

ALASKA LEGISLATURE COMMITTEE FILES, 1989-1990 8672
6019 HOUSE RESOURCES

423

would survive constitutional challenge.

February 14, 1989

The Honorable Bettye Fahrenkamp, Chairwoman
Senate Resources Committee
P.O. Box V
Juneau, Alaska

Dear Senator Fahrenkamp:

To assist your committee in its consideration of Senate Bill 140, I am writing to provide a synopsis of the Owsichuk decision and its implications for creating an area management system for allocating guide access to big game.

1. SYNOPSIS OF THE OWSICHEK DECISION.

On October 21, 1988, the Alaska Supreme Court decided that the statutes and regulations that underlie the state's exclusive guide area system ("EGA") are unconstitutional. 1/

On December 8, the court granted the state's request that the effect of this decision be postponed until June 1, 1989. Therefore, the EGA system is currently enforceable. Beginning in June, the system will have no legal effect, and any licensed person may guide hunters in a game management unit for which he or she is certified. 2/

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/ When a guide is licensed by the Division of Occupational Licensing, he or she is "certified" to conduct hunts in only those game management units where the guide has experience. Except for older guides who were "grandfathered" into more units, most guides are limited by regulation to certification in not more than three game management units. 12 AAC 38.200.

(Footnote Continued)

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Chairwoman, Senate Resources Committee

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The supreme court based the Owsichek 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). In light of its earlier decisions, the court declared that the "common use clause was intended to guarantee broad public access to natural resources."

In order to further clarify the meaning of the common use clause, the court looked at the constitutional history of this clause and at the historic development of wildlife law in general. 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."

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.

The court summarized its interpretation of the common use clause by stating that the clause was intended to put into the constitution "certain trust principles guaranteeing access to

(Footnote Continued)

At the time of the court's decision, 256 licensed guides had been assigned either exclusive or joint use guide areas. One hundred and eighty four licensed guides had no area to guide in. Therefore, after June 1 the Owsichek decision means that 184 more guides will be able to guide hunts in any of the game units for which they are certified. The additional hunting pressure, of course, varies from unit to unit. For example, the number of eligible guides in units 1, 2, 3, and 4 (southeast Alaska) will increase three-fold (from 13 to 33) while the number of eligible guides in unit 17 (Togiak - Dillingham area) will increase over six fold (from 17 to 129).

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the fish, wildlife and water resources of the state" and, at a minimum, this meant a "prohibition against any monopolistic grants or special privileges." 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.

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.
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.
3. The assignment of EGA's was not based primarily on wildlife management concerns. 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." 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."

Finally, the court had 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.

II; IMPLICATIONS FOR A NEW AREA MANAGEMENT SYSTEM

The Legislative Task Force on Guiding and Big Game has recommended that the state develop a new area management system for allocating access to guiding opportunities among licensed guides. It has recommended the establishment of a land-based concession system. While the Department of Law could defend this type of system, we believe that it would ultimately fail a legal challenge.

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Chairwoman, Senate Resources Committee

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Even if a system were developed that served only game management purposes and not the economic welfare of a segment of the guiding industry, it would not be safe. The Owsichek court noted that the common use clause precluded exclusive guide areas even if they could be justified as a wildlife management tool. 4/ In the court's view, the traditional game management tools -- licensing requirements, bag limits, and seasonal restrictions -- apparently are sufficient to protect the resource without conflicting with the clause. A court would recognize that the state can respond to any increased pressure on game resources by requiring hunter registration, permit drawing, or other methods now available to the Board of Game. Although these techniques may bring unpredictability to the business of guiding, we believe that a court would favor them over a system that has inherent constitutional problems.

In conclusion, a constitutional amendment is the only certain step that will guarantee a stable, long-term system that allows some, but not all qualified guides to have access to game resources in a particular area. We believe that any statutory, land-based system that does not have explicit constitutional underpinning and that resembles even remotely the EGA scheme that was struck down in Owsichek will be destined to the same fate.

Sincerely yours,

GRACE BERG SCHAIBLE
ATTORNEY GENERAL

By: *Stephen M. White*
Stephen M. White
Assistant Attorney General

SMW:jf

4/ Owsichek v. State, Guide Licensing and Control Board, 763 P.2d 488, 497 n.14 (Alaska 1988).

Alaska State Legislature

JUDICIARY
CHAIRMAN
907-465-4523



JAN FAIKS
POST OFFICE BOX V
JUNEAU, ALASKA 99811

Senate

February 6, 1990

Ken Owsichek
Box 190301
Anchorage, AK 99519

Dear Mr. Owsichek:

Attached is a detailed description of the notices provided for all meetings of the Legislative Task Force on Guiding and Game that you requested. After the initial meeting of June 29th which was held for the purpose of organizing the task force, each meeting was preceded by phone calls to task force members to establish a time and meeting place for the upcoming meeting. Once a date was agreed to, staff notified the members by mail or phone depending upon the time available before the meeting date. Also, again depending upon the time available before the meeting, various forms of public notice of the meeting were provided. The type of public notice provided for each meeting is identified in the attachments.

For the sake of thoroughness, I will also mention that on August 16th some task force members, but not a quorum, met with representatives of Birch, Horton, Bittner, and Cherot Law Offices for the purpose of discussing the scope of the work that the firm would provide for the task force. This gathering did not constitute a meeting for purposes of application of AS 44.62.310, but was, rather, an administrative gathering between staff and some task force members to discuss matters relating purely to the internal workings of the task force. The following people attended this gathering:

Task Force members:

Senator Faiks
Ken Fanning (by telephone)
Lew Pamplin (Wildlife Conservation)
Randall Burns (Occupational Licensing)

OUT OF SESSION

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

Ken Owsichek
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Staff:

Mark Riehle (Senator Faiks)
Steve White (Assistant Attorney General)

Birch, Horton representatives:

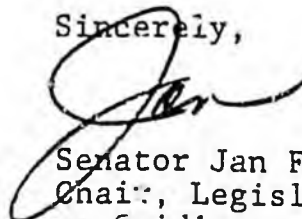
Steve Pradell
William Horn (by telephone)

I was discouraged to learn from my staff that, following your visits to my office in November and December, despite being urged to do so, you declined to participate in the task force hearings, suggesting instead that you had better things to do. I regret that you apparently felt it would be useless to offer testimony to the task force or to listen to the panel's discussions of issues. Significant changes based upon testimony were made to recommendations adopted by the task force. I feel that the task force could have benefited from your comments.

Much of your letter of January 20, 1990 consists of objections you have to policy decisions made by the task force. I regret your dissatisfaction with those policy decisions and can only urge you to bring these concerns to the attention of the legislative committees that will be working on the guiding legislation. It is not too late to attempt to influence those decisions.

In closing let me assure you that every effort was made to notify interested persons of meetings of the Legislative Task Force on Guiding and Game, that public testimony was actively solicited, and that public comments were seriously considered by members of the task force before recommendations were adopted.

Sincerely,



Senator Jan Faiks
Chair, Legislative Task Force
on Guiding and Game
(terminated January 25, 1990)

JF:TBC:pl
WKP1/105
Attachments

Ken Owsichek
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cc: Governor Cowper

All members of the Legislative
Task Force on Guiding and Game

✓ All State Legislators

William Horn
Birch, Horton, Bittner and Cherot

THE FOLLOWING ATTACHMENT IS A LIST OF ALL TASK FORCE MEETINGS

JUNE 29, 1989 - (work session) (posted Public Notices at Anchorage LIO, Senate Secretary posting)

JULY 19, 1989 - (work session) (notice may have been posted at the Anchorage LIO and notice may have been given to one or both of the Anchorage newspapers but no records exist to verify)

OCTOBER 5-6, 1989 - (combination work session/regular meeting with public comment)

(newspaper ads, written notice to staff mailing list)

NOVEMBER 8, 1989 - (regular meeting - public comment)

(posted Public Notice at Anchorage LIO, newspaper ads, written notice to staff mailing list and to approximately 1500 commercial licensees, landowners, agencies from agency lists, available to statewide teleconference network)

NOVEMBER 20, 1989 - (regular meeting - public comment)

(posted Public Notice at Anchorage LIO, newspaper ads, written notice to staff mailing list and to approximately 1500 commercial licensees, landowners, agencies from agency lists, available to statewide teleconference network)

DECEMBER 11-12, 1989 - (regular meeting - public comment)

(posted Public Notice at Anchorage LIO, newspaper ads, written notice to staff mailing list, available to statewide teleconference network)

JANUARY 4-5, 1990 - (work session with public comment)

(posted Public Notice at Anchorage LIO, available to statewide teleconference network)

JANUARY 22, 1990 - (final meeting - work session)
(available to teleconference network)

(posted Public Notice at Anchorage LIO, available to statewide teleconference network)

The attached press release was issued by the Legislative Task Force on Guiding and Game following their June 29, 1989 organizational meeting.

The release was provided to all radio, television and newspaper outlets in Alaska.

copy

June 29, 1989

PRESS RELEASE

Subject: Legislative Task Force on Guiding and Game

Senator Jan Faiks was elected Chairman of the Legislative Task Force on Guiding and Game during an organizational meeting in Anchorage Friday, June 29th.

The panel is made up of 15 members who represent the general public, Alaska natives, industry, the legislature and state agencies. The task force will develop a resource-based management system for allocating big game hunting opportunities among guide-outfitters.

Under the chairmanship of former Representative Henry Springer, in January the task force presented the Legislature with a package of recommendations. The effort resulted in the passage of House Bill 112 and Senate Bill 139. Both have been signed by the Governor. HB 112 provides for changes in regulations pertaining to the commercial big game industry in Alaska. SB 139 extended the task force for another year to develop recommendations for a statewide big game management plan.

The task force will conduct meetings throughout the legislative interim.

For additional information please call 561-7610.

The following is a list of newspapers in which advertisements were placed for the Legislative Task Force on Guiding and Game

Attached is a sample ad (all adds were similar with dates and times changed)

for the October 5th & 6th meeting:

Anchorage Daily News
Anchorage Times
Fairbanks Newsminer
Peninsula Clarion
Juneau Empire

For the November 8th meeting:

Anchorage Daily News
Anchorage Times
Fairbanks Newsminer

For the November 20th meeting:

Anchorage Daily News
Anchorage Times
Fairbanks Newsminer
Frontiersman
Peninsula Clarion

Legislative Task Force
on
Guiding and Game
will meet on

October 5th
10 a.m. to 4:30 p.m. • Work Session

7 to 9 p.m.
Public Testimony
Game Management Plan Options

October 6th
10 a.m. to 4:30 p.m. • Work Session

at
Anchorage Legislative Information Office
3111 C Street, First Floor

Public Welcome!

Senator Jan Faiks
Task Force Chairman

• For more information, call 561-7610 •

Also included in the packet to Mr. Owsichuk was a copy of the "staff-generated" task force related mailing list of about 140 individuals compiled during the time from June 29, 1989 to January 25, 1990.

The list was comprised of individuals and organizations who requested their names be placed on "the mailing list", in addition to task force members and others directly involved in the task force work either on a continuing or a temporary basis.

In addition to individuals and organizations on this list, mailed notices of meetings were sent to native organizations, village entities and all municipalities. Names and addresses for these groups were obtained from federal agencies in the form of mailing labels. Notices were also sent to licensed guide-outfitters and licensed members of related occupations, including air transporters and commercial use permit holders. These names and addresses were supplied by the Division of Occupational Licensing in the form of mailing labels.



Alaska Professional Sportsmen's Association

Representing Alaska's Big Game Guides, Outfitters, Air Taxis, Sport Fishing Guides,
Lodges and Support Industries

January 20, 1990

The Governor's Task Force on Guiding and Big Game
The Governor
The Alaska State Legislature

Dear Task Force Members, Governor, and Members of the State
Legislature:

The Alaska Professional Sportsmen's Association is an Alaskan non-profit corporation made up of hunting guides, outfitters, air taxi operators, transporters, fishing guides and lodges, taxidermists, every day fishermen and outdoor sportsmen and women who use our lands and renewable resources including our "common use" resources of water, fish and game. We include support industries such as sporting equipment supply stores, hotels, restaurants, etc. Our main purposes are to maintain equal access to our fish, game and waters and to promote proper game and fish management.

Although a young organization, less than a year old, we have already caused major changes in law and in the manner state and federal agencies treat sportsmen. This also includes ongoing litigation, litigation under preparation, recent Supreme Court decisions and an investigation into possible violations of the Federal Civil Right's Act by Federal, State and/or Local government officials.

Many of our members have been upset at the Task Force about the lack of fair and equitable public notice which should include mailings to the people who will be regulated and most impacted by recommendations of the task force. Although there are less than 500 registered guides and assistant guides in Alaska, they have not been directly notified, as would reasonably be expected, of what the task force is doing, what direction it is heading and what it's recommendation is to the Governor and Legislature. In addition, most of our members feel that the existing public process, as practiced especially by this Task Force, is no

this position, our representatives are TRUSTEES of all Alaska's waters, fish and game. The fish and game and waters do not belong to the administrative or legislative branches of government. They belong to the people of Alaska and are there for "common use".

It is apparent that the exclusive guide area scheme will not be put to rest by this Task Force. Because of the continued actions of a few to keep the EGA concept alive - in whatever form, the charge of the Task Force, the expectations of Alaskan's and the public process have been subverted. You occasionally asked for "public comments" but have already committed to a new guide area scheme. Your handouts and draft legislation make that clear. And yet there are tested alternatives to the resource allocation and permitting issues which the Task Force and ADF&G continue to dismiss as "administratively" unworkable. And yet they work in most states - and have for decades.

We want the Task Force and the Alaska Legislature to know that we are doing our best to participate, in a constructive manner, and are following this Task Force very closely. Anything resembling an exclusive guide area concept will be brought before the court requesting injunction as quickly as it is signed into law. You know this and many familiar with the Task Force have already admitted that the process will start all over again at great public expense.

Why not provide alternatives to the guiding and outfitting industry and to the legislature that you know can stand the test of the court. As mentioned, we are exploring further constitutional and now federal civil rights violations by state, federal and local government officials that we already believe may subject individuals in government to stiff fines and possible criminal charges.

The supposed "chaos and confusion" that you claim in your findings of the guiding profession was not created by the Owsichek decision. The chaos that exists was created by the actions of special interest groups trying to protect their unconstitutionally guaranteed incomes and investments with an exclusive guide area concept that deprived all Alaskans, under law, of their common use of fish, game and waters within our state and found illegal by our Supreme Court only after one Alaskan refused to "playball".

