

ALASKA LEGISLATURE COMMITTEE FILES 1987-1988 8672

4953 HRES HB 183 (FILE 1)

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BEAR PAW OUTFITTERS, INC.

Contract for Transportation and  
Notice of Risk

Bear Paw Outfitters, Inc. is a corporation whose principal business is the outfitting and transportation of photographers, fishermen, hunters, campers, adventurers and other outdoorsmen. Transportation is into scenic remote wilderness areas of Alaska. Camping accommodations and outfitting are available upon request.

Let it be known to all interested parties who enter in and upon and sign this contract, hereby acknowledge that Bear Paw Outfitters, Inc. is not acting as guides for hunting, but transporters of persons, equipment, and related paraphernalia.

By contracting for transportation services with Bear Paw Outfitters, Inc., the Outdoorsman is accepting risks not normally associated with public transportation services. The Outdoorsman's signature on this contract is his acknowledgement that he understands and accepts the risks associated with travel in remote areas. These risks include, but are not limited to fire, flood, wild animal attacks, avalanche, severe weather conditions (including flash floods, blizzards, snow, rain, and wind), treacherous currents, sweepers, floating logs, unseen obstructions, discharge of firearms and other hazards associated with remote travel.

It is the Outdoorsmen's responsibility to inform Bear Paw Outfitters, Inc. of any physical or mental illness he or she may have which may make an extended time in the "bush" a hazard. Bear Paw Outfitters, Inc. expressly disclaims liability for any personal injury or property damage incurred as a result of transportation or other services provided, and the Outdoorsman expressly waives any claim for liability against Bear Paw Outfitters, Inc.

To reserve services, Bear Paw Outfitters, Inc., requires a 30 percent deposit. The entire deposit is refundable upon a 60 day advance notice, but is otherwise non-refundable. Total payment is required prior to rendering of service.



# Alaska State Legislature

SENATOR KEN FANNING  
P.O. BOX 80929  
COLLEGE, ALASKA 99708



P.O. BOX V—STATE CAPITOL  
JUNEAU, ALASKA 99811  
(907) 465-3880

## Senate

### M E M O R A N D U M

To: Senators Coghill, Halford and Eliason  
Representatives Herrmann, Adams and Grussendorf

From: Senator Ken Fanning *KFP*

Date: January 14, 1988

RE: Report of meeting between guides and outfitters

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I want to take the opportunity to give you a preview of the attached report which I will be distributing to members of the House and Senate Resources Committees tomorrow. The report is of a recent meeting between representatives of the guides and outfitters.

As you are aware, SB 191, the guide bill, is back in Senate Resources Committee for additional hearings and possible changes.

I just wanted to keep you abreast of these new developments. If you have questions regarding the meeting or the bill itself, please contact Senator Coghill or his committee aide, Elizabeth Ziegler, or myself or my staff person, John Manly.

## COMMERCIAL HUNTING SERVICES

This is a concept paper. It is not designed to address every issue or answer every question, but rather to see if there are general concepts that can be agreed on that will help with the passage of a commercial hunting services bill this session.

- I. Licensed providers of transportation would not be affected by this bill unless:
  - A. they are advertising services or transportation specially for hunters, or
  - B. providing services for hunters beyond transportation (providing or renting gear, campsites, etc.)
- II. Others providing commercial services to hunters would have to be licensed by Board in one of two main categories, Guides/Master Outfitters or Transporter/Outfitters
  - A. Nonresidents hunting any big game in Alaska (bear, sheep, goats, muskox, bison, moose, caribou, deer, others?) would be required to have services of licensed contractor.
    1. Except each Alaska resident hunter could take up to 2, 3?, friends hunting without compensation.

2. Guides would be required for nonresidents to hunt Brown Bear, Sheep, or Goats.
  - a) Except for nonresidents hunting with resident hunter who is kindred in the second degree.
- B. Guides/Master Outfitters and Transporter/Outfitters would both be required to file reports on all contracts and all game taken.
- C. Both would be required to pay head fees on all game taken by clients.
  1. Head fees would be graduated and cumulative, designed to penalize abuse of resource and economically establish a maximum take.
  2. Head fees would be set annually by Board of Game based abundance or scarcity of game.
    - a) could vary by game unit or sub unit.
    - b) would be cumulative from one unit to another.

III. Transporter/Outfitters would be allowed to provide transportation (including air, horse, boat, backpacking, etc.), gear, campsites, and general hunting advice, butchering and packing.

A. Transporter/outfitters are not allowed in the field prior to an animal being killed, except to render assistance in a life (human!) threatening emergency.

1. Transporter contracts would be required to advise clients that if a transporter or employee is in the field with the client, the transporter is criminally liable and the client would also be subject to a large civil fine (\$1,500?).

B. Would be allowed to provide a person in the camp, not in the field, at legally established lodges and cabins, boats with living quarters, and at camps not serviced by air (i.e. camps reached by horse, boats, backpacking, or other ground or water transportation.)

C. Would not be allowed to have person in field or camp if camp reached or serviced by air.

D. If transporters provide air transportation with their own planes, they would be required to meet same safety, insurance, etc., requirements as Part 135 Air Taxi operators.

- IV. Guides would be able to provide the full range of guiding services for all Alaska game.
  - A. Guides would be able to guide only in exclusive or joint use guide areas assigned to them.
  - B. If guides had a transporter license, they could also provide transporter service under the same conditions as a transporter.
  
- V. Miscellaneous provisions
  - A. Board may investigate guide or transporter after one complaint.
  - B. Either add provisions to make prohibition against sale of exclusive guide areas enforceable or legalize the sale of guide areas.

Original sponsors: Coghill and Faiks

1 IN THE SENATE

BY THE RESOURCES COMMITTEE

2 CS FOR SENATE BILL NO. 191 (3d Resources)

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 FIFTEENTH LEGISLATURE - SECOND SESSION

5 A BILL

6 For an Act entitled: "An Act relating to the Guide Board and big game  
7 guiding, transporting, outfitting, and hunting;  
8 establishing a task force on guiding and the commer-  
9 cial taking of game; and providing for an effective  
10 date."

11 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

12 \* Section 1. AS 08.03.010(c)(20) is amended to read:

13 (20) Guide Board (AS 08.54.010) -- June 30, 1990 [1988].

14 \* Sec. 2. AS 08.54.010 is amended to read:

15 Sec. 08.54.010. CREATION AND MEMBERSHIP OF BOARD, For the  
16 purposes of licensing and regulating the activities of guides and  
17 transporters in the interest of the state's wildlife resources there  
18 is created the Guide Board consisting of seven members. No more than  
19 three members of the board shall hold or have held a registered,  
20 master, or class A assistant guide license. The other members must  
21 have a general knowledge of the game resources of the state and may  
22 not have a vested interest in the guiding industry. A minimum of 10  
23 years residence in the state is required for all members of the board.  
24 For administrative purposes, the board is in the Department of Com-  
25 merce and Economic Development.

26 ~~\* Sec. 3. AS 08.54.140 is amended to read:~~

27 ~~Sec. 08.54.140. QUALIFICATIONS FOR ASSISTANT GUIDE LICENSE. A~~  
28 ~~person is entitled to be licensed as an assistant guide if the person~~  
29 ~~(1) is 19 years of age or more;~~

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~~(2) [REPEALED~~

~~(3)] is favorably recommended to the board, in writing, by a registered guide;~~

~~(3) [(4)] meets additional qualifications which the board may require;~~

~~(4) [(5)] is in sound physical condition; and~~

~~(5) is familiar with the terrain and transportation problems in the district for which the license is requested.~~

*Min. Decision  
7/11/74  
L. J. [unclear]*

\* Sec. 4. AS 08.54 is amended by adding new sections to read:

Sec. 08.54.142. TRANSPORTER LICENSE. (a) A person may not engage in the business of transporting unless the person is licensed as a transporter under this chapter.

(b) A person may be licensed as a transporter if the person

(1) pays the annual license fee required under AS 08.54.-170(a);

(2) holds a current Alaska business license to do business as a transporter; and

(3) has not had a guide license revoked by the board.

Sec. 08.54.143. EXEMPTIONS FROM TRANSPORTER LICENSE REQUIREMENT.

(a) A person, other than a licensed guide, who provides air transportation to big game hunters for compensation is exempt from the license requirements for transporters under this chapter unless the person

(1) derives more than 50 percent of gross income as an air carrier from transporting big game hunters or their equipment or game to or from the field; or

(2) provides big game hunting services in addition to air transportation.

(b) A licensed guide who provides transportation services only in the restricted guide area assigned to the guide or the guide's

1 employer is exempt from the license requirements for transporters  
2 under this chapter.

3 Sec. 08.54.144. LIMITATIONS ON TRANSPORTERS. (a) A person  
4 required to be licensed as a transporter under this chapter may not  
5 accompany or be present with a big game hunter in the field for com-  
6 pensation or with an intent or an agreement to receive compensation  
7 except under the following circumstances:

8 (1) to drop off or pick up the hunter or the hunter's  
9 equipment or game;

10 (2) to provide assistance to another person whose health or  
11 safety is threatened;

12 (3) if prevented from leaving the field by mechanical  
13 failure of a vehicle, an accident, weather, or an act of God;

14 (4) to provide cooking or other personal services to the  
15 hunter at a camp not serviced by aircraft, motorized watercraft, or  
16 other motorized vehicle, as long as the services do not include spot-  
17 ting, stalking, pursuing, tracking, killing, or attempting to kill big  
18 game or meat packing;

19 (5) in a boat with living quarters;

20 (6) at a lawfully established cabin or permanent lodge.

21 (b) Advertising for transporting services must state, if appli-  
22 cable, that the transporter is not a licensed big game guide or out-  
23 fitter and is not authorized by law to provide a guided hunt in the  
24 state. A copy or sample of the advertising shall be submitted to the  
25 board, as provided in regulations of the board.

26 Sec. 08.54.145. CONTRACTS FOR GUIDING AND TRANSPORTING. A  
27 person required to be licensed as a master or registered guide or as a  
28 transporter under this chapter may provide services only by written  
29 contract. The contract must contain the text of AS 08.54.210. A copy

1 of each contract shall be submitted to the Department of Commerce and  
2 Economic Development not later than 30 days after the contract is  
3 signed or the services are provided, whichever occurs first. The  
4 department shall forward a copy of each contract to the Department of  
5 Fish and Game and to the Department of Public Safety, division of fish  
6 and wildlife protection.

7 \* Sec. 5. AS 08.54.150 is repealed and reenacted to read:

8 Sec. 08.54.150. RESPONSIBILITY OF REGISTERED OR MASTER GUIDE OR  
9 TRANSPORTER FOR VIOLATIONS. A registered or master guide contracting  
10 for a hunt, or a transporter contracting to transport a big game  
11 hunter, is equally responsible under AS 08.54.200 for a violation of a  
12 federal or state sport fish, game, guide, or transporter statute or  
13 regulation committed by an employee of the guide or transporter,  
14 respectively, if

15 (1) the employee is licensed or required to be licensed  
16 under this chapter; and

17 (2) the violation was committed in the course of the em-  
18 ployment.

19 \* Sec. 6. AS 08.54.170(a) is amended to read:

20 (a) The Department of Commerce and Economic Development shall  
21 set license fees under AS 08.01.065 for each of the following:

- 22 (1) master guide;  
23 (2) registered guide;  
24 (3) class A assistant guide;  
25 (4) assistant guide;  
26 (5) special guide;  
27 (6) transporter.

28 \* Sec. 7. AS 08.54.200(a) is repealed and reenacted to read:

29 (a) The board shall hold a hearing to determine whether a

1 licensee should be disciplined within a reasonable time after (1) a  
2 complaint concerning a licensee's guiding or transporting activities  
3 is filed with the board by a client of the licensee; (2) a complaint  
4 concerning a licensee's conduct during a life-threatening situation  
5 while guiding or transporting is filed with the board; or (3) a li-  
6 censee has been convicted of a violation of a federal or state game,  
7 guiding, or transporting statute or regulation.

8 \* Sec. 8. AS 08.54.200(b) is amended to read:

9 (b) After a hearing, the board may revoke, suspend, or deny  
10 renewal of a license, and may withdraw a licensee's restricted guide  
11 area assignment, if the board finds that the licensee

12 (1) engaged in unethical activity, unsafe activity, or  
13 activity that adversely affects the natural resources of the state  
14 when the activity is related to the purposes of the contract hunt or  
15 contracted transportation; or

16 (2) violated a provision of a federal or state game, guid-  
17 ing, or transporting [GUIDE] statute or regulation.

18 \* Sec. 9. AS 08.54.200(d) is amended to read:

19 (d) A person who is disciplined under this section may not  
20 engage in a guiding or transporting activity during the period of  
21 license revocation or disciplinary action. A person licensed under  
22 this chapter may not hire as a guide or transporter a person whose  
23 [GUIDE] license is suspended or revoked under this section. A person  
24 [GUIDE] whose license is suspended or revoked may not guide or trans-  
25 port in the employ of a person licensed under this chapter.

26 \* Sec. 10. AS 08.54.200(f) is amended to read:

27 (f) If a certified copy of a judgment of conviction of a li-  
28 censee [GUIDE] for an offense described under (c)(3) of this section,  
29 or for each of two offenses under (c)(4) of this section, is filed

1 with the board, the board shall immediately suspend the licensee's  
2 [GUIDE'S] license. The suspension may be ordered even if the con-  
3 viction resulted from a plea of nolo contendere or if the conviction  
4 is under appeal. The order remains in effect until after the final  
5 disposition of the disciplinary proceeding under this section.

6 \* Sec. 11. AS 08.54.200(g) is amended to read:

7 (g) A certified copy of a judgment of conviction of a licensee  
8 [GUIDE] for an offense is conclusive evidence of the commission of  
9 that offense in a disciplinary proceeding instituted against the  
10 licensee [GUIDE] under this section based on that conviction.

11 \* Sec. 12. AS 08.54.210 is amended to read:

12 Sec. 08.54.210, UNLAWFUL ACTS, (a) It is unlawful for

13 (1) a guide or a transporter [MASTER GUIDE, REGISTERED  
14 GUIDE, SPECIAL GUIDE, CLASS-A ASSISTANT GUIDE, OR ASSISTANT GUIDE] to  
15 fail to promptly [TIMELY] report to the Department of Public Safety,  
16 division of fish and wildlife protection, and in no event later than  
17 30 days, a violation of a state fish, game, [OR] guiding, or trans-  
18 porting statute or regulation that the guide or transporter reasonably  
19 believes was committed by a client or an employee of the guide or  
20 transporter, respectively;

21 (2) a guide or transporter to commit or aid the commission  
22 of a violation of this chapter or of a state game, [OR] guiding, or  
23 transporting statute or regulation, or for a guide or transporter to  
24 permit the commission of a violation that the guide or transporter  
25 [KNOWS OR] reasonably believes is being or will be committed without  
26 attempting to prevent it, short of using force, and without reporting  
27 it;

28 (3) a person to guide without [HAVING] a current valid  
29 guide license and [RESIDENT] hunting license in actual possession;

1 (4) a person to advertise as or represent to be a guide  
2 without holding a current valid registered or master guide license;

3 (5) a person who offers big game hunting services, includ-  
4 ing transportation, for compensation to advertise as or represent to  
5 be an outfitter with respect to the services without holding a current  
6 valid registered or master guide license;

7 (6) a guide or transporter to intentionally obstruct or  
8 hinder or attempt to obstruct or hinder lawful hunting engaged in by a  
9 person who is not a client of the guide or transporter, respectively;

10 (7) a person to violate AS 08.54.235;

11 (8) [6] a person to guide without being validly licensed as  
12 a guide under this chapter and as a [RESIDENT] hunter under AS 16, or  
13 to engage in the business of transporting in violation of AS 08.54.-  
14 142;

15 (9) [(7)] an assistant guide to contract to conduct a  
16 guided hunt;

17 (10) [(8)] an assistant guide to be in the field ~~of~~ a  
18 guided hunt except while employed and supervised by a registered or  
19 master guide;

20 (11) a person to provide transportation for which a license  
21 is required under AS 08.54.142 if the transportation is in an aircraft  
22 for which the <sup>operator</sup>~~person~~ does not hold a current valid air taxi/commercial  
23 operator (ATCO) operating certificate issued by the Federal Aviation  
24 Administration;

25 (12) a guide to provide transportation to a client in the  
26 restricted guide area assigned to the guide or the guide's <sup>operator</sup> employer if  
27 the transportation is in an aircraft

28 (A) for which the <sup>operator</sup> guide does not hold a current valid  
29 air taxi/commercial operator (ATCO) operating certificate issued

1 by the Federal Aviation Administration; or

2 (B) owned by the guide and the airplane is not  
3 operated under the provisions of 14 CFR Part 91.

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5 (13) a person to be accompanied during a big game hunt by an  
6 individual who is guiding the person in violation of (8) of this  
7 subsection.

8 (b) A person who violates (a)(1) - (7) [(a)(1) - (5)] of this  
9 section is guilty of a misdemeanor and upon conviction is punishable  
10 by a fine of not more than \$2,000 [\$1,000] or by imprisonment for not  
11 more than one year, or by both, and the person's license may be re-  
12 voked for a period up to five years. However, a person who engages in  
13 guiding or transporting [ACTIVITY] during the period for which the  
14 person's license is suspended or revoked under this chapter, or who  
15 violates (a)(8) - (10) [(a)(6) - (8)] of this section, is guilty of a  
16 felony punishable upon conviction, by a fine of not more than \$5,000  
17 and by imprisonment for not less than one year nor more than three  
18 years. In addition to punishment for a felony, all guns, fishing  
19 tackle, boats, aircraft, automobiles or other vehicles, camping gear  
20 and other equipment and paraphernalia used in, or in aid of, guiding  
21 or transporting [ACTIVITY] engaged in during the period of suspension  
22 or revocation, or used during a violation of (a)(8) of this section,  
23 may be seized by persons authorized to enforce this chapter and may be  
24 forfeited to the state as provided under AS 16.05.195. A person who  
25 violates (a)(11) or (12) of this section is guilty of a class B misde-  
26 meanor and upon conviction is punishable by a fine of not less than  
27 \$500 nor more than \$1,000. A person who violates (a)(13) of this  
28 section is subject to a civil fine of not more than \$1,500.

