

ALASKA LEGISLATURE COMMITTEE FILES 1987-1988 8672
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STATE OF ALASKA

AUDIT DIVISION
POUCH W
JUNEAU, ALASKA 99811

THE LEGISLATURE

BUDGET AND AUDIT COMMITTEE

November 22, 1985

Members of the Legislative Budget
and Audit Committee:

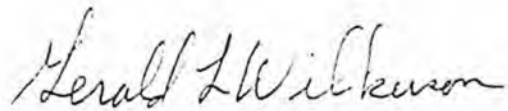
In accordance with the provisions of Titles 24 and 44 of the
Alaska Statutes (sunset legislation), the attached report is
submitted for your review.

A PERFORMANCE REPORT ON THE DEPARTMENT OF COMMERCE AND ECONOMIC DEVELOPMENT GUIDE LICENSING AND CONTROL BOARD

November 21, 1985

Audit Control Number

08-1253-86-R



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

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PURPOSE AND SCOPE OF THE REPORT

Purpose

In accordance with the intent of Titles 24 and 44 of the Alaska Statutes (sunset legislation), we have reviewed the activities of the Guide Licensing and Control Board for the past four fiscal years. Our examination was conducted to determine if the Board has been operating in an efficient and effective manner.

Legislative intent requires consideration of this report during legislative oversight hearings to determine whether the Guide Licensing and Control Board should be reestablished. The law now specifies that the Board will terminate June 30, 1986 and will have one year from that date to conclude its affairs.

Scope

The major areas of our examination were the licensing, examination, administration, complaint, and affirmative action functions of the Board. We reviewed and evaluated the following:

1. Applicable statutes and regulations.
2. Interviews with the license examiners.
3. Tests of files and documents of licensees.
4. Complaints filed with the Division of Occupational Licensing, Human Rights Commission, Equal Employment Opportunity Office, Attorney General's Office, and the Ombudsman Office.
5. Discussions with Board members.
6. Minutes of Board meetings and Division correspondence files.
7. Attorney General Opinions applicable to professional boards.

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ORGANIZATION AND FUNCTION

The Guide Licensing and Control Board was established by the 1973 Legislature and succeeded the Board of Fish and Game, Department of Fish and Game, which previously had regulated the guiding industry. The seven member Board is appointed by the Governor with confirmation by the Legislature and is restricted to having no more than three members as licensed guides. Board members serve staggered terms of three years or until their successors are appointed.

The Board is organized under the Department of Commerce and Economic Development, Division of Occupational Licensing. The Division assists the Board in the performance of their duties by providing administrative, licensure, and investigative support.

By law, a nonresident may not hunt, pursue, or take brown bear, grizzly bear, polar bear, or sheep in Alaska unless personally accompanied by a licensed master, registered, or assistant guide. Nonresidents hunting with an Alaskan relative are exempt from this requirement. The Guide Licensing and Control Board was appointed in part to protect these nonresident hunters from incompetent individuals holding themselves out to be qualified Alaskan guides.

The function of the Board is primarily regulatory, mandated by AS 08.54.040. Accordingly, the Board has the capacity to administer examinations, determine qualifications of guides, establish performance standards and regulate activities, maintain guide registers, prohibit harmful guiding activities, conduct hearings regarding licensure, and establish quotas of guides for specified geographical areas (exclusive guiding areas). The Board, through the assignment of exclusive guiding areas, limits hunting pressure by guides within a specific geographical area.

In addition, the Board licenses "transporters"; a licensed "transporter" is a person who transports hunters for hire.

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REPORT CONCLUSION

Policy Issues

This report contains policy issues raised as a result of our evaluation of various Board practices. The final policy decisions affecting these practices are not within the scope of this report but require legislative consideration. In debating these issues, the oversight committees should take into consideration the findings and recommendations presented in this report so the potential impact of policy changes can be evaluated.

Report Conclusion

In our opinion, the Guide Licensing and Control Board should be reestablished. The regulation and licensing of qualified guides is necessary to protect the public's health, safety, and welfare. The Board provides this service by establishing minimum qualification and experience requirements that provide reasonable assurance that persons licensed are both capable of safely conducting guided hunts and familiar with their prospective guiding areas. Assurance that those licensed act in a competent manner is also provided by active investigation of complaints and revocation or suspension of licenses where appropriate.

However, the following findings describe areas where weaknesses or conflicts exist. We have made recommendations which, if implemented, will improve the efficiency and effectiveness of the Board.

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FINDINGS AND RECOMMENDATIONS

Recommendation No. 1

The Guide Licensing and Control Board (GLCB) should develop a prioritized set of criteria to use in assigning both exclusive and joint-use guiding areas (EGAs).

Alaska Statute 08.54.040(a)(8) allows GLCB to:

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

GLCB has implemented this provision through the establishment of both exclusive and joint-use guide areas (EGAs), which limit the number of guides who can conduct hunts in various regions of the State. The GLCB's authority to assign EGAs is supported by an April 1977 Attorney General memorandum which determined that GLCB's regulations and activities implementing exclusive guiding areas were within their statutory powers.

This limitation on the practice of guiding ostensibly provides public benefits by providing for better game management; promotion and enforcement of ethical guiding practices; enhancing the "wilderness" aspect of big game hunting experience by separating guided hunting parties; and allows for the separation of non-compatible forms of hunting. The limits are also designed to provide for a greater degree of safety to the guided hunter by allowing guides to become familiar with the terrain and seasonal weather conditions of their assigned area.

GLCB does not act consistently when considering the assignment of exclusive and joint-use guiding areas. The criteria on which any given area assignment decision is made varies from decision to decision. Additionally, GLCB often does not adequately document the basis on which they make their assignments. We found inconsistencies and contradictions in the way that GLCB applied the following criteria when awarding EGAs:

1. Game Management Information - GLCB does not consistently review game management information in their area assignment decisions. What game information they do consider usually is second hand and anecdotal, provided by applicants or current users (see Recommendation No. 2).

2. Demonstration of Experience - When applying for an EGA, applicants must demonstrate that they have had guiding experience in the applicable game unit. Guides demonstrate their experience through the submittal to GLCB of a Statement of Financial Remuneration (SFR) for each guided hunt. SFRs list the names of hunters, guides assisting in the hunt, game units hunted, and the type of game taken.

Under the Board's regulations, SFRs are the primary evidence of a guide's activity and familiarity with the game unit involved. However, we found instances where the Board awarded EGAs to guides with no SFRs in the appropriate game unit, while denying other EGA applicants because they had no SFRs on file demonstrating their experience or activity.

3. Transfers of guiding areas - GLCB has been essentially approving transfers of guiding areas with little or no consideration of any other criteria such as game management, objections of joint users, or experience of the guide receiving the transferred area (see Recommendation No. 3).

This inconsistency on the part of GLCB in its decision-making, along with the lack of proper documentation of its rationale, ultimately results in a loss of effective control over the activities and policy of the guiding industry.

During the past four years, hearing officers have repeatedly found Board decisions to be arbitrary and capricious with little or no support. In effect, the Board has abdicated much of its control over area assignments through its inconsistent application of criteria. Hearing officer decisions are beginning to effectively replace GLCB in setting quotas for guides. Essentially, GLCB has not fully met its statutory responsibility to adopt an equitable and reasonable procedure for the assignment of guide areas.

We believe GLCB's responsibility would be better met by identifying pertinent criteria to be used in area assignment decisions, assigning some priorities to those criteria, and applying them consistently.

Recommendation No. 2

GLCB should improve methods of obtaining game management information from independent sources, such as the Alaska Department of Fish and Game (ADFG).

One of the primary justifications for the whole concept of EGAs is to enhance overall management of the public's game resources. Guides are awarded exclusive or joint-use areas so that they have a long-term interest in managing the game

in their EGA. GLCB has adopted regulations [12 AAC 38.053(d) (1)] that require it to consider an area's ability "... to sustain an additional guided hunting operation, in terms of game populations, terrain, methods of hunting, and use by other guides and hunters."

As stated in Recommendation No. 1, we found that GLCB rarely considers independent information regarding game populations and management concerns when assigning EGAs. GLCB relies on information provided by applicants and guides operating in the region under consideration. Certainly, the assessment of an active registered guide is important and should be considered. However, whether coming from an applicant or current user, it must be recognized that the guide has a vested interest in how the information is presented and interpreted.

Oftentimes, information presented to the Board is conflicting, depending on the desire of the guide. New applicants for areas claim game is plentiful, and the area is underutilized. Current users, on the other hand, emphasize game scarcity and hunting pressures.

If GLCB established better, more formal communications with ADFG they would better meet their regulatory and statutory obligation to enhance the management of the State's game resources. ADFG information may be no better than that of guides; however, it is more independent and more objectively developed. ADFG is charged with management of the State's game resources, and guided, non-resident hunters take up to an estimated 40% of the game in the State. We believe GLCB should attempt to improve communications and coordination with ADFG while taking steps to include their assessment of game populations and hunting pressures when considering assignment of EGAs.

Recommendation No. 3

GLCB should take more responsibility for area assignments by repealing regulations that allow a guide to designate to whom his EGA be reassigned.

Registered and master guides may each have a maximum of three EGAs. Typically, when a guide wishes to retire or perhaps become eligible for another, different EGA, he is allowed to turn back an existing EGA to the Board and designate the recipient of this reassignment. GLCB regulations currently allow, but do not necessarily require, this practice.

We found that these designated transfers override all other area assignment criteria. Essentially, GLCB has been automatically approving transfers of EGAs regardless of game management considerations, demonstration of experience

in the area by the transferee, and over the objections of affected joint users. Whereas GLCB evaluates, albeit inconsistently, regular area assignments, our review indicated they gave transfers much less scrutiny.

We believe that this lack of scrutiny encourages the practice of guides selling their EGAs to other guides in violation of GLCB regulations. With the Board giving little review to transfers, they greatly increase the potential of EGAs being awarded based solely on economic consideration; i.e., can the designated recipient afford to buy the area from its holder? This potential abuse is contrary to GLCB's statutory responsibility of establishing quotas for guide areas in an equitable and reasonable manner. We feel that all qualified guides for the area should receive equal chance at receiving an EGA, regardless of their ability to "buy" the rights from the previous holder.

By not adequately reviewing transfers of guide areas, the GLCB is missing an opportunity to achieve one of its stated policy goals. In the Board's FY 85 annual report, they state one of their policy objectives is to not allow additional joint use in areas that already have enough guides operating.

We feel that it would be better if the EGAs were surrendered to the Board; the Board review pertinent and prioritized criteria to determine if the region would support one or more additional guide operations; then consider all applications for the area under a equitable and reasonable method of allocation. Such a method could take into consideration unique qualifications such as a son or daughter who had worked as an assistant to their father, or perhaps a registered guide, who had "apprenticed" in the region under the surrendering EGA holder and accordingly, is more knowledgeable of the area than other applicants. By following such a procedure the Board would promote compliance with its own regulation restricting the transfer of guiding area permits.

Recommendation No. 4

GLCB should adopt procedures to improve the administration of the oral portion of the registered guide examination.

The oral portion of the registered guide examination is arbitrary and inconsistent in content and grading. This is because the examination content and grading guidelines are left to the discretion of the individual examiners.