The failure of the EGA system has been made apparent by the increasing issuance of more and more legislation and

guided hunter a year to qualify. The second license would be for guiding or outfitting to take moose, caribou and black bear only. This would require a one year apprenticeship. There is no reason to separate guiding from outfitting as they are so close that they are impossible to separate rationally and the Supreme Court found them both to be common users.

2. Establish a lottery and registration permit system for all non-residents. They are the consumptive "users" of the game, not the guides or outfitters. The lottery should be 6 to 8 months prior to the hunting season. Among other advantages, such a permit system will:

- a. Manage the game and limit the kill by permit or registration.
- b. Stop "hot spots" or kill zones from developing and spread hunting pressure throught the state.
- c. Stabilize hunting seasons and adjust the management of game by decisions made before the kill as well as after the kill.
- d. Leave game management with the proper agencies.

3. The guiding/outfitter test should be administrated one or two times a month by a college or a private firm the same way insurance license tests and other licensing tests are given. A practical test given in this manner insures fairness, equality and an acceptable level of competency in a guide. This eliminates bias and favoritism. The Division of Licensing should only issue a license to a person who passes the test, not dictate how one might get a license.

4. Discriminatory users fees, presently charged only of guides, outfitters, transporters, etc. should be eliminated. The present type of user fee violates equal protection under the law and discourages visitors. The standard tag and license fees are themselves user fees and can only be charged to the hunter who takes the game not to the person providing a guiding service to the hunter. The guide is only one link in a long chain of services provided a hunter. Hotels, restaurants, airlines, taxis all provide services. The system should also leave the choice of which guide or outfitter or service provider a visitor wishes to use to the visitor. It is not the government's role to dictate who a visitor must choose to provide guiding service.

5. Any and all licensed commercial service providers should be allowed to operate in the entire state. Allowing some guides to hunt the entire state while others are limited to

CORRECTION

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



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Lodges and Support Industries

January 20, 1990

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Legislature:

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Although a young organization, less than a year old, we have already caused major changes in law and in the manner state and federal agencies treat sportsmen. This also includes ongoing litigation, litigation under preparation, recent Supreme Court decisions and an investigation into possible violations of the Federal Civil Right's Act by Federal, State and/or Local government officials.

Many of our members have been upset at the Task Force about the lack of fair and equitable public notice which should include mailings to the people who will be regulated and most impacted by recommendations of the task force. Although there are less than 500 registered guides and assistant guides in Alaska, they have not been directly notified, as would reasonably be expected, of what the task force is doing, what direction it is heading and what it's recommendation is to the Governor and Legislature. In addition, most of our members feel that the existing public process, as practiced especially by this Task Force, is no

longer a meaningful process and may have violated state notice requirements. Our members look back to public meetings in 1988 and 1989 when the public was invited to speak at these meetings, and it became quite obvious that the Task Force was determined to remain on one track - back to an exclusive guide area concept, in direct violation of our state constitution and recent Supreme Court decisions. We have also had reports that the Task Force did not have "enough time" or "money" to notify everyone effected by their deliberations or recommendations so the Task Force put together "selective" mailouts. We have requested a copy of this list and requested an explanation as to its development.

A mailing to all registered guides/outfitters and transporters does not cost that much. Simply sending out the handouts from Task Force meetings to this small group would have done a great deal to fairly satisfy notice requirements. We have also requested proof of notice of all meetings of the Task Force which we believe were deficient.

We ask the Task Force, Governor and members of the Legislature to read pages 9 through 24 of the Owsichek decision of our State Supreme Court. It clearly deals with the "common use clause" researching back to the founding days of our constitution and our state. The court examined the "Why" of the words of our constitution. The Supreme Court offered the first and most substantial insight into the meaning of "common use" in their Owsichek decision. This was not a decision about leases and contracts but about "common use" of the waters, fish and game within the state of Alaska. The CWC fisheries case and several other cases fully back up the "common use" language and the intent of it's actions. In addition, guiding itself was given a "common use" designation. Guides are not the "users" of the game but supply guide, outfitter and transport services to the real users.

The legislature, and its appointed boards and commissions, have the responsibility to uphold our constitution and all of its provisions. Their purpose is not to find ways around our Constitution, but rather ways to expand its meaning - always reminded of the author's intent. Our public servants are not supposed to tell the people what to do but rather represent the goals and aspirations of Alaskan's in solving public problems. That means they must notify and listen to those most effected. Not cow tow to former Federal officials who now are given cozy consulting contracts. In

this position, our representatives are TRUSTEES of all Alaska's waters, fish and game. The fish and game and waters do not belong to the administrative or legislative branches of government. They belong to the people of Alaska and are there for "common use".

It is apparent that the exclusive guide area scheme will not be put to rest by this Task Force. Because of the continued actions of a few to keep the EGA concept alive - in whatever form, the charge of the Task Force, the expectations of Alaskan's and the public process have been subverted. You occasionally asked for "public comments" but have already committed to a new guide area scheme. Your handouts and draft legislation make that clear. And yet there are tested alternatives to the resource allocation and permitting issues which the Task Force and ADF&G continue to dismiss as "administratively" unworkable. And yet they work in most states - and have for decades.

We want the Task Force and the Alaska Legislature to know that we are doing our best to participate, in a constructive manner, and are following this Task Force very closely. Anything resembling an exclusive guide area concept will be brought before the court requesting injunction as quickly as it is signed into law. You know this and many familiar with the Task Force have already admitted that the process will start all over again at great public expense.

Why not provide alternatives to the guiding and outfitting industry and to the legislature that you know can stand the test of the court. As mentioned, we are exploring further constitutional and now federal civil rights violations by state, federal and local government officials that we already believe may subject individuals in government to stiff fines and possible criminal charges.

The supposed "chaos and confusion" that you claim in your findings of the guiding profession was not created by the Owsichuk decision. The chaos that exists was created by the actions of special interest groups trying to protect their unconstitutionally guaranteed incomes and investments with an exclusive guide area concept that deprived all Alaskans, under law, of their common use of fish, game and waters within our state and found illegal by our Supreme Court only after one Alaskan refused to "playball".

The failure of the EGA system has been made apparent by the increasing issuance of more and more legislation and

regulations on all factions of the hunting and visitor guiding industry. These regulations are like sand bags being thrown against a poorly constructed and crumbling dam. Not only has the exclusive guide area system been declared unconstititutional; IT DOES NOT WORK. The government control that had become necessary to keep the EGA system going was indeed creating chaos long before the Owsichuk decision. It is now easier for a doctor to get a license in the State of Alaska than it is to become licensed as a guide/outfitter. Total government control has not worked in socialist and communist countries and it will not work with our guiding industry.

The state's EGA system has also created a dangerous situation for the guiding industry on Federal land. The system gives the Federal agencies a way to eliminate all guiding on Federal land by attrition. It gives them a way to eliminate a "management problem". A problem which is consistent with the Theology of some Federal agencies, when they should (under various legal mandates) be exploring expanded visitor uses.

To say that it is the Guide Board or Task Force's responsibility to conserve game is incorrect. Guide licensing and game management are two separate and unrelated legal and game management concepts. Trying to manage game by limiting, restricting and putting unnecessary requirements on guides, outfitters, air taxis, etc. is not "game" management unless it is a component of an overall "take" permitting program. Game must be managed by wildlife behavioral professionals, game biologists, not politicians or the guide industry.

The purpose of the EGA system was to protect the income of a privileged few. It was not to conserve game. For those who continue to tell themselves that the purpose of the EGA and the Task Force's recommendations are to conserve game or is "resource based", are lying to themselves. Look at the industry in the last year of the EGA system - the game was not being preserved by the EGA system and the chaos of THAT EGA system is still obvious. Unfortunately, we anticipate this will continue under the new proposal.

As Vice President of The Alaska Professional Sportsmen's Association I recommend:

1. A total rewrite and simplification of guide laws. Establish two licenses. One license would be for guiding or outfitting all species of big game. This license should require a two year apprenticeship, taking no less than one

guided hunter a year to qualify. The second license would be for guiding or outfitting to take moose, caribou and black bear only. This would require a one year apprenticeship. There is no reason to separate guiding from outfitting as they are so close that they are impossible to separate rationally and the Supreme Court found them both to be common users.

2. Establish a lottery and registration permit system for all non-residents. They are the consumptive "users" of the game, not the guides or outfitters. The lottery should be 6 to 8 months prior to the hunting season. Among other advantages, such a permit system will:

a. Manage the game and limit the kill by permit or registration.

b. Stop "hot spots" or kill zones from developing and spread hunting pressure throught the state.

c. Stabilize hunting seasons and adjust the management of game by decisions made before the kill as well as after the kill.

d. Leave game management with the proper agencies.

3. The guiding/outfitter test should be administrated one or two times a month by a college or a private firm the same way insurance license tests and other licensing tests are given. A practical test given in this manner insures fairness, equality and an acceptable level of competency in a guide. This eliminates bias and favoritism. The Division of Licensing should only issue a license to a person who passes the test, not dictate how one might get a license.

4. Discriminatory users fees, presently charged only of guides, outfitters, transporters, etc. should be eliminated. The present type of user fee violates equal protection under the law and discourages visitors. The standard tag and license fees are themselves user fees and can only be charged to the hunter who takes the game not to the person providing a guiding service to the hunter. The guide is only one link in a long chain of services provided a hunter. Hotels, restaurants, airlines, taxis all provide services. The system should also leave the choice of which guide or outfitter or service provider a visitor wishes to use to the visitor. It is not the government's role to dictate who a visitor must choose to provide guiding service.

5. Any and all licensed commercial service providers should be allowed to operate in the entire state. Allowing some guides to hunt the entire state while others are limited to

one game unit also violates the common use and equal protection clauses of our constitution. A game permit system eliminates the need to limit the areas in which a guide can operate. The game is managed by the allowed permits acquired by the visitor and all the other users.

6. The state should not mandate unreasonable insurance. Our legislature took it upon itself to mandate insurance levels for guides when doctors and other professionals are not required by law to have insurance. This was done without reasonable public notice and input and imposed at the most difficult time of the season. The legislature's effect on the industry by mandating such unreasonable insurance requirements was to eliminate the "small guy". Remember that insurance does nothing to protect the hunter, the game or the guiding industry. If anything, it causes the guide to take more game, over and over, in order to pay the costs of the insurance. Guiding is a private service business and the state should treat it as such. Alaska has civil courts in place to handle any negligence or complaints between a guide and clients. Use this system. It is much more appropriate and cost effective.

7. A point system, much like the driver's license system, should be established to discipline guides. This would reduce the favoritism we have seen in the past and it would let a guide know where he or she stands when convicted of a fish or game violation. This point system should be reasonable and should not be used as a means of reducing the number of guides but of putting more pressure on those who violate. A point system should eliminate the substantial cost of hearings and greatly reduce the cost of enforcement.

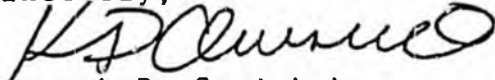
8. The Federal government likes the limited entry concept. It fits right in with their efforts to eventually stop all consumptive uses on park and refuge lands. The task force should recommend that the legislature demand, of the Federal government, the return of control of all fish and game management in the state to the state. All other 49 states have control of their resident fish and game and Alaska should not be treated differently. Law suits are already being developed to attack this inequality. It is time Alaska becomes a state and not an extension of the Federal Department of the Interior.

9. The task force should establish policies that encourage tourism and use of our renewable resources. The state spends millions of dollars to bring tourists to Alaska but

once they are here, the state doesn't want them to do anything other than take the train or ride the road. Does the state really want visitors to have access to our recreational resources?

10. The task force should recommend policies that establish scientific management of our fish and game, not policies that socioeconomically manage people. Equal access (common use) to our waters, fish and game is guaranteed by our constitution. It is the duty of the Task Force and our Legislature to act accordingly. The members of APSA believe in equal access, common use and wise use.

Sincerely,



Kenneth D. Owsichek
Vice President
Alaska Professional Sportsmen's Association

k1f/KO

cc: Governor Cowper
All Task Force Members
All State Legislators

TASK

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**MANAGING ALASKA'S
COMMERCIAL USERS OF BIG GAME**

A Report on a Proposed New Management System

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

**Legislative Task Force on
Guiding and Game**

January 1990


PREFACE

In the Letters of Intent from the Alaska House, dated April 6, 1989 and the Senate dated April 25, 1989, the Task Force was directed to forge a new resource-based management system for allocating big game hunting opportunities among guide-outfitters.

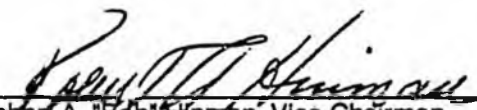
The Legislature stressed that conservation and management of big game resources is the foremost purpose of the management system. The system must provide broad access to game resources as guaranteed under the common use clause of Alaska's state constitution. This system, developed with input from public and private landowners, must be applicable throughout the state to help ensure a more standardized system of managing commercial use of wildlife. The state must receive compensation for commercial use. The new system must also ensure a viable industry, clearly basing any free market restrictions on wildlife management concerns.

The Task Force has addressed the constitutional questions raised by the Alaska Supreme Court decision in the Owsichuk case of October 21, 1988 which declared the former guide management system unconstitutional. That decision has been closely examined so that the proposed new system will be consistent with constitutional provisions.

The 15 member task force believes that the proposed system meets the legislative directives, and therefore we fully support the draft legislation included with this report. We urge the Legislature to swiftly implement the draft legislation to bring much-needed stability to the industry and enable greater cooperation among the state, federal and private landowners in Alaska.



Janice O. Falks, Chairman



Robert A. "Bob" Finnman, Vice-Chairman

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BACKGROUND

The Legislative Task Force on Guiding and Game was formed in May 1988 to find a legislative solution to a growing conflict between licensed big game guides and unlicensed "outfitters". The panel recommended sweeping changes incorporated in House Bill 112 which was signed into law in May 1989. During the time that the Task Force was working on these issues, the Alaska Supreme Court released its decision in the Owsichuk case (October 22, 1988) and declared the exclusive guide area system unconstitutional. Legislation was subsequently passed to extend the life of the Task Force to January 15, 1990 so that a new management system for big game guide-outfitters could be formulated.

