

ALASKA LEGISLATURE COMMITTEE FILES, 1989-1990

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HOUSE RESOURCES

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

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

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

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

(footnote continued)

noted in a post-Hughes case:

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

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

After Hughes, the statements in the Alaska Constitutional Convention regarding sovereign ownership, quoted supra, are technically incorrect. Nevertheless, the trust responsibility that accompanied state ownership remains. 3339

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

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

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

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

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

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

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

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

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

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

D.

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

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

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

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

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

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

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

(footnote continued)

wildlife management by giving each guide having an EGA an incentive to conserve wildlife. However, without a specific constitutional provision allowing EGAs, mere usefulness in wildlife management does not suffice to save the EGA program from unconstitutionality under the anti-monopolistic common use clause. In the analogous area of limited entry in commercial fisheries, one purpose of limited entry has always been conservation related. However, this was not sufficient to save precursors to the present limited entry system from findings of unconstitutionality prior to the constitutional amendment allowing limited entry. This history is detailed in State v. Ostrosky, 677 P.2d at 1188, 1199 (Alaska 1983).

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

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

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

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

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

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

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

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

(footnote continued)

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

IV.

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

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

(footnote continued)

or regulation.

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

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

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

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

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

20. Alaska Statute 09.50.250 provides in part:

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

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

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

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

V.

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

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

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

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

REVERSED and REMANDED.

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

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

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STEVE COWPER, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

November 1, 1988

Senator Jan Faiks
3111 C Street, Suite 525
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Dear Senator Faiks:

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

In Owsichek, the Alaska Supreme Court decided that the statutes and regulations that underlie the state's exclusive guide area system ("EGA") ^{1/} are unconstitutional. As of the date of the decision, October 21, 1988, this system has no legal force. (Page 27, last paragraph).

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

This was the first time the court was called on to interpret the common use clause with respect to wildlife. In earlier decisions, it had discussed the clause in the context of state waters (Wernberg and CWC Fisheries) and in the context of fish (Ostrosky and Johns). ^{2/} In light of its earlier decisions, the

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

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

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

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

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

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

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

1. The EGA system gave one guide the right to exclude all other guides from conducting hunts in his or her EGA. This right was based on the area holder's seniority, that is, his or her use, occupancy, and investment in the area. (Page 23, first complete paragraph.)

2. EGA rights had no time limit, and the system of transferring them, based as it was on the selling of "improvements" and a holder's designation of his or her successor, allowed the selling of areas as if they were a property interest. (Page 23, second complete paragraph.)

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

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

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

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

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

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

Senator Jan Faiks
Anchorage, Alaska

November 1, 1988
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neither I nor any other assistant attorney general who is familiar with the case believes that there is a ground for requesting a rehearing. Because the court's decision was unanimous and was published after such a long period of deliberation, it is likely that any lingering doubts about the case have been resolved. For the same reasons, it is highly unlikely, even if the court agreed to rehear the case, that it would reverse its decision.

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

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

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

Sincerely,

GRACE BERG SCHAIBLE
ATTORNEY GENERAL

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

SW/bt

Encl.

Senator Jan Faiks
Anchorage, Alaska

November 1, 1988
Page 5

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

Randall Burns, Director
Division of Occupational Licensing

Ray McNutt, Chairman
Guide Licensing and Control Board

Rod Swope, Special Staff Assistant
Office of the Governor

IN THE SUPREME COURT OF THE STATE OF ALASKA

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

Supreme Court No. S-1650

ORDER

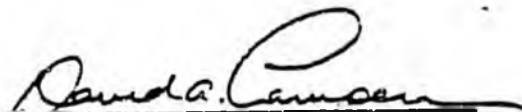
Trial Court No. 3AN 79-2387 Civil

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

IT IS ORDERED:

The motion for stay is granted. The portion of Opinion No. 3369, filed on October 21, 1988, which declares that the exclusive guide areas granted by the appellee State of Alaska Guide Licensing and Control Board are without legal force is stayed until June 1, 1989.