To qualify for licensure as a registered guide, an applicant must successfully pass the registered guide examination. This examination, which is prepared and administered by GLCB, is composed of two parts, a written and an oral section. Passage of the examination requires the applicant to obtain a score of 80% on both sections.

GLCB procedures require the oral portion of the registered guide examination to be administered by three examiners, consisting of a Board member and two master guides. Questions asked by the examiners are based on an oral exam sheet, which does not limit examiners to specific questions nor does it provide predetermined question grading values.

This allows individual examiners to emphasize whatever subject areas they wish in the questioning of applicants. Despite the lack of specific grading criteria on which to base examination scores, instances were noted in which applicants narrowly failed exams by combined examiner scores as high as 79%.

The inconsistency of exam content and grading is demonstrated by the following example. In February 1985, an applicant failed the oral portion of the examination. The reason for failure noted by the examiners was that the applicant needed more hunting experience in the field. Examiners recommended the applicant obtain specific area experience along with spring, late fall, and winter experience. One month later, the applicant took the oral examination again, and was passed by an examination committee made up of three different examiners.

GLCB appears to have demonstrated its own doubts regarding the validity of oral examination results. GLCB's regulation 12 AAC 38.010(c), states the failure to achieve a passing score on either section of the examination constitutes failure of the entire examination. However, on several occasions, after having been petitioned by applicants who passed the written portion of the exam while failing the oral portion, the Board waived the requirement that the written portion of the examination be retaken.

The lack of specific guidelines dictating the objective administration of the oral portion of the registered guide examination has resulted in inconsistent content and grading between individual examinations. The likelihood of exam passage is as much affected by who the examiners are and their individual judgement as it is by the knowledge and competence of the applicant.

Structured guidelines governing the administration of the oral portion of the registered guide examination should be implemented by GLCB. These guidelines need to provide examiners with specific directions as to examination questions to be asked and their assigned grading values. If implemented, structured guidelines will provide a more objective means of administering the examination. This will provide the Board with more of a fair and consistent test of applicant competence.

Recommendation No. 5

GLCB should seek both statutory and regulatory changes in order to improve the protection of the public from unethical guiding practices.

One of the primary purposes of licensing and regulating guides is to protect the public from unethical guiding practices. We identified regulations and statutes that serve to block effective consumer protection action on the part of GLCB and serves to protect guides at the expense of the public. We recommend that GLCB enhance its consumer protection responsibilities by taking the following actions:

- A. Pursue amendment of statutes that limit GLCB's authority to discipline guides for unethical activity.
- B. Adopt regulations and/or recommend legislation to require guides to post performance bonds.

Statutory Constraints to Effective Disciplinary Action

Alaska Statute 08.54.200(a)(1) does not allow the Board to consider complaints of unethical or incompetent guiding practices until receiving complaints from "... three or more clients [hunters] of separate [hunting] parties."

In the course of our review we found four instances where guides had two allegations of unethical guiding activity, as defined by GLCB's regulations, but still had not been brought before the Board for review. Law enforcement officials told us that the statute requiring three separate complaints was particularly onerous for effective resolution of consumer complaints. Law enforcement officials are put in the position of consumer ombudsman, trying to mediate and negotiate settlements of hunter-and-guide or guide-and-guide disputes.

GLCB's effectiveness and visibility would be enhanced if all allegations regarding unethical guide practices was brought to it for review on a case-by-case basis. It appears that the intent of the statute was to keep down the number of frivolous and unfounded complaints against guides. Other professional licensing boards listen to, and sort through, all cases and complaints, no matter how trivial, as a means of keeping apprised of the conduct of their licensees. We recommend that GLCB begin doing the same.

Bonding of Guides

Almost all hunters who use guiding services are non-residents, a large number from outside of the United States. As a result, when disputes arise between guides and hunters it is often very difficult and expensive for the complaining

hunter to seek legal remedies or implement administrative action. This difficulty is compounded by the three complaint requirement of the statutes discussed previously.

In the course of our review, we noted four cases where a non-resident hunter and guide were disputing the refundability of a deposit. One example, two out-of-state hunters sent in deposits of \$2,500 six months in advance of a hunt. Just prior to their departure for Alaska, the guide notified them that he would have to cancel their hunt. He offered to apply their deposits to a hunt the next year, but the hunters decided they wanted a refund. The guide did not respond to requests, and due to the statutory three complaint requirement, law enforcement officials were not able to bring the dispute before GLCB. The two hunters retained a Fairbanks attorney to pursue legal remedies, but soon abandoned the effort due to costs of litigation.

We recommend that GLCB pursue the necessary statutory and regulatory changes that would implement a mandatory requirement that guides post performance bonds. Performance bonds would allow hunters with legitimate grievances and claims against guides an easier, less expensive alternative in obtaining settlement of their claims. Guiding is a large industry in the State. It is important that GLCB do all it can to maintain the integrity of the guiding industry and uphold the reputation of the Alaskan guides with hunters outside of the State. The Board should recognize the unique type of consumer for guide services and take steps to adequately protect the interest of the out-of-state hunter/consumer.

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ANALYSIS OF PUBLIC NEED

Limited Analysis

The following analyses indicate both positive and negative factors as they relate to the public need as defined in the "sunset" law. These analyses are not intended to be comprehensive, but to address those areas we were able to cover during our review.

- I. The extent to which the board, commission, or program has operated in the public interest.
 - A. The Board has adopted regulations defining unethical conduct which clarify and strengthen the professional's responsibility to the public.
 - B. The Board does not consistently review the Department of Fish and Game game management information prior to assignment or transfer of an exclusive guiding area (EGA) (see Recommendation No. 1).

- II. The extent to which the operation of the board, commission, or agency program has been impeded or enhanced by existing statutes, procedures, and practices which it has adopted, and any other matter, including budgetary, resource, and personnel matters.
 - A. Regulation 12 AAC 38.054(b) allows an EGA permit holder to designate the qualified guide to whom he wishes to transfer his guide area. These transfers often take precedence over other guide area assignment criteria such as joint user objections, experience in the game unit, or game management considerations (see Recommendation No. 3).
 - B. Alaska Statute 08.54.200(a)(1) does not allow the Board to consider complaints of unethical or incompetent guiding practices until receiving complaints from three or more clients of separate parties regardless of the potential magnitude of the unethical act (see Recommendation No. 5).

- III. The extent to which the board, commission, or agency has recommended statutory changes which are generally of benefit to the public interest.
 - A. Senate Bill No. 294, which was introduced in April 1985 by the Resources Committee, contains the following items which should enhance public protection if ratified:

1. An amendment to AS 08.54.010 would increase game management considerations in regulating guide activities (see Recommendation No. 2).
 2. An amendment to AS 08.54.040 and a proposed new section (AS 08.54.195) would require consistency in procedures used in allocating EGAs (see Recommendation No. 1).
 3. New sections would require those guides that contract with more than one client at a time (an outfitter) to maintain a surety bond of \$5,000 (see Recommendation No. 5).
 4. The bill would require closer supervision over assistant guides while in the field.
 5. Unethical activities would be amended to include unsafe or unsportsmanlike actions that are detrimental to the game resources of the State.
 6. Statutes dictating qualifications for, and restrictions on, transporters would be repealed. Many of the services now being provided by transporters would be subject to the proposed outfitter statutes contained in this bill.
- B. Additional portions of SB 294 which do not appear to us to be in the public's best interest are as follows:
1. Current law limits the number of Board members that have guide licenses to no more than three of the seven members. SB 294's amendment of AS 08.54.010 would require that at least three Board members be active guides. This amendment would increase the potential for expanding the number of industry members on the Board at the expense of public participation.
 2. Currently, AS 08.54.200(a)(1) does not allow the Board to consider complaints of unethical or incompetent guiding practices until receiving complaints from three or more hunters of separate parties. SB 294 contains an amendment of this statute which would require that these complaints be received within five years prior to the hearing date. This would compound those problems outlined in Recommendation No. 5.

3. Currently, AS 08.54.210(a)(6) makes it unlawful for a master or registered guide to employ or supervise more than three assistant guides at the same time.

SB 294 would repeal this statute and could allow a master or registered guide to employ more assistants than they are capable of effectively supervising. The experience and professional judgement of the master or registered guide may not be available to clients when needed.

Alaska Statute 08.54.141 of this bill also provides that assistant guides shall be supervised at all times while in the field on guided hunts. The potential problem noted above will depend on enactment of this new section and on the Board's interpretation of the term "supervised."

4. Enactment of amendments to AS 08.54.200(c)(3) may unnecessarily restrict those hunting statutes or regulations upon which the Board can take disciplinary action.

IV. The extent to which the board, commission, or agency has encouraged interested persons to report to it concerning the effect of its regulations and decisions on the effectiveness of service, economy of service, and availability of service which it has provided.

- A. The public is invited to attend Board meetings and to give their input about the workings of the Board. Notices of meetings are advertised in at least five newspapers throughout the State. In addition, guides are notified by registered mail of meetings that might affect them.
- B. Publication of meeting information does not always precede the meeting by a reasonable time period. We found that the public was given less than a one week notice for two of the last eleven Board meetings.
- C. Teleconference meetings are not being noticed publicly. This limits public input at those meetings and may legally jeopardize Board decisions and actions.

V. The extent to which the board, commission, or agency has encouraged public participation in the making of its regulations and decisions.

- A. As stated under IV, the public is invited, by published notices in newspapers, to attend Board meetings to give their input about Board regulations or submit written testimony.
- B. Those problems noted in IV B and C above also represent potential problems in this public need area.

VI. The efficiency with which public inquiries or complaints regarding the activities of the board, commission, or agency filed with it, with the department to which a board or commission is administratively assigned, or with the Office of the Ombudsman have been processed and resolved.

- A. Since July 1983, ten complaints have been filed with the Ombudsman's Office concerning Board activity. Only one of these complaints, alleging improper denial of a registered guide license, was found to be justified.
- B. Since August 1984, 19 complaints against guides have been submitted to the Department of Commerce and Economic Development, Division of Occupational Licensing for investigation. These cases appear to have been investigated in a reasonable fashion and are pending Board action or court rulings.
- C. As mentioned in III above and in Recommendation No. 5, AS 08.54.200(a)(1) does not allow the Board to consider complaints of unethical or incompetent guiding practices until receiving complaints from three or more hunters of separate parties.

VII. The extent to which a board or commission which regulates entry into an occupation or profession has presented qualified applicants to serve the public.

- A. As of September 1985, 46 master guides and 361 registered guides were licensed in Alaska. These individuals were required to pass both a written and an oral exam, as well as obtaining practical experience in the field, prior to licensure.
- B. The oral portion of the registered guide examination is arbitrary and inconsistent in content and grading. This is because the examination content and grading guidelines are left to the discretion of the individual examiners (see Recommendation No. 4).

VIII. The extent to which State personnel practices, including affirmative action requirements, have been complied with by the board, commission, or agency to its own activities and the area of activity of interest.

A. The Board established 12 AAC 38.010(c) whereby an applicant for licensure who:

because of a language barrier, is unable to read and competently understand the English language may be excused from taking the written examination, and may be issued a license based on successful completion of the oral portion of the examination and demonstration of his capabilities and experience.