What the Owsichuk Decision Meant

The Alaska Supreme Court in Owsichuk reviewed the background of the common use clause in Alaska's constitution, and the state's obligation and options to manage the use of wildlife resources. The Court stated:

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

In examining the former guide system, including the Exclusive Guide Areas or EGAs, the Court concluded that it was seriously flawed because it was not based upon wildlife resource concerns:

"Although the Board justified the program to the legislature as a means of improving wildlife management...it is apparent that area assignments are not based primarily on wildlife management concerns. Rather, ...the Board bases its decisions on use, occupancy and investment. ... 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."

The Court clearly stated that there are other types of programs that legitimately authorize and thereby limit access to state resources:

"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."

However, the Court did not consider that the former guide system met these requirements and they went on to say that:

"...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."

What the Legislature has Directed the Task Force to Accomplish

In its directive to the Task Force, the Legislature stressed that conservation of Alaska's wildlife resources must be the foremost purpose of the new management system. The system must provide broad access as guaranteed by the common use clause of the Alaska constitution. It should have statewide applicability to allow for a more standardized system among state, federal, and private landowners. These directives also were discussed in the Task Force report "Alaska's Big Game: A Report on the Commercial Aspects of its Uses and Users", January 1989.

The Task Force has made every effort to ensure that its recommendations address the State Supreme Court decision in the Owsichek case. The following elements specifically address the court's findings:

1. Commercial opportunities to use wildlife resources will be based upon wildlife management objectives.
2. The authorization process treats all applicants fairly and does not automatically favor applicants on the basis of seniority in industry.
3. The authorization for commercial use is of finite duration.
4. The state receives compensation for use authorizations.
5. The transfer (assignment) of use areas is without financial profit to individual guide-outfitters and is subject to review and approval by the regulatory board.

TASK FORCE ACTIVITY SUMMARY

The Task Force on Guiding and Game was extended from January 1989 to January 15, 1990 by SB 139, which also expanded the group from 13 to 15 members. Most meetings and work sessions were chaired at the Legislative Information Office, 3111 "C" Street, and teleconferenced to other locations. The August 16th work session was held at the Anchorage offices of Birch, Horton, Bittner and Cherot, and the January 22nd meeting was chaired from Juneau.

June 29, 1989 - Organizational meeting; chairman elected
July 19, 1989 - Work session
August 16, 1989 - Work session
October 5-6, 1989 - Regular meeting with public comment
November 8, 1989 - Regular meeting with public comment
November 20, 1989 - Regular meeting with public comment
December 11-12, 1989 - Regular meeting with public comment
January 4-5, 1990 - Work session with public comment
January 22, 1990 - Final meeting to approve final report
and draft legislation

The meetings were open to the public and allowed access through the communications network of the Legislative Information Office plus toll free numbers for persons in remote locations. Public hearings were well attended and were scheduled at regular meetings and one work session.

Because of the limited time frame for the Task Force to complete its work, it retained a law firm to assist in developing its recommendations. The firm of Birch, Horton, Bittner, and Cherot was selected for its expertise in several pertinent areas, including recreational services franchising and licensing programs. Their staff included individuals experienced in fish and wildlife use allocation programs, Alaska fish and wildlife laws, and state administrative statutes (see also "Birch Horton Contract" in Appendices, Vol. II). These consultants provided information on the array of viable constitutional options for a big game guide-outfitting industry management system.

The Task Force also examined management systems for guide-outfitting that are used in other western states and Canadian provinces (see also ADF&G report in Appendices, Vol. I).

The Task Force acknowledges the many individuals and organizations providing testimony and other assistance during the meetings. We particularly want to extend our appreciation to Stephen White of the Alaska Department of Law; Heinrich Springer, Chairman of the Alaska Board of Game; SuzAnne Miller and Marianne See of the Alaska Department of Fish and Game; and Mark Riehle of Senator Falks' staff.

We also appreciate the input of the federal and state land management agencies including the Alaska Department of Natural Resources, U.S. Fish and Wildlife Service, National Park Service, U.S. Forest Service, and the Bureau of Land Management. In addition, federal land management staff in Washington D.C. met with Chairman Falks on November 1, 1989 to hear a progress report and to offer their support and cooperation toward a new state management system for big game guide-outfitting.

SUMMARY OF PUBLIC HEARINGS

The Task Force welcomed public testimony, and provided opportunities at regular meetings to receive written and verbal comments. Over the course of the meetings, approximately 100 people testified, with over 500 additional people present as observers. Verbal testimony was recorded, although it was not possible to transcribe all the recordings due to limited staff time. Written testimony, letters, and transcriptions of some verbal testimony are included in the Appendices.

The public expressed considerable interest in Task Force proceedings, and was well aware of the inherently conflicting interests that the Task Force was addressing. For example, the Chairman of the Board of Game testified that big game management concerns would be best served by terms for guide-outfitter use area permits that would be as long as 20 or 30 years. He substantiated this point with historical data from other states and countries. However, he acknowledged that too long a term for permits could be inconsistent with the state's constitutional mandate for a high degree of access to wildlife resources (Appendices, Vol. I).

Other competing interests were brought out in public testimony. Some guide-outfitters who did not have restricted guide areas under the former system have testified in favor of a selection process that does not favor prior area holders. However, several of those who had former areas supported a selection preference favoring former area holders. They wanted to increase the chance of re-acquiring those areas in which they had a substantial financial investment, and thus continue their business operations. Two of the federal land management agencies indicated a strong preference for sole use authorizations, while two others favored a system that allows joint use of permit areas.

Resident hunters testified that during this interim period between systems, the number of guide-outfitters increased in some areas and interfered with the quality of their hunting experiences. Testimony also indicated that the large and growing number of transporters are contributing to concentrations of hunters in some areas, thereby affecting wildlife availability as well as other commercial opportunities.

Many of those offering public testimony expressed their concerns that the new guide-outfitter management system provide opportunities for commercially viable operations, while at the same time protecting and conserving the wildlife resource that supports this industry. The industry would not remain internationally competitive without trophy animals. Those individuals hoping to be involved with this industry testified that they feared that a new system might include considerable administrative work, high fees, incompatibility with federal programs, short permit terms, or automatic lotteries for all applicants seeking use areas permits. Most individuals who testified favored a minimum of additional bureaucratic requirements and fees for guide-outfitters.

Private landowners and federal land managers offered their concerns that their management objectives and procedures be respected by provisions of the new system for designating guide-outfitter resource areas, and for subsequently allocating these areas. Separate meetings were held with some of these groups to help identify and address their concerns (see Appendices, Vol. II).

The Task Force considered all ideas proposed during public testimony, and incorporated some of them into the design of the proposed management system. However, there were no comprehensive solutions presented in public testimony which the Task Force felt could be adopted that would meet the objectives identified in Owsichek.

FINDINGS

The Task Force finds that:

- * the big game guide-outfitting industry should be promptly regulated in a manner that conserves the wildlife resource, is consistent with the constitutional common use clause, and provides economic viability to the industry;
- * an area-based system for guide-outfitting is necessary for managing commercial use opportunities to prevent damage to some big game resources from overharvest of populations or species that have a low recovery capacity or that exist in low abundance;
- * there are competing and conflicting interests that must be considered in developing a new administrative management system, and that any proposal therefore will represent a compromise among those interests;
- * if to protect big game populations from unregulated access by guide-outfitting, the state has to resort to management tools like shorter seasons, lower bag limits, or more permits, the result will be further restriction in hunting opportunities for resident and nonresident hunters.
- * guide-outfitting and related commercial uses of the big game resource can contribute significantly to the state's economy by increasing tourism and supporting a variety of related businesses, particularly in the rural regions of the state;
- * uncertainty about how and when a new system might operate is causing the guide-outfitting industry to lose clients to other international competitors, thus losing revenues that would otherwise come into the state;
- * federal land managers, while willing to cooperate to consolidate interagency administrative requirements, are developing plans to manage guide-outfitting on public lands if the state fails to promptly adopt a new system;
- * fees associated with commercially using wildlife resources need to be proportional to the use of the resource, yet be simple to calculate and not an additional burden to the increasing costs associated with guide-outfitting;
- * the recent decision by the Alaska Supreme Court regarding the state's subsistence law (in McDowell et al, December 22, 1989) does not affect the proposed legislation submitted with this report.

RECOMMENDATIONS

Certain basic findings and features of the management system developed as the draft legislation evolved, which the Task Force recommends to the Legislature as follows:

1. Guide-Outfitter Use Areas. To provide a resource-based management system that will benefit wildlife resources and promote a stable and successful guide-outfitting industry, guide-outfitter use areas must be established.

The areas should be based primarily on wildlife management considerations; that is, reflect the diversity of species, population levels of wildlife, and the demands on the resource by other users. They must be large enough to provide a reasonable opportunity for a viable guide-outfitting enterprise.

The Alaska Department of Fish and Game (ADF&G) will have responsibility for recommending boundaries of the use areas to the Big Game Commercial Services Board (Board). The Board shall adopt these areas as recommended, unless ADF&G approves proposed amendments (see also Appendix for description of ADF&G mapping project).

2. Schedule of Offerings of Use Areas. To provide an orderly entry by guide-outfitters into the new system, the Board should stagger the offerings of use areas to qualified guide-outfitters. In the first five years of the program, all areas of the state should be offered.
3. Pre-application Filing Period. Prior to the first offering of use areas, the Board should establish a pre-application filing period by game management units or subunits. Such a procedure will expedite the initial offering of areas and allow the Board and ADF&G to concentrate initial efforts in areas most in demand and where wildlife and conservation concerns are greatest.
4. Application Procedures. Application procedures must be established that are fair to all applicants and provide sufficient information to allow the Board to determine the most qualified applicant for each area. Applications will include appropriate forms, application fee, and proposed operational plans that will include locations of base camps, the number of clients, and the big game species to be hunted.
5. Evaluation of Applications and Permit Issuance. The Board must adopt procedures which provide equal opportunity to all qualified applicants. Evaluation of the applicants' qualifications must be objective and use specific criteria which include: experience in the area; operations plan; economic feasibility; safety record; record of compliance with fish and game laws and with trespass statutes; landowner permission; and necessary licenses and permits. The Board shall issue guide-outfitter use area permits to the most qualified applicant(s).
6. Conditional Permits. To provide time for a successful applicant to obtain all the necessary licenses, permit, or landowner's permission, the Board shall issue a conditional use area permit that is valid for 120 days. This conditional permit does not allow guide-outfitting, and expires if the applicant does not obtain the necessary authorizations within 120 days. If the permit expires, the Board offers the use area permit to the next best qualified applicant for that area.
7. Unawarded Areas. Use areas that are available but not awarded will be open to use by guide-outfitters who are certified to guide-outfit hunts in the game management unit and

who obtain a registration permit for the area. This permit would be valid for one regulatory year.

8. Terms of Use Permits. Guide-outfitter use area permits shall be of limited duration, and provide to the permittee the privilege to guide-outfit hunts for big game. The term of each permit may be established by the Board, to a maximum of 10 years, unless the Board determines after consultation with ADF&G that a longer term would better promote wildlife management and conservation in that area. In no case will the permit term exceed 15 years. Use permits may be limited in the number of clients and the species to be hunted. The Board must consider ADF&G's recommendations regarding sole or joint use for each area.
9. Assignment of Use Areas. Within its issued term, a use area permit may be assigned (transferred) by the Board if the assignment is for good cause, as defined by the Board. A permit may not be assigned if the permittee's license or the use area permit is under review for suspension or revocation, or if the permit or license has been suspended.

Because no property right accrues to the permittee with the issuance of an area use permit, such permits may not be sold. Any sale of improvements or facilities should be based on replacement value, and subject to review and approval of the Board.

10. Revocation of Permits. The Board may suspend or revoke use area permits after a hearing for specific causes that include: violation of permit terms, nonuse, unauthorized deviation from operations plan (either underuse or overuse), and fraud. The board may suspend or revoke a use area permit for violation of disciplinary sanction, and will automatically suspend a permit if the wildlife conservation fee is not paid when due or if the permittee's guide-outfitter license is revoked. Permits may also be revoked, terms of the permit changed, or the operations plan amended for wildlife conservation and management considerations.
11. Wildlife Conservation Fee. The Alaska Department of Commerce and Economic Development will charge a wildlife conservation fee that ensures a fair return to the people of the state for the commercial use of the big game resources. Each guide-outfitter and transporter who holds a use area permit, registration permit, or transporter license will pay this fee annually. The fee will equal \$25.00 for each big game animal taken by a client or customer, except that Sitka black-tailed deer will be \$5.00 per animal. The wildlife conservation fee is charged to transporters as well as guide-outfitters, because both groups are commercially using the wildlife resource. The Task Force considers that such costs should be borne by all providers of commercial hunting services.

The wildlife conservation fee will be charged to commercial service providers for both resident and nonresident hunters. Nonresident hunters already pay 75% of the total license and tag fees collected by the state while taking less than 10% of the big game animals harvested. Applying the conservation fee to commercial users only when nonresident clients are involved would be inconsistent with the concept of commercial users compensating the state for the monetary benefits they receive from public wildlife resources.

The commissioner of the Alaska Department of Administration shall separately account for wildlife conservation fees deposited into the General Fund. The annual estimated balance in the account may be used by the Legislature to make appropriations to ADF&G and the Alaska Department of Public Safety to carry out their respective responsibilities for management of game resources and enforcement of game laws.

12. Transporters Advertising Hunting Services. Transporters advertising big game hunting services will be required to have a commercial use permit in addition to a transporter's license, regardless of whether such services are considered incidental to their business.
13. Public Information. The Board shall maintain a centralized information center for information about big game commercial services and guide-outfitter use areas.

ANALYSIS OF PROPOSED LEGISLATION

This section explains how the proposed legislation addresses the main constitutional issues, as stated in the Owsichuk case, regarding a new management system for big game guide-outfitting. Specific sections of the draft are cited and explained under each issue.

A. The proposed management system for guide-outfitting must provide for the conservation of big game wildlife resources.

Rationale:

Specific language is included in several sections to make clear that the primary basis of the proposed guide-outfitter management system is wildlife conservation and management. Moreover, the proposed system is state-driven rather than industry-driven as in the past. For example, areas were formerly proposed by guides to meet their economic needs, whereas new areas will be proposed by ADF&G based primarily upon wildlife management concerns. Former exclusive guide areas were based upon excluding economic competition, in comparison to the proposed system of joint use areas, with sole use areas if based upon wildlife conservation needs.

The time-honored methods of managing and conserving wildlife, such as licensing requirements, bag limits, and seasonal restrictions (Owsichuk p. 10) affect all users. However, these methods are not sufficiently flexible to effectively manage commercial users of wildlife. The proposed land-based system does not restrict other users of the state's wildlife resource, and therefore offers the state additional measures to address wildlife management concerns.