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


DAVID A. LAMPEN
Clerk of the Supreme Court

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

THE LEGISLATURE
BUDGET AND AUDIT COMMITTEE

AUDIT DIVISION
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December 18, 1987

Members of the Legislative Budget
and Audit Committee:

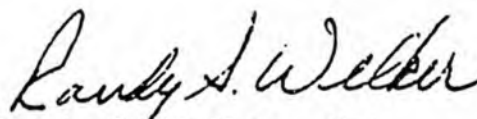
In accordance with the provisions of Titles 24 and 44 of the
Alaska Statutes (sunset legislation), the attached report is
submitted for your review.

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.

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 9 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 [DPS] 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

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JAN 20 1988

LEGISLATIVE
AUDIT

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

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.

The established guiding system creates specific guide areas across the state. A resident hunter, however, may hunt in any area of the state, irrespective of what guide or guides may also have been assigned that area. In addition, "outfitters," unlike Alaska's guides, are not limited to taking clients to particular regions of the state. An outfitter can transport clients anywhere, allow those individuals to hunt in an area until the number, size, or quality of the game coming out seems to be depleted, then move on to other areas which, perhaps, have not been over-hunted. It is important to realize that a guide can conduct hunts only in his or her assigned area(s), and is at the mercy, if you will, of resident hunters and outfitters.

The Department believes that a variety of special and public interests are presently fighting over a limited public resource that generates lucrative business through the provision of wilderness hunting (with outfitters) or guiding experiences. The pressures on the Guide Board have never been higher than right now. In its defense, the Guide Board has never received adequate support from the executive branch, having been avoided by Fish and Game, abandoned by Public Safety, seriously neglected by Commerce and Economic Development, and alternately ignored or criticized by the Department of Law. On the other hand, it is probably equally true that, until very recently, the Guide Board (and the guiding industry) would not have wanted and would have probably attempted to reject any proffered consistent, active administrative oversight of its activities.

The continued implementation of restricted or "exclusive" guide areas has brought the rather fragile guiding industry to a crisis point, with its flaws now being highlighted and focused on by its frustrated critics. But the fact remains, having created the Guide Board and statutorily agreed to regulate the guiding industry, the results of that decision are complex and the recent legislation recognizing the Board's creation of restricted areas only further complicates the matter. The legislation requires the promulgation in regulation of a "point system to be used by the board when it establishes and assigns a restricted guide area" [see AS 08.54.195(a)]. The legislation also establishes criteria that the Board must consider before it may assign a restricted area. These conditions, however, only further indicate that the Legislature recognizes that both resource and economic factors [see AS 08.54.195(b)(2), (3), (4), (5) and (e)] play an important part in determining the viability of the guiding industry.

Therefore, while the Committee's report finds that the Guide Board's actions to encourage the assignment of restricted areas serve to "unduly restrict entry into the guiding profession," the Guide Board can point to AS 08.54.195 as requiring the Board to weigh economic factors in deciding on the "quota of licensed operating guides who may operate within designated geographical game units" [AS 08.54.040(a)(2)]. This language would seem to recognize that the Guide Board may well have to limit the number of guides with assigned areas. We read this to mean, so long as the Board is guided by regulations creating a point system that will provide applicants with protection from subjective or arbitrary Board decisions, that the Guide Board may well limit the number of registered guides holding areas through the assignment of restricted guide areas.

The Department believes the Committee is right to find serious fault with the Guide Board for the Board's failure to develop regulations establishing area quotas and the point system, but we suggest the Committee should hesitate to fault the Board for attempting to solve what the guiding industry sees as an increasingly difficult situation (i.e., the increasing pressure on the big game resource) when the Legislature recently formalized the Board's authority to meet this problem through restricting area assignments.

As you note, the constitutionality of the guide area concept is currently before the court. In the meantime, so long as the Legislature believes the well-being of a guide's economic interest in an area is an important factor in setting quotas for a particular guide area, then the Department is hard put to unqualifiedly support the Committee's broad recommendation that the Guide Board simply "discontinue" the elimination of joint-use guiding areas.

The Department believes, before it can support such a recommendation, that more research needs to be done and regulations need to be put into place establishing proper assessment criteria for guide area assignments, whether joint-use or restricted. There may well be justification for some restricted areas, and there may well be justification for either opening up some presently restricted areas or adding additional users to current joint-use areas. The Department presently has no way of objectively or independently evaluating either the petitions brought before the Board or the validity of the current area assignments.