B. Regulations also provide that when assigning guide area permits,

the board will give preference to qualifying guides whose permanent residence is within the district in which the area is located.

IX. The extent to which statutory, regulatory, budgeting, or other changes are necessary to enable the agency, board, or commission to better serve the interests of the public and to comply with the factors enumerated in this subsection.

Please refer to the previous section, Findings and Recommendations.

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APPENDIX A

GUIDE LICENSING AND CONTROL BOARD
REVENUES COMPARED WITH EXPENDITURES

June 30, 1985

(UNAUDITED)

(Note 1)

| | <u>FY 83</u> | <u>FY 84</u> | <u>85</u> |
|---|-----------------|-----------------|-----------------|
| Revenues (Schedule 1, Note 2, | \$46,000 | \$53,735 | \$88,673 |
| Expenditures (Note 3) | <u>21,663</u> | <u>13,483</u> | <u>11,777</u> |
| Excess of Revenues over Expenditures | <u>\$24,337</u> | <u>\$40,252</u> | <u>\$76,901</u> |

Schedule 1
Types of Revenues
(Note 4)

| <u>Revenues</u> | <u>Amount</u> | <u>Collection Time</u> |
|--|---------------|------------------------|
| Master Guide License | \$150 | Biennially |
| Registered Guide License | 150 | Biennially |
| Class-A Assistant Guide License | 30 | Biennially |
| Assistant Guide License | 20 | Biennially |
| Transporter License | 10 | Biennially |
| Application For A Guide Examination | 25 | With Application |

Note 1

This revenue/expenditure comparison was prepared from available reports prepared by Occupational Licensing personnel. The records were not audited by us and, accordingly, we do not express an opinion on the Board's Revenues Compared with Expenditures.

Note 2

Revenue amounts reported do not include revenue obtained from the sale of game tags or hunting licenses. They only include revenue obtained from fees required to obtain and/or renew guide licenses.

Note 3

Expenditures consist of direct costs resulting from Board activities. These include miscellaneous contractual, travel, and per diem costs incurred by Board members and the Board's licensing examiner. The amounts do not include the administrative expenditures of the Division of Occupational Licensing such as employee salaries or the expenditures made to other departments such as the Department of Law, which assist the boards and the Division.

Note 4

Amounts reflected are those established by statute for FY 85. Chapter 37, SLA 1985 provides that the Department of Commerce and Economic Development shall set license fees effective upon adoption of said regulations.

APPENDIX E
GUIDE LICENSING AND CONTROL BOARD
EXAMINATION STATISTICS

Number of Examinations Given in FY 1984-1985 (Note 1)

| <u>Fiscal Year</u> | <u>Written Exam</u> | | <u>Oral Exam</u> | | <u>Total</u> |
|--------------------|---------------------|--------------|------------------|--------------|--------------|
| | <u>Passes</u> | <u>Fails</u> | <u>Passes</u> | <u>Fails</u> | |
| 1984 | 22 | 13 | 26 | 7 | 41 |
| 1985 | 19 | 9 | 17 | 4 | 30 |

Note 1

Licensure as a registered guide requires a passing score on both a written and oral examination. Licensure as a master guide requires a passing score on an oral examination only. Licensure as assistant guides and transporters does not require examination.

APPENDIX C

GUIDE LICENSING AND CONTROL BOARD
ADMINISTRATIVE STATISTICS
September 30, 1985

Currently Licensed

| | |
|--------------------------|-----|
| Master Guides | 46 |
| Registered Guides | 361 |
| Class-A Assistant Guides | 139 |
| Assistant Guides | 829 |
| Transporters | 141 |

Board Meetings Between
July 1, 1983 and June 30, 1985

July 17-22, 1983
October 25-26, 1983
December 7-13, 1983
March 12-17, 1984
December 13-14, 1984
February 9-17, 1985
March 18-19, 1985

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 Board

Thank you for the opportunity to comment on your preliminary audit report on 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 Licensing 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 correct, 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 examination for registered guides.

Mr. Gerald L. Wilkerson

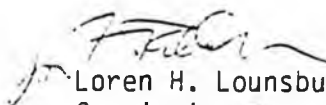
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December 23, 1935

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/sal444s
122365b

The Legislature
Budget and Audit Committee
Jim Griffin, Auditor

DEC 19 1965

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 do allow time for soliciting biological information from the Fish & Game biologist located in the area involved. I have solicited Fish & Game information in several cases that are coming before the GLCB this next meeting in December 1965. 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 (7) (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 guide who is well qualified to guide in the area.

The GLCB has a policy not to issue a new applicant an area 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 ~~XXXXXXXXXXXX~~ ..

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 area he is 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 of the severity of the complaint. Endangering life, flagrant game violations, and unethical practices, etc. The GLCB does have a guiding ethics regulation (12AAC 33.130) The complaints 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 3294.

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 165 will become instant guides creating an impossible situation for game populations and sportsmen safety.

In 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 ~~are~~ all have an educational background.

Comments Regarding Interior Letter #1
Sunset review 1974

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 criticisms related to transfers.

Recommendation # 2.

Agree with Mr. McNutt.

Recommendation #3.

I completely agree with Mr. McNutt's comments and would like to 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.

Guides & Outfitters

1V

Position Paper - Department of Public Safety

BILL NO: HB 183

DATE: 3/23/87

MAR 26 1987

TITLE: "An Act relating to the provision of goods or services to hunters."

CONTACT: Capt. James Nutgrass
Acting Director

~~The Department of Public Safety supports HB 183~~ an act amending the definition of big game guiding.

DEPARTMENT OF
PUBLIC SAFETY

The passage of the amendments to AS 08.54.210 and AS 08.54.240 will give the Department of Public Safety an important enforcement tool to investigate and prosecute cases against unlicensed guides in Alaska. The amendments should reduce the number of unlicensed guiding activities, which will allow us to better utilize our manpower to monitor other resource problems in Alaska. The amendments will further allow our uniformed officers to better enforce the laws pertaining to guiding in Alaska. Finally, these amendments strengthen the guide bill, making it more enforceable when dealing with unlicensed guiding activities. The penalty for unlicensed guiding in Alaska is a felony with a penalty of one (1) to three (3) years in prison and a fine of up to \$5,000.00. In sum, the passage of the amendments will aid our Department in carrying out its responsibilities: The enforcement of state laws and the protection of the fish and wildlife resources in the State of Alaska.

The following amendments to this legislation are proposed:

(Page 1, lines 24 and 25)

(4) A person to advertise as, or represent to be, or act as a guide or outfitter without holding a current valid registered or master guide license.

Justification: The advertising or representing to be a guide many times occurs in the lower 48 states. However, if a person "acts" as a guide, this would most likely occur within the State of Alaska, and within the criminal jurisdiction of the State of Alaska.

By adding Master or Registered guide to this section, this eliminates the ability of validly licensed assistant guides to represent themselves as outfitters or guides. We have determined that a substantial number of outfitters operating illegally in Alaska are, in fact, licensed assistant guides.

(Page 2, line 11 and 12)

Recommended amendment to the penalty provision of AS 08.54.210(9)(A) to: In the field does not include being present in a boat with living quarters or at a permanent lodge or a lawfully established cabin that the parties have a lawful right to be using.

Justification: Many residents of Alaska suffer trespass damages by persons utilizing cabins without permission. This amendment would close the loophole that a party could use to avoid prosecution under AS 08.54.210(6) by requiring a person to use only cabins that they have a legal right to be in rather than base camps that can be easily created.

Addition to AS 08.54.210(b)(1-5) Penalty Provisions

RESEARCH

Position Paper
HB 18?
Continued

(Page 2; lines 17-21)

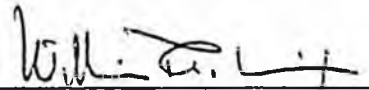
Recommend increasing the penalty provisions for violations of AS 08.54.210 (b)(1-5) to Standard Class A misdemeanor penalties which are a fine of not more than \$5,000.00 and imprisonment for a period of up to one year, or by both.

Justification: A \$1,000.00 maximum fine and imprisonment of up to six months currently allowed is not substantial enough to provide a deterrent, as judges are reluctant to imposed jail time for these cases.

(Page 2; line 23-26)

Recommend amending to the penalty provision of AS 08.54.210(10). We recommend amending the penalty provision of AS 08.54.210(9) to a Class A misdemeanor.

Justification: Standard Class A misdemeanor punishment should be sufficient to deter "clients" from engaging in this practice.



William R. Nix
Acting Commissioner

STATE OF ALASKA 1987 LEGISLATIVE SESSION
FISCAL NOTE

Bill Version: HB 183

Publish Date: _____

REQUEST

Revision Date: _____

Title: "An Act relating to the provision of goods or services to hunters."

Sponsor: Rep. Herrmann

Requestor: House Resources

Agency Affected: Public Safety

BRU: Fish & Wildlife Protection

Components: Enforcement

EXPENDITURES/REVENUES: (Thousands of Dollars)

| OPERATING | FY 87 | FY 88 | FY 89 | FY 90 | FY 91 | FY 92 |
|-------------------|-------|-------|-------|-------|-------|-------|
| PERSONAL SERVICES | | | | | | |
| TRAVEL | | | | | | |
| CONTRACTUAL | | | | | | |
| SUPPLIES | | | | | | |
| EQUIPMENT | | | | | | |
| LAND & STRUCTURES | | | | | | |
| GRANTS, CLAIMS | | | | | | |
| MISCELLANEOUS | | | | | | |
| TOTAL OPERATING | | 0 | 0 | 0 | 0 | 0 |
| CAPITAL | | | | | | |
| REVENUE | | | | | | |

FUNDING: (Thousands of Dollars)

| | | | | | | |
|---------------|--|---|---|---|---|---|
| GENERAL FUNDS | | 0 | 0 | 0 | 0 | 0 |
| FEDERAL FUNDS | | | | | | |
| OTHER | | | | | | |
| TOTAL | | | | | | |

POSITIONS:

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

ANALYSIS: (Attach a separate page if necessary)

No fiscal impact is anticipated.

Prepared by: Kyle Weaver

Division: Fish & Wildlife Protection

Phone: 269-5539

Date: 3/23/87

Approved by Commissioner: William R. *W. R. Herrmann*

Agency: Public Safety

Date: 3/24/87

Distribution (by preparer):

Legislative Finance
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Office of Management and Budget
Impacted Agency(ies)
Senate Secretary

Guides & Outfitters

v

Position Paper - Division of Occupational Licensing

STATE OF ALASKA

DEPARTMENT OF COMMERCE & ECONOMIC DEVELOPMENT

DIVISION OF OCCUPATIONAL LICENSING

APR 2 1987
STEVE COWPER, GOVERNOR

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

April 22, 1987

Dear Legislator:

At the Guide Board meeting held in Fairbanks, Alaska on April 11-14, 1987, the board unanimously adopted the following resolution and requested that the resolution be copied to each member of the Legislature:

"The Guide Board wishes to go on record as supporting Senate Bill 191."