Authorization for guide-outfitters to operate only in specific areas, and then only in compliance with approved operations plans, will help ensure that wildlife is not locally overharvested by commercial users.

Applicable Sections of Proposed Legislation

1. Findings and Purpose: subsections (a) (1) (A), (4-6); (b) (1-2), (c).
The allocation of access to big game hunting opportunities among guide-outfitters will help prevent overharvest of wildlife in those areas, and will allow continued open access to the big game resource by all users. This proposed system does not affect subsistence and resident sport hunters.
2. Article 5. Guide-Outfitter Use Areas. Sec. 08.54.610 (a); (b) (1); Sec. 08.54.620 (c)(1-2).
The ADF&G will propose boundaries that are based upon wildlife conservation and management considerations. The Board will designate sole or joint use for an area based upon wildlife resource information as well as other factors.

3. **Sec. 08.54.660. Term and Suspension or Revocation of Guide-Outfitter Use Area Permit; Operations Plan (a); (h).**
The usual term of a use permit can be extended to a maximum of 15 years if ADF&G substantiates that a longer term will further promote the wildlife conservation and management objectives of the use areas. The Board may modify or revoke a permit, or change the operations plan for wildlife conservation or management considerations.
4. **Section 8. Identification of Proposed Guided-Outfitter Use Areas (a); (d) (1).**
ADF&G will use wildlife management concerns as the basis for delineating the proposed use areas, and will evaluate public input and review comments in light of these considerations.

B. The system must provide for equal opportunity to all qualified guide-outfitters when access to commercial hunting privileges are allocated. Applicants should not be favored on the basis of seniority in the industry.

Rationale: The draft legislation specifies certain criteria that the Board must use to evaluate the qualifications of guide-outfitters applying for use area permits. These criteria have been developed to ensure that applicants will have an equal opportunity to obtain a permit, without a bias for seniority. In cases where an applicant does not have all the necessary authorizations or licenses, a conditional use area permit provides 120 days to obtain them.

In addition, areas will be offered on a staggered schedule with all being available in the first five years of the new program. Areas will continually become available, thus ensuring that new opportunities continue into the future.

Applicable Sections of Proposed Legislation

1. **Section 1. Findings and Purpose (b) (1).**
The allocation system will be fully consistent with common use principles of the state constitution.
2. **Sec. 08.54.650. Procedures for Granting Guide-Outfitter Use Area Permits (a-e).**
The Board is directed to adopt procedures for evaluating permit applications, by balancing specified criteria to provide equal opportunity for all applicants. The Board shall grant permits only to those guide-outfitters who are qualified under the criteria in this section. If an applicant does not have all the necessary licenses or authorizations when applying, a conditional use area permit is issued for 120 days to provide time to obtain them.
3. **Sec. 08.54.660. Guide-Outfitter Use Area Permit (c)**
A use area that is open for use but is not awarded is available under a registration permit system to any guide-outfitter certified in that game management unit.
4. **Sec. 10**
All guide-outfitter use areas shall be offered by the Board within the first five years that area permits are available.

C. The authorization to use the resource must be limited in duration. It should be comparable to existing state resource use authorizations that require contractual terms or restrictions, and not grant exclusive privileges to resource use.

Rationale: The draft legislation specifies that the duration of use area permits is limited, and specifies contractual terms and restrictions on the amount of commercial use. The proposed permit term of 10 years is relatively short in relation to the life expectancy of many big game species. For example, brown bears may take 12-20 years to mature to trophy quality, while sheep may take 9-11 years and moose 8-12 years respectively. If the duration of the permit were solely based on wildlife management concerns, it could be readily argued that a longer term would provide a permittee with more incentive to practice responsible wildlife conservation and harvest practices (see also testimony of the Chairman, Board of Game, in Appendices). However, a shorter period promotes more turnover of permits and broader public access to commercial wildlife harvest opportunities, as is required by the common use clause of the state constitution.

For each use area or registration permit, the Board may specify the species to be taken and may limit the number of clients who may be guide-outfitted each year in each area. These provisions provide the Board with flexibility to ensure that guide-outfitting will not adversely affect the resource in any area.

Use area permits are based on joint use that is managed by the Board through the contractual terms of operations plans. These plans are submitted and kept current by the guide-outfitters. Amendments must be approved by the Board, whether they propose increased or decreased commercial use. Where wildlife management concerns justify sole use of a specific area, the Board may authorize a single permit rather than joint use.

Applicable Sections of Proposed Legislation

1. Sec. 1. (6)
Wildlife conservation is promoted by fostering a long term interest in the wildlife resource, its management, and human uses.
2. Sec. 08.54.630 Guide-Outfitter Use Area Permit; Registration Permit (a-d)
The use area permit or registration permit specifies the big game species to be hunted, and may limit the number of clients that may be guide-outfitted. Guide-outfitters must have the appropriate use area permit or registration permit if they wish to guide-outfit for a big game hunt in a specific use area.
3. Sec. 08.54.660 Term and Suspension or Revocation of Guide-Outfitter Use Area Permit; Operations Plan (a-b) (d) (h-l)
The basic term of a use permit would not exceed 10 years, except in cases where the board has consulted with ADF&G and determined that a term up to 15 years would further the wildlife conservation and management objectives for the area. The use area permit may be suspended or revoked for failure to comply with the terms of the operations plan, fee requirements, or other administrative provisions. An operations plan is required, and must be amended and subsequently approved by the Board if the guide-outfitter intends to change his/her operation.

D. The state of Alaska must receive compensation for commercial harvest of big game resources.

Rationale: Of the several different fee systems evaluated by the Task Force, the draft legislation proposes a wildlife conservation fee as the most equitable option. This would be based on a nominal cost per animal harvested by clients or customers of commercial operators. Therefore the total cost would be proportional to the scale of each commercial operation, but would not require additional bookkeeping. Big game guide-outfitters and transporters would be required to pay these annual fees.

Transporters who advertise hunting services would be required to obtain a transporter's license and commercial use permit, and pay the associated permit fee. The fee would help provide compensation to the state for commercial use of big game.

Applicable Sections of Proposed Legislation

1. **Sec. 6 that amends Sec. 08.54.480 Wildlife Conservation Fee (a-d)**
An annual wildlife conservation fee will be paid by guide-outfitters and transporters. It is the sum of \$25 for each big game animal taken, except that the fee for Sitka black-tailed deer is \$5 each. The funds collected under this program would be separately accounted so that legislative appropriations could be made to ADF&G, and the Department of Public Safety for their respective wildlife management and law enforcement programs.
2. **Sec. 7 that amends AS.54.590 (13)**
The definition of "transportation services" includes any air taxi operators or air carriers advertising big game hunting services to the public, thereby requiring them to obtain a transporter's license and pay a commercial use permit fee under existing provisions of HB 112.

E. The use authorization must not be transferable for a profit to individual guide-outfitters. Any transfer must be subject to review and approval by the board.

Rationale: The proposed legislation includes a provision for the Board to reassign a use area permit within its original term of years, under specific conditions. This would not change the fact that the permit would still terminate on the original expiration date, at which time any guide-outfitter could apply for it. Any associated improvements could be sold only for replacement value, so that no "property value" is associated with the use area permit. In other words, if no cabin, lodge, or other real property existed in the use area, then no costs would be associated with an assignment of the permit.

Applicable Section of Proposed Legislation

1. **Sec. 08.54.670 Assignment of Guide-Outfitter Use Area Permits. (a-e)**
A use area permit may be assigned only within the original period of issue if the assignment would be consistent with the objectives of this system, and approved by the Board. No permit could be assigned if any proceedings were pending against the permittee to suspend or revoke the license or use area permit, or if either were suspended. If properties in the permit area are sold for more than replacement value, the permit assignment is cancelled.

COMPARISON OF PROPOSED SYSTEM WITH FORMER SYSTEM

The Task Force wants to emphasize that the proposed new system differs significantly from the former administrative system of managing big game guide-outfitting. The proposed system specifically differs from the former system in that it:

- * has as a basis wildlife conservation and management concerns, rather than being based upon economic factors such as use, occupancy and investment;
- * offers a permit-based system for allocating opportunity to commercially use big game resources, and thus provides additional and necessary techniques for wildlife conservation and management;
- * provides specific criteria and directives to the board to provide equal opportunity to applicants for use areas, and to ensure that seniority in the industry is not used as the determining factor to select permittees and thereby exclude new entrants to the industry;
- * provides annual compensation (wildlife conservation fees) to the people of the state, based upon actual use of the resource;
- * precludes any "property value" accruing to the permittee for the use of a public resource held in common use;
- * is based upon joint use rather than exclusive use. All use is managed through contractual terms as specified in an operations plan, approved by the Board, and subject to their modification if necessary for wildlife management and conservation. The former system was not subject to any contractual terms or restrictions. The board may determine, based upon wildlife management concerns, that an area should be authorized for sole use;
- * is not based on long-term or permanent duration, but is based on a system that provides for short-term authorizations, shorter in term than if based solely upon wildlife management considerations;
- * all available areas will be offered in the first five years and again become available on a staggered basis thus providing continuing access to these commercial use opportunities.

ADDITIONAL RECOMMENDATIONS

The Task Force also recommends unanimously that:

1. The legislature maintain adequate funding for the Department of Fish and Game's Division of Wildlife Conservation, and the Department of Public Safety's Division of Fish and Wildlife Protection. The success of the proposed management system for guide-outfitting depends heavily upon the ability of these state agencies to gather biological data, monitor wildlife use, and enforce laws and regulations.
2. Increased fiscal support for the Board be approved and provided through the Department of Commerce and Economic Development, Division of Occupational Licensing. The Board's workload will be extremely heavy especially during the first five years of the new program, if the system is to be implemented successfully.
3. Letters should be solicited from the federal land management agencies indicating their support for the provisions of the draft legislation proposing an area-based management system for big game guide-outfitting, and expressing their intention to cooperate with the state in implementing this system.

While the following recommendations are not unanimously endorsed, it is the consensus of the Task Force that they merit future consideration by the legislature or another task force.

1. Immediate attention should be given to further managing transporters who provide unguided hunting services. We are aware that the state must not interfere unnecessarily with air or water commerce; on the other hand, transporters can directly contribute to overharvest in some areas and then readily shift into other areas. Those who provide commercial services for hunting must participate with the big-game guide-outfitting industry in reimbursing the state for commercial use of the public wildlife resource.

Regulatory action by the new Big Game Commercial Services Board will be necessary, and enabling legislation may be required by the legislature. The legislature may wish to consider establishing another task force to further explore this problem and recommend solutions.

2. The Board should consider increasing the commercial use permit fee from that temporarily established in 1989. While we wish to leave to the Board the final decision on what the charge should be, we believe the present fee of \$100 does not sufficiently reimburse the state for the commercial use of the public wildlife resource.

1 IN THE SENATE

2 SENATE BILL NO.

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 SIXTEENTH LEGISLATURE - SECOND SESSION

5 A BILL

6 For an Act entitled: "An Act relating to guide-outfitter use area permits,
7 the Big Game Commercial Services Board, and guide-
8 outfitters, transporters, and providers of other big
9 game commercial services."

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

11 * Section 1. FINDINGS AND PURPOSE. (a) The legislature finds that

12 (1) unregulated access to game management units by guide-out-
13 fitters

14 (A) can potentially harm the state's valuable big game
15 resources by allowing overharvest of big game species or populations
16 that have a low recovery capacity or that exist in low abundance; and

17 (B) has hindered management of hunters guide-outfitted by
18 guide-outfitters, led to conflicts among guide-outfitters, and de-
19 creased the quality of the hunting experience for clients of guide-
20 outfitters and other hunters;

21 (2) an economically viable guide-outfitter industry can offer a
22 quality hunting experience to hunters from throughout the world who seek a
23 unique opportunity to pursue and take trophy big game animals in the state
24 and can contribute significantly to the state's economy by increasing
25 tourism and supporting a variety of businesses associated with the guide-
26 outfitter industry;

27 (3) the guide-outfitter industry provides an opportunity for
28 enhancing the state's economy, particularly the underdeveloped economies of
29 the rural regions of the state;

1 (4) intense competition exists for big game in many parts of the
2 state and the allocation of access to big game hunting opportunities among
3 guide-outfitters will prevent overharvest of big game in those areas and
4 will provide continued open access to the big game resource by all users;

5 (5) a resource-based management system for allocating access to
6 big game hunting opportunities among guide-outfitters will alleviate con-
7 flicts among guide-outfitters, will provide an effective basis for regulat-
8 ing guide-outfitters, and will enhance conservation and management of big
9 game;

10 (6) a long-term interest in the conservation of wildlife encour-
11 ages sound management practices among users of wildlife and fosters a
12 mutually beneficial relationship between wildlife and the users of wildlife
13 because the user understands that the user's own future well-being is
14 dependent upon wise use of the resource in the present.

15 (b) The purpose of this Act is to

16 (1) establish a resource-based system of allocating access to
17 big game hunting opportunities among guide-outfitters that is fully con-
18 sistent with common use principles of the Constitution of the State of
19 Alaska; and

20 (2) support the conservation and management of the state's
21 wildlife, provide economic and noneconomic benefits to the state and to the
22 citizens of the state, and generate revenue for the state from the wise use
23 of wildlife for commercial purposes.

24 (c) This Act does not affect the existing rights and privileges of
25 subsistence and resident sport hunters to take game in the state.

26 * Sec. 2. AS 08.54 is amended by adding new sections to read:

27 ARTICLE 5. GUIDE-OUTFITTER USE AREAS.

28 Sec. 08.54.610. GUIDE-OUTFITTER USE AREAS. (a) The board shall
29 establish guide-outfitter use areas throughout the state. The board

1 shall consider the recommendations of the Department of Fish and Game
2 in identifying the boundaries of the use areas. The board shall adopt
3 the recommendations of the Department of Fish and Game for each use
4 area unless the board obtains a finding from the Department of Fish
5 and Game that an amended use area boundary as proposed by the board
6 will not adversely affect wildlife conservation and management.

7 (b) The board may amend the boundaries of use areas adopted
8 under (a) of this section if

9 (1) the Department of Fish and Game finds that the proposed
10 amendment will not adversely affect wildlife conservation and manage-
11 ment; and

12 (2) the board notifies all guide-outfitters who hold use
13 area permits for the affected use areas of the proposed amendment and
14 provides those guide-outfitters with an opportunity to comment on the
15 proposed amendment.