29 \* Sec. 13. AS 08.54.230 is amended to read:

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Sec. 08.54.230. RECORDS OF GUIDED HUNTS. The Department of Commerce and Economic Development shall collect and maintain records of hunts conducted by guides. The department shall send a copy of records pertaining to each hunt to the Department of Fish and Game and to the Department of Public Safety, division of fish and wildlife protection, and shall make the records available to other state and federal agencies charged with the enforcement of statutes and regulations relating to guiding or game if requested for enforcement purposes. For all other purposes, the records are confidential and are not subject to inspection or copying under AS 09.25.110 - 09.25.-121.

\* Sec. 14. AS 08.54 is amended by adding a new section to read:

Sec. 08.54.235, TRANSPORTER REPORT. (a) <sup>person required to be licensed</sup> A transporter shall record on report forms provided by the Department of Commerce and Economic Development the following information:

- (1) the names and addresses of all persons transported;
- (2) the numbers from the Alaska hunting license and big game tags possessed by each person transported;

(3) the date of transporting; ~~and~~

(4) the game taken; and

(5) if known, the locality where the game was taken.

<sup>person required to be licensed as a</sup>

(b) A transporter shall have in actual possession, while providing transportation, a report required under this section. The transporter shall enter the information required under (a) of this section as soon as it is available.

(c) The report shall be submitted to the Department of Commerce and Economic Development within 21 days after providing the transportation. The department shall send a copy of each report to the Department of Fish and Game and the Department of Public Safety, division of fish and wildlife protection.

1 (d) This section does not apply to transportation provided by a  
2 guide for which a statement of financial remuneration (SFR) is submit-  
3 ted to the Department of Commerce and Economic Development, as re-  
4 quired under regulations of the board.

5 \* Sec. 15. AS 08.54.240(3) is repealed and reenacted to read:

6 (3) "guide" or "guiding" means accompanying or being pre-  
7 sent with, or providing a camp or personal service for, a big game  
8 hunter in the field, personally or through an assistant, for compen-  
9 sation or with the intent or an agreement to receive compensation;  
10 "guide" or "guiding" does not include the lawful activities of a  
11 licensed transporter under AS 08.54.144(a).

12 (See Page 3, lines 3 - 20)

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18 \* Sec. 16. AS 08.54.240 is amended by adding new paragraphs to read:

19 (7) "compensation" means any money, thing of value, or  
20 economic benefit conferred on or received by a person in return for  
21 services rendered or to be rendered by the person for another;

22 (8) "transport" or "transporting" means, for compensation  
23 or with the intent or an agreement to receive compensation,

24 (A) conveying an individual to or from the field for  
25 the purpose of taking big game;

26 (B) conveying from the field meat or parts from the  
27 big game that the individual has taken; or

28 (C) in conjunction with conveying a big game hunter,  
29

1 providing

- 2 (i) hunting or camping gear;  
3 (ii) a campsite; or  
4 (iii) general hunting advice.

7 \* Sec. <sup>17</sup>~~18~~. TASK FORCE ON GUIDING AND GAME. (a) The interim task force  
8 on the Guide Board and the commercial taking of big game is established  
9 under the jurisdiction of the Legislative Council. The task force consists  
10 of the commissioners of fish and game, commerce and economic development,  
11 and public safety, or their designees; two members of the senate appointed  
12 by the president of the senate; two members of the house of representatives  
13 appointed by the speaker of the house; and three members appointed by the  
14 governor as follows: one member of the Guide Board; one big game guide  
15 licensed under AS 08.54 who is not a member of the Guide Board; and one  
16 person engaged in a business, other than guiding, that includes transport-  
17 ing big game hunters to and from the field.

18 (b) The task force shall review the operations of the Guide Board and  
19 shall study problems and issues concerning the commercial taking of big  
20 game in the state and the businesses or professions that provide goods and  
21 services to big game hunters in the state. The task force shall submit to  
22 the Legislative Council, not later than January 15, 1989, a report on its  
23 findings and proposed legislation to address the problems and issues  
24 covered in the report.

23 (c) The task force terminates February 1, 1989.

24 \* Sec. <sup>18</sup>~~19~~. Notwithstanding the provisions of AS 08.54.210, amended by  
25 sec. 12 of this Act, the operation of AS 08.54.210(a)(5), (11), and (12),  
26 as added by sec. 12 of this Act, is suspended until January 1, 1989.

27 \* Sec. <sup>19</sup>~~20~~. Sections 1 - 3, 5 - 13, 15 - 17, and 19 of this Act take  
28 effect immediately under AS 01.10.070(c).

29 \* Sec. <sup>20</sup>~~21~~. Section 18 of this Act takes effect June 1, 1988.

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\* Sec. <sup>21</sup>~~22~~. Sections 4 and 14 of this Act take effect January 1, 1989.

# STATE OF ALASKA

## DEPARTMENT OF COMMERCE & ECONOMIC DEVELOPMENT

DIVISION OF OCCUPATIONAL LICENSING

STEVE COWPER, GOVERNOR

P. O. BOX D  
JUNEAU, ALASKA 99811-0300  
PHONE: (907) 465-2534

DATE: April 10, 1987  
TO: Guide Board  
FROM: ~~Kevin D. Henderson~~ Kevin D. Henderson  
Regulations Specialist  
SUBJECT: Guide Area Quotas and Point System

One of the next major projects which the Guide Board will have to do will be bringing the existing guide regulations into line with statute revisions implemented by the Legislature last year through Senate Bill 294. That legislation made the following two revisions to guide law which must be addressed:

1. the board's authority to establish a quota of guides operating in a specific area, AS 08.54.040(a)(7), was amended to require that the board establish such a quota by an "equitable, reasonable, and consistent procedure . . . ."; and
2. AS 08.54.195 was added as a new statute that says the board shall "establish uniform and consistent criteria including a point system to be used by the board when it establishes and assigns a restricted guide area."

These two changes, when implemented by regulation, will make significant changes in the procedure the board uses now. It means that a guide applies for a guide area permit that he or she will not only be required to show base use but will have to have established seniority over others applying for that area. It also means that area will open up only when the number of guides in that area drops below the established quota.

New board member, Stan Frost, has written a proposal for a point system which could apply to guides and I have attached his draft for your reference. As I attempted to draft regulations around this proposal, several concerns arose which I need the board to respond to. Mr. Frost's proposal is a good start but I believe it does not go far enough.

These are some of my observations, please give me your feedback:

1. Since guide areas can only be assigned to registered or master guides, there is no need for quotas or points being assigned to assistant or Class A guides.
2. One of the most difficult aspects of this project is going to be finding a consistent way to establish quotas for every guide area. The board must follow, to the extent possible, the criteria identified in AS 08.54.195(b). Stan Frost's proposal addressed the eligibility of the guide, but the statute also requires that some kind of point system be established to address the number of guides who can operate in each area. When these regulations are in place, the board can no longer be as flexible as in the past.
3. Since nowhere in the statutes are the terms, "exclusive guide area," or "joint use area", I suggest that, when changing regulations, the board simply use the statutory term, "restricted guide area," and then set a quota for each area from one guide to twenty, whichever the board determines to be appropriate.
4. In order to really make this new procedure work, all regulations from 12 AAC 38.051 through 12 AAC 38.057 will need to be rewritten. This will be an excellent time to remove the ambiguity these sections now contain.
5. I need some ideas from the board about an acceptable way to assign points to those who do not already have a guide area assignment. If points are to be awarded to guides who are actively guiding, the board needs to be very careful to assure that guides without assigned areas are not unfairly restricted from opportunity to conduct hunts either in open areas or in another guide's area.
6. Is it feasible for the board to establish a quota for the number of guides in a specific area and actually place that quota number in regulation? In other words, how often will the board need to adjust the quota for a guide area because of variables like moving game population.

I would appreciate your input into these concerns and questions. I am not meaning to confuse the issue. What I do want to communicate is that these statute changes mean major and significant changes need to be made in regulations and past board procedure. We will have to work together to draft regulations that work.

Guide Board

-3-

April 10, 1987

With your responses and whatever other help you can provide, I will attempt to draft regulations for the board to review between meetings. If appropriate, we may go ahead with public notice so that the board can conduct hearings at the next meeting.

Thank you for your cooperation and assistance.

KDH/dg17881D  
041087a  
Attachment

cc: Helen Welch, Licensing Examiner

Stan Frost

For Kevin Henderson

PURPOSED POINT SYSTEM FOR GUIDES

SINCE THE BEGINNING OF THE EXCLUSIVE GUIDE AREA CONCEPT, IT HAS BECOME CLEAR TO MANY OF US IN THE GUIDING INDUSTRY OF THE NEED FOR A FAIR AND HONEST WAY TO REASSIGN OPEN AREAS (AREAS WHICH HAVE REVERTED BACK TO THE BOARD) TO THOSE WHO ARE MOST QUALIFIED.

I WOULD LIKE TO THROW OUT A FEW IDEAS FOR THE CONSIDERATION OF THE GUIDE BOARD AND THE GUIDING INDUSTRY.

I BELIEVE THE INTENT OF THE GUIDE AREA CONCEPT, WAS TO UPGRADE THE GUIDING PROFESSION BY MAKING US MORE PROFESSIONAL, BY PRACTICING SOME CONSERVATION IN OUR AREAS AND NOT OVERBOOKING. WHAT, MAKES A TRUE PROFESSIONAL IN ANY PROFESSION ? IT SEEMS HE WOULD BE SOMEONE WHO SPENT MANY YEARS LEARNING HIS TRADE. THIS GETS US DOWN TO THE REASONING BEHIND THIS PURPOSED POINT SYSTEM, THOSE WHO SPEND A GREAT DEAL OF TIME IN THE FIELD CONDUCTING GUIDED HUNTS, ARE GOING TO BE LEARNING A GREAT DEAL MORE ABOUT GUIDING, THEN THOSE WHO SPEND VERY LITTLE TIME.

NATURALLY THERE IS A LOT MORE TO BEING A GUIDE/OUTFITTER THEN SPENDING TIME IN THE FIELD, BUT TIME IN THE FIELD, CONDUCTING GUIDED HUNTS, CONTRIBUTES MORE TO THE LEARNING PROSESS ABOUT GUIDING THEN ANY OTHER METHOD, FOR BOTH REGISTERED AND ASSISANT GUIDES, AND CAN BE DOCUMENTED BY THE FINANCIAL REMUNERATION STATEMENT.

THE OBJECT OF THIS POINT SYSTEM IS TO COME UP WITH A SIMPLE WAY OF GIVING DUE CREDIT TO THOSE DEDICATED TO THE GUIDING PROFESSION AND HAVE THEM PUT IN THE TIME TO BECOME TRUE PROFESSIONALS. BY GIVING POINTS TO THE ASSISTANT GUIDE IT WILL PROVIDE AN INCENTIVE TO BE MORE ACTIVE IN GUIDING, AND PASS HIS REGISTERED GUIDE TEST, AS EACH STEP INCREASES HIS POINT TOTAL, WHICH PUTS HIM HIGHER ON THE LIST FOR THE NEXT OPEN AREA.

YOUR COMMENTS WOULD BE APPRECIATED, DROP ME A LINE.

STAN FROST

## POINTS

1. MASTER GUIDE 6 points per year license issued and used
2. REGISTERED GUIDE 5 points per year license issued and used
3. ASSISTANT GUIDE 2 points per year license issued and used  
( note, issued and used, could mean, he conducted at least 3 or 4 hunts per year. )

### JUSTIFICATION

The number of points allowed is not the important question, but only that everyone is treated the same, and each step up the ladder makes them more qualified. When I say issued and used it just seems to me that a guide who actively conducts hunts each year, should have an advantage over one who just pays for his license. Only in that manner can the Alaskan Guide be upgraded to a true Professional. Would a Reg. guide who can-not book any hunts need an area ???

4. DAYS IN THE FIELD CONDUCTING GUIDED HUNTS

1 point per day in each year that the Reg. or Asst. Guide has been in the field conducting guided hunts in the last 10 years, divided by 10 (note, divided by 10 to keep the numbers down, and give an average per year.)

### JUSTIFICATION

The more time a man spends doing a job, the more proficient he should become. Give him credit for this. Many Assistant guides will benefit from this as some spend the total season on hunts. (To cover the possibility of accident or sickness to the guide in any given year it might be well to consider allowing him his average point time in the field, to give him time to recover.) 10 years is used because many guides will have 3 or 4 years credit as an Asst. guide and 6 years as a Guide/Outfitter which is not an excessive amount of time to become a full professional.

This time in the field should not include setting up camp before or after the season but only the time when Clients are booked on a hunt. This time can be documented by the FRS.

5. REGISTERED GUIDES WITH NO ASSIGNED AREA

10 points

( note, Guides who have transferred areas to another Guide should not qualify for these points. )

### JUSTIFICATION

This gives guides with no area an advantage over those with an area, but they would still have to spend time in the field each year. It would appear that those who have transferred an area have given up their rights to an area and should not get this advantage.

Note; It may not be unreasonable to consider requiring a guide to spend some time in the field each year in order to retain his area. It would be a much better judge of the use an area than the present system.

INITIAL POINT APPLICATION

Name \_\_\_\_\_ Guide Lic.No \_\_\_\_\_ Date \_\_\_\_\_

- (1) I, as a Master Guide, have conducted guided hunts, as a Master Guide for \_\_\_\_\_ years X 6 points per year which equals \_\_\_\_\_ POINTS
- (2) I, as a Registered Guide have conducted guided hunts, as a Registered Guide for \_\_\_\_\_ years X 5 points per year equals \_\_\_\_\_ POINTS
- (3) I, as an Assistant Guide have conducted guided hunts, as an Assistant Guide for \_\_\_\_\_ years X 2 points which equals \_\_\_\_\_ POINTS

NOTE: Do not start with the year that you received your license, list only those years that you conducted hunts under your new license.

- (4) I have been personally present in the field conducting Guided Hunts for the following number of days over the last 10 years as a Master, Registered, or Assistant Guide.

<u>YEAR</u>	<u>NO DAYS</u>	<u>YEAR</u>	<u>NO DAYS</u>
19__	_____	19__	_____
19__	_____	19__	_____
19__	_____	19__	_____
19__	_____	19__	_____
19__	_____	19__	_____
TOTAL	_____	TOTAL	_____
COLUMN 1	_____ PLUS	COLUMN 2	_____ = _____
			DIVIDE by 10 equals _____ POINTS

- (5) I have no areas assigned to me, nor have I transferd any areas and hereby claim an additional 10 points \_\_\_\_\_ POINTS
- (6) I have not been convicted of any State or Federal Game laws in the last ten years and hereby claim an additional 30 points \_\_\_\_\_ POINTS

TOTAL NUMBER OF POINTS \_\_\_\_\_ POINTS

I hereby certify under the penalty of perjury that the above information is true and correct.

X \_\_\_\_\_ Applicant Date \_\_\_\_\_

YEARLY POINT APPLICATION

Name \_\_\_\_\_ Guide Lic.No. \_\_\_\_\_ Year \_\_\_\_\_

- (1) I, hereby certify that I have exercised the rights and privileges of my Guides License, by conducting guided hunts in the above calendar year, and hereby claim the following additional points.

Master Guide	6 points	
Registered Guide	5 points	
Assistant Guide	2 points	_____ POINTS

- (2) I, have been personally present in the field conducting Guided hunts for the following number of days in the above calendar year and claim the following points.

No. Days \_\_\_\_\_ divided by 10 = \_\_\_\_\_ POINTS

- (3) I, have no areas assigned to me, nor have I transferred any Areas and claim an additional 2 points. \_\_\_\_\_ POINTS

- (4) I, have not been convicted of any State or Federal game Laws this year and claim an additional 3 points. \_\_\_\_\_ POINTS

Total number of points to be added to my point score \_\_\_\_\_ POINT TOTAL

I hereby certify under penalty of perjury that the above information is true and correct.

X \_\_\_\_\_ Applicant      Date \_\_\_\_\_

SLA 1974; am §§ 16, 17 ch 206 SLA 1975; am § 1 ch 20 SLA 1976; am § 13 ch 151 SLA 1978; am § 4 ch 23 SLA 1983; am § 23 ch 132 SLA 1984)

Effect of amendments. — The 1984 word correction in the first sentence and amendment, in subsection (c), made a added the second sentence.

Sec. 16.05.940. Definitions. In AS 16.05 — AS 16.40

(1) "aquatic plant" means any species of plant, excluding the rushes, sedges and true grasses, growing in a marine aquatic or intertidal habitat;

(2) "barter" means the exchange or trade of fish or game, or their parts, taken for subsistence uses

(A) for other fish or game or their parts; or

(B) for other food or for nonedible items other than money if the exchange is of a limited and noncommercial nature;

(3) "a board" means either the Board of Fisheries or the Board of Game;

(4) "commercial fisherman" means an individual who fishes commercially for, takes, or attempts to take fish, shellfish, or other fishery resources of the state by any means, and includes every individual aboard a boat operated for fishing purposes who participates directly or indirectly in the taking of these raw fishery products, whether participation is on shares or as an employee or otherwise; however, this definition does not apply to anyone aboard a licensed vessel as a visitor or guest who does not directly or indirectly participate in the taking; and the term "commercial fisherman" includes the crews of tenders or other floating craft used in transporting fish;

(5) "commercial fishing" means the taking, fishing for, or possession of fish, shellfish, or other fishery resources with the intent of disposing of them for profit, or by sale, barter, trade, or in commercial channels; the failure to have a valid subsistence permit in possession, if required by statute or regulation, is considered prima facie evidence of commercial fishing if commercial fishing gear as specified by regulation is involved in the taking, fishing for, or possession of fish, shellfish, or other fish resources;

(6) "commissioner" means the commissioner of fish and game unless specifically provided otherwise;

(7) "department" means the Department of Fish and Game unless specifically provided otherwise;

(8) "domestic mammals" include musk oxen, bison, and reindeer, if they are lawfully owned;

(9) "domicile" means the true and permanent home of a person from which the person has no present intention of moving and to which the person intends to return whenever the person is away; domicile may be proved by presenting evidence acceptable to the boards of fisheries and game;

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Sectional Analysis of HB 183  
An Act relating to the provision of certain goods or services to hunters  
in the field  
by Representative Adelheid Herrmann

Section 1:\*

Section 1 makes it unlawful for anyone but a licensed guide to be compensated for providing camping equipment, vehicles, or personal services to a hunter or a hunting party while that hunter or hunting party is in the field.

