timely Process Accusations
Against Guides for Violation of the Licensing Statute

The audit is correct in stating that several accusations are quite old and that, in one case, a hearing officer recommended dismissal because of the remoteness of the events which were the subject of the accusation. The audit, I believe, errs in attributing these facts to deficiencies in the Department of Law.

A review of the guide board docket and our own files discloses that, with respect to the oldest case, there is no record that the department received investigatory reports for which accusations might have been filed. Had they been received, it is fair to presume that action would have been taken immediately, since particularly in the occupational licensing field our department has acted swiftly to initiate disciplinary proceedings. Other cases have been active for varying lengths of time. Any delays have been the result of attempting to serve papers on the respondents, scheduling by the hearing officers, and final action on proposed decisions."

Auditor's Comments:

The Department of Law in an attachment to their response states that they have no record of receiving investigatory reports for two cases (CC77-5089 and E2054) for which accusations might have been filed. According to the information supplied to us by the Department of Public Safety, Division of Fish and Wildlife Protection, these cases were filed with their office.

In another part of the Department's response they state:

"...The history of some of the cases does reflect the fact we were extremely short staffed in 1976 with regard to Guide Board matters, because the attorney position assigned to these matters was not filled for most of the year. In addition, there have been a few cases which have not moved as quickly as they might have..."

Recently, the Department has made progress in processing accusations in a timely manner.

We affirm our recommendation as written.

Department of Law Response in Part:

"Failure to Take Action Against Guides
Who Have Not Filed Statements of Financial Remuneration

The Department of Law has never refused to initiate administrative proceedings against licensed guides for


violation of 12 AAC 38.060. In fact, department personnel have encouraged the Guide Board Investigator to prepare cases based on violations of this regulation.

The department has declined to criminally prosecute guides for violation of 12 AAC 38.060. There are several reasons why prosecutions are not initiated, but they boil down to this: it is nearly impossible to convict a guide under that regulation. Let me elaborate. When a district attorney evaluates a case, he or she views it against the standard of proof required in criminal cases: proof beyond a reasonable doubt. To be successful in prosecuting a guide will require that either the client (hunter) or an employee of the guide testify, against the guide, that a hunt was conducted. Since over 80 percent of guided hunters are nonresidents, it is extremely expensive to procure their testimony. Their appearance cannot be required in our courts. The testimony of a guide's employees is difficult to procure. But even if the State can overcome those hurdles and can prove the hunt occurred, the guide can always say that he mailed the Statement of Financial Remuneration to the appropriate office, but that it was "lost in the mail". The jury returns a verdict of not-guilty; the prosecutor has wasted valuable and limited resources; and a smug and no less unscrupulous guide goes about his business-as-usual."

Auditor's Comment:

We agree that it is difficult and expensive to prosecute a guide. However, the enforcement of all Guide Board Statutes and Regulations are necessary to ensure that the public and game resources are adequately protected and the guiding industry is properly regulated. By enforcing only certain Board laws and regulations, the attitude of non-compliance would be fostered among guides and the public which would be detrimental to the welfare of the State.

We affirm our recommendation as written.



Gerald L. Wilkerson, CPA
Legislative Auditor
Division of Legislative Audit

STATE OF ALASKA
THE LEGISLATURE

POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99811
907-465-3800


LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM

September 30, 1977

SUBJECT: Exclusive Guiding Areas

TO: Roger Levine
Legislative Audit Division

FROM: Kenneth E. Vassar 
Staff Attorney

On June 28, 1974, the Guide Licensing and Control Board adopted regulations (12 AAC 38.040 and 050) which limited guides applying for new certification to a total of three districts and authorized exclusive guiding areas in units 8, 16, and 20 (guiding districts established by the board correspond to game management units established by the Board of Fish and Game in 5 AAC 90.10 as of January 1, 1974). On January 1, 1977, section one of 133 SLA 1976 took effect. This section added a paragraph to AS 08.54.040 and reads as follows:

(a) Except as provided in sec. 45 of this chapter, the board shall....

(8) 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.

On February 25, 1977, the board amended 12 AAC 38.040 and 050. The amendment authorizes camp registration in all units - not just in units 8, 16, and 20 - based on occupancy, use, financial value, and other considerations. Camp registration is for the purpose of effectuating exclusive guiding areas surrounding the camps for distances to be determined by the board. The previous limitation of three districts per guide remained in effect.