16 Sec. 08.54.620. OFFERINGS OF GUIDE-OUTFITTER USE AREAS. (a)
17 The board shall annually offer available use areas to qualified guide-
18 outfitters. The board shall stagger the offering of use areas.

19 (b) The board may request recommendations from the public for
20 use areas to be offered at the next offering of use areas.

21 (c) The board shall decide whether a use area will be offered
22 for sole or joint use before offering the use area. In making its
23 decision, the board shall consider for each use area

24 (1) information provided by the Department of Fish and Game
25 on the status of big game populations, historical harvests of big
26 game, and uses of wildlife in the use area;

27 (2) information gathered from previous use by guide-outfitter-
28 ters that would facilitate big game management and planning;

29 (3) requirements for economically viable guide-outfitter

1 operations;

2 (4) the number of economically viable guide-outfitter
3 operations that the use area could support;

4 (5) the effect of guide-outfitting activities on resident
5 hunters; and

6 (6) other relevant factors, including land ownership
7 concerns, land management concerns, and law enforcement concerns.

8 (d) Use areas for which use area permits have expired or been
9 relinquished by the permittee or revoked by the board may be offered
10 at the next offering of use areas.

11 (e) The notice of the offering of use areas must include for
12 each use area

13 (1) the location and a brief description of the use area;

14 (2) whether the use area is available for sole or joint
15 use.

16 Sec. 08.54.630. GUIDE-OUTFITTER USE AREA PERMIT; REGISTRATION
17 PERMIT. (a) A guide-outfitter use area permit or registration permit
18 authorizes a guide-outfitter to guide-outfit hunts in the use area for
19 those big game species specified by the permit and may limit the
20 number of clients that may be guide-outfitted in the use area each
21 year.

22 (b) A sole use area permit grants to the permittee the sole
23 privilege to guide-outfit hunts for all big game species that occur
24 within the use area. A joint use area permit grants to the permittee
25 the privilege to guide-outfit hunts in the use area for the big game
26 species specified in the permit; however, all joint use area permits
27 for a use area, when considered together, must grant privileges to
28 guide-outfit hunts for all big game species that occur within the use
29 area.

1 (c) A use area that is not awarded to a guide-outfitter unde
2 AS 08.54.650 is open to use by guide-outfitters who are certified t
3 guide-outfit hunts in the game management unit in which the use are
4 is located and who obtain a registration permit for the use area. The
5 board may establish the number of registration permits that will be
6 issued for each use area. Registration permits are valid for the
7 calendar year in which they are issued. A registration permit must
8 specify the big game species for which hunts may be guide-outfitted
9 under the authority of the permit.

10 (d) A guide-outfitter may not guide-outfit a hunt for a big game
11 species in a use area, unless the guide-outfitter has a use area
12 permit or registration permit that entitles the guide-outfitter to
13 guide-outfit hunts for that species in that use area.

14 (e) A guide-outfitter shall physically participate in field
15 operations while guide-outfitted hunts are conducted under the author-
16 ity of a use area permit or registration permit held by the guide-
17 outfitter.

18 Sec. 08.54.640. APPLICATION FOR A GUIDE-OUTFITTER USE AREA
19 PERMIT. (a) A guide-outfitter who is licensed under AS 08.54.350 and
20 is certified by the board to guide-outfit hunts in the game management
21 unit in which the use area is located may apply for a guide-outfitter
22 use area permit.

23 (b) A guide-outfitter shall submit a separate application for
24 each use area permit sought. The application shall be made on a form
25 provided by the board and shall be accompanied by the application fee
26 and a proposed operations plan for the conduct of guide-outfitted
27 hunts under the use area permit, including locations of base camps,
28 the number of clients, and the big game species to be hunted.

29 (c) The department shall set the application fee for a guide-

1 outfitter use area permit under AS 08.01.065.

2 Sec. 08.54.650. PROCEDURES FOR AWARDING GUIDE-OUTFITTER USE AREA
3 PERMIT. (a) The board shall adopt procedures for evaluating the
4 qualifications of applicants for guide-outfitter use area permits.
5 The proceduzes must appropriately balance the criteria included under
6 (b) of this section to ensure that new guide-outfitter licensees under
7 this chapter are not unfairly disadvantaged or denied an opportunity
8 to obtain a use area permit in those game management units for which
9 the licensee is certified by the board.

10 (b) The board shall evaluate each application and determine
11 whether the applicant is qualified for a guide-outfitter use area per-
12 mit under criteria adopted by the board, including

13 (1) the applicant's ability and means to provide the type
14 and quality of guide-outfitting services proposed by the applicant, as
15 demonstrated by the applicant's proposed operations plan;

16 (2) whether the applicant has proposed a guide-outfitting
17 operation in the use area that is economically feasible given the
18 economic resources of the applicant;

19 (3) the applicant's history of safety in guide-outfitting
20 hunts or demonstrated ability to guide-outfit hunts safely;

21 (4) the applicant's history of compliance with state and
22 federal fish and game and guide-outfitting statutes and regulations;

23 (5) the applicant's experience in or knowledge of the use
24 area;

25 (6) the applicant's history of compliance with AS 08.54.-
26 520(a) in regard to prior authorization to enter or remain on state,
27 federal, or private land;

28 (7) whether the applicant has obtained those prior autho-
29 rizations to guide-outfit hunts on state, federal, or private land in

1 the use area from the significant or major landowners in the use area
2 or has demonstrated the ability to acquire those authorizations;

3 (8) whether the applicant holds all permits and licenses
4 necessary to guide-outfit hunts in the use area or has demonstrated
5 the ability to obtain the necessary permits and licenses.

6 (c) If the board determines that more applicants are qualified
7 to receive a use area permit for a use area than there are use area
8 permits available, then the board shall reevaluate the applications of
9 the qualified applicants and, with or without requesting additional
10 documentation, shall select the best qualified applicants to receive
11 the available permits. The board may request the qualified applicants
12 to appear before the board to discuss the applicant's application in
13 regard to the criteria in (b) of this section.

14 (d) The board shall award a use area permit only to a qualified
15 applicant.

16 (e) If a successful applicant does not provide, at the time the
17 board awards the use area permit, proof of the permits and licenses
18 necessary to guide-outfit hunts in the use area or the authorizations
19 to guide-outfit hunts on state, federal, or private land in the use
20 area from the significant or major landowners in the use area, the
21 board shall issue a conditional use area permit that is valid for 120
22 days. A conditional use area permit does not entitle the permittee to
23 guide-outfit hunts within the use area. If the successful applicant
24 provides proof satisfactory to the board within 120 days after issu-
25 ance of the conditional use area permit that the applicant has re-
26 ceived the necessary permits and licenses and land use authorizations,
27 the applicant shall be awarded a use area permit. If the successful
28 applicant does not provide the required proof within 120 days after
29 issuance of the conditional use area permit, the conditional use area

1 permit is void. If a conditional use area permit is voided under this
2 subsection, the board shall offer the use area permit to the next best
3 qualified applicant for the use area.

4 Sec. 08.54.660. TERM AND SUSPENSION OR REVOCATION OF GUIDE-
5 OUTFITTER USE AREA PERMIT; OPERATIONS PLAN. (a) The board shall
6 grant guide-outfitter use area permits for a term not to exceed 10
7 years, unless the board determines, after consultation with the De-
8 partment of Fish and Game, that a longer term will further promote the
9 wildlife conservation and management objectives of the use areas. The
10 term of a use area permit may not in any instance exceed 15 years.

11 (b) The board may after a hearing suspend or revoke a use area
12 permit for

13 (1) violation of the conditions of the use area permit;

14 (2) failure to exercise the privileges conferred by the use
15 area permit for one year;

16 (3) a significant unauthorized deviation, as defined by the
17 board, from an operations plan;

18 (4) fraud in applying for a use area permit or assignment
19 of a use areapermit; or

20 (5) other good cause, as defined by the board.

21 (c) The board may suspend or revoke a use area permit upon
22 conviction of the permittee of an unlawful act under AS 08.54.520.

23 (d) A use area permit is suspended automatically if the permit-
24 tee fails to pay the wildlife conservation fee when due. The suspen-
25 sion remains in effect until the wildlife conservation fee is paid.

26 (e) A use area permit is revoked automatically upon revocation
27 of the permittee's guide-outfitter license. A use area permit is
28 suspended automatically upon suspension of the permittee's guide-
29 outfitter license.

1 (f) If the license of a guide-outfitter is summarily suspended
2 under AS 08.01.075(c), the use area permits held by the guide-out-
3 fitter are suspended automatically until after the final disposition
4 of the disciplinary proceeding by the board.

5 (g) A hearing to suspend or revoke a use area permit may be
6 combined with a disciplinary proceeding under AS 08.01.075 or AS 08.-
7 54.500 involving the use area permittee.

8 (h) A use area permit may be revoked or the terms of the use
9 area permit or an operations plan may be altered by the board for
10 wildlife conservation and management considerations.

11 (i) A use area permittee shall submit an amended operations plan
12 if the permittee intends to vary the permittee's guide-outfitting
13 operation from that stated in the plan. An amended operations plan is
14 not effective until approved by the board. A permittee may not con-
15 duct a guide-outfitting operation outside of the terms of an approved
16 operations plan.

17 Sec. 08.54.670. ASSIGNMENT OF GUIDE-OUTFITTER USE AREA PERMIT.

18 (a) A use area permit may be assigned by the board under regulations
19 of the board if the assignment is

20 (1) consistent with the purposes of AS 08.54.610 - 08.-
21 54.690;

22 (2) not for consideration to the former permittee;

23 (3) to a guide-outfitter qualified to receive the use area
24 permit; and

25 (4) due to the death or disability of the former permittee
26 or for other good cause, as defined by the board.

27 (b) The sale of guide-outfitter facilities and equipment between
28 the former permittee and the assignee of a use area permit may not be
29 for an amount that exceeds the replacement value of the property. The

1 sale of property between the former permittee and the assignee of a
2 use area permit for an amount in excess of the replacement value of
3 the property voids the assignment of the use area permit.

4 (c) An assigned use area permit is valid only for the period for
5 which the use area permit was originally issued.

6 (d) If proceedings in which a guide-outfitter license may be
7 revoked or suspended under this chapter are pending against a guide-
8 outfitter, the guide-outfitter's use area permits may not be assigned
9 unless allowed for good cause by the board. During the period for
10 which a guide-outfitter's license is suspended under this chapter, use
11 area permits held by the guide-outfitter may not be assigned.

12 (e) If proceedings in which a guide-outfitter use area permit
13 may be revoked or suspended under AS 08.54.660 are pending against a
14 guide-outfitter, the use area permits that are the subject of the
15 pending proceedings may not be assigned. During the period for which
16 a use area permit is suspended under AS 08.54.660, the use area permit
17 may not be assigned.

18 Sec. 08.54.680. INFORMATION ON GUIDE-OUTFITTER USE AREAS. (a)
19 The board shall maintain and publish on a regular basis a comprehen-
20 sive list of all unawarded guide-outfitter use areas that are open to
21 application for use by qualified guide-outfitters.

22 (b) The board shall maintain a centralized information center
23 where information on guide-outfitter use areas and all commercial use
24 permittees can be readily obtained by guide-outfitters, government
25 agencies, and the public.

26 Sec. 08.54.690. DEFINITIONS. In AS 08.54.610 - 08.54.690

27 (1) "joint use" means the utilization of a guide-outfitter
28 use area by more than one use area permittee;

29 (2) "sole use" means the utilization of a guide-outfitter

1 use area by one use area permittee.

2 * Sec. 3. AS 08.54.310(a) is amended by adding new paragraphs to read:

3 (11) certify guide-outfitters to conduct guide-outfitting
4 activities within a game management unit;

5 (12) establish by regulation a system of guide-outfitter use
6 areas for allocating access to big game hunting opportunities among
7 guide-outfitters.

8 * Sec. 4. AS 08.54 is amended by adding a new section to read:

9 Sec. 08.54.355. GAME MANAGEMENT UNIT CERTIFICATION. (a) The
10 board shall certify guide-outfitters licensed under AS 08.54.350 to
11 guide-outfit hunts within a game management unit.

12 (b) A guide-outfitter may not guide-outfit hunts in a game
13 management unit unless the guide-outfitter is certified by the board
14 to guide-outfit hunts in the game management unit.

15 (c) The board shall allow a guide-outfitter to prequalify for
16 certification for each game management unit in which the guide-out-
17 fitter is competent to guide-outfit hunts. The board shall allow a
18 guide-outfitter to transfer a certification between game management
19 units.

20 * Sec. 5. AS 08.54.370(a) is amended to read:

21 (a) An applicant for renewal of a guide-outfitter license or a
22 marine mammal guide-outfitter license shall submit with the applica-
23 tion for renewal

24 (1) the hunt record required under AS 08.54.550 for the
25 period covered by the current license;

26 (2) the license fee for the next licensing period; [AND]

27 (3) the commercial use permit fee for the next licensing
28 period;

29 (4) an amended guide-outfitter use area permit operations

1 plans, if appropriate; and

2 (5) the wildlife conservation fee for the period covered by
3 the current license.

4 * Sec. 6. AS 08.54 is amended by adding a new section to article 2 to
5 read:

6 Sec. 08.54.480. WILDLIFE CONSERVATION FEE. (a) Each guide-
7 outfitter licensed under AS 08.54.350 and transporter shall pay annu-
8 ally a wildlife conservation fee.

9 (b) The wildlife conservation fee paid by a guide-outfitter is
10 the sum of \$25 for each big game animal other than deer and \$5 for
11 each deer taken by a client during the year. A guide-outfitter shall
12 pay the fee at the time for renewal of guide-outfitters' licenses.
13 Failure to renew a guide-outfitter's license does not excuse payment
14 of the fee.

15 (c) The wildlife conservation fee paid by a transporter is the
16 sum of \$25 for each big game animal other than deer and \$5 for each
17 deer that is (1) taken on a non-guide-outfitted hunt by a customer of
18 the transporter, and (2) transported by the transporter. Transporters
19 shall pay the fee at the time set by the department.

20 (d) The commissioner of administration shall separately account
21 for wildlife conservation fees deposited in the general fund by the
22 department. The annual estimated balance in the account may be used
23 by the legislature to make appropriations to the Department of Fish
24 and Game and the Department of Public Safety to carry out their re-
25 spective responsibilities for management of game resources and en-
26 forcement of game laws.