SB 191: An Act relating to guide licensing fees; amending the definition of big game guiding; prohibiting compensation of an unlicensed person for guiding; and prohibiting a person not licensed as a guide from advertising as or representing to be an outfitter.

Sincerely,

DIVISION OF OCCUPATIONAL
LICENSING

5836W42287a

Guides & Outfitters

v1

AG's Opinions on the Issue of Residency & Licenses

Steve Cowner, Governor

REPLY TO:

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

1st NATIONAL CENTER
100 CUSHMAN ST.
SUITE 400
FAIRBANKS, ALASKA 99701
PHONE: (907) 452-1568

POUCH K - STATE CAPITOL
JUNEAU, ALASKA 99811
PHONE: (907) 465-3600

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

December 8, 1986

The Honorable Jim Duncan
Alaska State Legislature
P. O. Box V
Juneau, Alaska 99811

Re: Hunting guide area
residency requirements
A.G. No. 661-87-0259

Dear Representative Duncan:

Your request of December 2, 1986, to the Acting Attorney General for "an opinion concerning the current guide licensing law and a constitutional question about residency requirements" has been referred to me.

As you are no doubt aware, in 1986 the legislature reimposed a residency requirement on professional guiding activities in Alaska. (A similar requirement had been repealed in 1983, following an Attorney General's opinion that the requirement was most likely unconstitutional.) As amended by sec. 20, ch. 71, SLA 1986, the relevant section reads:

Sec. 08.54.210. Unlawful acts. (a) It is unlawful for

. . . .

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

. . . .

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

On September 29, 1986, in response to a request from the director of the Division of Occupational Licensing, Department of Commerce and Economic Development, the Attorney General issued a formal opinion concerning the residency requirement imposed by AS 08.54.210(a). A copy of the opinion is attached to this letter. The gist of the Attorney General's opinion is that the state cannot discriminate against nonresidents in its regulation of the guiding

Representative Jim Duncan
Alaska State Legislature

December 8, 1986
Page 2

A.G. No. 661-87-0259

profession. That is, the opportunity to professionally guide hunts in Alaska must be the same for residents of Alaska and for residents of other states. The analysis supporting this opinion is equally applicable to the state's assignment of restricted guide areas to individual guides (see AS 08.54.195). The opinion does not, however, make any pronouncement as to the validity of AS 08.54.040(a)(7), which states:

Sec. 08.54.040. Powers and duties. (a) Except as provided in AS 08.54.045, the board shall

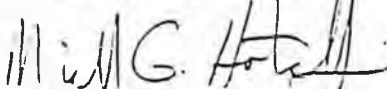
. . . .
(7) establish a quota of licensed operating guides who may operate within designated geographical game units or subunits of the state and provide for an equitable, reasonable, and consistent procedure for limiting the number of guides to that quota; preference may be given to qualified available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

(emphasis added.) The distinction in AS 08.54.040(a)(7) is significantly different from the distinction drawn in AS 08.54.210(a). AS 08.54.040(a)(7) distinguishes not between residents and nonresidents of the state, but rather between a resident applicant for a restricted area and applicants who do not reside in the applied for area. The 1986 amendments (sec. 6, ch. 71, SLA 1986) changed the language of this section from "preference shall be given" to "preference may be given." Again, the September 29, 1986, Attorney General's opinion expresses no view as to the validity of this provision.

I believe that the September 29, 1986, formal opinion of the Attorney General answers your questions. If you have further questions which are not answered by the opinion, feel free to contact me.

Sincerely,

RONALD W. LORENSEN
ACTING ATTORNEY GENERAL

By. 
Michael G. Hotchkin
Assistant Attorney General

MGH/ma

enclosure

BILL SHEFFIELD, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

September 29, 1986

Kathy Marshall, Director
Department of Commerce
and Economic Development
Division of Occupational Licensing
P.O. Box D
Juneau, AK 99811

REPLY TO:

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

1st NATIONAL CENTER
100 CUSHMAN ST.
SUITE 400
FAIRBANKS, ALASKA 99701
PHONE: (907) 452-1568

POUCH K - STATE CAPITOL
JUNEAU, ALASKA 99811
PHONE: (907) 465-3600

Re: Resident hunting license
requirement for guides;
AS 08.54.210(a)(3), (a)(6)
Our File: 661-87-0063

Dear Ms. Marshall:

In your memorandum dated July 22, 1986, you asked several questions concerning AS 08.54.210(a)(3) and (a)(6). You asked, first, if the cited sections prohibit a currently licensed registered guide, master guide, class-A assistant guide, or assistant guide from continuing to work as a guide in Alaska if the guide does not possess a resident hunting license. Second, you asked whether the division of occupational licensing must reject new guide license applications filed by persons who do not possess resident hunting licenses. Finally, you asked our opinion regarding the constitutionality of the requirement imposed by AS 08.54.210(a)(3) and (a)(6) that a person must possess a resident hunting license in order to guide in Alaska.

Only your third question need be answered. The short answer to that question, which has been provided to you by

Kathy Marshall, Director
Division of Occupational Licensing
661-87-0063

September 29, 1986
Page 2

memorandum dated August 3, 1986, is that the residency requirement imposed by AS 08.54.210(a)(3) and (a)(6) is unconstitutional as applied to currently licensed or prospective guides in any of the listed guide categories. Your department need not and should not implement or enforce the requirement that a guide must possess a resident hunting license. The relevant sections should be read as if the word "resident" did not appear. Thus, the requirements that a guide be validly licensed as a hunter under AS 16, and have a current (resident or nonresident) hunting license in actual possession while guiding, are valid and should be enforced.

BACKGROUND

The qualifications for a person to receive a master guide license are found at AS 08.54.100, for a registered guide license at AS 08.54.110, for a class-A assistant guide license at AS 08.54.120, and for an assistant guide license at AS 08.54.140. Before July 1983, an applicant for any of these licenses was required by statute to be a resident of the State of Alaska. "Resident" was defined in AS 08.54.240(3) to mean "a person who maintains a place of residence within the state; has not claimed residency in another state for the immediately preceding 12 months; [and] shows by all attending circumstances that his intent is to make this state his permanent residence."

Kathy Marshall, Director
Division of Occupational Licensing
661-87-0063

September 29, 1986
Page 3

In 1982, following the Alaska Supreme Court's decision in Noll v. Alaska Bar Association, 649 P.2d 241 (Alaska 1982), the Alaska Attorney General opined that "it is highly likely" that a court would find each of the above-referenced residency requirements unconstitutional. 1982 Inf. Op. Att'y Gen. (Dec 3; 366-357-83). The next year, the legislature repealed each of the guide license residency requirements. Sec. 19, ch. 68, SLA 1983, p. 10, l. 25.

Unlike the repealed residency requirements, AS 08.54.210(a)(3) and (a)(6), which were enacted in 1986 (sec. 20, ch. 71, SLA 1986), do not impose a residency requirement per se on a license applicant. Instead, they require an already licensed guide to possess a resident hunting license in order to act as a guide. Such a license may be obtained only by a person who has maintained a permanent place of abode and a voting residence in the state for 12 consecutive months. See AS 16.05.940(19), "resident" defined. Thus the new provisions, like the repealed provisions, effectively restrict the guiding profession in Alaska to Alaska residents of at least 12 months' duration.

LEGAL ANALYSIS

A. Constitutionality

State-imposed requirements that use residency status to differentiate between classes of persons wishing to pursue an occupation in a state are subject to challenge under several constitutional provisions. For present purposes, only article IV, section 2, clause 1, of the United States Constitution (the "privileges and immunities clause"), need be considered. This clause, which states, "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states," was "intended to create a national economic union." Supreme Court of New Hampshire v. Piper, 470 U.S. 274, 280, 105 S.Ct. 1272, 1276 (1985). According to the United States Supreme Court, "the pursuit of a common calling is one of the most fundamental of those privileges protected by the Clause." Piper, 470 U.S. at 280, n.9, 105 S.Ct. at 1277, n.9 (quoting United Building & Construction Trades Council v. Mayor & Council of Camden, 465 U.S. 208, 219 (1984)). The Court has stated that "one of the privileges which the Clause guarantees to citizens of State A is that of doing business in State B on terms of substantial equality with the citizens of that State." Piper, 470 U.S. at 280, 105 S.Ct. at 1276 (quoting Toomer v. Witsell, 334 U.S. 385, 396 (1948)).

Kathy Marshall, Director
Division of Occupational Licensing
661-87-0063

September 29, 1986
Page 5

Review of a residency requirement under the privileges and immunities clause proceeds in three steps. First, in order for the clause to be implicated, it must be established that the residency requirement infringes a protected privilege of a citizen of another state. Once such infringement is established, the rationale for the discrimination against the nonresident is examined to determine whether there is a substantial justification for it, beyond the mere fact that the person who is discriminated against is a citizen of another state. Finally, if such justification exists, the residency requirement is examined to determine whether it bears a substantial relationship to the particular "evil" posed by the nonresident. A residency requirement which does not pass each of the latter two steps violates the privileges and immunities clause and is constitutionally impermissible. Noll v. Alaska Bar Association, 649 P.2d 241 (Alaska 1982).

Applying the first step of this test to the statute in question, it is clear that the ability to act as a commercial hunting guide is a privilege which is protected under the privileges and immunities clause. The Alaska Supreme Court, in recognizing the practice of law as a protected privilege, noted that privileges protected under the clause include "common callings . . . ordinary livelihoods . . . [and] professional

pursuits." Shelev v. Alaska Bar Association, 620 P.2d 640, 643 (Alaska 1980). "Guiding" is defined at AS 08.54.240(3) to mean "accompanying or directing a hunter . . . for compensation or with the intent or an agreement to receive compensation" Hunting guides in Alaska generally make their living from their guiding activities. The activity of commercial guiding is, therefore, a protected privilege. Of course, AS 08.54.210(a), which prohibits a nonresident from commercially guiding in Alaska, impinges upon the nonresident's exercise of that privilege.

The next two steps in privileges and immunities clause analysis are closely related to each other. The first requires a determination of whether there is a "substantial justification" for the discrimination against nonresidents. No such justification can exist absent a showing that nonresidents are "a peculiar source of the evil" which the state's action is meant to remedy. Noll, 649 P.2d at 243. The final step requires a determination of whether the discrimination bears a "substantial relationship" to the state's objective. No such relationship exists if the state could accomplish its objective (i.e., elimination of the "evil" posed by nonresidents) through a less restrictive means than the discrimination imposed against nonresidents. Piper, 473 U.S. at 284, 105 S.Ct. at 1279.

These latter two steps pose more difficult questions than the first step, as neither the statute nor the legislative history behind sec. 20, ch. 71, SLA 1986, disclose the legislature's reasons for imposing the residency requirement on guides. The several obvious reasons which may be postulated are examined below. None of the postulated reasons survives scrutiny under the privileges and immunities clause test.