Until the Division of Occupational Licensing can provide the level of administrative support truly necessary to assist the Guide Board in reaching more objective evaluations, the experience and testimony of Board members and guides who appear before the Board should continue to

be relied upon. It is, after all, the job the statute gives the Board to do. The fact that the executive branch has, up until now, failed to provide the necessary support to the Board to professionalize its activities and decision-making process is no reason to suddenly tie its hands.

Prior Audit Recommendation No. 1

As stated above, the Department concurs in the Committee's recommendation that the Board place in regulation its criteria for establishing guide area quotas. Such regulations are currently being developed. It is expected that this project will be both time-consuming and very controversial. We hope the Board will complete this project by the end of 1988. We believe the Board appreciates the serious need for these guidelines and will work hard to put a quota and point system in place by year's end. The staff of the Division of Occupational Licensing will work closely with the Board in developing these regulations.

Prior Audit Recommendation No. 2

The Department concurs with the recommendation that the Board "improve" its methods of obtaining game management information from independent sources, including the Alaska Department of Fish and Game. However, as you are aware, the Division of Game is most reluctant to become actively involved in this area of game regulation. If the Board is to "improve," then we believe that there must be more than the anticipation of cooperation by executive branch agencies on the part of the Legislature. One possible solution would be statutory language mandating the provision of game management data from Fish and Game to the Guide Board. The data should be made available in ways that are useful to the Board and in a time frame that will meet the Guide Board's needs. The presence of game biologist expertise at Board meetings would also be more than helpful; it would assist in professionalizing Board decisions.

Prior Audit Recommendation No. 3

The Department concurs with the recommendation that the Board prohibit the transfer of an area from one guide to another. The Department fully supports your belief that all qualified guides should receive an equal chance at receiving an area assignment, as long as some mechanism is created that guarantees the guide relinquishing an area adequate compensation for the lawful property improvements he or she made while holding the area.

The current system is no doubt in place because the guide relinquishing an area certainly does not intend to simply walk away from what is, in many cases, tens of thousands of dollars in improvements in the area, leaving it for the next lucky guide who comes along. The statute says that a guide "may sell or otherwise transfer a lodge, camp or other lawful improvement to property located in a restricted guide area. Sales price may not exceed fair market value" [AS 08.54.195(e)]. If the Board could create a system wherein all applicants for a relinquished area were required to post proof of an ability to compensate the former guide for any improvements at fair market value, then all applicants could be considered equally and the area awarded according to the established criteria.

One matter that deserves further discussion, however, concerns the transfer of a guide area to a guide's heir. The guiding industry very much supports transfer to an heir. Whether the Legislature would condone such a practice should be made clear in statute. Otherwise, the Department would most likely continue to believe that all transfers should be prohibited.

Prior Audit Recommendation No. 4

We are pleased by the Committee's finding in this recommendation that the Board has done much to improve the oral examination of the Guide Board. The Department will continue to work with the Guide Board to improve the quality and objectivity of the guide exam.

Prior Audit Recommendation No. 5

The Department concurs with the recommendation that the Board pursue an amendment to AS 18.54, eliminating the need to receive three separate complaints before the Board can pursue an investigation against a guide for unethical or incompetent practices. We would support such action by the Legislature in the bill which reestablishes the Guide Board.

The recommendation that the Board pursue the posting of a performance bond by guides is more difficult to evaluate. On its face, the Department understands the Committee's reasons for seeking such bonding, and concurs with the suggestion that such a practice might well provide a more efficient, less expensive claim settlement process. However, the Division of Occupational Licensing's experience with contractor bonding has also led us to recognize that the impact of a bonding requirement on the guiding industry might be very severe.

As you are no doubt aware, the current economic situation in Alaska has made it extremely difficult to get bonding. It is possible, but current bonding companies often require the provision of unencumbered assets totalling in excess of \$100,000 for a \$10,000 bond. The current poor bonding market in Alaska has effectively eliminated some persons from the contractor industry because they cannot meet the requirements imposed by the bonding companies. This would, no doubt, have the same affect in the guiding industry.