27 * Sec. 7. AS 08.54.590(13) is amended to read:

28 (13) "transportation services" means the carriage for
29 compensation of big game hunters, their equipment, or big game animals

1 harvested by hunters to, from, or in the field; "transportation ser-
2 vices" does not include the carriage by aircraft of big game hunters,
3 their equipment, or big game animals harvested by hunters

4 (A) on nonstop flights between state or federally
5 maintained airports; or

6 (B) by an air taxi operator or air carrier for which
7 the carriage of big game hunters, their equipment, or big game
8 animals harvested by hunters is only an incidental, as defined by
9 the board, portion of its business unless the air taxi operator
10 or air carrier advertises hunting services to the public;

11 * Sec. 8. IDENTIFICATION OF PROPOSED GUIDE-OUTFITTER USE AREAS. (a)
12 The Department of Fish and Game shall propose guide-outfitter use areas for
13 use by the Big Game Commercial Services Board in establishing a resource-
14 based management system for allocating access to big game hunting oppor-
15 tunities among guide-outfitters. The department shall identify proposed
16 guide-outfitter use areas for appropriate regions and areas of the state.
17 The department may set priorities for identifying use areas and may deter-
18 mine the extent and number of use areas to be identified at one time. The
19 department shall complete the identification of proposed use areas within
20 two years after the close of the first public comment period prescribed
21 under (e) of this section. The department shall complete the identifica-
22 tion of proposed use areas for a significant portion of the state within
23 nine months after the close of the first public comment period prescribed
24 under (e) of this section.

25 (b) The Big Game Commercial Services Board may recommend to the
26 department those areas of the state that should receive priority in identi-
27 fying use areas.

28 (c) The department shall publish a public notice that it is accepting
29 public comment for identification of areas as proposed guide-outfitter use

1 areas. The department shall accept public comment for 60 days after the
2 notice is first published.

3 (d) The department shall propose use areas in light of the following
4 considerations:

5 (1) wildlife management concerns, including abundance and diver-
6 sity of wildlife, historical harvest of wildlife from the area, and exist-
7 ing administrative boundaries established for wildlife management purposes:

8 (2) wildlife law enforcement concerns;

9 (3) public comment received under (c) of this section;

10 (4) land ownership in the area;

11 (5) administrative restrictions;

12 (6) existence of boundaries that can be readily identified in
13 the field;

14 (7) accessibility of the area and other transportation consid-
15 erations;

16 (8) existence of complementary and noncomplementary land uses
17 within the area;

18 (9) existing facilities within the area; and

19 (10) other considerations relevant to the purposes of this sec-
20 tion.

21 (e) The department shall provide maps or descriptions to the public
22 of the use areas proposed under (d) of this section and shall solicit
23 public comment on the proposed use areas. The public shall have 45 days
24 after the maps or descriptions are distributed to comment on the use areas
25 proposed by the department. At the close of the comment period, the de-
26 partment shall review the proposed use areas in light of the public comment
27 received and shall then recommend boundaries for the proposed use areas.
28 The department shall transmit its boundary recommendations to the Big Game
29 Commercial Services Board as the recommendations are made final.

1 (f) The actions of the department under this section are exempt from
2 the Administrative Procedure Act (AS 44.62).

3 (g) In this section

4 (1) "department" means the Department of Fish and Game;

5 (2) "public" includes a natural person, corporation, associa-
6 tion, organization, society, company, partnership, or state, federal, or
7 local government agency.

8 * Sec. 9. PRELIMINARY DETERMINATION OF ELIGIBILITY FOR GUIDE-OUTFITTER
9 USE AREA PERMIT. (a) In order to facilitate and expedite the process for
10 issuing guide-outfitter use area permits during the first five years that
11 offerings of guide-outfitter use areas are made under AS 08.54.610 - 08.-
12 54.690, enacted by sec. 2 of this Act, the Big Game Commercial Services
13 Board shall make preliminary determinations of the eligibility of a guide-
14 outfitter to receive use area permits.

15 (b) A guide-outfitter may apply, at times set by the board, for a
16 preliminary determination of eligibility for a use area permit for each
17 game management unit in which the guide-outfitter is certified or prequal-
18 ified for certification to guide-outfit hunts under AS 08.54.355, enacted
19 by sec. 4 of this Act.

20 (c) A guide-outfitter is qualified for a preliminary determination of
21 eligibility to receive a use area permit if the board finds that the guide-
22 outfitter satisfies the criteria of AS 08.54.650(b), enacted by sec. 2 of
23 this Act, that can be satisfied without reference to the characteristics of
24 a specific use area.

25 (d) A preliminary determination of eligibility to receive a use area
26 permit does not vest a right in the guide-outfitter to receive a use area
27 permit when use areas are offered under AS 08.54.650, enacted by sec. 2 of
28 this Act.

29 * Sec. 10. During the first five years that offerings of use areas are

1 made under AS 08.54.610 - 08.54.690, enacted by sec. 2 of this Act, the Big
2 Game Commercial Services Board shall offer all guide-outfitter use areas.

3 * Sec. 11. SEVERABILITY. If a provision of this Act or the application
4 of this Act to a person or circumstance is held invalid, the remainder of
5 this Act and the application of this Act to other persons or circumstances
6 are not affected by the invalidity.

7 * Sec. 12. AS 08.54.310(b)(1) is repealed.
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Letter of Intent
For
SCS for CS HB 112 (Fin)

It is the intent of the legislature that the Big Game Commercial Services Board, with recommendations from the Task Force on Guiding and Game, established under provisions of CS HB 112 (Finance) am shall consider the implications of the Owsichuk decision issued by the Alaska Supreme Court on October 21, 1988, when establishing the resource-based management system for allocating big game hunting opportunities among guide-outfitters.

It is the intent of the legislature that any management system should:

1. Provide for the conservation of the game resources.
2. Provide for equal opportunity to all qualified guide-outfitters when access to hunting rights are assigned or reassigned.
3. Provide financial compensation to the state for the commercial harvest of Alaska's big game resources to be used for game management purposes.
4. Designate the Alaska Department of Fish and Game as the lead agency to formulate management areas.
5. Provide for long-term stability and economic health of any commercial industry utilizing big game resources.
6. Include recommendations from private and public land owners in order to ensure statewide applicability.

BY THE SENATE FINANCE COMMITTEE

Senate Adopted 4/25

LETTER OF INTENT
FOR
CS HB 112 (FINANCE)

It is the intent of the legislature that the Big Game Commercial Services Board established under the provisions of CS HB 112 (Finance) shall consider the implications of the Owsichex decision issued by the Alaska Supreme Court on October 21, 1988 when establishing the resource-based management system for allocating big game hunting opportunities among guide-outfitters.

It is the intent of the legislature that the foremost purpose of any management system should be the conservation of game resources. Any system that places restrictions on free market competition between guides must be based on clear findings that such restrictions are needed to prevent harmful impacts on game populations that cannot be prevented through licensing requirements, bag limits, seasonal restrictions, or other traditional game management tools that are now available to the state.

Without a constitution^l amendment, a system would have to provide the broad access guaranteed by the "common use" clause of the constitution. The system would have to have access rights that are limited in duration, and the system would have to provide equal opportunity to all qualified guide-outfitters when these rights are reassigned. In order to prevent the development of non-uniform policies by various federal, state and private landowners, the system should have statewide applicability.

ADOPTED BY
THE HOUSE
4-6-89

Adopted 35-2

Original sponsor: Resources Committee

IN THE SENATE BY THE RESOURCES COMMITTEE

HOUSE CS FOR CS FOR SENATE BILL NO. 139 (Resources)

IN THE LEGISLATURE OF THE STATE OF ALASKA

SIXTEENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act providing for retroactive extension of the termination date of the Task Force on Guiding and Game; increasing the membership of the Task Force on Guiding and Game; authorizing certain agencies to assist the Task Force on Guiding and Game; and providing for an effective date."

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

* Section 1. Section 14(d), ch. 160, SLA 1988, is repealed and re-enacted to read:

(d) The task force terminates on the earlier of

(1) January 15, 1990; or

(2) the date of enactment into law of

(A) a licensing system for hunting guides and other persons who provide services to hunters for the purpose of facilitating the harvest of big game; and

(B) a management system for allocating rights of access to big game to licensed guides.

* Sec. 2. Notwithstanding the qualifications for members of the Task Force on Guiding and Game set out in sec. 14(a), ch. 160, SLA 1988, the members of the task force on January 8, 1989, shall continue to serve until they resign or the task force is terminated.

* Sec. 3. Notwithstanding the number and composition of the Task Force on Guiding and Game set out in sec. 14(a), ch. 160, SLA 1988, the membership of the task force is increased by two additional members appointed by

the governor. Of the two persons appointed to the task force under this section, one person shall have expertise in research and analysis and, if possible, particular knowledge in resource management or allocation systems and may not have a financial interest in a business involving or related to the commercial taking of game and one person shall represent Native village landholders.

* Sec. 4. The Office of the Governor, office of management and budget, division of policy and the legislature's House Research Agency and Senate Advisory Council shall provide information, data, research, analysis, and technical assistance to the task force, as requested by the task force, for the purpose of developing a management system for allocating rights of access to big game to licensed guides.

* Sec. 5. Sections 1 - 2 of this Act are retroactive to January 8, 1989.

* Sec. 6. This Act takes effect immediately under AS 01.10.070(c).



Alaska State Legislature

HOUSE OF REPRESENTATIVES/
COMMITTEE ON RESOURCES

POUCH V
JUNEAU, ALASKA 99811
(907) 465-3718

Letter of Intent
For
HCS CS SB 139 (Res)

It is the intent of the legislature that the task force established under the provisions of SB 139 shall consider the implications of the Owsichuk decision issued by the Alaska Supreme Court on October 21, 1988 when developing the resource-based management system for allocating big game hunting opportunities among guide-outfitters.

It is the intent of the legislature that the foremost purpose of any management system should be the conservation of game resources. Any system that places restrictions on free market competition between guides must be based on clear findings that such restrictions are needed to prevent harmful impacts on game populations that cannot be prevented through licensing requirements, bag limits, seasonal restrictions, or other traditional game management tools that are now available to the state.

Without a constitutional amendment, a system would have to provide the broad access guaranteed by the common use clause of the constitution. The system would have to have access rights that are limited in duration, and the system would have to provide equal opportunity to all qualified guides when these rights are reassigned. In order to prevent the development of non-uniform policies by various federal, state, and private landowners, the system should have statewide applicability.

Alaska State Legislature

RECEIVED

JUDICIARY
CHAIRMAN
907-465-4523



JAN 15 1990

JAN FAIKS
SENATE OFFICE

JAN FAIKS
POST OFFICE BOX V
JUNEAU, ALASKA 99811

Senate

January 11, 1989

RECEIVED
JAN 12 1990

The Honorable Tim Kelly
President
Alaska Senate
Post Office Box V
Juneau, Alaska 99811

Dear Senator Kelly:

The Legislative Task Force on Guiding and Game is scheduled to release its final report and recommendations to the Alaska Legislature by January 15, 1990.

In spite of the panel's best efforts, the task force will need additional time to complete its work. As you are aware, problems associated with both the weather and volcanic eruptions caused numerous travel delays for many of the task force members in mid to late December. This forced postponement of a scheduled pre-holiday meeting and resulted in our falling behind.

With your approval of the necessary time extension, the task force will present its findings and recommendations to the Legislature on January 25, 1990. Please notify me at your earliest convenience if the extension is acceptable.

Sincerely,

Senator Jan Faiks, Chairman
Legislative Task Force on
Guiding and Game

JF:mr

*Delay approved
S. Kelly
1/15/90*

OUT OF SESSION

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ANCH

ALASKA 99503

907-561-7610

Kenneth D. OWSICHEK, Appellant,

v.

STATE of Alaska, GUIDE LICENSING
AND CONTROL BOARD, Appellee.

No. S-1650.

Supreme Court of Alaska.

Oct. 21, 1988.

Rehearing Denied Dec. 5, 1988.

Hunting guide brought an action for a declaration that the Guide Licensing and Control Board's assigning of exclusive guide areas in which only the designated guide could lead hunts was unconstitutional. Guide also sought damages. Upon remand from the Supreme Court, 627 P.2d 616, the Superior Court, Third Judicial District, Anchorage, Milton Souter, J., upheld the Board's actions, and guide appealed. The Supreme Court, Rabinowitz, C.J., held that: (1) the statutes which allowed such licensing violated the Constitution's public use clause; (2) guide could not recover damages against the State; and (3) guide was not a public interest litigant.

Reversed and remanded.

1. Fish ⇐10(1)

Game ⇐5

Grants of exclusive rights to harvest natural resources listed in common use clause of Constitution (fish, wildlife, and waters) should be subjected to close scrutiny. Const. Art. 8, § 3.

2. Game ⇐5

Constitutional clause reserving fish, wildlife, and waters to people for common use prohibited grant of "exclusive guide areas" to hunting guides in which only the designated guide may lead hunts and from which all other guides are excluded, as such areas were granted essentially on basis of seniority, with no rental or usage fee to State, for unlimited duration, and were administered in such way that guides could transfer them for profit as if they owned them, and statutes and regulations permitting assignment of such areas were uncon-

stitutional. AS 08.54.040(a)(7), 08.54.195; Const. Art. 8, §§ 3, 17.

3. United States ⇐78(12)

Even if Guide Licensing and Control Board, in granting "exclusive guide areas," in which only designated guide could lead hunts, acted in excess of its authority or failed to comply with requirements of licensing statutes, discretionary function exception to Tort Claims Act prohibited guide from recovering damages which allegedly resulted from such conduct, as licensing program in question was major policy initiative of Board, and there was no evidence that Board acted in bad faith. AS 09.50.250.

4. Costs ⇐194.42

Hunting guide was not "public interest litigant" in his challenge to statutes which authorized Guide Licensing and Control Board to grant exclusive guide areas to hunting guides in which only the designated guide could lead hunts and from which all other guides were excluded, as guide, who claimed that statute jeopardized \$450,000 he had invested in his guiding operation, and that he suffered over \$100,000 in damages, had sufficient economic incentive to bring lawsuit without regard to public interest.

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

Charles E. Tulin, Anchorage, for appellant.

Michael G. Hotchkin and Sarah E. McCracken, Asst. Attys. Gen., Anchorage, Ronald W. Lorensen, Acting Atty. Gen., Juneau, for appellee.

OPINION

Before RABINOWITZ, C.J., and
BURKE, MATTHEWS, COMPTON and
MOORE, JJ.

RABINOWITZ, Chief Justice.

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

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

I.