One possible justification for the residency requirement involves the safety of hunters, and is based on the presumption that resident guides are more likely to be familiar with the terrain, hunting conditions, and species likely to be encountered in the field than are nonresidents. This justification was raised by the State of Wyoming when it attempted to defend a similar guide residency requirement from a privileges and immunities clause challenge. Powell v. Daily, 712 P.2d 356 (Wyo. 1986). The Powell court held the justification to be insufficient, finding that it failed both steps of the privileges and immunities test. First, it is not a "substantial" justification, because nonresidents are not a peculiar source of the evil of incompetent or unsafe guides. The Powell court noted:

[Mere] residence in this state does not make a competent guide. If the State's position were to be upheld, a person born and raised in New York City who moved to Cheyenne over a year ago could qualify for a guiding license, while Mr. Powell, who has hunted and fished in Idaho, Montana and

Wyoming for 30 years, cannot qualify because he makes his home in Idaho Falls. The State cannot seriously contend that merely living in Cheyenne for a year makes a prospective guide a better safety risk when guiding hunters in the rugged wilderness areas of our state.

Powell, 712 P.2d at 361. This statement applies equally to the situation in Alaska. This justification fails the final step of the test as well, because the state could guard against incompetent or unsafe guides through less restrictive means than discrimination against nonresidents. In fact, it already does so by requiring each applicant for a registered guide license to pass both written and oral examinations, which test the applicant's knowledge not only of general guiding and hunting matters, but also of the particular terrain and conditions in which the prospective guide is applying to operate. 12 AAC 38.010.

Another justification for the discrimination might be that residents are more likely to know and abide by local laws and regulations than are nonresidents. This justification, too, fails for the reasons discussed above.

Finally, the discrimination might be justified if the state had some definite need to control or police the guiding industry which required that its practitioners be physically located within the confines of the state. The present record, however, discloses no such unique need, nor any greater administrative need to control or police the commercial guiding industry.

Kathy Marshall, Director
Division of Occupational Licensing
661-87-0063

September 29, 1986
Page 3

than the need to control or police the commercial fishing industry or any other industry in which both residents and nonresidents of Alaska participate. ^{1/}

Based on the information available to us, we conclude that the discrimination against nonresidents under AS 08.54.210(a)(3) and (a)(6) cannot be justified, and that the residency requirement imposed by those paragraphs on persons wishing to commercially guide in Alaska violates article III, section 2, of the United States Constitution. We note that the only courts that have considered this or a similar issue have reached the same conclusion. Powell v. Daily, 712 P.2d. 333 (Wyo. 1986) (residency requirement for applicants for guide license held unconstitutional); Godfrey v. Montana State Fish and Game Commission, 631 P.2d. 1265 (Mont. 1981) (residency requirement for applicants for outfitter license held unconstitutional).

B. Severability

Our conclusion that the residency requirements of AS 08.54.210(a)(3) and (a)(6) are unconstitutional raises the

^{1/} One other possible rationale, protection of resident guides from competition by nonresidents, is not a valid justification for discrimination against nonresidents, as "[t]he Privileges and Immunities Clause was designed primarily to prevent such economic protectionism." Piper, 470 U.S. at 135, n.13, 105 S.Ct. at 1279, n.13.

issue of whether the requirements are severable from the remaining portions of AS 08.54.210(a). AS 08.54 does not contain an express "savings clause," specifying that any provision found to be invalid is to be severed from the rest of the Act. The general savings clause set forth in AS 01.10.030, however, is applicable. This statute provides as follows:

CONSTITUTIONALITY AND SEVERABILITY. Any law heretofore or hereafter enacted by the Alaska legislature which lacks a severability clause shall be construed as though it contained the clause in the following language, "If any provision of this Act, or the application thereof to any person or circumstance is held invalid, the remainder of this Act and the application to other persons or circumstances shall not be affected thereby."

The purpose of this statute is to "preserve to as great an extent as possible all valid portions of enactments by the Alaska State Legislature." Lynden Transport, Inc. v. State, 532 P.2d 700, 711 (Alaska 1975). As the court noted in Lynden, however, a general severability clause creates only a weak presumption in favor of severability. Lynden, 532 P.2d at 712-713.

The test the court announced in Lynden for determining the severability of a statutory provision is as follows: "A provision will not be deemed severable unless it appears both that, standing alone, legal effect can be given to it and that the legislature intended the provision to stand, in case others

included in the act and held bad should fall." Lunden, 532 P.2d
at 713 (quoting Dorchy v. Kansas, 264 U.S. 236, 239 (1924)).

As to the first issue, it is apparent that if the
residency requirements are stricken the relevant paragraphs can
still be given complete legal effect. After striking the resi-
dency requirements, the subsection would read, in pertinent part:

Sec. 08.54.210. UNLAWFUL ACTS. It is
unlawful for

.....

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

.....

(6) a person to guide without being validly
licensed as a guide under this chapter and as a
. . . hunter under AS 16[.]

The next issue is whether the legislature intended the
remainder of the two paragraphs to stand, absent the residency
requirements. It is self-evident that the legislature's intent
to prohibit persons from guiding without first obtaining a guide
license, which they must carry in their possession while guiding,
is completely separate from the residency requirement. The guide
license requirements are, therefore, severable from the residency
requirements, and should be enforced. The only remaining ques-
tion is whether the legislature intended to require guides to be
licensed as hunters, regardless of the residency requirement. The

Kathy Marshall, Director
Division of Occupational Licensing
661-87-0063

September 29, 1986
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conclude that the legislature did so intend, for the following reason. In enacting AS 08.54.210(a)(3) and (a)(5), the legislature imposed requirements that guides be (a) residents of Alaska, and (b) licensed as hunters. Had the legislature intended by this provision to require only that guides be residents of Alaska, it would have said so, and not also required guides to obtain and carry hunting licenses with them while guiding. 2

CONCLUSION

We have concluded that a court would find AS 08.54.210(a)(3) and (a)(5) to be unconstitutional, insofar as these paragraphs require a commercial hunting guide to be a resident of Alaska, because they unjustifiably discriminate against citizens of other states. Your agency should not implement or enforce the residence requirement provisions of this statute.

We have also concluded that the residency provisions of the paragraphs are severable from the remainder of the statute. You should, therefore, implement and enforce AS 08.54.210(a) as if the word "resident" did not appear therein.

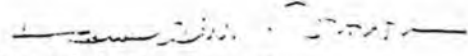
2/ Further evidence of the legislature's intent to require guides to be licensed as hunters may be found at AS 08.54.100(1) and 08.54.110(2) and 12 AAC 08.100(11).


Kathy Marshall, Director
Division of Occupational Licensing
661-87-0063

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Page 10

If you have any questions or comments about this opinion, please do not hesitate to contact us.

Sincerely,


Harold M. Brown
Attorney General


Michael G. Hotonkin
Assistant Attorney General

HMB/MGH/ma

cc: Colonel Robert M. Henderson, Department of Public Safety
Herb Soll, Department of Law
Dennis D. Kelso, Department of Fish and Game
Ray McNutt, Chairman, Guide Board

MEMORANDUM

State of Alaska

TO: Sgt. Robert Boutang
Division of Fish & Wildlife
Protection
Department of Public Safety

DATE: July 29, 1986

FILE NO: 661-87-0055

TELEPHONE NO:

FROM: Harold M. Brown
Attorney General

SUBJECT: Interpretation of
guide statutes and
regulations under
ch. 71, SLA 1986

By: Sarah Elizabeth McCracken
Assistant Attorney General
Natural Resources-Anchorage

SEM

Your request of July 22, 1986 raised several questions regarding interpretation of the new guide law, ch. 71, SLA 1986, and guide board regulations under this new regime.

Your first inquiry was whether Fish and Wildlife Protection officers should be directed to enforce AS 08.54.210(a)(3), which makes it unlawful, inter alia, for a person to guide without having a resident hunting license in possession. The term "resident" is defined in AS 08.54.240(4) and AS 16.05.940(19) to mean residency for 12 consecutive months.

You should be aware that Richard Long, Chief Investigator for the Department of Commerce and Economic Development, division of occupational licensing, has already requested a written Attorney General's opinion on the question of the constitutionality of the residency requirement in the new guide law. That request is pending, and an opinion will probably not be issued before your meeting on July 30. I am enclosing, however, a copy of the bill review letter from the Attorney General to the Governor regarding HCS CSSB 294 (Res) am H, the bill enacted as ch. 71, 1986. Page five of that letter discusses briefly the residency requirement in section 20, and notes that durational residency requirements for obtaining vocational or professional licenses have previously been held invalid, and that a court is unlikely to uphold the provision. Unless there is a strong record demonstrating a legitimate state need to impose a durational residency requirement, it is unlikely that a charge of violating AS 08.54.210(a)(3), with respect to the resident hunting license, would result in a conviction. Although our formal response to Richard Long's request is being drafted by another attorney and is not yet available, it is unlikely that the opinion will recommend enforcement of this provision.

Your second question related to criminal sanctions for violations of guide regulations. As explained on page five of

the attached bill review letter, section 20 of the bill (now AS 08.54.210(a)(2)) makes it clear that it is unlawful (a misdemeanor) for a guide to commit a violation of a guide statute or a guide regulation. Therefore, for example, a guide could be charged under AS 08.54.210 and 12 AAC 38.060 for failing to file or have in camp a statement of financial remuneration, and could be charged with violating 12 AAC 38.070 (responsibility of guide to his client), about which you specifically inquired.

You also asked whether a guide could be charged criminally with guiding in another guide's exclusive guide area. The answer to that question is also yes. The express terms of AS 08.54.210(a)(2) apply to a violation of a guide regulation, and this intent is further clarified by the reference in AS 08.54.200(c)(4) to a "conviction for hunting in a restricted area not assigned to the licensee without proper written permission." (Emphasis added).

You also inquired about the requirement in 12 AAC 38.090 that a master, registered, or class A assistant guide must be "in the field and participating in the conduct of the guided hunt whenever assistant guides are guiding." This regulation is not affected by the changes in ch. 71, SLA 1986, although the regulation is made somewhat more clear by the new definition of "guide" or "guiding" in AS 08.54.240(3). The new definition provides:

(3) "guide" or "guiding" means accompanying or directing a hunter in the field, personally or through an assistant, for compensation or with the intent or an agreement to receive compensation, while the hunter or the person accompanying or directing the hunter spots, stalks, pursues, tracks, kills, or attempts to kill big game; in this paragraph, "in the field" does not include being present in a boat with living quarters or at a lodge or base camp;

There is no specific definition of the term "in the field" in the statute or in guide board regulations, but the new statute does clarify that "in the field" does not include being present "in a boat with living quarters or at a lodge or base camp." If "in the field" does not include being at a lodge or base camp, it must mean being in the hunting area, including being at a spike camp or actually stalking game. Because there is no special legal meaning attached to the term "in the field" (other than that now clarified in ch. 71, SLA 1986), the term should be interpreted consistent with its common dictionary

Sgt. Robert Boutang
Division of Fish & Wildlife Protection
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meaning. See State v. Debenham Electric Supply Co., 612 P.2d 1001, 1002 (Alaska 1980) (unless words have acquired special meaning by statute or case law they are to be construed in accordance with common usage); see also AS 01.10.040. For a general definition of "field" in the context of hunting, see Webster's Third New International Dictionary 845 (1971 ed.) In short, the term "in the field" should be interpreted in accordance with its common usage in the context of the specific facts of each case. If you have questions about a specific case, please contact this office or the District Attorney's Office.