This might also mean that guides who are holding little used areas might relinquish the areas rather than meet the bonding requirement, which would be all to the good, as it would free up areas for guides without areas who are seriously interested in guiding. At the same time, the bonding requirement might discourage or keep out some younger, less well-established guides who do not have adequate assets or resources, the very same guides for whom the Committee is interested in providing better access to the system. (This problem is partially countered in the construction area by allowing a contractor to make a cash deposit in the amount of the bond, but often a cash deposit is difficult for the smaller contractor to make.)

The Department appreciates this recommendation by the Committee and believes it certainly deserves consideration, but its potential impact on guides should probably be more thoroughly evaluated prior to any formal action by either the Board (through regulations) or the Legislature (through legislation) to require bonding of guides.

Final Comments

The Department is committed to improving the workings of the Guide Board. We have identified the following as areas where we believe immediate improvements are necessary:

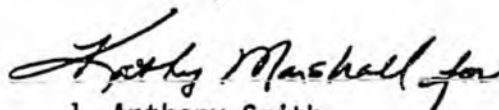
1. the general administrative support provided by the Division of Occupational Licensing;
2. better technical data from the Division of Game;
3. the Board's maps of the guide areas and assignments; and
4. guide area application or guide area transfer procedures.

January 20, 1988

In conjunction with the guiding industry, the Department will be approaching the Legislature for funding to provide more adequate staffing to the Board and for some form of computerized mapping of the guide areas. In the meantime, we are in the process of temporarily transferring the Guide Board's licensing examiner to Juneau so that that position will have the benefit of additional staff assistance and supervisory support while the Department attempts to more adequately support the difficult work of the Guide Board.

This audit has been another mechanism utilized by us to assist the Department in proper administration of the guide statutes and in helping the Guide Board to review its role. We have appreciated its independent evaluation of the Guide Board's performance.

Sincerely,



J. Anthony Smith
Commissioner

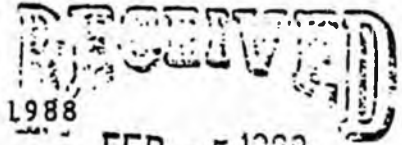
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cc: All Members of the Guide Board

**DEPARTMENT OF COMMERCE &
ECONOMIC DEVELOPMENT**

DIVISION OF OCCUPATIONAL LICENSING

7TH FLOOR FRONTIER BLDG.
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ANCHORAGE, ALASKA 99503
PHONE: (907) 561-2878



February 2, 1988

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

LEGISLATIVE
AUDIT

ATTN: Jim Griffin

Recommendation #1

The Guide Board did not adopt a blanket policy of eliminating all joint use guide area permits.

The guide Board did adopt a policy to eliminate joint use guide area permits as much as possible and in situations that involve small overlaps of boundaries. The board will grant transfers to an heir of a guide or to another guide who inherits a guide's permit. In just about all cases when this occurs, the guide inheriting the permit has worked for the guide holding the area for a number of years. This criteria is applied to a retiring guide. In these cases as well as regular transfers small overlaps are eliminated as much as possible. This is the area that brings the criticisms of the board not acting in a consistent manner on reassigning guide area permits. In most cases each transfer is different.

The board has on numerous cases asked the Department of Fish & Game for biological information with limited success. We do ask the applicant for a transfer or a new assignment to get this information if they can. This also isn't always possible because the board doesn't know what areas are to be involved in a given meeting. As Chairman I have asked our Director, Randall Burns, to see what could be done to relieve this situation.

While game management is not the primary responsibility of the guide board, it is in the criteria of issuing guide area permits. 12AAC 38.210 (b) (2) addresses that, not only in the area involved but also adjoining areas.

Regarding the effect of the policy being a limited entry. The situation probably would be better if it was on a limited entry scale such as commercial Fisheries. Both industries involve renewal resources that belong to everyone. Limited entry for the guiding industry would make the guide board's job much easier.

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Page 2.