Consistent with the current statute AS 08.54.240 (3), this section also clarifies that "in the field" does not refer to being present in a boat with living quarters, or being at a lodge or base camp.

Section 1 also makes it unlawful for a hunter to compensate anyone but a licensed guide to perform the services of a licensed guide.

\*This bill has only one section.

RECEIVED MAR 11 1988

NOTICE OF PROPOSED CHANGE TO  
THE REGULATIONS OF THE GUIDE BOARD

Notice is hereby given that the Department of Commerce and Economic Development, Guide Board, under authority vested by AS 08.-54.040(a)(7) and 08.54.050, proposes to adopt a regulation in Title 12 of the Alaska Administrative Code dealing with guide area permits for game management unit 4 to implement AS 08.54.-040(a)(7) and 08.54.195 as follows:

12 AAC 38.295 is added to set a quota of guides who may hold a guiding area permit for game management unit 4. This proposal is similar to a regulation which was adopted by the Guide Board on May 1, 1986 but disapproved by the regulations attorney on July 20, 1987. That disapproval has been challenged in Juneau Superior Court by Karl Lane and Tarleton Smith v. Grace Berg Schaible No. 1JU-87-1949 CIV.

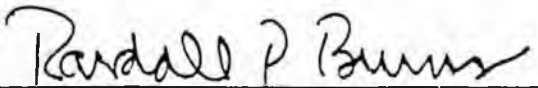
Notice is also given that any person interested may present written statements or arguments relevant to the action proposed by mailing them to Kevin Henderson, Regulations Specialist, Division of Occupational Licensing, P.O. Box D-LIC, Juneau, Alaska 99811, so that they are received no later than Thursday, April 7, 1988.

Notice is also given that written or oral statements or arguments relevant to the action proposed may be presented at a public hearing to be held Friday, April 8, 1988, from 3:00 p.m. to 4:30 p.m., at Centennial Hall, in Juneau, Alaska. This hearing will also be the public hearing required by AS 08.54.195(d) on whether it is in the public interest for the board to deny transfer or reassignment of the existing guide area permits for game management unit 4 until the number of permits is reduced to the quota level.

Copies of the proposed regulation may be obtained by writing to the above address or by telephoning 907-465-2535.

This action is not expected to require an increased appropriation.

The Guide Licensing and Control Board, upon its own motion or at the instance of any interested person, may, after the deadline stated above, adopt the proposal within the scope of this notice without further notice or may decide to take no action on it.

  
Randall Burns, Director  
Div. of Occupational Licensing  
Dept. of Commerce &  
Economic Development

DATE: 3/3/88

12 AAC 38 is amended by adding a new section to Article 2 to read:

12 AAC 39.295. QUOTA ON GUIDING AREA PERMITS FOR GAME MANAGEMENT UNIT 4. No application for initial issuance or for reassignment of a guiding area permit for game management unit 4, as defined in 5 AAC 78.005(d), will be considered by the board until normal attrition has reduced the number of guides holding guiding area permits for that game management unit to five. At that time, the board will, in its discretion, issue an additional guiding area permit for that game management unit, and the maximum number of guides authorized to hold guiding area permits for game management unit 4 shall be six. (Eff. / /88, Reg. )

Authority: AS 08.54.040(a)(7)

AS 08.54.195(d)

BILL SHEFFIELD, GOVERNOR

**DEPARTMENT OF COMMERCE &  
ECONOMIC DEVELOPMENT**

DIVISION OF OCCUPATIONAL LICENSING

POUCH D  
JUNEAU, ALASKA 99811  
PHONE: (907) 465-2534

December 23, 1985

Mr. Gerald L. Wilkerson  
Legislative Auditor  
Legislative Audit Division  
Pouch W  
Juneau, AK 99811**RECEIVED**  
DEC 24 1985**LEGISLATIVE  
AUDIT**

Dear Mr. Wilkerson:

Re: Preliminary Audit Findings  
Guide Licensing and Control BoardThank you for the opportunity to comment on your preliminary audit report  
of the Guide Licensing and Control Board.Our position remains the same from previous correspondence in that, we  
concur with your findings and recommendations, and also support continuation  
of the board. We once again offer the following comments regarding  
your recommendations:

In reference to recommendation #1, it is important to note that many  
of the actions or decisions made by the Guide Licensing and Control  
Board were made upon advice and support of counsel from the Department  
of Law. This is done especially in relation to your finding that  
hearing officer decisions are replacing that of the Guide Lic  
and Control Board where setting quotas for guides are concerned.  
However, we believe the board has demonstrated an honest effort to act  
accordingly within the parameters of what they perceived to be cor-  
rect, based on legal advice.

Regarding recommendation #4, this matter was brought to the attention  
of the board by staff of the Division of Occupational Licensing during  
previous board meetings. Although the board did acknowledge the need  
to address this issue, no time was given to address the oral examina-  
tion for registered guides.

Mr. Gerald L. Wilkerson

-2-

December 23, 1985

We strongly support your suggestions in recommendation #5 and feel that, although performance bonds posted by master and registered guides may not be entirely adequate to rectify all complaints, it would certainly allow some means of restitution for injured parties from receiving unethical services.

Thank you once again for the opportunity to comment on your findings and for your cooperation.

Sincerely,

  
Loren H. Lounsbury  
Commissioner

LHL/sa1444s  
122385b

The Legislature  
Budget and Audit Committee  
Jim Griffin, Auditor

DEC 19 1985

LEGISLATIVE  
AUDIT

Recommendation #1

The Guide Licensing and Control Board (GLCB) uses the Statements of Financial Remunerations as proof of use and experience in areas when assigning Exclusive Guide Areas (EGA). There have been discrepancies in the past, the last year the GLCB have been adhering closely to the criteria of using SFRs. The GLCB seeks biological and Fish & Game surveys when they are available. This cannot always be done. Some areas Fish & Game haven't run surveys or recent surveys. Most of the time, the GLCB doesn't know which areas will be before them until the applicant comes before the GLCB with his application. This doesn't allow enough time to obtain the information. In cases that are held over and coming before the GLCB at a later date to allow time for soliciting biological information from the Fish & Game biologist located in the area involved. I have sold Fish & Game information in several cases that are coming before the GLCB this next meeting in December 1985.

I hope to get a regulation passed that requires an applicant applying for an EGA to obtain this information from the Fish & Game for presentation to the GLCB.

Along these lines there also should be a regulation requiring the same criteria for a transfer be the same as a new applicant. That is to show proof of experience in the area as would a new applicant. And going farther, an applicant for a transfer from an EGA holder to himself show proof of working with the EGA holder for a certain time. One or two years. Co-signing SFRs could be used as proof as well as additional proof, either in EGAs or joint use areas.

Recommendation #2

Regulation (12 AAC 38.053 (F) (1) applies mostly to applications for joint use areas and EGAs being applied for by more than one guide. The proposal to pass a regulation requiring the applicant to obtain Fish & Game biological information on the area applied for will help in this area.

Recommendation #3

I do not agree that an EGA holder should have to surrender his EGA to the GLCB and not have the opportunity to transfer the EGA to a guide of his choice with the approval of the GLCB. There are many cases where an EGA holder has farmed his area, carefully not to over harvest, so has improved both game populations and size of the animals in the area. To enhance game populations and sportsmen enjoyment is one purpose of the GLCB. Financial investments should also be considered in transfers, land, buildings and equipment related to guiding in the area. A guide who has spent many years building up an area with improvements to game populations should certainly have something to say about who's care the area ~~XXXXXX~~ comes under. Son, ~~XXXXXX~~ Daughter, apprentice or a guide who is well qualified to guide in the area.

The GLCB has a policy not to issue a new applicant an area X in joint use. In other words filing over an area that is already in joint use, or use by only one EGA holder. The GLCB is working to eliminate as much joint use as possible. This can only be done through natural attrition. The GLCB cannot choose two permit holders out of six joint users and pull their permits without due cause. I do think, and it has been the GLCB's policy the last two years. A Ega holder is convicted of some violation that merits revoking his area that is in joint use with others, that area will not be reassigned ~~XXXXXX~~ ..

Where the area is extremely large and doesn't have many joint users some leeway should apply to a new applicant. The guide losing the area should not have a say one way or the other in the matter. However, in cases such as this very careful scrutiny in all criteria must be made. One thing along these lines. At one time the intent of GLCB to review and reassess all EGAS. Considering size, utilization and condition of game populations. This was never done, primarily because time and budget restrictions wouldn't allow it.

#### Recommendation #4

##### Oral guide examinations:

There are inconsistencies in administering oral tests. The purpose of the oral test is to determine the applicant's practical field experience and knowledge of game habits, size and the areas being tested for. Most of this is impossible to determine with a tightly held oral tests with set questions and answers. The examiner should have some flexibility but should not be allowed to wander far afield and asking impertinent questions. There should also be a standard time for the test, say 1 or 1½ hours. One problem that keeps cropping up is first aid. I propose that an applicant be required to have passed a first aid course within the year prior to taking the guide exam.

The GLCB has been trying to upgrade this portion of the guide test. Here again, the increasing number of applications for testing each meeting is also increasing the work load of the GLCB.

#### Recommendation #5

There should be some changes in Statute 08.54.200 (A) (1). The change should give the GLCB some flexibility on guide complaints. Taking in consideration the severity of the complaint. Endangering life, flagrant game violations, and unethical practices, etc. The GLCB does have a guiding ethics regulation (12AAC 38.190) The complaint are slowly being corrected since the administration was consolidated in the Department of Commerce, Division of Occupational Licensing. The GLCB investigator is investigating all complaints that come in now.

We are trying to get a section in the new guide bill, (Senate Bill #294) to satisfy the change mentioned above. Bonding is already addressed in §294.

The bill also creates an outfitter's license and repeals the transporters license. This should help to alleviate the wide spread unlicensed guiding. These unlicensed guides are a big factor in guiding complaints.

The bill also goes into more detail on what guiding is. Enforcement people say the present bill doesn't explain guiding enough for them to make a case on ~~unlicensed~~ unlicensed guiding. The new bill should give them the tools they need to enforce that section.

The GLCB would like to conduct more work on all these programs and others as well.

It is very important to the guiding industry that the GLCB not be sun setted. If the guide bill is not extended or a new bill passed, the guiding industry will be plunged into a chaos that it could never recover from. Just about everyone with a super cub or 185 will become instant guides creating an impossible situation for game populations and sportsmen safety.

An addition to recommendation #4.

At this last GLCB meeting we appointed 2 master guides and a registered guide to study the oral test and make up a new one that would standardize the test. These men ~~all~~ all have an educational background.

Comments Regarding Interim Letter #1  
Sunset review GLCB

Recommendation # 1.

I agree with all of Mr. McNutt's comments. In addition I might add. There have been a number of meetings to establish a point for awarding and transferring guiding areas. The suggested method that had the most merit was to award points for criteria relating to use of the area, financial investment in the area, residence alternate areas, etc. I would suggest that those who did so much work on this system be contacted and a system be finalized and approved. This will eliminate most of the criticism related to transfers.

Recommendation # 2.

Agree with Mr. McNutt.

Recommendation #3.

I completely agree with Mr. McNutt's comments and would like add emphasis here. The assigned area concept will do more to elevate the quality of guiding in Alaska than any change in years. It gives the area holders a responsibility toward the area and game. Now through leases from the state and permits from the federal government, it will be possible for guides to build permanent structures in many areas. The guides will continue to increase their investments in areas. As the investment both in time and monetary increases so does the guides financial responsibility increase. After working for years to build a high quality operation it seems only just that upon retirement the permit holder would be able to choose his successor, who in nearly every case would be the most qualified person for the transfer no matter what selection criteria were used. There have been abuses of this in the past as there were some transactions that seemed to be merely real estate sales. The GLCB is aware of this and is taking a firm stance against real estate dealers. It would seem that guiding like any other business would allow a successful and ambitious business man to build some value into his business so that when it came time for retirement he would have something to sell. Because the guiding business involves land and resources that belong to the public, the burden of responsibility upon the area permit holder is great. aside from his investment in property and equipment the value lies in his concessionary right to the area and it's wildlife. If he has treated these right with regard and respect and obeyed all covenants both moral and legal it seems only right that he should be able to sell this right to another qualified individual of his choosing. This would allow him to maximize the return for his investment.

Recommendation #4.

The GLCB commented on this in addition to Mr. McNutt's comments and covered it quite thoroughly.

Recommendation # 5.

Agree with Mr. McNutt.

(10) "fish" means any species of aquatic finfish, invertebrate, or amphibian, in any stage of its life cycle, found in or introduced into the state, and includes any part of such aquatic finfish, invertebrate, or amphibian;

(11) "fish derby" means a contest in which prizes are awarded for catching fish;

(12) "fishery" means a specific administrative area in which a specific fishery resource is commercially taken with a specific type of gear; however, the Board of Fisheries may designate a fishery to include more than one specific administrative area, gear type, or fishery resource; in this paragraph "gear" and "type of gear" have the meanings given in AS 16.43.990;

(13) "fishing derby association" means a civic, service, or charitable organization in the state, not for pecuniary profit, whose primary purpose is to promote interest in fishing for recreational purposes and which has been in existence for five years before applying for a permit under this chapter, but does not include an organization formed or operated for gaming or gambling purposes;

(14) "fish or game farming" means the business of propagating, breeding, raising, or producing fish or game in captivity for the purpose of marketing the fish or game or their products, and "captivity" means having the fish or game under positive control, as in a pen, pond, or an area of land or water which is completely enclosed by a generally escape-proof barrier;

(15) "fish stock" means a species, subspecies, geographic grouping or other category of fish manageable as a unit;

(16) "fur dealing" means engaging in the business of buying, selling, or trading in animal skins, but does not include the sale of animal skins by a trapper or hunter who has legally taken the animal, or the purchase of animal skins by a person, other than a fur dealer, for the person's own use;

(17) "game" means any species of bird, reptile, and mammal, including a feral domestic animal, found or introduced in the state, except domestic birds and mammals; and game may be classified by regulation as big game, small game, fur bearers or other categories considered essential for carrying out the intention and purposes of AS 16.05 — AS 16.40;

(18) "game population" means a group of game animals of a single species or subgroup manageable as a unit;

(19) "hunting" means the taking of game under AS 16.05 — AS 16.40 and the regulations adopted under those chapters;

(20) "nonresident" means a person who is not a resident of the state;

(21) "nonresident alien" means a person who is not a citizen of the United States and whose permanent place of abode is not in the United States;

(22) "operator" means the individual by law made responsible for the operation of the vessel;

(23) "personal use fishing" means the taking, fishing for, or possession of finfish, shellfish, or other fishery resources, by Alaska residents for personal use and not for sale or barter, with gill or dip net, seine, fish wheel, long line, or other means defined by the Board of Fisheries;

(24) "resident" means a person who for 12 consecutive months has maintained a permanent place of abode in the state and who has continually maintained a voting residence in the state; and in the case of a partnership, association, joint stock company, trust, or corporation, "resident" means one that has its main office or headquarters in the state; however, a member of the military service who has been stationed in the state for the preceding 12 consecutive months is a resident for the purposes of this paragraph, and the dependent of a resident member of the military service, who has been living in the state for the preceding year is a resident for the purposes of this paragraph, and a person who is an alien but who for one year has maintained a permanent place of abode in the state is a resident for the purposes of this paragraph;

(25) "rural area" means a community or area of the state in which the noncommercial, customary, and traditional use of fish or game for personal or family consumption is a principal characteristic of the economy of the community or area;

(26) "seizure" means the actual or constructive taking or possession of real or personal property subject to seizure under AS 16.05 — AS 16.40 by an enforcement or investigative officer charged with enforcement of the fish and game laws of the state;

(27) "sport fishing" means the taking of or attempting to take for personal use, and not for sale or barter, any fresh water, marine, or anadromous fish by hook and line held in the hand, or by hook and line with the line attached to a pole or rod which is held in the hand or closely attended, or by other means defined by the Board of Fisheries;

(28) "subsistence fishing" means the taking of, fishing for, or possession of fish, shellfish, or other fisheries resources by a resident domiciled in a rural area of the state for subsistence uses with gill net, seine, fish wheel, long line, or other means defined by the Board of Fisheries;

(29) "subsistence hunting" means the taking of, hunting for, or possession of game by a resident domiciled in a rural area of the state for subsistence uses by means defined by the Board of Game;

(30) "subsistence uses" means the noncommercial, customary and traditional uses of wild, renewable resources by a resident domiciled in a rural area of the state for direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation, for the making and selling of handicraft articles out of nonedible by-products of fish

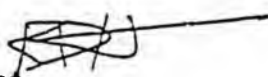
# STATE OF ALASKA

## DEPARTMENT OF COMMERCE & ECONOMIC DEVELOPMENT

DIVISION OF OCCUPATIONAL LICENSING

BILL SHEFFIELD, GOVERNOR

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

DATE: October 31, 1986  
TO: Guide Board members  
FROM: Kevin D. Henderson   
Regulations Specialist  
SUBJECT: Department of Law review of proposed regulations

Attached is a memorandum from Lawrence Delay, Assistant Attorney General, and my response to that memo concerning the proposed regulations adopted by the board at your last meeting. The board had asked that they be given a chance to review the potential editing of the Attorney General's Office before they are permanently filed. Here is your opportunity.