The following questions have arisen as a result of this activity, and they are as follows:

- (1) Did the board have the authority, before January 1, 1977 (the effective date for section one of 133 SLA 1976), to authorize exclusive guiding areas?
- (2) Assuming it had such authority, did it exceed its authority in granting exclusive guiding areas outside units 8, 16, and 20?
- (3) What effect has section one of 133 SLA 1977 had on the authority, if any, of the board to establish exclusive guiding areas?
- (4) May guides who have been granted an exclusive guiding area transfer the right to guide exclusively in that area, and may the board authorize such practice?
- (5) Did the board have authority, before January 1, 1977, to limit guides to three districts each?
- (6) What effect has section one of 133 SLA 1976 had on that authority?

The following paragraphs will address these questions.

1. Exclusive guiding areas before January 1, 1977. The regulation in effect before January 1, 1977, which authorized the establishment of exclusive guiding areas in units 8, 16, and 20 was 12 AAC 38.050(a) and (b). These subsections stated:

- (a) Registration of one main camp by guides in units 8, 16, and 20 will be allowed based on occupancy, use, and financial value that must be substantiated to the board's satisfaction.
- (b) Camp registration is to effectuate an exclusive big game guiding area surrounding the registered camp, for a distance to be determined by the board.

The authority cited for this section was AS 08.54.050, which has not been amended since then. It provides:

The board shall adopt procedural and substantive regulations, under the Administrative Procedure Act (AS 44.62), required by this chapter or reasonably necessary for its administration.

Considering the language of AS 08.54.050, it is apparent that 12 AAC 38.050(a) and (b) could have been justified only if it were "reasonably necessary" for the administration of some provision of the chapter. It is arguable that the establishment of exclusive guiding areas was "reasonably necessary" for administering the following paragraphs of AS 08.54.050(a):

(a) Except as provided in sec. 45 of this chapter, the board shall....

(3) establish guide performance standards and regulate activity...

(6) prohibit guiding activities which are unsportsmanlike, unethical, unsafe, against principles of conservation, degrading to the guiding profession, or which adversely affect the natural resources....

Generally speaking, state officers, boards, commissions, and departments have such powers as may have been delegated to them by express constitutional and statutory provisions, or as may properly be implied from the nature of the particular duties imposed on them. It will be noted that AS 08.54.040(a)(3) grants broad powers to the board. The board shall regulate the activities of guides. Courts have recognized the wide range of discretion vested in state boards under such broad statutes and have refused to interfere with the exercise of that discretion unless the person challenging it demonstrated that the board's action was prohibited by a specific statutory provision or by clear legislative intent. The following synopsis is a small sampling of those cases reaching this result:

Courts should not substitute their judgment for that of the commission with respect to what is wise and fair in the economy of the state. Sun Oil Co. v. Burford, 130 F.2d 10. (1942 C.A. 5th Cir)

A state officer's decision is not arbitrary and capricious, even though not the wisest and best that could be made, if action was exercised honestly and on due consideration, and there was room for two opinions. Whatcom County v. Langlie, 246 P.2d 836. (1952 Wash)

Roger Levine
Page 4
September 30, 1977

A board or commission on which the legislature confers broad general powers is invested with discretion in choosing the means and methods of accomplishing the result expected, and, in the absence of fraud or manifest abuse of that discretion, its determination is conclusive. Elliott v. Superior Court, 180 C.A.2d 894.

An administrative agency which has authority to enact regulations is vested with a large measure of discretion and the burden of showing that the agency has acted improperly in enacting regulations rests upon the one who asserts it. Page v. Welfare Commissioner, 365 A.2d 1118 (1976 Conn)

The powers granted in AS 08.54.040(a)(3), as noted before, are broad. If the cases cited apply, which it seems they should, then the board's actions have a rebuttable presumption of validity based upon the board's wide discretion in choosing the means of accomplishing the results expected. The presumption of validity cannot be rebutted merely by asserting that the board's decision is not "the wisest and the best that could be made." The burden is on the party challenging the board's actions to show that they are arbitrary, capricious, or fraudulent, or that they constitute manifest abuse of the discretion granted the board. To the best of my knowledge, no such showing has been made.