Finally, you asked how the new guide bill affects outfitters or people who simply transport hunters or game for hire. Section 27 of ch. 71, SLA 1986 repeals AS 08.54.142--AS 08.54.146, the statutes governing transporters. Accordingly, it is now no longer necessary for a person who merely transports hunters or game to obtain a transporter's license or file a report. Similarly, a person who, for example, rents hunting equipment (tents, vehicles, etc.) and perhaps also provides transportation to a lodge or base camp, but who does not accompany a hunter on the hunt (in the field), is not required to obtain a guide's license. The new definition of "guiding" in AS 08.54.240(3) is somewhat different from the former definition, but still only applies to a person who, for compensation, accompanies or directs a hunter in the field "while the hunter spots, stalks, pursues, tracks, kills, or attempts to kill big game." For a discussion of the meaning of "guiding" that is based on the former AS 08.54.240(2) but which remains valid under the amended language, see 1977 Inf. Op. Att'y Gen. (Sept. 26; Meacham), copy attached.

If you have additional questions, please let us know.

SEM/jmo
Encl:

cc: Capt. James Nutgrass
Col. Red Henderson

A PERFORMANCE REPORT ON THE
DEPARTMENT OF COMMERCE AND ECONOMIC DEVELOPMENT
GUIDE BOARD

December 11, 1987

Audit Control Number

08-1305-88-R

Commissioner, Department of
Commerce and Economic Development

J. Anthony Smith

Deputy Commissioners, Department of
Commerce and Economic Development

John Williams

Members of the
Guide Board

Chairman
Member
Member
Member
Member
Member
Member

Ray McNutt
Edward J. Shavings, Sr.
Ben Ballenger
Charles Weir
Stanley Frost
Edward Gamble, Sr.
Arthur Clark

STATE OF ALASKA

AUDIT DIVISION
P.O. BOX W
JUNEAU, ALASKA 99811-3300

THE LEGISLATURE
BUDGET AND AUDIT COMMITTEE

December 18, 1987

Members of the Legislative Budget
and Audit Committee:

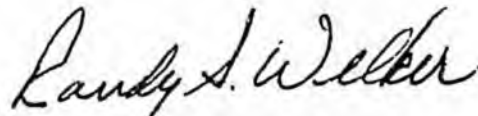
In accordance with the provisions of Titles 24 and 44 of the
Alaska Statutes (sunset legislation), the attached report is
submitted for your review.

A PERFORMANCE REPORT ON THE
DEPARTMENT OF COMMERCE AND ECONOMIC DEVELOPMENT
GUIDE BOARD

December 11, 1987

Audit Control Number

08-1305-88-R



Randy S. Welker, CPA
Acting Legislative Auditor
Division of Legislative Audit

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PURPOSE AND SCOPE OF THE REPORT

Purpose

In accordance with the intent of Titles 24 and 44 of the Alaska Statutes (sunset legislation), we have reviewed the activities of the Guide Board for the past four fiscal years. Our examination was conducted to determine if the Board has been operating in an efficient and effective manner.

Legislative intent requires consideration of this report during legislative oversight hearings to determine whether the Guide Board should be reestablished. The law now specifies that the Board will terminate June 30, 1988 and will have one year from that date to conclude its affairs.

Scope

The major areas of our examination were the licensing, examination, administration, complaint, and affirmative action functions of the Board. We reviewed and evaluated the following:

1. Applicable statutes and regulations.
2. Interviews with the license examiners.
3. Tests of files and documents of licensees.
4. Complaints filed with the Division of Occupational Licensing, Human Rights Commission, Equal Employment Opportunity Office, Attorney General's Office, and the Ombudsman Office.
5. Discussions with Board members.
6. Discussions with licensed guides.
7. Minutes of Board meetings and Division correspondence files.
8. Attorney General Opinions applicable to professional boards.

ORGANIZATION AND FUNCTION

The Guide Board was established by the 1973 Legislature and succeeded the Board of Fish and Game, Department of Fish and Game, which previously had regulated the guiding industry. The seven member Board is appointed by the Governor with confirmation by the Legislature and is restricted to having no more than three members as licensed guides. Board members serve staggered terms of three years or until their successors are appointed.

The Board is organized under the Department of Commerce and Economic Development, Division of Occupational Licensing. The Division assists the Board in the performance of their duties by providing administrative, licensure, and investigative support.

By law, a nonresident may not hunt, pursue, or take brown bear, grizzly bear, polar bear, or sheep in Alaska unless personally accompanied by a licensed master, registered, or assistant guide. Nonresidents hunting with an Alaskan relative are exempt from this requirement. The Guide Board was appointed in part to protect these nonresident hunters from incompetent individuals holding themselves out to be qualified Alaskan guides.

The function of the Board is primarily regulatory, as mandated by AS 08.54.040. Accordingly, the Board has the capacity to administer examinations, determine qualifications of guides, establish performance standards and regulate activities, maintain guide registers, prohibit harmful guiding activities, conduct hearings regarding licensure, and establish quotas of guides for specified geographical areas (exclusive guiding areas). The Board, through the assignment of exclusive guiding areas, limits hunting pressure by guides within a specific geographical area.

It is this last practice and function of the Board which is the most controversial. The Board's method and policy of assigning exclusive guide areas has become an increasingly contentious procedure. The Board has adopted a policy of eliminating previously allowed joint-use areas and is gradually trying to reestablish exclusive guide areas.

REPORT CONCLUSION

In our opinion, the Guide Board should be reestablished. The regulation and licensing of qualified guides is necessary to protect the public's health, safety, and welfare. The Board provides this service by establishing minimum qualification and experience requirements that provide reasonable assurance that persons licensed are both capable of safely conducting guided hunts and familiar with their prospective guiding areas.

However, we also recommend that the Legislature limit the reestablishment period of the Guide Board to a two year period. The Board's current policy regarding the assignment (see Recommendation No. 1) and transfer of guiding areas (see Prior Audit Recommendation No. 3) along with the pending suit before the Alaska Supreme Court challenging the legal basis of area assignments all involve significant public policy issues.

Resolution of these issues, particularly an adverse ruling in the Supreme Court case, will have an extensive effect on the operations of the Guide Board. We believe that it would be good public policy for the Legislature to limit any statutory extension of the Board to June 30, 1990 in order to provide for formal legislative reevaluation of the Board and its operations within the next two years.

CORRECTION

**THIS DOCUMENT
HAS BEEN REPHOTOGRAPHED
TO ASSURE LEGIBILITY**

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FINDINGS AND RECOMMENDATIONS

Recommendation No. 1

The Guide Board should discontinue its blanket policy of eliminating joint-use guiding areas.

Joint-use areas, as the name implies, allow more than one guide to conduct or authorize guided hunts in a given geographical area. In contrast, exclusive guide areas are geographic regions assigned by the Board to one individual. Only that individual may legally conduct or authorize guided hunts in the assigned area. Over the past two years the Guide Board has adopted a policy of eliminating previously approved joint-use areas and encouraging the assignment of only exclusive guide areas.

Such a policy unduly restricts entry into the guiding profession without offering any substantial public benefit. The policy primarily serves the interests of established guides who have previously received exclusive areas. The Board indicated that the primary reason for adopting this policy is to lessen hunting pressure on game resources throughout the State.

The Board adopted this policy without consulting the Division of Game within the Department of Fish and Game (DFG) for that agency's assessment of game populations. The Division reported to us that game populations statewide have generally been stable over the past 5 to 7 years. Even though there may be some justification for having strictly exclusive guide areas in some regions of the State, adoption of a blanket policy on a statewide basis, especially without independent consultation with DFG, is not warranted.

We do not believe that game management is the primary responsibility of the Board. If it were, provisions should be made to place it in an executive branch agency that also has such responsibilities. As part of the Division of Occupational Licensing, its primary purpose is the licensing and regulation of qualified individuals to conduct guided hunts.

Effect of the Policy - Limiting Entry

This policy, in effect, establishes a two-tiered licensing system. Becoming registered is only the first step to becoming an independent, practicing professional guide. An individual must also obtain a viable exclusive guide area in which to conduct business. Essentially, an individual can be licensed but is not allowed to guide in various areas designated as exclusive to other guides.

The implementation of the exclusive area policy; adoption of regulations allowing each guide to have up to three exclusive guiding areas; and the routine approval of guide designated transfers of assigned guiding areas (see discussion in Prior Audit Recommendation 3); all serve to restrict entry into the guiding profession. Such regulations and practices suggest that the Board may be more interested in the protection and development of the proprietary interests of established guides rather than promoting equitable access to the profession for all qualified individuals.

We do not question the Board's legal authority for implementing the exclusive guide area concept, although at the time of this report a lawsuit is pending before the State Supreme Court challenging the Board's authority on this issue. Over the past ten years, the Attorney General has repeatedly stated that assignment of exclusive guide areas is within the Board's statutory authority.

However, the Board should use its authority to the extent necessary to promote hunter safety and consumer protection. Using its authority to restrict effective entry into the profession is not in the best interests of the public. Continued use and even expansion of joint-use guiding areas encourages more competition in the guiding profession and allows an increased number of qualified guides access to viable hunting areas within the State.

Prior Audit Recommendations

In our previous review, "A Performance Report on the Department of Commerce and Economic Development, Guide Licensing and Control Board, November 21, 1985," we reported five recommendations. Many of the issues discussed in these prior recommendations still exist although almost all of them have been addressed to some degree by the Board.

Prior Audit Recommendation No. 1

The Guide Board should develop a prioritized set of criteria to use in assigning both exclusive and joint-use guiding areas.

In our previous report we stated that the Board did not act consistently when they considered the assignment of exclusive and joint-use guiding areas. The criteria on which any given area assignment was made varied from decision-to-decision. We also noted that the Board often did not adequately document the basis on which they made assignment decisions.

This inconsistency on the part of the Board in its decision-making, along with the lack of proper documentation of its rationale, resulted in the loss of effective control over

the activities and policy of the guiding industry. We felt that the Board's responsibility would be better met if it would identify pertinent criteria to be used in area assignment decisions, assign some priorities to the criteria, and apply them consistently.

Legislative Audit's Current Position

Alaska Statute 08.54.040(a)(7) was amended in 1986 and now requires that the Board "provide for an equitable, reasonable, and consistent procedure for limiting the number of guides [in an assigned area]." (Emphasis added.) Additionally, AS 08.54.195 (a) was added and directs the Board to "adopt regulations that establish uniform and consistent criteria, including a point system, to be used by the board when it establishes and assigns a restricted guide area."

The Guide Board is currently in the process of implementing this prior recommendation and meeting its statutory responsibility to adopt regulations that provide for uniform and consistent area assignment criteria. A proposed point system is currently being considered by the Board in conjunction with the Division of Occupational Licensing's regulations specialist.

Prior Audit Recommendation No. 2

The Board should improve methods of obtaining game management information from independent sources, such as the Alaska Department of Fish and Game (ADFG).

One of the primary justifications for the whole concept of exclusive guiding areas is the enhancement of the overall management of the public's game resources. Guides are awarded exclusive or joint-use areas so that they have a long-term interest in managing the game in their area. The Board has adopted regulations [12 AAC 38.053(d)(1)] that require it to consider an area's ability "... to sustain an additional guided hunting operation, in terms of game populations, terrain, methods of hunting, and use by other guides and hunters."