I suggest that you review Mr. Delay's suggestions carefully and if you have any comment provide them in writing to me or Ray McNutt by November 17, 1986. Together, we can formulate the board's response and transmit it to Lawrence Delay. With your comments he can then complete his final review and get the regulations filed with the Lt. Governor's Office.

Your timely response to this opportunity will be very much appreciated.

KH/wfs4642W  
103086a  
Enclosures

cc: Helen Welch, Administrative Assistant ✓  
Lawrence Delay, Assistant Attorney General

# MEMORANDUM

# State of Alaska

TO: Kathy Marshall, Director  
Division of Occupational Licensing

DATE: October 23, 1986

FILE NO:

TELEPHONE NO: 276-3550

FROM: Harold M. Brown  
Attorney General

SUBJECT: Guide Licensing and  
Control Board pro-  
posed regulations;  
File No. 993-86-072

By: *Lawrence C. DeLay*  
Lawrence C. DeLay  
Assistant Attorney General  
Commercial Section-Anchorage

We have reviewed the above-referenced proposed regulations and offer the following comments and suggestions for your consideration. Further work on these proposed regulations will await your response to the suggestions contained herein.

Proposed 12 AAC 38.052(d) reads as follows:

12 AAC 38.052(d) is amended to read:

(d) A copy of written permission required in (a) and (b) of this section must, at all times during the hunt, be on the person of the guide conducting the hunt or in the base camp from which the hunt is conducted, and must be on the person of each employee of the master or registered guide to whom the permission was given. Permission must be written on the statement of financial remuneration to be filed for that hunt. (Eff. 5/12/78, Reg. 66; am 10/11/81, Reg. 80; am 10/15/82, Reg. 84; am 6/16/85, Reg. 94; am \_\_/\_\_/\_\_, Reg. \_\_)

Authority: AS 08.54.040(a)  
AS 08.54.050

Comment: The proposed change seeks to provide for an organized method of preserving evidence of written permission in a manner which poses no significant additional burden upon the guide requesting permission.

Suggested Action: The only modifications suggested are to reword the last sentence of the proposed regulation and to

STATE OF ALASKA  
DEPARTMENT OF COMMERCE  
& ECONOMIC DEVELOPMENT

OCT 24 1986

DIVISION OF  
OCCUPATIONAL LICENSING

present the proposed draft in a form properly indicating the changes. The suggested modifications may be stated as follows:

(d) A copy of the written permission required in (a) and (b) of this section must, at all times during the hunt, be on the person of the guide conducting the hunt or in the base camp from which the hunt is conducted, and must be on the person of each employee of the master or registered guide to whom the permission was given. [A GUIDE RECEIVING WRITTEN PERMISSION SHALL FILE A COPY OF THAT PERMISSION WITH THE BOARD BY DECEMBER 31 OF THE YEAR IN WHICH THE PERMISSION IS GRANTED.] The written permission must be written upon the statement of financial remuneration filed with the hunt.

Proposed 12 AAC 38.054(g) reads as follows:

12 AAC 38.054 is amended by adding subsection (g) to read:

(g) The board may, consistent with AS 08.54.040 and 12 AAC 38.051, adjust a guiding area permit when reassigning that permit.

Comment: This subsection is consistent with the board's power under 12 AAC 38.054 and 12 AAC 38.051 and serves to clarify the board's power to reassign a permit as well as to adjust the boundaries of the guiding area and the number of permit holders in a specified area. However, the only concern with the proposed subsection is that it is not clear exactly what the board may adjust. We presume that the board may only adjust boundaries and the number of permit holders.

Suggested Action: The subsection may be rewritten, if consistent with the board's intent, to state:

When reassigning a permit, the board may, consistent with AS 08.54.040 and 12 AAC 38.051, adjust the boundaries of the area governed by the permit or adjust the number of guides who hold a permit to conduct guided hunts in that area.

Proposed 12 AAC 38.054(h) reads as follows:

12 AAC 38.054 is amended by adding subsection (h) to read :

(h) In game management units one through four, no initial application or application for reassignment will be considered by the board until such time as normal attrition has reduced the number of guides licensed to conduct hunts in those game management units to five. When the total number of guides licensed in units is five, the board will, in its discretion, approve an additional guide to be licensed in that unit. The maximum number of guides authorized to conduct hunts in game units one through four shall be six. (Eff. 5/12/78, Reg. 66; am 10/15/82, Reg. 84; am \_\_\_/\_\_\_/\_\_\_, Reg. \_\_\_)

Authority: AS 08.54.040(a)  
AS 08.54.050

Comment: The focus of attention on units one through four raises concerns of unequal treatment. The board is apparently concerned with protecting the livelihood of the permit holders of these units because of game population decline in the face of increased hunting by non-guided as well as guided hunters. If the board chooses to reduce the number of permit holders for this reason, the board may do so by denying new applicants by exercising its authority under 12 AAC 38.051(b)(2) and allowing the number of existing permit holders to be reduced by natural attrition. The proposed subsection is therefore unnecessary and in view of its unequal treatment aspect, likely to create more problems than its solves.

Suggested Action: This subsection should not be added to the regulations.

Proposed 12 AAC 58.056(g) reads as follows:

12 AAC 38.056 is amended by adding a new subsection to read:

(f) Before a matter will be heard by the board at a meeting, all area permit holders affected shall be contacted in writing by certified-return receipt mail by the applicant and the replies received shall be submitted to the board at that meeting. (Eff. 5/12/78, Reg. 66; am

6/16/80, Reg. 74; am 6/27/81, Reg. 78; am  
\_\_/\_\_/\_\_, Reg. \_\_)

Authority: AS 08.54.040(a)  
(3), (6) and (8)  
AS 08.54.050

Comment: This subsection will enable the board to determine whether certain interested parties have received notice of a petition filed under 12 AAC 38.056 and requires the burden of providing such notice to be placed upon the petitioner. The only change recommended here is a rewording which clarifies these points.

Suggested Action: The proposed subsection should be rewritten as follows:

Before the board will hear any petition or request brought under this section, the petitioner shall contact all permit holders affected by the petition by certified mail, return receipt requested, and the returned receipts or the replies of the affected permit holders shall be submitted to the board.

Proposed 12 AAC 38.085 reads as follows:

12 AAC 38 is amended by adding a new section to read:

12 AAC 38.085. BASE OF OPERATION. Permit holders in game management units one through four must not conduct or supervise guided hunts from more than one vessel over 18 feet or from no more than one land camp of operation. (Eff. \_\_/\_\_/\_\_, Reg. \_\_)

Authority: AS 08.54.040(a)  
AS 08.54.050

Comment: The board's intent behind this proposed section is not clear. One possibility is that the board intends to prevent a hunting party from splitting up into smaller groups. However, it is not clear whether the board has the authority to prevent that from happening.

The proposed section may be in conflict with present guide regulations which do not expressly require guided parties

to remain in one group. Under 12 AAC 38.175, a registered or master guide may employ guides to assist in a guiding operation and when such assistants are employed, the registered or master guide is required by 12 AAC 38.090 to be "in the field and participating in the conduct of the guided hunt." There is no express requirement that assistant guides are to be in the physical presence of their employer guide during the hunt, hence it appears to be permissible for an assistant guide accompanying a hunter to split off from the main group and conduct a hunt as long as that assistant is under the supervision of the employer guide.

The proposed section addresses only units one through four, raising again the suspicion of unequal treatment. The proposed section also appears to have other problems in that the phrase "conduct or supervise guided hunts from ... [a] vessel" is ambiguous if applied to a circumstance where a hunt is first conducted by vessel and later by land. Also, there is no apparent reason for the board's imposition of the 18' limit on the length of the vessel used in the hunt. Is the board encouraging the use of a flotilla of small boats over a single cabin cruiser? Finally, what definition of "land camp of operation" does the board intend to apply? Does the board intend to distinguish between a base camp and a temporary "spike" camp? If so, a new definition section should address this distinction.

Suggested Action: The proposed section should be examined and revised, if necessary, in light of the board's intent and the existing regulatory scheme.

Proposed 12 AAC 38.140(a)(3) reads as follows:

12 AAC 38.140(a) is amended by adding a new paragraph (3) to read:

(3) the applicant must hold a current certification of basic first aid skills prior to taking the examination. (Eff. 6/28/74, Reg. 50; am 6/16/85, Reg. 94; am \_\_\_/\_\_\_/\_\_\_, Reg. \_\_\_)

Authority: AS 08.54.040  
AS 08.54.050  
AS 08.54.110(2)

Comment: Public policy favors requiring guides to have certified first aid skills in view of the nature of their profession. It is noted that 12 AAC 38.140 imposes licensing

Kathy Marshall, Director  
Division of Occupational Licensing

October 23, 1986  
Page 6

requirements in addition to those set forth in AS 08.54.110 and that subsection (3) of that statute requires a guide to have "... practical field experience in ... first aid ...." This requirement is in contrast to the proposed subsection which provides that an applicant for a registered guide license is not allowed to take the examination unless the applicant holds a current certification of first aid skills. However, these two requirements are not wholly duplicative in that one calls for practical experience whereas the other calls for formal certification of those skills.

Suggested Action: This subsection is approved for submittal to the Lieutenant Governor's office.

LCD:ihr

cc: Kevin Henderson ✓  
Regulations Specialist  
Ray McNutt, Chairman  
Guide Licensing & Control Board  
Charles Ward, Investigator

# MEMORANDUM

# State of Alaska

TO: Lawrence C. Delay  
Assistant Attorney General  
Commercial Section  
Department of Law

THRU:

FROM: ~~Kevin D. Henderson~~  
Kevin D. Henderson  
Regulations Specialist  
Division of Occupational Licensing  
Department of Commerce and  
Economic Development

DATE: October 31, 1986

FILE NO.: 993-86-0072

TELEPHONE NO.: 465-2535

SUBJECT: Guide Board proposed  
regulations

I have received your October 23, 1986 memorandum to Kathy Marshall concerning proposed regulations adopted by the Guide Board. The Guide Board requested an opportunity to review the comments and editing of the Attorney General's Office prior to the proposed regulations being filed; your review should clearly satisfy that request. I have sent your memo to all guide board members and have asked that they channel their concerns through me or Ray McNutt for forwarding to you.

These regulations were adopted by the board on April 10, 1986 and the adoption order was signed by the chairman on May 1, 1986. On May 12, 1986, they were transmitted to the Department of Law for final review and filing. The proposed regulations were typed in final form, without the changes indicated, in accordance with page 56 of the Drafting Manual for Administrative Regulations, Department of Law, 9th Edition.

On behalf of the division, allow me to respond to your comments and suggestions in the order you presented them.

1. Your suggested change to 12 AAC 38.052(d) is an improvement and appears to be well within your authority under AS 01.05.031(b). This amendment with your change should be approved for filing.
2. Your proposed rewrite of 12 AAC 38.054(g) is consistent with the board's intent and with 12 AAC 38.051 and should be approved for filing.
3. The division concurs with your assessment of 12 AAC 38.054(h) being equally concerned that this subsection provides for unequal treatment. This concern was highlighted by the Legislature in their passage of HCS CSSB 294 (Chapter 71, SLA 1986). Section 6 of that bill amends AS 08.54.040 by adding the word "consistent" to paragraph (7) and section 14 of the same bill adds AS 08.54.195 as a new statute calling for a point system for determining quotas for guide areas, this has yet to be developed. If this section is disapproved, I would suggest that your reasoning be fully explained to the board as guidance for adopting regulations in the future.

4. The division concurs with your revision to 12 AAC 38.056 and feels it is both consistent with the intent of the board and with your authority under AS 01.05.031(b).
5. As I understand it, 12 AAC 38.085 was originally proposed by guides in Southeast as a way of preventing a registered or master guide from conducting several hunts concurrently from more than one base camp. This has been a problem in Southeast especially with the use of larger marine vessels. Apparently there have been times when a single registered or master guide would conduct hunts from two large boats that could sleep several people. The boats would be hunting in different locations and, therefore, making it impossible for the guide to comply with 12 AAC 38.090. The significance of an 18' boat is not clear. Ray McNutt, Guide Board chairman, could be of more help on this proposed regulation.
6. The purpose of 12 AAC 38.140(a)(3) was to assure that an applicant has verifiable first aid knowledge at the time of application so that the Guide Board could remove first aid questions from the written examination. These questions have been controversial in the past. With the passage of SB 294, however, a primary authority for the entire section of 12 AAC 38.140 was removed by the repeal of AS 08.54.110(12). The division is currently working on a new regulation project that will include a proposal to repeal 12 AAC 38.140 entirely. We believe, however, that AS 08.54.110(3) is sufficient authority for requiring first aid certification and suggest that this section be approved and renumbered as a single separate section.

After you have received a response from the board chairman, your final review, editing, and approval for filing of these regulations would be appreciated. We are beginning to work on a major reworking of all guide board regulations, including renumbering. Any comments or suggestions you have concerning the Guide Board and its regulations will be appreciated.

KH/wfs4643W  
103186b

cc: Kathy Marshall, Director  
Helen Welch, Administrative Assistant ✓  
Guide Board members

# STATE OF ALASKA

DEPARTMENT OF PUBLIC SAFETY  
BUREAU OF FISH & WILDLIFE PROTECTION

BILL SHEPHERD, GOVERNOR

ROBERT J. SUNDBERG  
COMMISSIONER

P. O. BOX 5188, ANNEX  
ANCHORAGE, ALASKA 99502

February 28, 1983

Clark Engel, Master Guide  
4129 Lana Court  
Anchorage, Alaska 99504


Dear Clark:

During the past few years the guiding industry through the Guide Board has made substantial improvements in cleaning up the industry and improving the image of guiding in Alaska. The Guide Board distribution of exclusive guide areas and it's thorough investigations of accusations made against members of the guiding industry have gone a long way to improving the guiding business in Alaska.

With over 1,100 licensed guides, ranging from Master Guides to Assistants it takes a well coordinated effort to ensure that the same standards are applied by the guiding industry throughout the state. The industry has an impact upon tourism and upon the image of the state of Alaska through the sportsmen that it caters to. This Board has helped standardize the practices and procedures through which the guides have operated thereby giving the guiding industry in Alaska a good image on the outside. From a law enforcement standpoint, during the past few years we have seen a steady decline in the number of guide related violations. In fact, in FY-82 of the commercial users of the resource, the guiding industry had one of the lowest of violation rates of any in the state. I think this speaks highly on the industry and this trend should be continued. Guiding has a role in Alaska and how big that role will be will depend entirely upon the activities and the image of the industry.

Clark, this isn't much but I hope this will give you and your members some idea of how I felt the industry has progressed and the usefulness of the Board during my few years of association with them.

Sincerely,



Colonel Robert J. Stickles  
Director

RJS/rt

Packet

nick jr. shw



Sargent Boutang

in charge ?? 269-5653

LIST

NE AISLE

Personal Arrangements

Car  
Airlines/Travel Agent  
Place to Stay

Research Questions

List of Guides and Outfitters/Associations - Who represents who  
Summary of Master, Assistant, Registered Guide  
Proof of Illegal Outfitting  
Game Management Unit Map with Overlay of Who has What area  
Where Allocation Process fits  
Federal Lands/Commercial Operations  
Enforcement Actions  
Enforcement Dollars  
Where does subsistence fit

Problems with Guides/Outfitters

Women training  
History of bad experiences  
Illegal actions by guide board  
Is entry too limited  
Illegal Outfitting  
Legitimate Outfitting  
What's best for the resource  
What's best for the economy

Possible Solutions/Angles

More Money for Enforcement  
Guides doing a better job at safari shows etc.  
Regulating Outfitters  
Allocation Process  
Fairer way to get your own area  
Require Hunters who hire a guide to check registered guide list or revoke license

Phone Log  
 Calls made by Rep Herrmann's Office for  
 House Resources Committee

TO	#	PLACE
465-4648	Juneau CIO	Juneau
842-5667	Dorothy Carlson	Dillingham
842-5319	Dorothy Dillingham CIO	"
465-3706	Rep Adams	Juneau
465-4942	Rep Herrmann 3x	"
465-2450	Legal Services	71
465-4992	Rep Koponen 2x	"

NA  
NA

David McGuire MD - King Salmon → 562-4142<sup>#</sup>

Ed Grasser - Talkeetna → 745-6944

Dennis Harms -

Jay Mussey Cordwood

Joe Klutsch

Naknek → Borough

----- Jim Clark -----

Toqialk

Bridge #  
562-2867

20 ~~11/11/11~~  
~~11/11/11~~ of Over Contract C10

• Public

- ~~Bills~~
- ~~Sectional~~
- ~~Press Release~~
- ~~Agendas~~

WRITTEN

Sectional Analysis  
More Letters  
Resources Calendar  
Memo Tam  
Memo to Ben re: Lyman  
Max re: minutes???

TELECONFERENCE

Call Juneau re: sites  
Egegik,  
Newhalen  
Dorothy  
Lyman/re: Bethel  
Port Heiden

OUTFITTER CALLS

Carol Klutxch  
Karl Lane  
White Cougar  
Jay Massey  
Others in Book  
Jim Clark

SET-UP

Pads  
Pens  
Pencils  
Scrap Pads

✓ write, compile xerox

Bills  
Public Packets  
✓ Sign - In

WITNESSES

Ed  
Seargent Boutang

Jack Jordan  
Liza McCracken  
Keving Henderson/Jenny Strickler

Dave Tim  
✓ Chuck Weir (sp?)

Game Board People  
Guide Licensing & Control Board People

Beth Ziegler  
✓

RESEARCH

Page 9 of Report registered and master guides can have a max. of three exclusive areas/designated areas check on curretn law.

Guide Board Membership - are all guides?

Info. on Examiners and who becomes a guide.