Mr. Gerald L. Wilkerson;

We have in the neighborhood of 400 registered and Master Guides and we are licensing around 10 to 15 twice per year. There is just not the clientele or suitable areas available for that number of guides. Federal withdrawals sure haven't helped the situation. Even though we have that demand on areas there are still some open and can be used by any registered guide. Granted, these aren't the best areas for guiding operations but they are a start. I do admit that there are some guides who hold very large areas. I believe these should be looked at closely and should they not be utilized to their potential, divided to make room for some of the younger guides to get into the guiding business. This was a stated policy of the previous board after they had covered the state with assignments. This never happened with the previous board. The work load that this was never attempted. I have wanted to do this ever since I have been a member of the board. Budget and time has precluded that happening. I believe if a value was put on a guiding area permit, we would see guides applying for what they actually need for a realistic use of the area. I realize this will have to be accomplished through the legislature.

Recommendation #2

As mentioned above, I have asked our Director to address this issue.

Recommendation #3

I still do not agree that an area holder should surrender his guide area to the board when he wishes to transfer whether he be retiring getting out because of health or what ever reason. There is no other business that a man can't sell or give it to whoever he wants to. While our statues and regulations do not allow selling an area permit they do allow for a guide to sell his improvements that supported his guide area permit. The assigned area permit has done more to elevate the quality of the guiding industry in Alaska than anything that's taken place in the past. The responsibility it gives to the permit holder for the game resource, prompts a guide to upgrade their business and increase his investments in the area he has. As investments in both time and monetary increases so does the guides financial responsibility increase. After years working to build a high quality business it's only right that upon retirement the permit holder be able to choose his successor. This ^{onesc} in just about all cases is the most qualified person for the transfer no matter what selection criteria is used. There have been abuses of this in the past as there were transfers that seemed to be nothing

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Page 3

Mr. Gerald L. Wilkerson:

more than real estate sales. The Guide Board is aware of this situation and is taking a firm stance against these kind of dealings.

If your recommendation is adopted, assigning areas regardless of their ability to buy the rights of the previous holder, Since it is illegal to buy the rights of the holder, I assume that this would take in the previous holder's improvements. Should this be implemented, it could mean a man working to improve the area both resource and monetary wise could lose everything he worked for.

I do agree that in some cases people that weren't as well qualified as others have gotten area permits through transfers. I would like to see a regulation put in that the transferee be required to work with the permit holder a certain number of years to qualify for the transfer. I think this should be for at least two years, would prefer longer.

Recommendation #4

The current oral examination is as fair as an oral examination can be. The oral portion of the examination is the most important of the two parts.

Recommendation #5

The guide board did address this issue during the last guide bill (294) passage to no avail. We also tried to get an outfitter section included. Both were deleted by the legislature. We are faced with getting another bill through the legislature this session. So far none has been introduced to my knowledge. We plan to push for each individual complaint to come before the board for a hearing. I believe this will alleviate the need for bonding guides.

We also need to pursue Senate bill 191 regarding outfitters & unlicensed guiding. This unregulated activity is causing a lot of the complaints against the guiding industry as well as a detriment to the game resources of the state. The resource being the more important. This is one reason the guide board has to limit the guides operating in some areas of the state. The well populated area around King Salmon with moose and caribou is one as well as some areas on the north slope.

One other thought. I don't believe a time limit should be put on the life of the guide board. Changes takes time and some regulations as long as two years.

STATE OF ALASKA

THE LEGISLATURE
BUDGET AND AUDIT COMMITTEE

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

January 29, 1988

Members of the Legislative Budget
and Audit Committee:

We have reviewed the Department of Commerce and Economic Development, Division of Occupational Licensing's response to our preliminary report. Our comments regarding the response follows:

Prior Audit Recommendation No. 5

As pointed out in the Division of Occupational Licensing (DOL's) response, it currently does appear that our prior audit recommendation regarding the bonding of guides is problematical. DOL indicates in their response that imposition of a bonding requirement may have a very severe impact on individuals both in the guiding industry and those trying to enter the profession. One of our primary concerns when evaluating the performance of any professional licensing board is the degree to which the board provides equitable and fair entry into the regulated profession.

Certainly, given DOL's experience in this area with other professions and their assessment of the current market situation for obtaining bonding, their comments regarding the advisability of requiring bonds are well-founded. If current market conditions are so severe that obtaining performance bonding would have an adverse impact on individuals trying to enter or stay in the guiding profession, thus serve to limit competition in the industry, then we concur with DOL's assessment.