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

One of the first activities of the Board was to establish a scheme of "exclusive guide areas" (EGAs) and "joint use areas." Under this system, a guide would be able to register his camp and be entitled to exclusive guiding privileges in a designated area surrounding it. "Joint use areas" would be assigned where the areas used by two or more guides overlapped.¹ The Board first voted in April 1974 to implement this scheme for Game Management Units 16 and 20.² Shortly thereafter, in

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

2. The Board of Game has divided the state into twenty-six Game Management Units, primarily for purposes of establishing hunting seasons and bag limits for different species. For these purposes, many Units are divided into several subunits with different applicable regulations. See AS 16.05.255; 5 AAC 78.001-.600, 80.001-.600, 83.001-.600, 86.001-.910, 88.001-.910.

July 1974, the Board voted to extend the program to Unit 8 (Kodiak Island).

For the following year, the Board considered applications for EGAs but took no action. In July 1975, the Board granted dozens of exclusive and joint use areas in the three Units for which the regulation was passed. The Board further resolved at that time to extend the program to eleven more Units, including Unit 19. In January 1976, the Board voted to grant EGAs to qualified guides anywhere in the state. Applications were to be based on "occupancy, use, financial value, and such other qualifications as the Board may prescribe." The Board set a deadline of November 1, 1976, for receipt of applications for EGAs. The Board began granting EGAs in Units other than 8, 16 and 20 in December 1976, starting with Units 23-26. EGAs for other Units were granted gradually over the following months.

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

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

Ch. 133, § 1, SLA 1976. This provision took effect January 1, 1977. *Id.* at § 5. The legislative history reveals that the intent of this section was to ratify the

The Guide Licensing and Control Board has adopted these Units for purposes of licensing hunting guides. 12 AAC 38.200(b) (Eff. 6/28/74). Each licensed guide may be certified to practice in up to three Units. 12 AAC 38.200(d) (Eff. 6/28/74). Unit 16 is in South Central Alaska, near Anchorage, and Unit 20 occupies a large part of Interior Alaska, including Fairbanks.

Board's EGA program. Transcript of Senate Resources Committee Hearing on S.B. 661, at 1, 14-15 (March 12, 1976); Transcript of House Resource Committee Hearing on S.B. 661, at 33-34 (April 27, 1976).

Finally, in 1986 the legislature enacted AS 08.54.195.³ This statute for the first time imposed procedures and criteria on the Board with respect to the EGA program. This reform was enacted in response to a "sunset report" on the GLCB by the Division of Legislative Audit, which was harshly critical of the Board's implementation of the EGA program.⁴ See Division of Legislative Audit, *A Performance Report on the Department of Commerce and Economic Development Guide Licensing and Control Board*, Audit Control No. 08.01253-86-R (Nov. 21, 1985).

II.

Kenneth D. Owsichek is a registered guide who was licensed to lead hunts in

Game Management Units 17, 18 and 19 in February 1976.⁵ He alleges that he had worked as an assistant guide in this area from 1972 to 1976. He claims that in January 1976, upon passing his guide license examination, he invested \$300,000 to build a lodge and several cabins together with other facilities for a full-scale guiding operation on Lake Clark. He also claims to have spent \$150,000 on four aircraft to fly in clients.

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

3. Alaska Statute 08.54.195 provides:

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

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

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

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

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

(4) big game populations in the area;

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

(6) other relevant facts or circumstances.

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

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

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

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

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

4. The 1986 legislation also modified AS 08.54.040(a)(8) in response to the sunset report. Specifically, the legislation (1) renumbered it subsection 040(a)(7), (2) required "an equitable, reasonable, and consistent procedure" (emphasized language added in 1986), and (3) provided that "preference may be given" to local resident guides (instead of *shall*). Ch. 71, § 6, SLA 1986.

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

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

for guided hunts in the area for two of the five years preceding the application."

Owsichuk petitioned for review of this decision. In November 1978, the Attorney General's office found that, based on contracts submitted for hunts in 1976, 1977 and 1978, he was qualified to receive an EGA in Units 17 and 19, and recommended that the Board adopt this decision. In its December 1978 meeting, the Board resolved "that the portion of Mr. Owsichuk's application that is not in conflict with presently granted guide (sic) areas be allowed. That no portion of the application that overlaps or is presently in joint use be granted." By letter dated February 5, 1979, the Board informed Owsichuk of its decision and assigned him area 19:33, in Unit 19. Owsichuk objected to this decision because he was unable to land his planes within the areas granted to him, rendering them "un-hunttable."

On April 6, 1979, Owsichuk filed a complaint in superior court challenging the Board's actions. His amended complaint alleged that: (1) prior to January 1, 1977, the Board lacked authority to promulgate regulations creating EGAs; (2) the actions of the Board violated due process and equal protection under the federal and state constitutions; (3) the actions of the Board were an unconstitutional taking of property; (4) AS 08.54.040(a)(8) was an unconstitutional delegation of authority because of the lack of standards; (5) the statutes and regulations constituted an unlawful impairment of contracts under the

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

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

Alaska Constitution; (6) the regulations did not comply with what standards existed in the statute; and (7) he suffered damages. By way of relief Owsichuk sought a declaration that the Board's assigning of EGAs is unconstitutional and that he is entitled to recover damages against the state in an amount in excess of \$100,000 as a consequence of the state's illegal and unconstitutional actions.

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

This appeal followed.⁸

III.

A.

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

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

Alaska Const., art. VIII, § 2. The state argues that this clause is a broad grant of authority to the state to manage these resources, and that it places no limitations on this authority greater than those contained in other constitutional provisions, such as equal protection.⁹

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

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

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

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

In *CWC Fisheries v. Bunker*, 755 P.2d 1115 (Alaska 1988), we addressed the question of whether a state tidelands grant included an exclusive right of fishery, or whether it was subject to a public trust easement. In holding the latter, we relied in part on the common use clause. While specifically declining to determine whether this clause imposed a higher duty than that imposed by common law public trust principles, *id.* at 1120 n. 10, we stated, "At least in the absence of some clear evidence to the contrary, we will not presume that the legislature intended to take an action which would, on its face, appear inconsistent with the plain wording of this constitutional mandate." *Id.* at 1120.

In *State v. Ostrosky*, 667 P.2d 1184 (Alaska 1983), *appeal dismissed*, 467 U.S. 1201, 104 S.Ct. 2379, 81 L.Ed.2d 339 (1984),

10. Similarly, it has been stated:

The common use clause necessarily contemplates that resources will remain in the public domain, and will not be ceded to private ownership. Since the right of common use is

we addressed the constitutionality of limited entry fishing. Limited entry fishing bears an obvious similarity to the EGA scheme in that both place restrictions on the commercial harvesting of a natural resource by giving a special status to a limited number of licensees. In *Ostrosky* we stated:

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

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

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

In *State v. Ostrosky*, 667 P.2d 1184 (Alaska 1983), we noted that there is a tension between the limited entry clause of the state constitution and the clauses of the constitution which guaranty open fisheries. [Citing sections 3 and 15 of article VIII] We suggested that to be constitutional, a limited entry system should impinge as little as possible on the open fishery clauses consistent with the constitutional purposes of limited entry, namely, prevention of economic distress to fishermen and resource conservation.

Id. at 1266.

Since there is no constitutional amendment authorizing EGAs, we must in this case address a common use question similar to that which was not addressed in *Ostrosky*. We do so, however, in light of

guaranteed expressly by the constitution, it must be viewed as a highly important interest running to each person within the state. *State v. Ostrosky*, 667 P.2d 1184, 1196 (Alaska 1983) (Rabinowitz, J., dissenting).

Cite as 763 P.2d 488 (Alaska 1988)

our observations in *Wernberg*, *CWC Fisheries*, *Ostrosky*, and *Johrs* that the common use clause was intended to guarantee broad public access to natural resources.

B.

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

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

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

11. Responding to a question about this provision on the floor of the convention, a member of the Resource Committee explained, "The language here has a lot of history behind it.... The language in this section harks back to the

Alaska Constitutional Convention Papers, Folder 210, paper prepared by Committee on Resources entitled "Terms" (emphasis added, except to "use"). Because an EGA is clearly a type of monopoly, "exclusive grant," or at least a "special privilege," this history strongly suggests that the statutes at issue here are unconstitutional. However, this history also states that "rights to use are secured by the general laws of the state," clearly giving the legislature some leeway in regulating use of the resources.

The state finds support for its position in a debate that occurred at the convention over registered trap lines. This debate is significant because, like EGAs, registered trap lines would allow a prior existing user to exclude newcomers from the privilege of harvesting the wildlife resource. On the floor of the convention, a delegate asked whether the common use clause would prohibit registered trap lines, and the spokesman for the Resources Committee responded that it would be "arguable." 4 Proceedings of the Alaska Constitutional Convention 2462-63 (Jan. 17, 1956). In response to this concern, the Resources Committee inserted language in the commentary to the common use clause authorizing registered trap lines: "This provision does not apply to the domestication of fur-bearing animals or other animals subject to intensive culture, to fish in private ponds, or to registered trap lines if authorized by law." 6 Proceedings of the Alaska Constitutional Convention app. V, at 98 (Commentary on Article on State Lands and Natural Resources, Jan. 16, 1956) (emphasized language added after first draft; *cf. id.* at 83 (Dec. 16, 1955)).

Resolution of the trap line issue begs the question in the instant case. One might argue that addition of the language excluding registered trap lines from the effect of the common use clause was intended to authorize the legislature to enact this type

old tradition whereby wildlife in its natural state was in the presumed ownership of the sovereign until reduced to possession." 4 Proceedings of the Alaska Constitutional Convention 2492 (Jan. 18, 1956).

of regulation generally, and that the reasoning should extend to EGAs. However, the language in the commentary is highly specific, which more likely suggests that the common use clause would prohibit all similar regulation, with registered trap lines as a narrow exception in response to the political pressures of the moment.

[1] In a discussion about fishing in lakes, the Constitutional Convention underscored its intent that the public retain broad access to fish, wildlife and water resources, and that these resources not be the subject of private grants. In floor debates, a question arose about the status of a natural lake falling within the boundaries of someone's private property. The delegates agreed that the common use clause guaranteed the public's right to use the lake for fishing, although it did not authorize a trespass across the landowner's property to get to the lake. 4 Proceedings of the Alaska Constitutional Convention 2460 (Jan. 17, 1956). The Convention made it clear that only fish in small private ponds may be owned free of the public's right of access. See *id.* at 2460-61; 6 Proceedings of the Alaska Constitutional Convention app. V, at 98 (Commentary on Article on State Lands and Natural Resources, Jan. 16, 1956). This confirms the view of the common use clause and the public trust expressed in *CWC Fisheries v. Bunker*, 755 P.2d 1115 (Alaska 1988), holding that a grant of a fee interest in tidelands remains impressed with a public trust easement. It also reinforces our conclusion that grants of exclusive rights to harvest natural resources listed in the common use clause should be subjected to close scrutiny.

C.

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

The Supreme Court traced the history of wildlife law from its roots in ancient Rome through its English common law development and transfer to this country in *Geer v. Connecticut*, 161 U.S. 519, 522-29, 16 S.Ct. 600, 601-04, 40 L.Ed. 793, 794-97 (1896). In that case, the Court affirmed the defendant's conviction, upholding a state statute forbidding transportation of certain game birds killed in Connecticut across state lines. The Court noted that in England, the right to hunt and fish "[was] vested in the King alone and from him derived to such of his subjects as [had] received the grants of a chase, a park, a free warren, or free fishery." *Id.* at 527, 16 S.Ct. at 603, 40 L.Ed. at 796 (quoting 2 W. Blackstone, *Commentaries* * 410). As a recent authority explains:

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

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

The *Geer* court asserted that this authority to regulate taking of wildlife passed to the states upon separation from England. 161 U.S. at 528, 16 S.Ct. at 604, 40 L.Ed. at 796. However, unlike the authority vested in the King, the authority of the states, with their guarantees of democratic government, was not plenary.

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

Id. at 529, 16 S.Ct. at 604, 40 L.Ed. at 797 (emphasis added). The Court held that the

Cite as 763 P.2d 448 (Alaska 1988)

state's "ownership" of wildlife, in trust for the people, authorized the statute at issue in that case. *Id.*

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

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

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

Thus, common law principles incorporated in the common use clause impose upon the state a trust duty to manage the fish, wildlife and water resources of the state for the benefit of all the people.¹² We have twice recognized this duty in our prior decisions. In *Mellakatla Indian Community, Annette Island Reserve v. Egan*, 362 P.2d 901, 915 (Alaska 1961), *aff'd*, 369 U.S. 45, 82 S.Ct. 552, 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

12. The Court overruled *Geer's* state ownership doctrine in *Hughes v. Oklahoma*, 441 U.S. 322, 99 S.Ct. 1727, 60 L.Ed.2d 250 (1979). That case involved facts almost identical to *Geer*: the Oklahoma statute at issue forbade the export of minnows taken from the waters of the state. *See id.* at 323, 99 S.Ct. at 1729, 60 L.Ed.2d at 254. The Court struck down the statute as violative of the commerce clause. *Id.* at 338, 99 S.Ct. at 1737, 60 L.Ed.2d at 263. The Court found the state ownership doctrine to be a legal fiction that created anomalies and did not conform to "practical realities." *Id.* at 335, 99 S.Ct. at 1735, 60 L.Ed.2d at 261. Nothing in the opinion, however, indicated any retreat from the state's public trust duty discussed in *Geer*. Indeed, the Court stated, "[T]he general rule we adopt in this case makes ample allowance for preserving, in ways not inconsistent with the Commerce Clause, the legitimate state concerns for conservation and protection of wild animals

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 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); *Stats v. Ostrcsky*, 667 P.2d 1184, 1189, 1191 (Alaska 1983), *appeal dismissed*, 467 U.S. 1201, 104 S.Ct. 2379, 81

underlying the 19th century legal fiction of state ownership." *Id.* at 335-36, 99 S.Ct. at 1735-36, 60 L.Ed.2d at 261. As one U.S. District Court 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 Stewart 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.

L.Ed.2d 339 (1984); *Werberg v. State*, 516 P.2d 1191, 1198-99 (Alaska 1973); see also *Ostrosky*, 667 P.2d at 1196 (Rabinowitz, J., dissenting).

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

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

Finally, cases applying the public trust doctrine in navigable waters have frequently struck down state actions in violation of the trust without any reference to either federal or state constitutions. A good example is the lodestar of American public trust law, *Illinois Central Railroad Co. v. Illinois*, 146 U.S. 387, 13 S.Ct. 110, 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, 13 S.Ct. at 118, 36 L.Ed. at 1043.