\*\*\*Maps\*\*\*

HOUSE RESOURCES COMMITTEE HEARINGS

Agenda for Hearings & Teleconference On HB 183 - Guides & Outfitters  
Representative Adelheid Herrmann, Co-chair  
October 14-15, 1987

WEDNESDAY OCTOBER 14, 1987

9:00 AM - 12:00 NOON

- 1 Introductions
- 11 Opening Remarks  
Remarks on the Issue . Representative Herrmann  
Senator Coghill's Office - Status of SB 191
- 111 History of Guiding in Alaska  
Chuck Weir - Member, Guide Licensing and Control Board  
Charles Ward & Other Staff, Guide Licensing and Control Board
- 1V Division of Fish and Wildlife Protection  
Enforcement actions, Violations, Enforcement Funds
- V Assistant Attorney General  
Issues concerning Residency  
The Role of the Game Board in making allocations

12:00 NOON - 1:30 PM - LUNCH

1:30 PM - 5:00 PM

- V1 Question/Answers  
Questions of witnesses from legislators  
Legislators' discussion on issue and suggestions for change  
Requests from legislators for further witnesses

THURSDAY OCTOBER 14, 1987

9:00 AM - 12:00 NOON

Carry Over From Wednesday

12:00 Noon - 1:30 PM - Lunch

1:30 PM - 5:00 PM

Public Testimony may begin pending completion of legislators'  
discussion

FRIDAY OCTOBER 16, 1987

9:00 AM - 12:00 NOON

1:30 PM - 5:00 PM

These times are reserved for Public Testimony.

STATE OF ALASKA  
THE LEGISLATURE

POUCHY - STATE CAPITOL  
JUNEAU, ALASKA 99811  
907.465.3800

LEGISLATIVE AFFAIRS AGENCY  
LEGISLATIVE REFERENCE LIBRARY

May, 1988

Copies of minutes listed below were originally included in this file. The minutes are available on the STAIRS database CMPR. In order to save space copies of minutes have not been left in the files.

Mary Van Nimwegen

House Resources 3-24-88 8:30a.m.

FISCAL NOTE

REQUEST:

Revision Date: \_\_\_\_\_  
Title: "An Act relating to the provision of goods or services to hunters."

Agency Affected: PUBLIC SAFETY  
BRU: Fish & Wildlife Protection

Sponsor: Rep. Herrmann  
Requestor: House Resources

Components: Enforcement

RECEIVED FEB - 4 1988

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL	-0-	-0-	-0-	-0-	-0-	-0-
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND	-0-	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS						
OTHER						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS:

FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)

No fiscal impact is anticipated.

JWR  
2/2/88

Prepared by: Captain Conrad Seibel, Operations Commander  
Division: Fish & Wildlife Protection

Phone: 269-5509  
Date: 1-28-88

Approved by Commissioner: Wayne A. Houtstar  
Agency: PUBLIC SAFETY

Date: 2-2-88

- Distribution (by preparer):
- Legislative Finance
  - Legislative Sponsor
  - Requestor
  - Office of Management and Budget
  - Impacted Agency(ies)

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA  
THIRD JUDICIAL DISTRICT AT ANCHORAGE

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

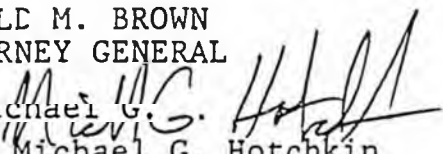
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Case No. 3AN 79-2387 Civil

APPEAL FROM THE DECISION OF THE GUIDE LICENSING  
AND CONTROL BOARD OF THE STATE OF ALASKA

BRIEF OF APPELLEE

HAROLD M. BROWN  
ATTORNEY GENERAL

By:   
Michael G. Hotchkin  
Assistant Attorney General

State of Alaska  
Department of Law  
1031 W. 4th Ave., Suite 200  
Anchorage, Alaska 99501  
Telephone: 907-276-3550

Attorney for Appellee

Filed January 30, 1986 in the  
Superior Court for the State  
of Alaska.

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Clerk of the Court

## ISSUES PRESENTED

1. Are statutes and regulations that authorize and direct the Guide Licensing and Control Board to conserve the state's game resources and preserve the guiding profession, by regulating guiding activity in guide units 17 and 19 unconstitutional on their faces?
2. Did the guide board properly apply its regulations to Owsichek, or, in treating him equally with all similarly situated persons applying for exclusive use area permits, unjustly discriminate against him?
3. Can Owsichek maintain a damages claim against the state in the face of AS 09.50.250, and of the state's common law quasi-judicial immunity from suit?

## INTRODUCTION

This appeal involves a challenge to the exclusive use guiding area system, employed since 1974 to regulate big game guiding activities in Alaska. Despite the voluminous arguments advanced, the background of this case and the nature of Owsichek's challenges to the system are simple. The Guide Licensing and Control Board (the "board"), pursuant to statutes, adopted regulations to implement a system of exclusive use guiding areas, designed to alleviate the tremendous and increasing pressures exerted on the state's sensitive natural resources by professional guides, and further designed to preserve the viability of the guiding profession. In 1976,

Owsichek applied for an area. However, he did not meet the board's stated application criteria, so his application was denied. In 1978 Owsichek reapplied, was found qualified, and, based upon his successful history of guiding in a particular area, was assigned that area for his exclusive guiding use. Because he was not happy with the area assigned to him, Owsichek appealed the board's decision, challenging the basis and the implementation of the entire exclusive use area system. He alleges that the statutes and regulations authorizing the area system are invalid, and that even if the statutes and regulations are valid, the board somehow discriminated against him. Owsichek requests a declaratory judgment and money damages. His charges are without merit.

#### STATEMENT OF THE CASE

Professional guiding, like other commercial industries which exist by the bounty of Alaska's renewable natural resources, faced a crisis in the early 1970's. Alaska's population explosion, coupled with the efficiency of aircraft-based hunting, led to an overcrowded industry, with too many guides putting too much pressure on a few sensitive areas. Recognizing the problem, the legislature took action in 1973, creating the Guide Licensing and Control Board to regulate the industry. AS 08.54.010. It specifically instructed the board to, inter alia, "establish guide performance standards and regulate activity," and "prohibit guiding activities which are ... unsafe, against principles of conservation, degrading to the guiding profession, or which adversely affect the natural resources." AS 08.54.040(a)(3) and (a)(6). AS 08.54.050 gave

the board broad authority to carry out its duties. 1/

Among the board's first concerns were the problems caused by too many guides operating in too few areas. These problems included potentially volatile conflicts between guides in the bush, Exhibit B, at 5, 7; R. 35, 37, 65-67, 2/, overhunting in sensitive areas leading to depletion of species. R. 13, 34; Tr. 205, and the declining ability of professional guides to make a living. R. 74-75. The board devised a regulatory system to remedy these problems, as well as to spread guide pressures throughout the state, give guides incentive to conserve game resources, increase the quality of guided hunts, assist in policing the profession, allow new guides to break into the profession, and assist in maintaining good relations between the profession and the public. Exhibit B, at 21-24, 35.

In 1974, the board adopted 12 AAC 38.040, which established as guide districts the 26 game units into which the state had been divided 3/, and 12 AAC 38.050, which provided that

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1/ A good synopsis of the historic basis for the exclusive area system and the actions of the board was presented to the House Resources Committee by the board's chairman in 1976. It is attached as Exhibit B.

2/ Citation references are: R., record on appeal; Tr., December, 1977 meeting transcript; and O. Br., Appellant's Brief.

3/ The distinction between units and areas is crucial to this case. A "unit" (or district) is one of the major divisions of the state for administrative purposes. An "area" is a subdivision of a unit, which is assigned for the exclusive guiding use of a particular guide or guides. A guide must be certified for any unit in which he wishes to operate; he may then guide in his exclusive area or in any "open" area (areas not assigned to a particular guide) in the unit. Assignment of an area does not pass any rights to the land. The system merely  
(Footnote Continued)

guides could register their main camps in certain highly pressured units (16 and 20, and, in 1975, 8), in order to acquire exclusive guiding areas around their camps. In effect, the system "grandfathered" those guides with the greatest experience and investment in particular areas, while encouraging other guides to operate in less pressured areas. <sup>4/</sup> Exhibit B, at 13. The system may be compared to the commercial fishing limited entry system, except that while fishermen who did not merit grandfather rights were forced out of their profession altogether, guides who did not merit grandfather rights simply had to move their operations into different areas, and while limited entry involved a single determinative application period, new guides are always able to establish qualifications and, periodically, may apply for exclusive use areas.

In 1976, the legislature expressly endorsed the board's actions, ordering the board to similarly regulate the entire state. AS 08.54.040(a)(8) (eff. 1-1-77) (See pages 11-15, infra.). In January, 1976, the board adopted regulations extending the system to the rest of the state. R. 71, 12 AAC

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(Footnote Continued)

provides that as between guides, only certain ones may operate in certain areas. Unguided hunters are not affected at all by the system.

<sup>4/</sup> 12 AAC 38.050 allowed the board to consider "occupancy, use, and financial value" in awarding areas. The board's policy has always been to rate past use as the highest priority. For units limited before 1977 (i.e., units 8, 16 and 20) board policy required proof of use of the area in four consecutive years. R. 48. For all other units the board has generally required proof of use of the area in three of the five years preceding application (two of five years for temporary permits), although the board varied the standards somewhat to account for differences among units. O. Br. Appendix A; T. 194.

38.050 (as am. 2-25-77). In April of that year the board established November 1, 1976 as the application and qualification deadline for areas in all units not yet limited, and notified all registered and master guides of the deadline. R. 75-76. At its December, 1977 meeting, the board ruled on applications for areas in units 17 and 19, the subjects of this appeal. Rejected applicants for these units were allowed to file petitions, which were heard at the November, 1978 board meeting.

In May, 1978, new regulations were filed, governing all exclusive area applications to be filed during subsequent application periods. 12 AAC 38.051 et seq. These regulations codified the board's application standard requiring three years of use out of the previous five years to obtain an area, and changed other aspects of the system (e.g., the requirement that applicants maintain a camp in the area). Periodically, the board opens units for applications; guides who have been operating in open areas may thus secure those territories as exclusive areas.

Ken Owsichek applied for an area in units 17 and 19 during the 1976 application period, the first year in which he guided hunts, the year he obtained his guide license, and the year he acquired a fishing (and later hunting) lodge on Lake Clark (in unit 9, where Owsichek has never been certified to guide -- his certification is limited to units 17, 18 and 19). The board denied his application, because he did not meet the qualification requirement of two years of use (for a temporary permit) before November, 1976. Owsichek filed a petition, which was referred to a hearing officer. Before the hearing officer, Owsichek and the board agreed that while Owsichek had not been

qualified to receive an area in 1976, he was so qualified in 1978. R. Vol. IIIA, 476-477. He then filed a new application for an extremely large area straddling the border of units 17 and 19. See application maps. The board considered Owsichek's testimony on his use of the area, evidence of its carrying capacity, and the situations of the other guides in the vicinity, as its regulations required. The board granted Owsichek the open portion of the applied-for area, from which he had taken bear, moose and caribou during the previous year. 5/ This area was comparable to areas assigned to other guides. February 1979 meeting, tapes #11 and 12. Owsichek appeals the board's decision.

#### DISCUSSION

Owsichek's appeal of the board's decision consists of vaguely defined attacks on the validity of the board's statutes, its regulations, and its implementation of the exclusive area system. Notably, he does not analyze the board's application of its statutes and regulations to his exclusive area applications, but rather presents a collection of what he sees as inconsistencies in board decisions during the course of its history, to prove the unconstitutionality of the statutes, regulations and exclusive area system. Owsichek's allegations of inconsistency, and the board's decisions on Owsichek's

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5/ Owsichek's repeated assertions that the board denied his application for an area, and that the board's decision put him out of business, are patently false. Owsichek received and holds to this day the portion of his applied-for area in which he had been hunting. Nor has he been put out of business. Since 1979 he has guided more than two dozen hunters in units 17, 18 and 19.

1 IN THE SENATE

2 CS FOR SENATE BILL NO. 191 (  
3 IN THE LEGISLATURE OF THE STATE OF ALASKA  
4 FIFTEENTH LEGISLATURE - SECOND SESSION

**DRAFT**

5 A BILL

6 For an Act entitled: "An Act relating to the Guide Board and big game  
7 guiding, transporting, outfitting, and hunting and  
8 establishing an interim task force on guiding and the  
9 commercial taking of big game; and providing for an  
10 effective date."

11 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

12 \* Section 1. AS 08.01.065 is amended by adding a new subsection to  
13 read:

14 (e) Notwithstanding other provisions of this section, the de-  
15 partment shall establish the amount of a fee for a nonresident guide  
16 license at three times the amount of the fee for a resident guide  
17 license.

18 \* Sec. 2. AS 08.03.010(c)(20) is amended to read:

19 (20) Guide Board (AS 08.54.010) -- June 30, 1989 [1988].

20 \* Sec. 3. AS 08.54.210 is amended to read:

21 Sec. 08.54.210. UNLAWFUL ACTS. (a) It is unlawful for

22 (1) a guide [MASTER GUIDE, REGISTERED GUIDE, SPECIAL GUIDE,  
23 CLASS A ASSISTANT GUIDE, OR ASSISTANT GUIDE] to fail to promptly  
24 [TIMELY] report to the Department of Public Safety, division of fish  
25 and wildlife protection, and in no event later than 30 days, a viola-  
26 tion of a state fish, game, or guiding statute or regulation that the  
27 guide reasonably believes was committed by a client or an employee of  
28 the guide;

29 (2) a guide to commit or aid the commission of a violation

1 of this chapter or of a state game or guiding statute or regulation or  
2 to permit the commission of a violation that the guide knows or rea-  
3 sonably believes is being or will be committed without attempting to  
4 prevent it, short of using force, and without reporting it;

5 (3) a person to guide without having a current valid guide  
6 license and resident hunting license in actual possession;

7 (4) a person without a current valid registered or master  
8 guide license to advertise as or represent to be

9 (A) a guide; or

10 (B) an outfitter offering big game hunting services

11 [WITHOUT HOLDING A CURRENT VALID GUIDE LICENSE];

12 (5) a guide to intentionally obstruct or hinder or attempt  
13 to obstruct or hinder lawful hunting engaged in by a person who is not  
14 a client of the guide;

15 (6) a person to guide without being validly licensed as a  
16 guide under this chapter and as a resident hunter under AS 16;

17 (7) an assistant guide to contract to conduct a guided  
18 hunt;

19 (8) an assistant guide to be in the field on a guided hunt  
20 except while employed and supervised by a registered or master guide.

21 (b) A person who violates (a)(1) - (5) of this section is guilty  
22 of a misdemeanor and upon conviction is punishable by a fine of not  
23 more than \$2,000 [\$1,000] or by imprisonment for not more than one  
24 year, or by both, and the person's license may be revoked for a period  
25 up to five years. However, a person who engages in guiding activity  
26 during the period for which the person's license is suspended or  
27 revoked under this chapter, or who violates (a)(6) - (8) of this  
28 section, is guilty of a felony punishable, upon conviction, by a fine  
29 of not more than \$5,000 and by imprisonment for not less than one year

1 nor more than three years. In addition to punishment for a felony,  
2 all guns, fishing tackle, boats, aircraft, automobiles or other vehi-  
3 cles, camping gear and other equipment and paraphernalia used in, or  
4 in aid of, guiding activity engaged in during the period of suspension  
5 or revocation may be seized by persons authorized to enforce this  
6 chapter and may be forfeited to the state as provided under AS 16.05.-  
7 195.

8 \* Sec. 4. AS 08.54.240(3) is repealed and reenacted to read:

9 (3) "guide" or "guiding" means accompanying or being pre-  
10 sent with, or providing a camp or personal service for, a big game  
11 hunter in the field, personally or through an assistant, for compen-  
12 sation or with the intent or an agreement to receive compensation;  
13 "guide" or "guiding" does not include accompanying or being present  
14 with a hunter

15 (A) in a boat with living quarters;

16 (B) at a lawfully established cabin or permanent  
17 lodge;

18 (C) while providing transportation to or from the  
19 field, if the persons providing transportation and the persons  
20 being transported do not stalk, pursue, track, kill, or attempt  
21 to kill big game; or

22 (D) in a camp while attending to horses that are being  
23 used to transport big game hunters to or from the field;

24 \* Sec. 5. AS 16.05.407 is repealed and reenacted to read:

25 Sec. 16.05.407. NONRESIDENT HUNTING BIG GAME ANIMALS MUST BE  
26 ACCOMPANIED. (a) A nonresident may not hunt, pursue, or take a brown  
27 bear, grizzly bear, polar bear, goat, or sheep in the state, unless  
28 personally accompanied by

29 (1) a guide licensed under AS 08.54; or

1 (2) a resident 20 years of age or older who has hunted in  
2 and is familiar with the terrain and environment in the game manage-  
3 ment unit in which the hunting takes place and

4 (A) is the spouse of the nonresident; or

5 (B) is related to the nonresident, within and includ-  
6 ing the second degree of kindred, by marriage or blood.

7 (b) A nonresident may not hunt, pursue, or take a moose or  
8 caribou in the state, unless personally accompanied by

9 (1) a guide licensed under AS 08.54; or

10 (2) a resident 20 years of age or older who

11 (A) does not receive compensation for accompanying the  
12 nonresident; and

13 (B) has hunted in and is familiar with the terrain and  
14 environment in the game management unit in which the hunting  
15 takes place.

16 (c) An applicant for a nonresident big game tag for the taking  
17 of an animal specified in (a) or (b) of this section shall first  
18 furnish to the state, on a form provided by the state, an affidavit  
19 showing that the applicant will be personally accompanied while hunt-  
20 ing by a person who is qualified under the terms of (a) or (b) of this  
21 section, as appropriate.

22 (d) Before accompanying a nonresident hunter under (a)(2) or  
23 (b)(2) of this section, the resident shall furnish to the state, on a  
24 form provided by the state, an affidavit showing that the resident  
25 meets the requirements of (a)(2) or (b)(2) of this section, as appro-  
26 priate.