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

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

Commissioner, Department of
Commerce and Economic Development

Loren H. Lounsbury

Deputy Commissioners, Department of
Commerce and Economic Development

Terry Elder
Greg Baker

Members of the
Guide Licensing and Control Board

Chairman
Member
Member
Member
Member
Member
Member

Ray McNutt
Edward J. Shavings, Sr.
Douglas Pope
Charles Weir
Poldine Carlo
Ralph G. Fenner
James Harrower

STATE OF ALASKA

THE LEGISLATURE
BUDGET AND AUDIT COMMITTEE

AUDIT DIVISION
POUCH W
JUNEAU, ALASKA 99811

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.

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.

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.

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.

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.

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>FY 85</u>
Revenues (Schedule 1, Note 2)	\$46,000	\$53,735	\$88,678
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 B

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

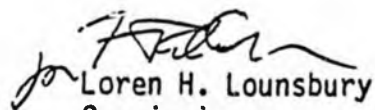
-2-

December 23, 1985

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

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

Sincerely,


Loren H. Lounsbury
Commissioner

LHL/sa1444s
122385b

The Legislature
Budget and Audit Committee
Jim Griffin, Auditor

DEC 19 1985

**LEGISLATIVE
AUDIT**

Recommendation #1

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

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

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

Recommendation #2

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

Recommendation #3

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

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

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 ~~XX~~ 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 ~~xx~~ 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 38.180) 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 S294.

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

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

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

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

An addition to recommendation #4.

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

Comments Regarding Interim Letter #1
Sunset review GLCB

Recommendation # 1.

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

Recommendation # 2.

Agree with Mr. McMutt.

Recommendation #3.

I completely agree with Mr. McMutt'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. McMutt's comments and covered it quite thoroughly.

Recommendation # 5.

Agree with Mr. McMutt.

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

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

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

An addition to recommendation #4.

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

STATE OF ALASKA
THE LEGISLATURE

POUCH Y STATE CAPITOL
JUNEAU, ALASKA 99811
907 465 3800

LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM

February 4, 1989

SUBJECT: Sectional Summary of SB 140; An Act relating to big game hunting and to the regulation of big game and marine mammal guide-outfitting, transportation, and other commercial services for big game hunters, creating the Big Game Commercial Services Board; and providing for an effective date.

TO: Senator Bettye Fahrenkamp

FROM: George Utermohle *GU*
Legislative Counsel

The following is a sectional summary of SB 140 requested by Nancy Peterson of your staff.

Please note that a summary of a bill should not be considered an authoritative interpretation of the bill. The bill itself is the best statement of its contents.

Section 1 of the bill repeals and reenacts AS 08.01.010(10) to provide that the Big Game Commercial Services Board is subject to and benefits from centralized licensing procedures under AS 08.01.

Section 2 of the bill repeals and reenacts AS 08.03.-010(c)(20) to provide that the Big Game Commercial Services Board terminates on June 30, 1993 under the "sunset" provisions of AS 08.03.

Section 3 of the bill adds new sections to AS 08.54.

ARTICLE 4. BIG GAME COMMERCIAL SERVICES BOARD.

Sec. 08.54.300 establishes the Big Game Commercial Services Board (Board) in the Department of Commerce and Economic Development. The Board consists of nine members. Three members of the Board are the commissioners (or their designee) of fish and game, natural resources, and public safety.

Two members of the board are either guide-outfitters or class-A guide-outfitters. One member of the Board is a transporter. One member of the Board is a member of the Board of Game who is chosen by the Board of Game. One member is a person who represents Native landholders. And one member of the Board is a public member. The guide-outfitter, transporter, and public members of the Board, as well as the representative of Native landholders, are appointed by the governor.

Sec. 08.54.310 sets out the duties and powers of the Board. The Board shall prepare, grade, and administer examinations for guide-outfitters licenses and for game management unit certifications; determine qualifications for class-A guide-outfitter, marine mammal guide-outfitter, and assistant guide-outfitter licenses; establish performance standards for providers of big game commercial services and regulate the activities of these providers; publish an annual list of big game commercial services providers; prohibit big game commercial services that are unsportsmanlike, unethical, unsafe, etc; revoke, suspend, or deny renewal of licenses and permits; authorize issuance of transporter licenses and commercial use permits; and meet at least twice each year.