In our prior audit, we stated that the Board rarely considered independent information regarding game populations and management concerns when assigning areas. The Board relied on information provided by applicants and guides operating in the region under consideration. Although we recognized that the assessment of game populations by an active registered guide was an important consideration, we felt that in many instances it had to be understood that the guide offering such information often had a vested interest in how the information was presented and interpreted.

We recommended that the Board establish better, more formal communications with ADFG in order to better meet their regulatory and statutory obligation to enhance the management of the State's game resources. We encouraged the Board to improve communications and coordination with ADFG and take steps to include that agency's assessment of game populations and hunting pressures when considering assignment of guiding areas.

Legislative Audit's Current Position

There has been some improvement by the Board in the use of independent game information from ADFG when making its decisions regarding assignment of guide areas. However, as stated previously, the Board's policy of encouraging the creation of only exclusive guide areas has resulted in making many of the concerns behind this prior recommendation irrelevant. Use of independent game information for specific regions of the State no longer appears to be a significant factor in the Board's decision-making process.

Prior Audit Recommendation No. 3

The Board should take more responsibility for area assignments by repealing regulations that allow a guide to designate to whom their area be reassigned.

Registered and master guides may each have a maximum of three guide areas. Typically, when a guide wishes to retire or perhaps become eligible for another, different guide area, he or she is allowed to turn back an existing area assignment to the Board and designate the recipient of the reassignment. Board regulations allow for, but do not necessarily require, this practice.

In our prior audit we found that these designated transfers overrode all other area assignment criteria. Essentially, the Board automatically approved transfers of guiding areas regardless of game management considerations, demonstration of experience in the area by the transfer recipient, and over the objections of affected joint-users. Whereas, the Board evaluated, albeit inconsistently, regular area assignments, our prior audit indicated they gave transfers much less scrutiny.

This lack of scrutiny encouraged the practice of guides selling their assigned areas to other guides in violation of Board regulations. With the Board giving little review to transfers, they greatly increase the potential of area assignments being awarded based solely on economic considerations. This potential abuse is contrary to the Board's statutory responsibility of establishing quotas for guide areas in an equitable and reasonable manner. All qualified guides for an area should receive equal chance at receiving an area assignment regardless of their ability to buy the rights from the previous holder.

It would be a better administrative practice if area assignments were surrendered to the Board; the Board reviewed pertinent and prioritized criteria to determine if the region would support one or more additional guide operations; and then consider all applications for the area under an equitable and reasonable method of allocation. By following such a procedure the Board would promote compliance with its own regulations restricting the transfer of guiding area permits.

Legislative Audit's Current Position

The Board continues to automatically approve almost all transfers of area assignments regardless of game management considerations, demonstration of experience, and over the objections of affected joint-users. On several occasions the Board approved the transfer of assigned joint-use areas contrary to the Board's own stated policy of eliminating joint-use area assignments.

The Board often approves transfers to individuals who would not qualify to receive the assignment had they been an original applicant for the area. We reviewed 19 transfers approved by the Board over the past two years. In 8 of those 19 transfers (42%) the approved recipient did not have any documented guiding experience in the transferred area. Had the individual been an original applicant for the assignment, he or she would have been required to have at least 2 years of documented guiding experience in the applied for area.

We again recommend that the Board evaluate transfers of area assignments as they would original area assignments. Such an evaluation would enable all qualified guides a more equal opportunity to receive an assigned area.

Prior Audit Recommendation No. 4

The Board should adopt procedures to improve the administration of the oral portion of the registered guide examination.

To qualify for licensure as a registered guide, an applicant must successfully pass the registered guide examination. This examination, which is prepared and administered by the Board, is composed of two parts, a written and an oral section. Passage of the examination requires the applicant to obtain a score of 80% on both sections.

The Board procedures require that the oral portion of the registered guide examination be administered by three examiners, consisting of a Board member and two master guides. In our prior report, we stated that the oral portion of the examination was arbitrary and inconsistent in its content and grading. This was due to the practice of allowing examiners to use their individual discretion in determining examination content and grading guidelines.

We noted that the lack of specific guidelines to dictate the objective administration of the oral examination resulted in inconsistent content and grading between individual examinations. The likelihood of exam passage was as much affected by who the examiners were and their individual judgement as it was by the knowledge and competence of the applicant.

We recommended that the Board adopt structured guidelines for the administration of the oral examination. Any such guidelines needed to provide examiners with specific directions as to examination questions to be asked and their assigned grading values.

Legislative Audit's Current Position

The Board has substantially improved administration of the oral portion of the guide examination. The examination score sheet has been redesigned and now includes predetermined categories and assigned grade values. In addition, all oral examinations are tape-recorded which allows objective review of the questions and responses in instances where an applicant may appeal the scoring or content of his or her questions and responses. These changes in the oral examination process has provided the Board with fairer and more consistent administration of the oral examination.

Recommendation No. 5

The Board should seek both statutory and regulatory changes in order to improve the protection of the public from unethical guiding practices.

One of the primary purposes of licensing and regulating guides is to protect the public from unethical guiding practices. In our prior report, we identified regulations and statutes that serve to block effective consumer protection action on the part of the Board and serves to protect guides at the expense of the public. We recommended that the Board enhance its consumer protection responsibilities by taking the following actions:

- A. Pursue amendment of statutes that limit the Board's authority to discipline guides for unethical activity.
- B. Adopt regulations and/or recommend legislation to require guides to post licensing/payment bonds.

Statutory Constraints to Effective Disciplinary Action

Alaska Statute 08.54.200(a)(1) does not allow the Board to consider complaints of unethical or incompetent guiding practices until receiving complaints from "... three or more clients [hunters] of separate [hunting] parties."

The Board's effectiveness and visibility would be enhanced if all allegations regarding unethical guide practices was brought to it for review on a case-by-case basis. It appears that the intent of the statute was to keep down the number of frivolous and unfounded complaints against guides. Other professional licensing boards listen to, and sort through, all cases and complaints, no matter how trivial, as a means of keeping apprised of the conduct of their licensees. We recommended that the Board follow the same practice.

Bonding of Guides

Almost all hunters who use guiding services are nonresidents; a large number from outside of the United States. As a result, when disputes arise between guides and hunters it is often very difficult and expensive for the complaining hunter to seek legal remedies or implement effective administrative action. This difficulty is compounded by the three complaint requirement of the statutes discussed previously.

We recommended that the Board pursue the necessary statutory and regulatory changes that would implement a mandatory requirement that guides post a licensing or payment bond with the Division of Occupational Licensing. Such a bond would allow hunters, and perhaps even employees of the guides, with legitimate grievances and claims against guides an easier, less expensive alternative in obtaining settlement of their claims.

Guiding is a significant industry in the State. It is important that the Board do all it can to maintain the integrity of the guiding industry and uphold the reputation of the Alaskan guides with hunters outside of the State. The Board should recognize the unique type of consumer for guide services and take steps to adequately protect the interest of the out-of-state hunter/consumer.

Legislative Audit's Current Position

Neither of the two parts of this prior report recommendation have been implemented. The same abuses and conditions which led to our previous recommendation still exist. Currently, the Division of Occupational Licensing has three guides who have two complaints each pending against them, but whose cases are being held back from formal report to the Board until another complaint is received. In addition, the Attorney General's Consumer Protection Office is involved with a legal complaint against a guide for receiving money for a contracted hunt without providing services.

Subsequent Comment

The Department of Commerce and Economic Development, Division of Occupational Licensing indicate in their response to this report that current market conditions have made it extremely difficult to obtain bonding in Alaska. Cost of bonding may be so prohibitive that, if required, it would represent another barrier to entry to the guiding profession. (See the agency's response to our report, pages 30-31 and our final statement on page 37 for further discussion of the issues currently involved in obtaining bonding.)

ANALYSIS OF PUBLIC NEED

Limited Analysis

The following analyses indicate both positive and negative factors as they relate to the public need as defined in the "sunset" law. These analyses are not intended to be comprehensive, but to address those areas we were able to cover during our review.

- I. The extent to which the Board, commission, or program has operated in the public interest.
 - A. The Board is unduly restricting entry by adopting a policy of gradually eliminating all joint-use guide areas (see Recommendation No. 1).
 - B. The Board has adopted regulations defining unethical conduct which clarify and strengthen the guide's responsibility to the public.
 - C. The Board has adopted the Alaska Professional Hunters Association (APHA) first aid training course as a requirement for new applicants prior to receiving a license.

- II. The extent to which the operation of the Board, commission, or agency program has been impeded or enhanced by existing statutes, procedures, and practices which it has adopted, and any other matter, including budgetary, resource, and personnel matters.
 - A. Regulation 12 AAC 38.054(b) allows an EGA permit holder to designate the qualified guide to whom he wishes to transfer his guide area. These transfers often take precedence over other guide area assignment criteria such as joint-user objections, experience in the game unit, or game management considerations (see Prior Audit Recommendation No. 3).
 - B. Alaska Statute 08.54.200(a)(1) does not allow the Board to consider complaints of unethical or incompetent guiding practices until receiving complaints from three or more clients of separate parties (see Prior Audit Recommendation No. 5).
 - C. The Board does not consistently review the Department of Fish and Game game management information prior to assignment or transfer of an exclusive guiding area (EGA) (see Prior Audit Recommendations No. 1-3).

III. The extent to which the board, commission, or agency has recommended statutory changes which are generally of benefit to the public interest.

A. At the time this report was being prepared, two pieces of legislation affecting guides and the Guides Board, Senate Bill No. 191 (SB 191) and House Bill 183 (HB 183), were pending before the Legislature. The Guides Board informally supports both pieces of legislation. Although subject to revision, they both would generally require:

1. Larger fees (three times as high) for nonresident guides than resident guides.
2. A broader statutory definition of what would constitute guiding. SB 191 would define guiding as:

being present with, or providing an established camp for, a big game hunter in the field, personally or through an assistant, for compensation or with the intent or an agreement to receive compensation; "guide" or "guiding" does not include accompanying or being present with a hunter (a) in a boat with living quarters; (b) at a permanent lodge or structure; or (c) while providing transportation to or from the field, if the persons providing the transportation and the persons being transported do not stalk, pursue, track, kill, or attempt to kill big game.

3. In a position paper on HB 183 the Department of Public Safety (DPS) states that passage of such legislation would provide the agency with:

an important enforcement tool to investigate and prosecute cases against unlicensed guides in Alaska. [HB 183] should reduce the number of unlicensed guiding activities which will allow us to better utilize our manpower to monitor other resource problems in Alaska. [HB 183] will further allow our uniformed officers to better enforce the laws pertaining to guiding in Alaska. Finally, [HB 183] strengthens the guide bill, making it more enforceable when dealing

with unlicensed guiding activities.... In sum, the passage of the amendments will aid [D.] in carrying out its responsibilities: The enforcement of state laws and the protection of the fish and wildlife resources in the State of Alaska.