27 (e) A person who falsifies an affidavit under (c) or (d) of this  
28 section is guilty of perjury under AS 11.56.200.

29 (f) A nonresident who violates this section or a resident who

1 violates (d) of this section is guilty of a misdemeanor and upon  
2 conviction is punishable by imprisonment for not more than one year,  
3 or by a fine of not more than \$5,000, or by both.

4 \* Sec. 6. AS 16.05 is amended by adding a new section to read:

5 Sec. 16.05.786. DUTY OF BIG GAME TRANSPORTERS TO REPORT VIO-  
6 LATIONS. (a) A person who transports a big game hunter to or from  
7 the field for compensation, or with the intent or an agreement to  
8 receive compensation, shall promptly report to the Department of  
9 Public Safety, division of fish and wildlife protection, and in no  
10 event later than 30 days, a violation of a state fish, game, or guid-  
11 ing statute or regulation that the person reasonably believes was  
12 committed by a client or employee of the person.

13 (b) A person who violates this section is guilty of a misde-  
14 meanor and upon conviction is punishable by a fine of not more than  
15 \$2,000 or by imprisonment for not more than one year, or by both.

16 \* Sec. 7. TASK FORCE ON GUIDING AND GAME. (a) The interim task force  
17 on the Guide Board and the commercial taking of big game is established  
18 under the jurisdiction of the Legislative Council. The task force consists  
19 of the commissioners of fish and game, commerce and economic development,  
20 and public safety, or their designees; two members of the senate appointed  
21 by the president of the senate; two members of the house of representatives  
22 appointed by the speaker of the house; and six members appointed by the  
23 governor as follows: one member of the Guide Board; one big game guide  
24 licensed under AS 08.54 who is not a member of the Guide Board; and one  
25 person engaged in a business, other than guiding, that includes transport-  
26 ing big game hunters to and from the field; and three public members.

27 (b) The task force shall review the operations of the Guide Board and  
28 shall study problems and issues concerning the commercial taking of big  
29 game in the state and the businesses or professions that provide goods and

1 services to big game hunters in the state. The task force shall submit to  
2 the Legislative Council, not later than January 15, 1989, a report on its  
3 findings and proposed legislation to address the problems and issues  
4 covered in the report.

5 (c) The task force terminates January 15, 1989.

6 \* Sec. 8. Sections 1, 2, and 4 - 7 of this Act take effect immediately  
7 under AS 01.10.070(c).

8 \* Sec. 9. Section 3 of this Act takes effect 60 days after the effec-  
9 tive date of sec. 1 of this Act.

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STATE OF ALASKA  
THE LEGISLATURE

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LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM

March 24, 1988

SUBJECT:           Constitutionality of statutes requiring guides  
                    for nonresident hunters and requiring guides  
                    to be residents

TO:                 Representative Adelheid Herrmann  
                    Co-Chair, House Resources Committee

FROM:              Edward H. Hein *EHA*  
                    Legislative Counsel

You have asked whether state statutes that require non-resident big game hunters to be accompanied by a guide and that require guides to be residents are constitutional.

Under AS 16.05.407, a nonresident who wishes to hunt brown bear, grizzly bear, or sheep must be accompanied by a licensed guide or by a resident relative. The question is whether this statute violates the Equal Protection Clause of the Alaska Constitution, Article I, section 1. That section provides, in part, that "all persons are equal and entitled to equal rights, opportunities, and protection under the law."

The test of constitutionality under this section is whether the discrimination against nonresidents substantially furthers a legitimate goal of the state, which then must be balanced against the nature of the nonresident's interest or right involved. State v. Erickson, 574 P.2d 1, 12 (Alaska 1978). The goals of the state in requiring guides for nonresidents are not stated in the statute, but arguably are hunter safety and enforcement of game laws. These are legitimate state objectives.

The next question is whether the discrimination against most nonresidents substantially furthers these objectives. It is reasonable to conclude that nonresident hunters, on the whole, are less familiar with Alaska's terrain and weather conditions than residents are. Nonresidents may also be

unfamiliar with specific hunting techniques for hunting Alaskan animals, such as the brown bear and dall sheep. Therefore, requiring nonresident hunters to be accompanied by licensed guides is a rational means of protecting their safety. Requiring guides also helps ensure that nonresidents comply with state game laws, particularly since guides are required by law to report violations committed by their clients. But the statutory scheme is flawed, from a constitutional standpoint, in at least two ways.

First, the statute makes an exception for nonresident hunters who are accompanied by a resident who is 20 years of age or older and related within the second degree of kinship. Substituting a resident in place of a licensed guide is not even rationally related to the goal of protecting the nonresident hunter's safety. As one court has stated, this kind of exception is "impossible to reconcile with the theory of safety unless one indulges in the violent presumption that mere residence in this State makes a competent, knowing guide." Schakel v. State, 513 P.2d 412 (Wyoming 1973). It may be that a close relative will be more concerned than another resident for protecting the nonresident, but this does not make the resident relative any more qualified to accompany big game hunters than other residents who are not licensed guides. Second, the list of big game animals for which the nonresident must be accompanied is not complete. Although it covers bears and sheep, it omits goats, moose, and caribou -- animals frequently hunted by nonresidents.

These two flaws in the statute make it vulnerable to constitutional challenge. In particular, the exception for resident relatives is probably unconstitutional. Amending these aspects of the statute would make it more defensible.

The second statute is AS 08.54.210(a)(3) and (6), which make it unlawful for a person to guide without a guide license and a resident hunting license. The effect is to exclude nonresidents from engaging in the business of guiding in the state. This residency requirement is in violation of the Privileges and Immunities Clause of the United States Constitution. The Attorney General has so advised the Department of Commerce and Economic Development and has directed that the requirement not be enforced. The requirement has been removed in various versions of SB 191.

Article IV, section 2 of the United States Constitution provides, in relevant part, that "The citizens of each state should be entitled to all privileges and immunities of citizens in the several states." In line with this purpose, the Court has said that the clause protects fundamental interests -- "those that bear on the vitality of the Nation as a single entity." Baldwin v. Montana Fish and Game Commission, 56 L.Ed.2d 354, 365 (1978). One of the most fundamental interests protected by the Privileges and Immunities Clause is the right to pursue a common calling, ply a trade, or do business in another state. Supreme Court of New Hampshire v. Piper, 84 L.Ed.2d 205 (1985); Toomer v. Witsell, 92 L.Ed. 1460, 1471 (1948). A nonresident's interest in engaging in the business of big game guiding in Alaska is such a fundamental interest and, therefore, is protected by the Privileges and Immunities Clause.

To discriminate against nonresidents, the state must have a substantial reason beyond the mere fact that they are citizens of other states. Toomer at 1471. The state cannot, for example, discriminate solely for the purpose of giving residents an economic advantage over nonresidents. Lynden Transport, Inc. v. State, 532 P.2d 700, 710 (Alaska 1975). The statute identifies no evil caused by nonresidents that requires that they be excluded from guiding in the state. There is no showing that a nonresident is inherently less qualified to be a guide than a resident. A nonresident would have to meet the same qualifications as a resident to obtain a guide license. As one court has stated, "mere residence in this state does not make a competent guide." Powell v. Daily, 712 P.2d 356 (Wyoming 1986). There is no showing that excluding nonresidents from guiding in the state in any way protects the state's game resources. The United States Supreme Court has stated that a "state's interest in its wildlife and other resources must yield when, without reason, it interferes with a nonresident's right to pursue a livelihood in a State other than his own." Baldwin.

The residency requirement for licensed guides is in violation of the Privileges and Immunities Clause of the United States Constitution and is unenforceable.

EHH:bb  
b4/050

(1) calendar year and must be in the possession of any person exercising rights under any fishing or hunting license issued pursuant to W.S. 23-2-101 or 23-2-201. Holders of pioneer licenses as defined under W.S. 23-1-705(d) and (e) and holders of licenses only under W.S. 23-2-201(b)(xi) and (xii) are exempt from the provisions of this section. (Laws 1983, ch. 175, § 1; 1985, ch. 166, § 1; 1986, ch. 69, § 1.)

The 1985 amendment, effective June 1, 1985, inserted "and holders of licenses only under W.S. 23-2-201(b)(xi)" in the last sentence.

The 1986 amendment, effective June 11, 1986, inserted "and (xii)" in the second sentence.

Editor's notes. — Laws 1983, ch. 175, § 2, provides:

"(a) Any person may contribute to the enhancement of fish and wildlife habitat by purchasing a fish and wildlife habitat card. The card shall show the name of the purchaser and shall indicate the amount of the contribu-

tion by a letter designation on the card as follows:

- (i) Five dollars (\$5.00) 'C' Card;
- (ii) Ten dollars (\$10.00) 'B' Card;
- (iii) Twenty dollars (\$20.00) 'A' Card;
- (iv) Fifty dollars (\$50.00) or more 'A+' Card.

"(b) Cards shall be approximately two and one-quarter (2<sup>1</sup>/<sub>4</sub>) inches by three and one-quarter (3<sup>1</sup>/<sub>4</sub>) inches in size. All proceeds from the voluntary purchase of such cards shall be transferred to the game and fish fund under W.S. 23-1-501."

## ARTICLE 4. GUIDES AND OUTFITTERS

### § 23-2-401. Guides required; exceptions; issuance of resident guide license.

(a) No nonresident shall hunt big or trophy game animals on any designated wilderness area, as defined by federal or state law, in this state unless accompanied by a licensed professional guide or a resident guide. There shall be at least one (1) licensed professional guide or resident guide accompanying each two (2) nonresident hunters. The commission may also specify other areas of the state, or specific big or trophy game species, for which a licensed professional or resident guide is required for nonresidents, for purposes of proper game management, protection of hunter welfare and safety, or better enforcement of game fish laws. The commission may allow licensed guides to accompany more than two (2) hunters but no more than six (6) hunters in specific areas.

(b) Any resident possessing a valid resident big or trophy game animal license may apply for and receive a resident guide license. The resident guide license shall be issued without charge or bond by the commission, any district supervisor or resident game warden upon receipt of an affidavit from the resident stating the names and addresses of the nonresident hunters to be guided, the game to be hunted, the area to be hunted, and that the resident has not received nor will accept directly or indirectly any compensation for his services as a guide. A resident guide shall not guide more than two (2) nonresident hunters in any calendar year on any national forest, wilderness area, national game refuge, or national park, except as provided in W.S. 23-2-401, nor shall he accept any compensation or gratuity for his services.

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The name and license number of the nonresident hunter shall be placed on the back of the resident guide license and stamped or signed by the issuer.

(c) A resident landowner may guide hunters on land owned by or deeded land leased to him without a guide license, or he may authorize nonresidents hunting without a guide on those lands. The license must bear the signature of the landowner, lessee, or agent of the owner on whose private property he is hunting as evidence that permission to hunt has been granted. (Laws 1939, ch. 65, § 47; 1943, ch. 112, § 9; C.S. 1945, § 47-401; Laws 1946, Sp. Sess., ch. 2, § 4; 1949, ch. 88, § 2; 1957, ch. 168, § 2; W.S. 1957, § 23-54; Laws 1961, ch. 109, § 1; 1969, ch. 129, § 2; 1973, ch. 249, § 1; W.S. 1957, § 23.1-49; Laws 1975, ch. 81, § 1.)

**Repealing clauses.** — Laws 1946, Sp. Sess., ch. 2, § 8, repealed all acts or parts of acts inconsistent with this act.

**Requirement that nonresident employ guide held constitutional.** — Subsection (a), requiring nonresident big game hunters who hunt in federal wilderness areas to employ guides, does not violate the equal protection provisions of the federal and state constitutions, nor the privileges and immunities clause of the United States constitution. *O'Brien v. State*, 711 P.2d 1144 (Wyo. 1986).

The requirement that a nonresident employ a guide to accompany him into a federal wilderness, in which he has a valid license to hunt, is specifically authorized by the National Wilderness Preservation System Act and regulations, and does not violate the supremacy clause. *O'Brien v. State*, 711 P.2d 1144 (Wyo. 1986).

**Law reviews.** — For note on constitutional considerations and the new Wyoming Guide Law, see IX Land & Water L. Rev. 169 (1974).

### § 23-2-402. License required for professional guides; qualifications; suspension or revocation of license.

(a) No person shall engage in the business of guiding for any consideration or compensation without a professional guide's license. Any competent person who possesses the following qualifications shall upon payment of the license fee, receive a professional guide's license:

- (i) Citizen of the United States;
- (ii) At least eighteen (18) years of age;
- (iii) Resident of Wyoming;
- (iv) Knowledgeable of trophy care and appropriate game and fish laws;

(v) Can satisfactorily pass a written or oral examination which is devised and administered at the discretion of the commission. The examination may include knowledge of the area, of hunting practices, of big game, or guiding practices and of game and fish laws.

(b) The commission may suspend or revoke a professional guide's license on the grounds provided by W.S. 23-2-405(a)(iii).

(c) As used in this section "professional guide" means any person employed for any pecuniary profit or other gain, who provides professional services to aid any person in taking any of the game animals, fish or birds in this state. A professional guide shall not furnish any meals or accommoda-

port damage; claims for damages;  
time for filing; determination; ap-  
peal; arbitration.

ARTICLE 1. GENERAL PROVISIONS

§ 23-1-101. Definitions of wildlife.

(a) As used in this act:

(i) "Big game animal" means antelope, bighorn sheep, deer, elk, moose or mountain goat;

(ii) "Exotic species" means any wild animals, including amphibians, reptiles, mollusks, crustaceans or birds not found in a wild, free or unconfined status in Wyoming;

(iii) "Furbearing animal" means badger, beaver, bobcat, marten, mink, muskrat or weasel;

(iv) "Game bird" means grouse, partridge, pheasant, ptarmigan, quail, wild turkey and migratory game birds;

(v) "Game fish" means bass, catfish, crappie, grayling, ling, northern pike, perch, salmon, sauger, sunfish, trout, walleye or whitefish;

(vi) "Migratory game bird" means all migratory game birds defined and protected under federal law;

(vii) "Predacious bird" means English sparrow and starling;

(viii) "Predatory animal" means coyote, jackrabbit, porcupine, raccoon, red fox, wolf, skunk or stray cat;

(ix) "Protected animal" means black-footed ferret, fisher, lynx, otter, pika or wolverine;

(x) "Protected bird" means migratory birds as defined and protected under federal law;

(xi) "Small game animal" means cottontail rabbit or snowshoe hare, and fox, grey and red squirrels;

(xii) "Trophy game animal" means black bear, grizzly bear or mountain lion;

(xiii) "Wildlife" means all wild mammals, birds, fish, amphibians, reptiles, crustaceans and mollusks, and bison designated by the Wyoming game and fish commission and the Wyoming livestock board within Wyoming. (Laws 1939, ch. 65, § 2; 1943, ch. 112, § 1; C.S. 1945, § 47-102; Laws 1957, ch. 45, §§ 1, 2; ch. 178, §§ 2, 3; W.S. 1957, § 23-1; Laws 1959, ch. 89, § 1; 1965, ch. 45, §§ 1, 2; ch. 184, §§ 4, 5; 1973, ch. 249, § 1; W.S. 1957, § 23.1-1; Laws 1979, ch. 63, § 2; ch. 140, § 1.)

**Cross references.** — As to hunting and trapping licenses generally, see §§ 23-2-101 to 23-2-306. For regulatory provisions concerning birds and animals, see §§ 23-3-101 to 23-3-116. For regulatory provisions concerning fish, see §§ 23-3-201 to 23-3-205. For regulatory provi- sion concerning wildlife, see §§ 23-3-301 to 23-3-308. For provisions concerning protection and propagation of fish, see §§ 23-4-101 to 23-4-103. As to game bird farms, see §§ 23-5-101 to 23-5-110. As to fishing pre- serves, see §§ 23-5-201 to 23-5-204. As to

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"A. I have an opinion. And my opinion is that probable is a heavier word than I would use. And I would have to say that he suffered a heart attack in and around the events of having been involved in a truck accident, and there is a possible causal relationship, due to the background of the known arteriosclerosis, and that I think to deny that relationship would be foolish.

"But I think for me to say probable cause would also be saying more than I can absolutely say.

"Q. . . .

"Do you, in your opinion, see it as a likely cause? Is that a better word?"

"THE WITNESS: I don't think that I can say that's the likely cause, because I just don't know the physiologic way that happens. I think there is an undeniable relationship.

"I think there is a—there is something that happened in this man's day that does not happen every day in the course of his job, and that in and around that unusual event he had a heart attack.

"And we know that stressful situations sometimes seem related to heart attacks. And to say that there is absolutely no relationship between those two things would be incredulous."

The direct causal connection requirement is not whether or not the truck accident was the probable cause of appellee's myocardial infarction, but whether, as stated in *Kaan*,

" . . . it is more probable than not that work exertion or stress contributed in a material degree to the precipitation, aggravation, or acceleration of a myocardial infarction." *Kaan v. State ex rel. Wyoming Worker's Compensation Division*, 689 P.2d at 1389.

The cardiologist was not asked the question in such a manner that he could recite the magic words in a concise affirmative opinion statement. His statements, however, when considered together, satisfy the holding in the *Kaan* case:

" . . . I think there is an undeniable relationship.

"I think there is a—there is something that happened in this man's day that does not happen every day in the course of his job, and that in and around that unusual event he had a heart attack. "And we know that stressful situations sometimes seem related to heart attacks. And to say that there is absolutely no relationship between those two things would be incredulous."

We, therefore, affirm the order of the trial court.



Keiran W. O'BRIEN, Appellant  
(Defendant),

v.

STATE of Wyoming, Appellee  
(Plaintiff).

No. 85-112.

Supreme Court of Wyoming.

Jan. 13, 1986.

Defendant was convicted by a justice of the peace for Park County, of hunting in federal wilderness area without a guide. His conviction was affirmed by the District Court, Park County, John T. Dixon, J., and he appealed. The Supreme Court, Raper, J., Retired, held that statute distinguishing between residents and nonresidents with respect to guide requirement did not violate equal protection.