The Board may provide for registration of hunting camps and facilities; establish a management system for guide-outfitters; and establish standards of supervision that a guide-outfitter must exercise over class-A guide-outfitters and assistant guide-outfitters.

Sec. 08.54.320 provides that the Board shall adopt regulations as required by this chapter and as necessary for administration of this chapter.

ARTICLE 5. LICENSING.

Sec. 08.54.350 sets out the minimum qualifications necessary for a guide-outfitter license. A guide-outfitter may contract to guide-outfit hunts for big game.

Sec. 08.54.360 sets out the minimum qualifications necessary for a marine mammal guide-outfitter license. A marine mammal guide-outfitter may contract to guide-outfit hunts for marine mammals.

Sec. 08.54.370 sets out the requirements for renewal of guide-outfitter and marine mammal guide-outfitter licenses. The department may not renew a license unless these requirements are satisfied.

Sec. 08.54.380 sets out the minimum qualifications necessary for a class-A guide-outfitter license. A class-A guide-outfitter may not contract to guide-outfit hunts. A class-A guide-outfitter must be under the supervision of a guide-outfitter but may take charge of a camp in the absence of a guide-outfitter.

Sec. 08.54.390 sets out the minimum qualifications necessary for an assistant guide-outfitter license. An assistant guide-outfitter may not contract to guide-outfit hunts and must be employed by a guide-outfitter and supervised by a guide-outfitter or class-A guide-outfitter while in the field on a hunt.

Sec. 08.54.400 sets out the requirements for obtaining and renewing a transporter license.

A transporter may provide transportation services to big game hunters. A transporter may also provide accommodations to big game hunters in the field in certain situations. A transporter must place a decal provided by the department on each piece of transportation equipment that the transporter uses in providing transportation services to big game hunters.

Sec. 08.54.410 provides for an appeal to the commissioner of commerce and economic development if an applicant for any class of guide-outfitter license or transporter license is denied a license by the Board. Specific criteria that an appellant must satisfy in order to file an appeal under this section are set out.

Sec. 08.54.420 provides that guide-outfitter, marine mammal guide-outfitter, and transporter licenses are renewed annually.

Sec. 08.54.430 provides for examinations for any class of guide-outfitter license that may be required under this chapter. The Board shall administer qualification examinations at least twice a year and at least once each two years shall administer the examinations at a location

outside of Anchorage. The examinations must be administered at least 90 days apart.

The Board shall regularly provide information on examinations and qualifications for all classes of guide-outfitter licenses to residents of rural areas.

Sec. 08.54.440 provides for renewal of all classes of guide-outfitter licenses after the license has lapsed. If any class of guide-outfitter license has lapsed for two consecutive years, the applicant must satisfy the requirements for initial issuance of the license.

A guide-outfitter does not have to repeat the three year apprenticeship as a class-A guide-outfitter or an assistance guide-outfitter unless the guide-outfitter license has been lapsed for three years or more.

Sec. 08.54.450 provides that the department shall set fees for examinations and licenses required under this chapter. A license fee for any class of guide-outfitter license is in addition to the fee paid for a hunting license.

Sec. 08.54.460 requires that a person, other than a licensed guide-outfitter, marine mammal guide-outfitter, or transporter, who provides other big game commercial services for compensation register with the Board, obtain a commercial use permit, and pay the commercial use permit fee. Examples of "other big game commercial services" are listed.

Sec. 08.54.470 requires guide-outfitters, marine mammal guide-outfitters, and transporters to obtain an annual commercial use permit and pay the commercial use permit fee.

The department, in consultation with the Board, shall set the amount of the commercial use permit fee.

A guide-outfitter, marine mammal guide-outfitter, or transporter shall pay the commercial use permit fee with the application for issuance or renewal of their license.

The commissioner of administration shall separately account for the fees received for commercial use permits. The legislature may use the money received for commercial use permits to make appropriations to the Department of Fish and Game and the Department of Public Safety for game management and enforcement of game laws.

ARTICLE 6. PENALTIES.

Sec. 08.54.500 sets out the procedures for discipline of a person who holds any class of guide-outfitter license.