Beyond the wide discretion vested in the board under AS 08.54.040(a)(3), there is the further discretion inherent in administering the powers granted the board under AS 08.54.040(a)(6). That paragraph gives the board the power to prohibit guiding activities which are "against principles of conservation...or which adversely affect the natural resources." This, too, is a broad power since the legislature did not restrict the means for accomplishing the results expected, and it carries with it wide discretion in choosing the means to be used. A look at the situation which existed before adoption of the regulation in issue illustrates the reasonableness of the board's decision to authorize exclusive guiding areas. Senator Poland, in floor debate over CS SB 661 (a precursor of 133 SLA 1976) on March 25, 1976, stated:

Kodiak Island was one of the toughest ones of all, because they had had, believe it or not, 198 guides that had been guiding on Kodiak at one time or another.

By the use of the, by using past records of guiding there, they were able to reach an amicable agreement where 19 are now guiding there. The others had to go to other districts.

It is important to recognize that Kodiak Island is within unit 8, one of the designated units within which exclusive guiding areas were authorized.

In a situation where a large number of guides are concentrating on limited areas of hunting, thus causing potentially irreversible damage to the resources in those limited areas, and where it is the duty of the board to prohibit guiding activities which adversely affect the natural resources, it seems that there is "room for two opinions" as to the reasonable necessity of establishing exclusive guiding areas in those regions. Hence, the board's decision to use such areas was within its range of discretion.

In short, I believe that the broad powers and wide discretion granted the board under AS 08.54.040(a)(3) and (6) encompass and authorize the establishment of exclusive guiding areas.

2. Exclusive guiding areas outside units 8, 16, and 20 before February 25, 1977. Assuming that 12 AAC 38.050, as it read before the recent amendment (2/25/77), was valid, granting exclusive areas outside units 8, 16, and 20 would not have been valid. The establishment of such areas would have been beyond the authority of the board's own regulations, since authorizing exclusive areas in certain units implies a lack of authorization for exclusive guiding areas in other units.

3. The effect of 133 SLA 1976 on exclusive guiding areas. After the effective date of section one of 133 SLA 1976, the board amended 12 AAC 38.050(a) to read:

Registration of camps by guides will be allowed based on occupancy, use, financial value and other considerations that must be substantiated to the board's satisfaction.

The listing of authority under the regulation was also amended to add AS 08.54.040(a)(6), as well as AS 08.54.050. It is interesting to note that section 40(a)(6) was listed and not section 40(a)(8), the new paragraph dealing specifically with quotas.

Roger Levine
Page 6
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There are at least two considerations which support the argument that passage of 133 SLA 1976 (hereinafter referred to as sec. 40(a)(8)) ratified or at least did not refute the board's power to authorize exclusive guiding areas.

The first consideration relates to the language of sec. 40(a)(8). The section is quoted on the first page of this memorandum. It requires the board to establish quotas within "designated geographical game units or subunits of the state." Since an exclusive guiding area simply amounts to a quota of one within a designated subunit of the state, the establishment of such areas is expressly authorized under this language.

The section also requires the board to provide for an equitable and reasonable procedure for limiting the number of guides to the quota. In furtherance of this requirement, the board has utilized advice from biologists in the Department of Fish and Game to determine where exclusive guiding areas are needed. Furthermore, the regulations provide guidelines for the granting of exclusive areas; under these guidelines, the board must take into consideration occupancy, use, financial value, and other considerations.

It is true that the guiding districts used by the board correspond to districts established by regulation of the Board of Fish and Game and that there are also established subunits under those regulations which do not correspond to the exclusive guiding areas. Nevertheless, the legislation does not specify the subunits to which the board must adhere. Thus, the board is free to designate its own subunits and is not bound by regulations adopted by the Board of Fish and Game.

The second consideration supporting exclusive guiding areas subsequent to the enactment of sec. 40(a)(8) relates to the legislative history of sec. 40(a)(8). It was introduced in the senate in 1976 as SB 661, section one of which provided for quotas "within designated geographical areas." This bill was replaced with CS SB 661, section one of which provided for quotas "within designated geographical game units or subunits." The new language was provided by the Senate Resources Committee and represents a conscious effort by the chairman of that committee to assure the authority of the board to establish exclusive guiding areas. In her statement on the Senate floor on March 25, 1976, Senator Poland, the chairman of the committee, specifically referred

to the method in use by the board at that time on Kodiak Island (this statement is quoted supra), and in describing CS SB 661, she stated:

It's a policy of setting a quota and assigning guides to definite units. It has been practiced on Kodiak Island and has worked out extremely well there....