Affirmed.

Cardine, J., filed a dissenting opinion.

#### 1. Constitutional Law §48(1, 3)

There is presumption of constitutionality of statute and burden is on attacker to

show unconstitutionality beyond reasonable doubt.

2. Constitutional Law ⇨48(3)

Reasonable doubts as to constitutionality are resolved by upholding statute, if possible.

3. Constitutional Law ⇨213.1(2)

When ordinary interest is involved in equal protection challenge, then court merely examines to determine if there is rational relationship between classification made by statute or statutes being viewed and legitimate legislative state objective. U.S.C.A. Const. Amend. 14; Const. Art. 1, § 34.

4. Constitutional Law ⇨213.1(2)

When fundamental interest is affected or if classification is inherently suspect, then classification must be subjected to close scrutiny in equal protection challenge to determine if it is necessary to achieve compelling state interest. U.S.C.A. Const. Amend. 14; Const. Art. 1, § 34.

5. Constitutional Law ⇨236

Elk hunting is sport, not fundamental right, and thus constitutionality under equal protection of statute [W.S.1977, § 23-2-401 (a, b)] distinguishing between residents and nonresidents with respect to guide requirement for hunters was subject to review under rational relationship test. U.S.C.A. Const. Amend. 14; Const. Art. 1, § 34.

6. Constitutional Law ⇨236

Game ⇨4

Statute [W.S.1977, § 23-2-401 (a, b)] distinguishing between residents and nonresidents with respect to guide requirement for big game hunting in wilderness areas did not violate equal protection where the classification was rationally connected with State's expressed objective of better enforcement of game and fish laws as well as hunter welfare and safety. U.S.C.A. Const. Amend. 14; Const. Art. 1, § 34.

7. Constitutional Law ⇨207(1)

Game ⇨4

Statute [W.S.1977, § 23-2-401 (a, b)] distinguishing between residents and nonresidents with respect to guide requirement for big game hunting in wilderness areas did not violate privileges and immunities clause [U.S.C.A. Const. Art. 4, § 2, cl. 1] where no fundamental right was involved.

8. States ⇨4.13

Statute [W.S.1977, § 23-2-401 (a, b)] distinguishing between residents and nonresidents with respect to guide requirement for big game hunting in federal wilderness areas in Wyoming was not preempted by national wilderness preservation system in light of provision in federal Wilderness Act [16 U.S.C.A. § 1133(c)(7)] stating that nothing in the chapter is to be construed as affecting jurisdiction or responsibility of states with respect to wildlife and fish in national forests. Wilderness Act, § 4(c)(7), 16 U.S.C.A. § 1133(c)(7); U.S.C.A. Const. Art. 6, cl. 2.

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Ernest F. Fuller, Jr. of Bormuth, Freeman & Fuller, Cody, and Michael K. Davis of Redle, Yonkee & Arney, Sheridan, for appellant.

A.G. McClintock, Atty. Gen., Gerald A. Stack, Deputy Atty. Gen., John Renneisen, Sr. Asst. Atty. Gen., Marion Yoder, Asst. Atty. Gen., and Cheryl Solon, Legal Intern, for appellee.

Timothy J. Kirven and Felecia A. Rotellini, Legal Intern, of Kirven & Kirven, Buffalo, for amicus curiae Wyoming Outfitters Ass'n.

Before THOMAS, C.J., and ROONEY,\* BROWN and CARDINE, JJ., and RAPER, J., Retired.

RAPER, Justice, Retired.

Keiran W. O'Brien (appellant) was convicted, and fined \$100 by a justice of the peace for Park County, on January 18, 1984, of hunting in a federal wilderness

\* This case was decided prior to the retirement of

Justice Rooney on November 30, 1985.

area unaccompanied by a licensed professional guide or resident guide, in violation of W.S. 23-2-401(a) and (b).<sup>1</sup> On appeal to the district court, Park County, Fifth Judicial District, sitting as an appellate court, the conviction was affirmed after the district judge had given the matter his close attention and thoughtful consideration as reflected in a comprehensively written opinion. Appellant appeals from the order of affirmance.

The issues advanced by the appellant are:

"I.

"Does Wyoming Statute Section 23-2-401(a), requiring nonresident big game hunters who hunt in federal wilderness areas to employ guides violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution?

"II.

"Does Wyoming Statute Section 23-3-401(a) violate the Privileges and Immunities Clauses of the United States Constitutions [sic]?

"III.

"Does Wyoming Statute Section 23-2-401(a) violate the Supremacy Clause of the United States Constitution because it

1. W.S. 23-2-401(a) and (b):

"(a) No nonresident shall hunt big or trophy game animals on any designated wilderness area, as defined by federal or state law, in this state unless accompanied by a licensed professional guide or a resident guide. There shall be at least one (1) licensed professional guide or resident guide accompanying each two (2) nonresident hunters. The commission may also specify other areas of the state, or specific big or trophy game species, for which a licensed professional or resident guide is required for nonresidents, for purposes of proper game management, protection of hunter welfare and safety, or better enforcement of game [and] fish laws. The commission may allow licensed guides to accompany more than two (2) hunters but no more than six (6) hunters in specific areas.

"(b) Any resident possessing a valid resident big or trophy game animal license may apply

conflicts with the purposes of the National Wilderness Preservation System Act and federal regulations thereunder?"

We will affirm the decision of the district court and appellant's conviction.

Appellant, at the time of his citation on September 28, 1983, was a 46-year-old Minnesota resident having in his possession a valid "Wyoming Non-Resident Elk and Fishing Privilege" license. He and his brothers had set up two hunting camps in the Park County section of the Teton wilderness area of the Teton National Forest. At the time of his citation at one of the campsites, and at the trial, appellant admitted he had been hunting elk in the federal wilderness area without a licensed guide. He knew at that time that Wyoming law required him to have such a guide when hunting big game animals in a wilderness area. Elk are big game animals. W.S. 23-1-101(a)(i).

Appellant further admitted that he had hunted in the Wyoming wilderness from 1980 to 1983 intentionally without a guide because he felt the guide requirement was unconstitutional. He was an experienced hunter, familiar with the wilderness area in which he was hunting having been there on a ten or eleven-day camping trip with a Wyoming resident friend living in that area. In 1980 he had hunted for two weeks 20 to 30 miles from the area he was

for and receive a resident guide license. The resident guide license shall be issued without charge or bond by the commission, any district supervisor or resident game warden upon receipt of an affidavit from the resident stating the names and addresses of the nonresident hunters to be guided, the game to be hunted, the area to be hunted, and that the resident has not received nor will accept directly or indirectly any compensation for his services as a guide. A resident guide shall not guide more than two (2) nonresident hunters in any calendar year on any national forest, wilderness area, national game refuge, or national park, except as provided in section 23-1-49(a) [§ 23-2-401(a)], nor shall he accept any compensation or gratuity for his services. The name and license number of the nonresident hunter shall be placed on the back of the resident guide license and stamped or signed by the issuer."

hunting when he was issued the citation. He also testified at the trial that to hire a guide would cost between \$1,500 and \$2,000 for a ten-day trip.

In *Schakel v. State*, Wyo., 513 P.2d 412 (1973), this Court declared unconstitutional the predecessor statute to the one under which appellant was convicted and which we now consider. Since that time the amended version of W.S. 23-54 (1957), now W.S. 23-2-401, supra note 1, has been in effect. These two developments cast a different light on the problem and lead to a different conclusion than *Schakel*. The state in *Schakel* pointed out that W.S. 23-54 (1957) had been repealed in its entirety and replaced, but this Court properly refused to then consider the new statute as applicable. In addition, the United States Supreme Court in *Baldwin v. Fish and Game Commission of Montana*, 436 U.S. 371, 98 S.Ct. 1852, 56 L.Ed.2d 354 (1978), has held that recreational hunting is not a fundamental right protected by the Privileges and Immunities Clause of the United States Constitution. We therefore write on a clean slate, though some principles of law enunciated in *Schakel* remain viable. It may appear that different views are now present. If so, such differences can be attributed to discoveries in the field of law unearthed by *Baldwin*, as well as the statutory amendment. The recent case of *Powell v. Daily*, Wyo., 712 P.2d 356 (1986), involves an entirely different question, i.e., the resident requirement for a professional guide, so we will do no more than distinguish it later in this opinion.

[1.2] In considering a constitutional attack on a statute, basic principles must be kept in mind. There is a presumption of constitutionality, and the burden is on the attacker to show unconstitutionality beyond a reasonable doubt. *Bell v. State*, Wyo., 693 P.2d 769 (1985). Reasonable doubts as to constitutionality are resolved

by upholding the statute, if possible. *Armiño v. State*, Wyo., 678 P.2d 864 (1984).

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution has a parallel in Art. 1, § 34 of the Wyoming Constitution.<sup>2</sup> This Court has held those respective provisions are equivalents. *Washakie County School District Number One v. Herschler*, Wyo., 606 P.2d 310, cert. denied 449 U.S. 824, 101 S.Ct. 86, 66 L.Ed.2d 28 (1980). Therefore, our holding on the equal protection question herein shall be under both the United States and Wyoming Constitutions.

### I

[3.4] There are two tests designed to determine if statutory classifications meet equal protection requirements. The first is employed where the interest affected is an ordinary one and the second where a fundamental interest is at issue. When an ordinary interest is involved, then a court merely examines to determine if there is a rational relationship between a classification made by the statute or statutes being viewed and a legitimate legislative state objective. In other words, if the court perceives that the legislature had some arguable basis for choosing the end and the means, it will sustain the law. *Cheyenne Airport Board v. Rogers*, Wyo., 707 P.2d 717 (1985). When a fundamental interest is affected or if a classification is inherently suspect, then the classification must be subjected to close scrutiny to determine if it is necessary to achieve a compelling state interest. The latter test requires that the state establish that there is no less onerous alternative by which its objective may be achieved. *Washakie County School District Number One v. Herschler*, supra.

*Baldwin* settles the matter of whether the right to hunt is a fundamental right in

2. Amendment XIV, § 1, Amendments to the Constitution of the United States: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." Arti-

cle 1, § 34, Wyoming Constitution: "All laws of a general nature shall have a uniform operation."

relation to the Privileges and Immunities Clause<sup>3</sup> of the United States Constitution:

"Does the distinction made by Montana between residents and nonresidents in establishing access to elk hunting threaten a basic right in a way that offends the Privileges and Immunities Clause? • • Elk hunting by nonresidents in Montana is a recreation and a sport. In itself—wholly apart from license fees—it is costly and obviously available only to the wealthy nonresident or to the one so taken with the sport that he sacrifices other values in order to indulge in it and to enjoy what it offers. It is not a means to the nonresident's livelihood. The mastery of the animal and the trophy are the ends that are sought; appellants are not totally excluded from these. The elk supply, which has been entrusted to the care of the State by the people of Montana, is finite and must be carefully tended in order to be preserved.

"Appellants' interest in sharing this limited resource on more equal terms with Montana residents simply does not fall within the purview of the Privileges and Immunities Clause. Equality in access to Montana elk is not basic to the maintenance or well-being of the Union. Appellants do not—and cannot—contend that they are deprived of a means of a livelihood by the system or of access to any part of the State to which they may seek to travel. We do not decide the full range of activities that are sufficiently basic to the livelihood of the Nation that the States may not interfere with a nonresident's participation therein without similarly interfering with a resident's participation. Whatever rights or activities may be 'fundamental' under the Privileges and Immunities Clause, we are persuaded, and hold, that elk hunting by

3. We observe an obvious interplay between the Equal Protection and the Privileges and Immunities Clauses. Some conditions to their application are the same. The involvement of a fundamental right is one of them.

4. W.S. 23-1-101(a)(i): "'Big game animal' means antelope, bighorn sheep, deer, elk, moose or mountain goat."

nonresidents in Montana is not one of them." 98 S.Ct. at 1862-1863.

We consider all of the observations of the Supreme Court of the United States applicable in Wyoming, as well.

[5] Since elk hunting is a sport and not a fundamental right,<sup>4</sup> we then need only apply the less rigorous test applied to an ordinary right, and we need only examine to determine if there is a rational relationship between the classification made by the statute or statutes being viewed and a legitimate state objective. The statutory classification we are here viewing is that nonresidents, in addition to having a Wyoming nonresident hunting license, must, when hunting big and/or trophy game animals<sup>4</sup> on any designated wilderness area in Wyoming as defined by federal law, be accompanied by a licensed professional or resident guide. W.S. 23-2-401, *supra* note 1. No such requirement is placed on resident hunters. The question is then whether there is a rational relationship between that classification between nonresidents and residents and a legitimate legislative state objective.

By W.S. 23-1-103, all wildlife<sup>5</sup> in Wyoming is declared to be the property of the state, and the purpose of the act (W.S. 23-1-101 through 23-6-207 as amended from time to time) and the policy of the state are to provide an adequate and flexible system for the control, propagation, management and regulation of all Wyoming wildlife.

The declaration of ownership and preemption by the state of the management and control of all wildlife in Wyoming has constitutional sanction. As said in *Lacoste v. Department of Conservation of State of Louisiana*, 263 U.S. 545, 44 S.Ct. 186, 68 L.Ed. 437 (1924), the wildlife within the

5. W.S. 23-1-101(a)(xiii): "'Wildlife' means all wild mammals, birds, fish, amphibians, reptiles, crustaceans and mollusks, and bison • • • within Wyoming."

borders of a state are owned by the state in its sovereign capacity for the common benefit of all its people. Because of such ownership and in the exercise of its police power, the state may regulate the taking and use thereof. *Baldwin* spoke approvingly of *Lacoste* in connection with police power in pointing out that the state has great latitude in determining what means are appropriate for the protection of wildlife. We hasten to agree with *Schakel*, however, that the enlightened concept of this ownership is one of a trustee with the power and duty to protect, preserve and nurture the wild game. *Baldwin* observes that though in most respects all those in a state must be treated equally, the state need not always share those things held in trust for its own people.

To carry out the state function of wildlife management, the Wyoming game and fish commission was legislatively created, W.S. 23-1-201, with extensive powers and duties, W.S. 23-1-302, including direction of the Wyoming game and fish department created by W.S. 23-1-401. A unique feature of game and fish management is that it is not financed by state appropriated funds, but primarily from hunting and fishing license fees and some federal grants. According to the 1984 Annual Report (Report) of the Wyoming game and fish department, an official publication required by W.S. 23-1-503,<sup>6</sup> the department had income of \$23,393,488.53 of which \$15,730,839.30 was from licenses plus \$540,750 from nonresident big game application fees. Report at 73. Its expenditures were \$16,918,177.33. Report at 71. Wildlife management is a substantial state activity in terms of cost.

Enforcement of game and fish laws is a significant role the state must perform,

6. We take judicial notice of official reports of state departments. *Washakie County School District Number One v. Herschler*, 606 P.2d at 322 n. 16. We selected the 1984 Annual Report for use because it covers the period July 1, 1983, to June 30, 1984, during which appellant was licensed and arrested.

according to the chief game warden in 1984 when he said, "Law Enforcement is an on-going activity of the Division and is an important part of wildlife management." There were 2,642 arrests and fines amounting to \$267,361 in 1983. Report at 12. There is some appropriated fund expense, in that connection, probably not measurable, except by some cost accounting method not to our knowledge undertaken, in that not only Wyoming game and fish department personnel are directed and authorized to arrest violators but also "every Wyoming law enforcement officer is authorized, empowered, and directed to arrest without a warrant, any person found violating any provision of" the game and fish act. W.S. 23-6-101.

[6] As a part of the game and fish scheme of enforcement, guides play an important part. Every guide is required and "shall promptly report to the department or any game warden each violation of this act or order of the commission by any person guided." W.S. 23-2-403. One of the requirements and qualifications of the professional guide is that he have knowledge of the wilderness area, of hunting practices, of big game or guiding practices, and of game and fish laws. It is to be expected that nonresidents in many if not most cases would not have that knowledge and the familiarity to carry on the sport within the wilderness areas of Wyoming in a safe and law-abiding way. The hunter is protected and violations avoided through the guide requirement. It must be recalled that the legislatively stated purposes of requiring guides are "for purposes of proper game management, protection of hunter welfare and safety, or better enforcement of the game [and] fish laws." W.S. 23-2-401(a).<sup>7</sup> It expresses legislative intent.

7. This provision was not in W.S. 23-54 (1957), considered in *Schakel*. W.S. 23-54 (1957), in part:

"A. . . . It shall be unlawful for any person who is not the owner of a resident license or permit lawfully authorizing the same to hunt, pursue or kill, or attempt to hunt, pursue or kill any elk, deer, bear, moose or mountain sheep on any land within any na-

We do not undertake to suggest that out-of-state hunters violate game laws to a greater extent than resident hunters. There is no empirical data available in Wyoming to sustain such a suggestion. The guide requirement is one of passive action to discourage violation of the law, unknowingly or knowingly. In Baldwin, it was observed that Montana has a law making guides responsible for reporting game law violations committed by persons in their hunting parties and that this in a sense makes a guide a surrogate warden and seems to bolster the state's warden force. We thus perceive a rationality and connection with the expressed state objective of better enforcement of the game and fish laws.

*Schakel*, in discussing safety, felt it significant that antelope were not included; that it was as unsafe to hunt antelope as elk. Antelope are now included as a big game animal. W.S. 23-1-101(a)(i), supra note 4. *Schakel* also noted that a wilderness area is by its definition clearly a more dangerous area to one not acquainted with the area.<sup>8</sup> W.S. 23-2-401(a) is now limited

tional forest, national park or national game refuge within the boundaries of the State of Wyoming, any part of which is open to the hunting of deer, elk, moose or mountain sheep at any time during the calendar year in which said hunting is done, unless accompanied by a licensed guide; provided, however, that parties of two or more such persons hunting together need not be accompanied by more than one licensed guide for each two such persons.