The Board may hold a disciplinary hearing upon receiving a complaint about the guide-outfitter licensee. The Board shall hold a disciplinary hearing upon receiving three complaints from members of three separate hunting parties about a licensee's activities or a complaint about a licensee's conduct in a life-threatening situation or if the licensee is convicted or certain state or federal laws.

The Board may revoke, suspend, or deny renewal of any class of guide-outfitter license after a hearing if the Board finds that the licensee engaged in certain proscribed activities or violated certain state or federal laws.

The Board shall revoke any class of guide-outfitter license after a hearing if the Board finds that the licensee is not qualified for the license held, is incompetent, or has been convicted of certain state or federal laws during the preceding five years.

The Board shall immediately suspend any class of guide-outfitter license if a certified copy of a judgment of conviction of a licensee for certain state or federal crimes is filed with the Board.

Sec. 08.54.505 provides for the discipline of transporters and commercial use permittees.

The Board may hold a disciplinary hearing regarding the activities of a transporter or commercial use permittee upon receiving a complaint about the transporter or commercial use permittee. The Board shall hold a disciplinary hearing upon receiving three complaints from members of three separate hunting parties about the transporter's or permittee's activities or if the transporter or permittee is convicted of certain state or federal laws.

The Board may revoke, suspend, or deny renewal of transporter license or commercial use permit after a hearing if the Board finds that the licensee or permittee engaged in certain proscribed activities or violated certain state or federal laws.

The board shall revoke a transporter license or commercial use permit after a hearing if the Board finds that the licensee or permittee is not qualified for the license or permit or has been convicted of certain state or federal laws during the preceding five years.

The Board shall immediately suspend a transporter license or commercial use permit, if a certified copy of a judgment of conviction of licensee or permittee for certain state or federal crimes is filed with the Board.

Sec. 08.54.510 sets out general provisions applicable to disciplinary proceedings.

A person who is disciplined under AS 08.54.500 or 08.54.505 may not engage or be employed in the business of providing big game commercial services during a period of license or permit revocation or other disciplinary action. A person who is licensed under this chapter or who holds a commercial use permit may not employ a person whose license or permit under this chapter has been suspended or revoked.

A license or permit that has been revoked must be surrendered immediately to the department.

A certified copy of a judgement of conviction is conclusive evidence of the commission of the offense in a disciplinary proceeding of the Board, regardless of whether the conviction resulted from a plea of nolo contendere or the conviction is under appeal, unless the conviction is overturned on appeal.

The Board shall notify a complainant of the result of the Board's hearing within 30 days after the hearing. The Board must also notify a complainant of its reasons for not taking disciplinary action.

Sec. 08.54.520 sets out unlawful acts involving the provision of big game commercial services and establishes the penalties for those acts.

A person may be punished by a fine of not more than \$30,000 or imprisonment for not less than two months or more than one year or both for

- (1) failing to report violations of certain laws by a client or employee if the person holds a license or permit issued under this chapter;
- (2) committing, aiding in the commission of, or allowing a violation of certain fish and game laws if the person holds a license or permit issued under this chapter;
- (3) providing commercial big game services without holding a commercial use permit;
- (4) obstructing the lawful hunting activities of hunter who is not a client of the person, if the person holds a license or permit under this chapter;
- (5) failing to transmit big game conservation fees to the department;
- (6) providing guide-outfitting services except while employed and supervised by a guide-outfitter, if the person is a class-A guide-outfitter or assistant guide-outfitter.

A person may be punished by a fine of not more than \$30,000, or imprisonment for not less than two months or more than one year, or both for a first offense or by a fine of not more than \$50,000 or imprisonment for not more than three years for a second or subsequent offense for

- (1) providing guide-outfitter services without having an appropriate class of guide-outfitter license and hunting license in actual possession;
- (2) advertising or to representing to be a guide-outfitter without holding a guide-outfitter or marine mammal guide-outfitter license;
- (3) providing transportation services to a big game hunter without holding a transporter license;
- (4) contracting to lead a hunt, if the person is a class-A guide-outfitter or assistant guide-outfitter.

A person who provides big game commercial services while the person's license to provide those services is suspended or