I think there can be no question but that the author of the language which was enacted and became sec. 40(a)(8) intended it to authorize the continued practice of granting exclusive guiding areas and that the legislature, at least by implication, intended the same result in passing the bill.

4. Transferral of guiding rights in exclusive guiding areas. The grant of an exclusive guiding area is a privilege and not a vested right of the grantee. Under sec. 40(a)(8), the privilege may only be granted by the board subject to "equitable and reasonable" procedures established by the board. It may not be granted, then, by any other person or group, including the holder of a grant. Furthermore, the authorization by the board of such practice would constitute the abrogation of its statutory duty to establish "equitable and reasonable" procedures for limiting guides to the quota established. Part of the procedure established by the board includes consideration of the use and occupancy of the area by the guide seeking the privilege. To allow the sale or transfer in any manner of the privilege by its holder would destroy the equitable and reasonable nature of the grant since it would eliminate the use and occupancy considerations. Therefore, such practice is beyond the authority of any grantee of an exclusive guiding area and may not be authorized by the board.

5. Three districts per guide before sec. 40(a)(8).

6. Three districts per guide after sec. 40(a)(8).

Sec. 40(a)(8) provides for the establishment of quotas within districts; it does not address itself to the establishment of a three district per guide quota. Therefore, since sec. 40(a)(8) has no effect on such a quota, the board's authority to limit guides to three districts must be based upon some other section in the chapter, and questions 5 and 6 may thus be answered together.

Roger Levine
Page 8
September 30, 1977

The regulation limiting new certifications to a limit of three districts per guide is 12 AAC 38.040. Before the amendments of February 25, 1977, the authority listed for this regulation was AS 08.54.050, but after the amendment, this was expanded to include AS 08.54.040(a)(3) and (6). These sections have been quoted previously in this memorandum and will not be reproduced here.

The establishment of a three district per guide limitation is within the authority of the board under the broad powers established in sec. 40(a)(3) and (6), for it can be justified as reasonably necessary to the regulation of guiding activity under sec. 40(a)(3) and to the prohibition of guiding activities which are unsafe under sec. 40(a)(6). By limiting a guide to three districts, the board is better able to assure the competence of the guide in the areas where he is guiding. The guide is more likely to become well aware of the individual nature of his guiding area and of the animals and potential dangers therein. Thus, the regulation promotes competency, safety, and conservation in guiding and is within the authority of the board to adopt.

I hope this has satisfactorily answered your questions. If there is anything more I can do for you, please let me know.

KEV:jpd

STATE OF ALASKA

JAY S. HAMMOND, GOVERNOR

DEPARTMENT OF COMMERCE &
ECONOMIC DEVELOPMENT

DIVISION OF OCCUPATIONAL LICENSING

POUCH D - JUNEAU 99011

March 20, 1978

Representative Al Osterback, Chairman
House Resources Committee
Alaska State Legislature
Juneau Alaska

*Copies
File*

Dear Al:

The Commerce Department notified me today that you had scheduled House Joint Resolution 95 for a hearing on Friday afternoon.

The Guide Licensing & Control Board has had to readjust its proposed hearing in Fairbanks and now have it scheduled starting March 27, to run through that week. For some of the members to spend a week away from their jobs has been difficult and they have had to reschedule many of their activities to be prepared to attend the Board meeting. In talking to some of the Board members it seems under the circumstances they would be unable to come to Juneau for Friday's meeting.

Our own staff in Anchorage is loaded with work, trying to get ready for the meeting, and the Attorney General's office in Anchorage, where we have Liza Fessner as our special attorney, is also swamped. She is in the process of finalizing a full day of court cases for the Board to hear. I would very much like to have her at a hearing in case legal questions come up that the Board members could not answer.

At our last hearing on H.J.R. 95 the time ran on so long that your committee did not hear from the Department of Game or the Attorney General's office. Both of these departments have been somewhat involved in our activities, and where I do not know what their testimony would be it might be that your committee would want to hear from them.

Respectfully yours,

Mark

Marcus F. Jensen, Chairman
Guide Licensing and Control Board

cc: Board members
Wm. Bellinger

****PLEASE NOTE****

THE ORIGINAL FILE CONTAINS AN OVERSIZED DOCUMENT THAT IS UNSUITABLE FOR FILMING. PLEASE REFER TO THE ALASKA STATE ARCHIVES TO VIEW THE ORIGINAL.

DESCRIPTION: MAP (XEROXED COPY)

GUIDING UNITS 23-26