"B. \* \* \* No such licensed guide shall be required for not more than two non-residents hunting together when accompanied without compensation or gratuity by a resident of the State of Wyoming who is the owner of a resident big game license and a resident guiding permit. A resident guiding permit shall be issued, without charge and without bond, by the Cheyenne office or by any district supervisor or by any resident deputy game warden of the Wyoming game and fish commission to any resident of Wyoming owning a big game license in effect if and when such resident shall make and file an affidavit stating the names and addresses of not more than two non-resident hunters to be guided, the game to be hunted, the area in which they will hunt, and that such resident has not received nor will accept directly or indirectly any remuneration whatsoever. A resident

to wilderness area. We notice that by W.S. 23-2-402(a)(v) a professional guide must take an examination which may include knowledge of hunting practices. This would include firearm handling and safety while hunting. So we find that hunter welfare and safety is a factor in requiring nonresidents to be accompanied by a guide and perceive it to be a rational legislative objective as stated in the statute.

While the appellant's statement of issues refers only to W.S. 23-2-401(a), we also see the noncompensated resident guide licenses as provided in W.S. 23-2-401(b), supra note 1, as a rational means of proper game management, protection of hunter welfare and safety, and better enforcement of game and fish laws. When the noncompensated resident guide obtains his license to guide a nonresident, he must furnish an affidavit stating the names and addresses of the nonresidents to be guided, the game to be hunted, and the area to be hunted. When the license is issued, the name and license number of the nonresident must be placed on the back of the resident guide

guide shall not guide more than two non-residents in each calendar year regardless of the number of resident guiding permits issued to him in each calendar year."

8. 16 U.S.C.A. § 1131(c) (1985):

"A wilderness, in contrast with those areas where man and his own works dominate the landscape, is hereby recognized as an area where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain. An area of wilderness is further defined to mean in this chapter an area of undeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions and which (1) generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable; (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation; (3) has at least five thousand acres of land or is of sufficient size as to make practicable its preservation and use in an unimpaired condition; and (4) may also contain ecological, geological, or other features of scientific, educational, scenic, or historical value."

license and stamped or signed by the issuer. This makes sense because it furnishes intelligence to the Wyoming game and fish department of who and where the hunters are and what they are hunting. This is an aid to the game warden assigned to that area in patrolling his territory and anticipating hunting pressure in the vicinity. In the event of a reported or suspected violation, it furnishes immediately, locally available investigative sources even after the hunter has left the state. In the event of lost hunters or dangerous high country storms, it permits a better check on the safety of hunters or rescue efforts if that should be required. We discern that keeping track of hunters is an important aspect of game management, hunter welfare and safety, and enforcement. There are undoubtedly difficulties of supervision of hunting in the wilderness area where every attempt is made to keep the surrounding and large expanses of land and timber in a primitive state.

Perhaps there are some nonresident hunters who are fully capable of looking out for themselves in particular areas and pose no problem to enforcement, but it is reasonable to conclude and more likely that they should have help. Baldwin points out that a statutory classification impinging upon no fundamental interest need not be drawn so as to fit with precision the legitimate purposes animating it. That a statute might have furthered its underlying purpose more artfully, more directly, or more completely does not warrant a conclusion that the method it chose is unconstitutional.

Appellant has not carried his burden of establishing irrationality of one of the means chosen by the state to carry on the business of game management for its citizens and citizens of other states within its boundaries. We hold W.S. 23-2-401 constitutional in not violating the equal protection provisions of the federal and state constitutions.

9. 16 U.S.C.A. § 1133(d)(7) (1985):

II

[7] Article IV, § 2, United States Constitution, provides that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." Section 1 of the Fourteenth Amendment of the Constitution is somewhat repetitive of that declaration of right and states that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; \* \* \* nor deny to any person within its jurisdiction the equal protection of the laws." We need not concern ourselves with any fine distinctions that may exist between the language of Art. IV, § 2 and that in the Fourteenth Amendment with respect to privileges and immunities. We are here dealing with the privileges and immunities of citizens of the state of Wyoming to the extent they may apply to the citizen of another state—Minnesota—temporarily in the state of Wyoming to engage in the recreational sport of big game hunting for elk in a wilderness area. Under such circumstances we must examine Art. IV, § 2 and decide under those facts and circumstances whether the questioned activity of the state is prohibited. There is no comparable or parallel provision in the Wyoming Constitution except that "[t]he State of Wyoming is an inseparable part of the federal union, and the constitution of the United States is the supreme law of the land." Article 1, § 37, Wyoming Constitution.

Appellant, as a resident of Minnesota, claims that W.S. 23-2-401(a), supra note 1, violates the Privileges and Immunities Clause of the United States Constitution in that appellant, as a nonresident, has been afforded access to a federal wilderness area on a different basis than residents of the state of Wyoming. Appellant, however, agrees that the National Wilderness Preservation System does not interfere with the jurisdiction of states over wildlife and fish.<sup>9</sup>

"Nothing in this chapter shall be construed as affecting the jurisdiction or responsibilities of

*Baldwin* summarizes some situations in which state citizenship or residency can be used to distinguish among persons:

" \* \* Suffrage, for example, always has been understood to be tied to an individual's identification with a particular State. [Citation.] No one would suggest that the Privileges and Immunities Clause requires a State to open its polls to a person who declines to assert that the State is the only one where he claims a right to vote. The same is true as to qualification for an elective office of the State. [Citations.] Nor must a State always apply all its laws or all its services equally to anyone, resident or nonresident, who may request it so to do. [Citations.] Some distinctions between residents and nonresidents merely reflect the fact that this is a Nation composed of individual States, and are permitted; other distinctions are prohibited because they hinder the formation, the purpose, or the development of a single Union of those States. Only with respect to those 'privileges' and 'immunities' bearing upon the vitality of the Nation as a single entity must the State treat all citizens, resident and nonresident, equally. Here we must decide into which category falls a distinction with respect to access to recreational big-game hunting." *Baldwin*, 98 S.Ct. at 1860.

We have in Part I of this opinion placed weight on the ownership in trust of the state's wildlife. However, that position must yield when without reason it interferes with a nonresident's right to pursue a livelihood in a state other than his own. That right is protected by the Privileges and Immunities Clause. Such a case is *Toomer v. Witsell*, 334 U.S. 385, 69 S.Ct. 1156, 92 L.Ed. 1460 (1948), upon which appellant relies. In that instance the Court struck down a South Carolina statute requiring nonresidents of South Carolina to pay a license fee of \$2,500 for each com-

mercial shrimp boat and residents to pay a fee of only \$25 on the ground that it violated the Privileges and Immunities Clause. Other burdens were also placed on nonresidents such as requiring proof before issuance of an annual license that they had paid South Carolina income taxes on profits from operations the preceding year and requiring boats licensed to travel for shrimp in the state's waters to dock at a South Carolina port and unload, park and stamp their catch before transporting to another state or waters thereof. Violations entailed suspension of the violator's license. The Court held that commercial fishing like other common callings is within the purview of the Privileges and Immunities Clause. The key word is commercial which translates into livelihood and distinguishes it from recreational fishing and hunting.<sup>10</sup> When a statute interferes with the right to make a living (pursue a common calling) by a nonresident, then a fundamental right is involved, and we apply a different test than when the right to engage in recreation is involved.

The district judge relied on *State v. Antonich*, Wyo., 694 P.2d 60 (1985), and applied the test there set out when analyzing a privileges and immunities claim. First the court must ascertain whether a statute burdens a fundamental right or activity since only those privileges and immunities bearing upon the concept of interstate harmony fall within the scope and purpose of the clause. Second, the court must examine the reasons for the discriminatory treatment to determine their validity and their relation to the degree of discrimination imposed by the statute. The district court, then sitting as an appellate court, determined that in the light of *Baldwin* no fundamental right was involved in that hunting is a recreational sport and not a fundamental right. In such cases the Privileges and Immunities Clause did not come into play, and there was no constitutional viola-

the several States with respect to wildlife and fish in the national forests."

10. *Toomer v. Witsell* explains that the ownership theory is really but a fiction expressive in legal

shorthand of the importance to its people that a state have power to preserve and regulate the exploitation of an important resource.

tion in that regard. We agree with the thorough analysis of the district judge.

A most recent case in this Court, *Powell v. Daily*, supra, where the issue was whether W.S. 23-2-402(a)(ii), requiring a professional guide, amongst the other statutory qualifications, to have been a resident of Wyoming for a period of one year, was prohibited by the Privileges and Immunities Clause. It was held that such a requirement restricts the right of an Idaho resident to pursue a means of livelihood, and pursuing a common calling, plying a trade and doing business in another state are fundamental rights protected by the Privileges and Immunities Clause. W.S. 23-2-402(a) does specifically refer to the professional guide as being "in the business of guiding." *Powell* is a nonresident livelihood case in a fundamental right category while the nonresident hunter who is in Wyoming seeking recreation and pursuing a sport does not possess such a protected right. There is no conflict between *Powell* and the case we now have at hand. *Powell* deals with statutes from the point of view of the professional guide with a livelihood at stake—a fundamental right. We here deal with the hunter who has no fundamental right at stake. Our holding must necessarily take a different, less serious slant, accordingly. Where fundamental rights are involved, the test is entirely different and more stringent. *Schakel* was not a livelihood case but a hunter case. The complexion of the *Schakel* case has been completely changed by *Baldwin* and statutory amendment. The references in *Powell* to the *Schakel* case are not applicable to the hunter case we have here.

### III

[8] The Supremacy Clause of the Constitution of the United States is found in the second clause of Art. VI:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the

Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

The appellant claims that the requirement that he employ a guide to accompany him into a federal wilderness, in which he has a valid license to hunt, burdens his right of access guaranteed him by the National Wilderness Preservation System. His claim is broadened to a charge that the guide law is inconsistent with the objectives of the National Wilderness Preservation System in that there is a limitation to his access as a licensed hunter when he has no need for a guide. Appellant concludes that the federal legislation and regulations preempt the professional guide requirement of W.S. 23-2-401(a).

The argument is most difficult to follow in the face of a specific provision, 16 U.S.C.A. § 1133(c)(7), supra note 9, stating that nothing in the chapter is to be construed as affecting the jurisdiction or responsibilities of the several states with respect to wildlife and fish in the national forests. A further provision, 16 U.S.C.A. § 1133(d)(5) (1985) states that "[c]ommercial services may be performed within the wilderness areas designated by this chapter to the extent necessary for activities which are proper for realizing the recreational or other wilderness purposes of the areas." Professional guiding is a commercial service in that such guides are compensated for their work. We have held that the use of such guides is a rational requirement of the statute requiring nonresidents to be accompanied by a licensed guide when hunting big game. This is consistent with the responsibility of the state of Wyoming with respect to wildlife.

The supplemental applicable Code of Federal Regulations, 36 CFR 293.8, specifically authorizes commercial services "to the extent necessary for realizing the recreational or other wilderness purposes, which may include, but are not limited to, the public services generally offered by packers, outfitters, and guides."

From the clear language of the National Wilderness Preservation System and regulations, we can find neither prohibition nor inconsistency but in fact find specific authority. W.S. 23-2-401(a) does not violate the Supremacy Clause of the Constitution of the United States.

Affirmed.

CARDINE, Justice, dissenting.

I dissent.

I would hold that § 23-2-401, W.S.1977, violates the Equal Protection Clause of the Fourteenth Amendment and is unconstitutional. It has no rational relationship to the objectives it seeks to promote. This result is consistent with our holding in *Schakel v. State*, Wyo., 513 P.2d 412 (1973).

The majority opinion reaches a result different from *Schakel* (which held the predecessor of § 23-2-401—§ 23-54—unconstitutional) because of the amendment of the statute and because of the holding in *Baldwin v. Fish and Game Commission of Montana*, 436 U.S. 371, 98 S.Ct. 1852, 56 L.Ed.2d 354 (1978). *Baldwin* merely makes clear that only a low level of constitutional scrutiny need be applied because hunting is not a fundamental right; *Baldwin* does not alter our scrutiny of this statute from that applied in *Schakel*. *Schakel* spoke of a "reasonable and appropriate" means, which is a low level of scrutiny. It is the same requirement applied in the majority opinion.

I cannot find that the statute under attack, § 23-2-401, is a rational means to accomplish legitimate state ends. The ends sought are set forth in § 23-2-401(a) as proper game management, protection of hunters, and better enforcement of the game and fish laws. All of these are legitimate ends. The problem is whether a statute, which classifies on the basis of residence and requires only nonresidents to be accompanied by a guide in wilderness areas, is a rational means to accomplish these ends.

I inquire first whether the statute is rationally related to the objective of enforcing the game laws. It is true that guides must know the game laws and report violations. It is also likely that nonresident hunters do not have the same knowledge and are less likely to hunt in a safe and law-abiding manner without guides. The question, however, is whether the classification, which does not require a resident to have a guide, is rationally related to the objective. The court's opinion states that it is not suggested "that out-of-state hunters violate game laws to any greater extent than resident hunters." If nonresidents are no more likely to violate game laws than residents, a statute which classifies by residency has no rational relationship to the objective of enforcing game laws.

The next inquiry is whether the statute is rationally related to the goal of promoting hunter safety. Unlike the statute attacked in *Schakel v. State*, supra, this amended statute requires that a nonresident have a guide when hunting any big game animal in wilderness areas.

I cannot reconcile *Schakel* with the majority opinion. *Schakel* attacked the statute in question, § 23-54, W.S.1957 quoted on pages 7-8 of the opinion, as having little if any relationship to promoting hunter safety. One reason for the attack was that nonresident antelope hunters were not required to have a guide. The statute in this case does not require nonresident small game hunters or fisherman to have a guide. It would seem that nonresident small game hunters and fishermen are as likely to lose their way in a wilderness area as are big game hunters. And, if the potential problem is the handling of firearms, there is nothing to suggest that nonresidents are any more likely to mishandle their firearms than are residents.

*Schakel* also held that § 23-54 had little to do with safety because it provided that a resident, without qualifications, could guide up to two nonresident hunters if he did so without compensation and after filing an affidavit with the Game and Fish Commission. A very similar provision is now

found in § 23-2-401(b), W.S.1977. Schakel stated that this provision was "impossible to reconcile with the theory of safety unless one indulges in the violent presumption that mere residence in this State makes a competent, knowing guide . . ." If an affidavit will suffice to qualify a guide, why cannot a nonresident supply the Game and Fish Commission with the same information as a resident and qualify? The reason he cannot can only be understood by indulging in "the violent presumption" referred to in Schakel.

Schakel also questioned the provision of § 23-54 which permitted the uncompensated resident guide to guide no more than two nonresidents in any calendar year. This same provision is found in § 23-2-401(b). There is no apparent reason why, after guiding two nonresidents, the uncom-

pensated guide becomes a threat to hunter safety and can guide no more. The provision suggests that the statute seeks objectives other than hunter safety.

Finally, in the absence of any evidence that nonresidents have a different effect on the game population than do residents, I fail to see how the statute rationally relates to the objective of proper game management.

I believe that even with the lowest level of scrutiny this statute should be held unconstitutional.



*State, Wyo.*, 483 P.2d 519 (1971), which involved the same statutes and contention. The same question was raised earlier this term in the case of *Binger v. State, Wyo.*, 712 P.2d 349 (1986). Appellant in that case relied upon the same authorities as here argued and which this Court rejected. Disposal of this case is governed by the two before-mentioned cases.

Affirmed.



Calvin POWELL, Petitioner (Plaintiff),

v.

O.R. "Bud" DAILY, Frances Osborn, Ed P. Moriarity, Gene Harriet, Alice Hays, Denzel L. Coffey, and Dennis Daly, constituting the Wyoming Game and Fish Commission; and W. Donald Dexter, Director of the Wyoming Game and Fish Department, Respondents (Defendants).

No. 85-81.

Supreme Court of Wyoming.

Jan. 8, 1986.

Idaho resident filed an action for a declaration that residency requirement of Wyoming statute governing game and fish guide licenses was unconstitutional. The District Court, Laramie County, Joseph F. Maier, J., certified the constitutional issue. The Supreme Court, Rose, J. (Retired), held that, Wyoming statute, requiring applicant for game and fish guide license to be a resident of Wyoming for a period of one year, burdened a fundamental right with a degree of discrimination which did not bear a close relation to any of the state's asserted reasons for the discriminatory treatment and, thus, violated the privileges and immunities clause of the Federal Constitution.

Question answered, and case remanded.

Rooney, J., with whom Brown, J., joined, filed a dissenting opinion.

#### 1. Constitutional Law ⇨207(2)

Pursuing a common calling, plying a trade, and doing business in another state are "privileges" protected by the privileges and immunities clause of the Federal Constitution. U.S.C.A. Const. Art. 4, § 2, cl. 1.

See publication Words and Phrases for other judicial constructions and definitions.

#### 2. Constitutional Law ⇨207(2)

Guiding hunters and fishermen in Wyoming, for which guide license was required by W.S. 1977, § 23-2-402(a)(iii), was a "business" and, thus, a fundamental right protected by the privileges and immunities clause of the Federal Constitution. U.S.C.A. Const. Art. 4, § 2, cl. 1.

See publication Words and Phrases for other judicial constructions and definitions.

#### 3. Game ⇨4

State's duty or right to use wildlife resources for benefit of its people does not mean that laws enacted in connection with those resources are free from constitutional scrutiny.

#### 4. Constitutional Law ⇨207(2)

Fish ⇨9

Game ⇨4

W.S. 1977, § 23-2-402(a)(iii), requiring applicant for game and fish guide license to be a resident of Wyoming for a period of one year, burdened a fundamental right with a degree of discrimination which did not bear a close relation to any of the state's asserted reasons for the discriminatory treatment and, thus, violated the privileges and immunities clause of the Federal Constitution. U.S.C.A. Const. Art. 4, § 2, cl. 1.

John B. Rogers, Cheyenne, for petitioner.  
A.G. McClintock, Atty. Gen., Lawrence J. Wolfe, Sr. Asst. Atty. Gen., and Marion