- IV. The extent to which the Board, commission, or agency has encouraged interested persons to report to it concerning the effect of its regulations and decisions on the effectiveness of service, economy of service, and availability of service which it has provided.
- A. The public is invited to attend Board meetings and to give their input about the workings of the Board. Notices of meetings are advertised in at least five newspapers throughout the State. In addition, guides are notified by registered mail of meetings that might affect them.
 - B. Teleconference meetings are not being noticed publicly. This limits public input at those meetings and may legally jeopardize Board decisions and actions.
- V. The extent to which the Board, commission, or agency has encouraged public participation in the making of its regulations and decisions.
- A. As stated under IV, the public is invited, by published notices in newspapers, to attend Board meetings to give their input about Board regulations or submit written testimony.
 - B. The problem noted in IV. B. above also represents potential problems in this public need area.
- VI. The efficiency with which public inquiries or complaints regarding the activities of the Board, commission, or agency filed with it, with the department to which a board or commission is administratively assigned, or with the Office of the Ombudsman have been processed and resolved.
- A. Since January 1986, nine complaints have been filed with the Ombudsman's Office concerning Board activity. Two of these complaints, (1) alleging guide examination scoring is arbitrary and inconsistent and (2) alleging board's decision to reduce guide area is unfair, are pending administrative proceeding.

B. Since July 1985, 54 complaints against guides have been submitted to the Department of Commerce and Economic Development, Division of Occupational Licensing for investigation. Thirty-three of these cases have been closed, thirteen are currently in administrative hearing proceedings and nine are still pending investigation. Investigations appear to have been conducted in a reasonable fashion.

C. As mentioned in III above and in Recommendation No. 5, AS 08.54.200(a)(1) does not allow the Board to consider complaints of unethical or incompetent guiding practices until receiving complaints from three or more hunters of separate parties.

VII. The extent to which a Board or commission which regulates entry into an occupation or profession has presented qualified applicants to serve the public.

A. As of October 1987, 51 master guides and 348 registered guides were licensed in Alaska. These individuals were required to pass both a written and an oral exam, as well as obtaining practical experience in the field, prior to licensure.

VIII. The extent to which State personnel practices, including affirmative action requirements, have been complied with by the Board, commission, or agency to its own activities and the area of activity of interest.

A. The Board established 12 AAC 38.010(c) whereby an applicant for licensure who:

because of a language barrier, is unable to read and competently understand the English language may be excused from taking the written examination, and may be issued a license based on successful completion of the oral portion of the examination and demonstration of his capabilities and experience.

B. Regulations also provide that when assigning guide area permits,

the board will give preference to qualifying guides whose permanent residence is within the district in which the area is located.

- IX. The extent to which statutory, regulatory, budgeting, or other changes are necessary to enable the agency, board, or commission to better serve the interests of the public and to comply with the factors enumerated in this subsection.

Please refer to the previous section, Findings and Recommendations.

APPENDIX A
GUIDE BOARD
SCHEDULE OF REVENUES COMPARED WITH EXPENDITURES
For Fiscal Year 1987
(UNAUDITED)
(Note 1)

| | <u>FY 87</u> |
|---|------------------|
| Revenues (Note 2) | \$153,442 |
| Expenditures (Note 3) | <u>133,205</u> |
| <u>Excess of Revenues</u> <u>over Expenditures</u> | <u>\$ 20,237</u> |

Note 1

The Schedule of Revenues Compared with Expenditures was prepared from available records and discussions with the Division of Occupational Licensing (DOL) personnel. The records were not audited by us and, accordingly, we do not express an opinion on the Board's Schedule of Revenues Compared with Expenditures.

Note 2

Revenue amounts reported do not include revenue obtained from the sale of game tags or hunting licenses. They only include revenue obtained from fees required to obtain and/or renew guide licenses.

Note 3

Expenditures consist of direct costs resulting from board member activities, (i.e., travel and per diem) and an allocation of direct and indirect costs of DOL. The procedures used by DOL for their allocation were not reviewed by us, and we express no opinion regarding their reasonableness. It should be noted, that represented expenditures do not include expenses incurred by other Departments or other divisions of the Department of Commerce and Economic Development in assisting the Board.

APPENDIX B
GUIDE BOARD
SCHEDULE OF ESTIMATED REVENUES
COMPARED WITH BUDGETED EXPENDITURES
For Fiscal Year 1988
(UNAUDITED)
(Note 1)

| | |
|---|-------------------|
| Average Revenue (Note 2) | \$ 77,675 |
| Less: Expenditures (Note 3) | <u>148,469</u> |
| <u>Excess of Expenditures over Revenues</u> | <u>\$(70,794)</u> |

Schedule 1
Types of Revenues

| <u>Revenues</u> | <u>Amount</u> | <u>Collection Time</u> |
|---------------------------------|---------------|------------------------|
| Master Guide License | \$240 | Biennially |
| Registered Guide License | 240 | Biennially |
| Class-A Assistant Guide License | 50 | Biennially |
| Assistant Guide License | 50 | Biennially |
| Transporter License | 50 | Biennially |
| Application Fee | 30 | |
| Examination Fee | 25 | |

Note 1

The Division of Occupational Licensing (DOL) prepared the above Schedule of Estimated Revenues Compared with Budgeted Expenditures. The schedule is included for informational purposes only and has not been audited by us. Accordingly, we do not express an opinion on the Board's Schedule of Estimated Revenues Compared with Budgeted Expenditures.

Note 2

Revenues were estimated based upon the current licensing fees (see Schedule 1) and projected license renewals and application fees for fiscal years 1988 through 1991. Because of a downward trend in Alaska's economy, the projection for revenues includes a factor representing 20% to 30% decline in the number of licensed professionals.

Note 3

Expenditures consist of direct costs associated with Board member activities (i.e., travel and per diem) and an allocation of direct and indirect costs of DOL. It should be noted that represented expenditures do not include expenses incurred by other Departments or other divisions of the Department of Commerce and Economic Development in assisting the Board. Expenditures for the Board represent an allocation of budgeted expenditures for all Boards in the Department for FY 88.

Note 4

The schedule represents the licensing fees currently in effect. Fees were raised in November 1986 in response to legislative intent to make the Boards more self-supporting.

APPENDIX C
GUIDE BOARD
EXAMINATION STATISTICS

Number of Examinations Given in FY 1984-1985 (Note 1)

| <u>Fiscal Year</u> | <u>Written Exam</u> | | <u>Oral Exam</u> | |
|------------------------|---------------------|--------------|------------------|--------------|
| | <u>Passes</u> | <u>Fails</u> | <u>Passes</u> | <u>Fails</u> |
| 1985 | 22 | 13 | 26 | 7 |
| 1986 | 13 | 16 | 18 | 1 |
| 1987 | 16 | 24 | 17 | 0 |

Note 1

Licensure as a registered guide requires a passing score on both a written and oral examination. Licensure as a master guide requires a passing score on an oral examination only. Licensure as assistant guides and transporters does not require examination.

APPENDIX D
GUIDE BOARD
ADMINISTRATIVE STATISTICS
September 30, 1987

Currently Licensed

| | |
|--------------------------|-----|
| Master Guides | 51 |
| Registered Guides | 348 |
| Class-A Assistant Guides | 140 |
| Assistant Guides | 854 |

Board Meetings Between
July 1, 1985 and June 30, 1987

December 2-7, 1985
April 7-11, 1986
December 6-13, 1986
April 11-17, 1987

STATE OF ALASKA

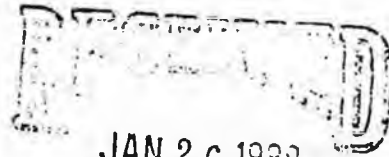
STEVE COWPER, GOVERNOR

DEPARTMENT OF COMMERCE & ECONOMIC DEVELOPMENT

P. O. BOX D
JUNEAU, ALASKA 99811-0800
PHONE: (907) 465-2500

OFFICE OF THE COMMISSIONER

January 20, 1988



Mr. Kandy Welker
Acting Legislative Auditor
Division of Legislative Audit
Budget and Audit Committee
P.O. Box W
Juneau, AK 99811

LEGISLATIVE
AUDIT

Dear Mr. Welker:

This letter is written in response to the Budget and Audit Committee's (hereinafter "Committee") report of its sunset performance review of the Guide Board (hereinafter "Board"). Below is the Department of Commerce and Economic Development's (hereinafter "Department") comments on the Committee's findings and recommendations.

Recommendation No. 1

The Committee has found that "over the past two years, the Guide Board has adopted a policy of eliminating previously approved joint-use areas and encouraging the assignment of only exclusive guide areas." As a result, the Committee recommends that the Guide Board "discontinue its policy of eliminating joint-use guiding areas." After careful consideration, the Department finds that the Committee's recommendation is overbroad. The issues raised by this recommendation are very complicated, and solutions are not readily apparent. In the final analysis, it is our opinion that the very painful and muddled processes that are evident at the meetings of the Guide Board are an accurate reflection of the difficulty in finding any wholly acceptable public solutions to the issues surrounding the assignment of joint-use or restricted guide areas.

For instance, while the Guide Board is created for "the purposes of licensing and regulating the activities of guides in the interest of the state's wildlife resources" (see AS 08.54.010; emphasis added), and while the audit report states that the Committee found the Board adopted this policy without consulting the Division of Game, it is also well known that the Division of Game, for whatever reason(s), is most reluctant to become involved in providing the Guide Board with necessary data. Currently, the Division of Game is under no specific requirement to provide the Board with accurate or pertinent data regarding game populations.

The issue, however, is not simply game "populations," but also the size and quality of the game within each area. While Alaskans most frequently are hunting for subsistence or personal use, with "trophy-sized" game not a prerequisite to a successful hunt, being able to offer large trophy animals is relatively more important to guides whose clients are paying thousands of dollars to come to Alaska from Europe, Asia, and the "Lower 48" for the big game hunt.

Before the Department can reasonably assess the validity of the recommendation that the Guide Board discontinue its policy of eliminating joint-use guiding areas, the Department believes the Legislature must consider the nature of the agency it has created and the concept of requiring nonresidents and nonresident aliens who wish to "hunt, pursue or take" big game to be accompanied by a licensed guide (see AS 16.05.407 and AS 16.05.408).

As recently as 1986, the Legislature saw fit to formalize Alaska's guiding system by specifically providing for the establishment and assignment of "restricted" (or exclusive) guide areas (see Chapter 71, SLA 1986). It seems somewhat contrary to legislative intent to have the Legislature specifically provide for the establishment of restricted guide areas in one year and the Guide Board to be criticized in practically the next year for establishing such areas.

This is not to say that the Department does not appreciate the concerns which have given rise to the Committee's recommendation. Indeed, the Department is particularly sensitive to allegations that the Guide Board is, as suggested, "more interested in the protection and development of the proprietary interests of established guides rather than promoting equitable access to the profession for all qualified individuals." However, the recommendation also seems somehow "too easy." It has not taken into account the ultimate issue: despite Alaska's size, there is not -- and will never be -- sufficient hunting areas or big game animals in those areas to give every registered guide joint-use -- let alone exclusive use -- of an area.

Alaska must realize that big game is a limited resource. A report that states there has been a stable game population statewide for the past five years does not describe -- by guide area -- the impact over the past years in the number, size, and quality of the big game animals found in that area.