In light of this historical review we conclude that the common use clause was in-

tended to engraft in our constitution certain trust principles guaranteeing access to the fish, wildlife 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 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)

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Cite as 763 P.2d 480 (Alaska 1988)

(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

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 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 dura-

tion, 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 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

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 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. Ostrorsky*, 667 P.2d 1184, 1188, 1189 (Alaska 1983).

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.

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

IV.

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

Owsichuk bases his claim for damages on allegations that the Board acted without authority in enacting the EGA regulations initially and that the regulations failed to comply with the legislation that was later

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 or regulation.

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

18. Our resolution of this issue makes it unnecessary for us to decide Owsichuk's other chal-

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) (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 provid-

enges to the statutes and to the actions of the Board.

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

20. Alaska Statute 09.50.250 provides in part:

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

ed for in AS 09.50.250. Furthermore, there is no evidence that the Board acted in bad faith.

V.

[4] 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 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, Owsichek 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.



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

KOEHRING MANUFACTURING COMPANY, Appellant and Cross-Appellee.

v.

EARTHMOVERS OF FAIRBANKS, INC., Appellee and Cross-Appellant.

Nos. S-1910, S-1921 and S-1946.

Supreme Court of Alaska.

Oct. 21, 1988.

Rehearing Denied Nov. 16, 1988.

Action was brought against owner/lessor of crane under strict products liability theory, and owner filed third-party complaint against manufacturer for indemnity. The Superior Court, Fourth Judicial District, Fairbanks, Mary E. Greene, J., found owner entitled to indemnification, and parties appealed. The Supreme Court, Compton, J., held that: (1) manufacturer was required to indemnify owner; (2) trial court did not abuse its discretion in refusing to permit manufacturer to amend pleading to assert affirmative defense of owner's independent negligence; (3) trial court did not abuse its discretion in limiting sanction imposed against manufacturer for discovery violations; and (4) trial court did not err in its award of attorney fees.

Affirmed.

Mathews, C.J., dissented and filed opinion, in which Rabinowitz, J., joined.

1. Indemnity ⇐15(9)

Whether manufacturer was obligated to indemnify owner/lessor of product for strict products liability judgment against it was question of law.

2. Indemnity ⇐13.1(3)

Retailer or lessor found liable on strict products liability theory may obtain indemnity from manufacturer, provided that re-

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 Owsichek, rather than the state, is viewed as the prevailing party.

January 12, 1990

Statement before the task force by Henry Springer - Chairman of the Guide Board - 12-12-89

During the introduction of Mr. Springer, acting Chairman of the task force, Bob Hinman explained that the length of time of a guide-outfitter area use permit is of considerable interest to the Board of Game in their allocation system.

"That specific subject is of quite a bit of concern to the Game Board members and to the Board of Game as a regulatory body. The reason for that is, unlike some of the legal and commercial implications which we have heard about, which are very necessary...I'm trying to direct my comments on the game management aspect of the time element.

There are no real easy answers. The testimony I want to give is basically help this task force to build a case for later for maybe legal review why the time element of 10 years maybe, which has been declared as a maximum defendable period from an economic and a commercial and a legal aspect, why that probably is too short and not acceptable from a game management stand point.

The trick under the Owsichek decision for the Board is trying to decide where the weight is. I thought first maybe the attorneys did a poor job in regards to the Supreme Court to feed them data that made them say what they said. But, I don't think so. I think the judges are pretty cagey people and I think they understood the implication, too. And I take what Steve White says as <fair coin ?>and I think that Owsichek simply said the common use clause is of more importance in the relationship to the original functions of area and time concepts in regards to commercial guiding areas. I think thats what the judges really thought. That puts us in the dilemma of trying to decide what is more important then in relation of the constitutional demand of the common use clause versus the sustained yield clause of game managment. Even so, they are not part of the task for this task force. But, nevertheless thats an important element in the game management concept. There's no use in coming up with a really elaborate system if you aint got any game. So that aspect all of a sudden takes on a different connotation.

The tricky part I think, is to find out what would be the maximum acceptable from a game management aspect and what is the minimum acceptable from a legal and commercial aspect, and those are two different things. Coming up to the question here about how does time relate to a population of management of game in general or game species, specific. Ah, there's several elements involved in it. One of them is just simply the population structure of a specific game species, by itself. If you want to extract it out like that. And, then within that concept the percentage of each classification within the population, the sex composition, the dynamics of a given species or a given population. They all enter into it and that what makes that whole thing complex. Because it's not a stationary thing, it's not something you can just like a car or something, you can say it runs so long on so much gas and stuff like that. There are so many variables in it. That is exactly the Board function, is trying to determine that type of aspect which enters into what you are doing.

Im homing in, even tho there are several elements in that management aspect. The species, the area that we're talking about, the __specific relationship from one species to another within an ecosystem. Last not least, some of the cyclical aspects which are poorly understood at that point for a lot of species, especially in Alaska. They all enter into it, but I want to home in on the time element, because that is something we are considering right now under that specific paragraph.

You gotta decide what the management goals are. And, for some areas that is pretty simple. And, I get into some examples. But, let it suffice at this point to say that Alaska is probably one of the most complex areas in the world for two reasons. One of them, because of the constitutional demands in regards to sustained yield and common use clause, but also and that shouldn't be overlooked because of the uniqueness of the subsistence priority loss to a resource. You take those two things as basic parameters and you immediately have as a chain reaction a whole bunch of real complex consequences.

Trying to extract out what would be reasonable from a strictly professional scientific I have looked at what different areas in the world that have very valuable game resources. How they're doing it in order <for them to come up?> have say extracted out some kind of principles in relationship to time elements that we could use as a guidance.

Let it just be stated from the start that the question that come up is it more important for some species than for others is absolutely valid. There are factors like the longevity of the species, obviously a species like a small deer, roe deer, a black tail deer and so on, react completely different in relationship to population dynamics and structures than for example, a animal with high longevity like a brown bear, or something like that. If the reproductive cycles are different

the composition of the populations are different, the reactions within the ecosystem are different, therefore different time elements are in. Also, up here and in those areas of the world where predators are present, they create a specific problem because you interject a predator/prey relationship which has distinct influences on the game population.

So, realizing that not all the factors are the same because Alaska has some unique factors, there are some things we can extract out for time elements. The best managed resource right now, game resource was worldwide, I would say from an overall standpoint, both from effectiveness and the yield that it produces in the highest return to the owners, are in the socialist countries, primarily the east bloc countries of Siberia, Mongolia and so on. They have that honed down to a science where the population produce the highest yield and return in both monetary and biomass. The reason is very simple. That is a totalitarian system and there is a specific body which is charged with nothing else but doing that. And that is a fairly simple and basically what they have done, they created game management areas which are managed in perpetuity without changing owners or managers. Therefore, there's first a very high degree of knowledge for a specific area there because that guy basically gets put there until he dies. So that knowledge level stays with a specific manager unless he makes a bad word during perestroika or something like that (laughter). He stays there til he dies. That is an important aspect of it. Tho that time element is basically without any limit. The other thing that is unique for that type of thing is that the government personnel is doing all not only all the managing but goes to the point that the guiding services and the exact animal that a client will shoot is pointed out by that person, government employee. He's attached there all the time. They are so good, they will tell you for example, on the red deer, within three points on the wild animal how high it will score. That's how familiar and how close they have.

They have also taken over the genetic breeding pattern that was developed during Nazi Germany and have <kept stock books so to speak ???> where they know exactly which trend of genetics they want to continue strictly from a trophy management standpoint. Im just pointing it out how fine tuned the management system in those areas is and they include some pretty large scale wild area like we have in Alaska and Siberia. It's just developed right down.

The next thing, tho they, the co-ops for example, most of it is done direct. Some of them are done through co-ops. They develop 10 year plans that get submitted to the higher management in the government and its set up on 10 year cycles."

END of Side B, TAPE 6 - 12-12-89

BEGINNING OF SIDE TAPE 7 - 12-12-89

(in progress) "used as a good example, they have political subdivisions. In other words, an area of a township that's controlled by villagers and so on, becomes a hunting territory. And the hunting rights are detached from land ownership. What happens there is, they have a common use clause per say, but it's separated from land mass, and they auction that off. It's a first you gotta pre-qualify as a hunter, then if you do that then you have the right to bid. They have two types of territories set up by predominant game species. One is called "low game". Those are small game species, the biggest one being wild boar and roe deer. They come up on 7 year cycles. Every 7 years they've got to re-bid, without any preference rights to previous owners. It's strictly a monetary deal. In other areas that contain species like red stag, and high backs and chemy and so on they're called "high game" territories. They are bid in some areas on a 12 year cycle and in some areas on a 15 year cycle.

Those cycles were determined for three basic reasons. One of them, administrative, managerial reason from a governmental standpoint. They tie into their budget and political cycles. Because it comes up so and so often, it is connected with that. The second thing is an historic connection. Before the Weimar Republic all game in Germany belonged to the nobility and they handed out rights to certain species to be hunted on those type of cycles, so there's some historic aspect to it. And the third one, and that is the overriding one is the game managerial aspect of it. There we see they're looking depending on the species, between 7 and 15 year cycles.

The third system that's widely used, especially in Africa, is a concession-type system. A concession type deal is basically done in two different connections. One of them being like the old British colonial base where the professional hunter or a qualified person picked up a concession and basically has it in perpetuity as long as there are no wild (unk) it can be indefinite. When the colonialism was on the way out and some of the countries, especially the socialist countries, took over, they have come up with a modified concession system where they determine, re-determine how many animals and which classes can be harvested. On that basis they put it out to public tender and then the successful bidder will have the right for a specific area, to fulfill that harvest. It's practiced right now in countries like Tanzania, Zymbabwe, Botswana, Nabibia and so on. There are several unique features with that. One, there is absolutely no interference from other hunters after the prevailing party has received the concession for that area. Nobody else is allowed in that area to hunt. The second thing is of course, in specifically those

areas is poaching is a big problem and that has very defined consequences, and that is that the cooperation between the hunting firm or the hunter who has the concession and the military is a very close cooperation.

The time element there differ, depending on the species. In areas for example in the Zambezi Valley, they can go 10-15 years with their elephants or some of the larger species present. It can go down to 5 years in low velt or high velt areas where you have the more pronounced step animals. It's a unique system. Another thing that is very unique is that the government will post a game warden with each bidder that stays during all hunting operations right in a pre-determined camp so they can do it on their own as a check and balance system. ("Great idea" -comment from task force member - Springer responded: "Great idea, yeah, we get all the unemployed people out in the woods..") Then you got ..all those systems have two elements which are pronounced, and that is an area concept and a time element involved with it.

In the United States you have a mixture. Typically, game in the lower 48 is managed in the statistical probability basis without area or time element other than from a managerial standpoint. The managers say "we want so many white tail deer and statistically over Thanksgiving weekend, following Thanksgiving, we're going to kill 22,000 deer of various classes, and we want so many bucks out of there, therefore we're going to make a 2 day buck season and a one day doe season, and statistically that is going to produce that much of a kill which fulfills our management requirements" and if it doesnt fulfill it then they may make another one day special doe season or something. If the weather was bad or everybody got drunk and went off the highway and didn't make it out in the woods. All those type of deals.

Its done on a statistical experience curve and it works to a high degree fairly well. Keeping in mind though, that all those areas are generally either fairly heavily populated or have only one major game species like white tail deer for example. When you go in the other areas of the lower 48 where you have a higher diversity of game species, like in the western states you come back to some kind of a concession system that is getting more and more heavily integrated with tresspass authorizations where the ranchers that hold wide real estate titles are looking at that as an income from hunting. That is getting more and more pronounced. The other thing that's getting more and more pronounced is just private game ranching and game farming because people are fed up with that statistical one weekend only type deal and they seek a higher quality hunt and thats what plays into it.

Those people in those ranches needless to say, they set it up on a trying to produce trophy animals because that's what they're selling.

To come back to Alaska and the Board function...our biggest problem the way I can see it coming up is, and that relates to what the (guide) task force is up to. Is strictly the relationship between management and the allocation system. I don't want to but I got to bring up the matter of subsistence here because it has a pronounced influence what this task force has to do and a pronounced influence on the guiding industry.

We got, like I said, in the constitution, two demands - a common use clause and a sustained yield clause. And we got four groups of people that are set up on a priority basis. Both ANILCA and the state subsistence law gives clear preference to the resource to subsistence users. They got ..on everything that comes up they got to be considered first. And the second group, especially for the four big game species, among caribou and moose, the residents have priority over non-residents. That leaves then simply non-residents and hunters that are involved through the guiding industry on the rear end of the <trough -?>. And the reasons that is very significant and important is because one of the things that would fit nicely into the Supreme Court demands would be a demand for either a lottery system or a permit system or a first-come, first-serve type assignment system, because that would fulfill the demands for not having some kind of hanky-panky allocation assignment going on.

That is probably, from the game management and allocation standpoint, the worst one for us. For us, being the Board. And there are a variety of reasons. I want to go through some of them.

In order to do that, in all cases where we utilize the permit system, it's done because there's some kind of a problem. The problem most likely being that there is a limited resource available. That's when we do it. In order to determine that there is a limited resource available in a specific area we have to have pretty detailed knowledge about that area. That's how we find out. In those areas that are not heavily utilized, we don't know even about it. The resource may be in trouble, it may be not. But, we concentrate on those areas that have heavy utilization and where there is either political fallout or some kind of public outcry. Nelchina herd for example, and things like that.

That type of a system, unless we say there's some complete imbalance in the sex ratio or age or something where we make it all bulls or something like that, it goes without exclusive determination as to sex or age. From a game management standpoint that is a real problem.

Then, the other thing is when you get then into the aspect of guiding or allocating it. Let's assume as an example, the Nelchina situation here on caribou, just as an example. We went the last time, last go-round last spring, the department told us that the herd could stand such and such a harvest. It was 1800 permits or something like that. We had to go through first trying to decide how many of those should go to subsistence users, we had to find out what is the subsistence demand on an historic basis for that area. We came up with 750 or 800 on the basis of testimony. That left 1250 permits open to the general public. The next step we had to go through was to decide how many of those should go to residents or were there any left over for non-residents. The determination was made after a lot of testimony that that did not fulfill the demand from resident people and as a consequence, none of them went out to non-residents. It just shows for the record how difficult it becomes to ..in regards to managing a specific segment of a population in an area for a specific time period when we don't even have rudimentary data for all of Alaska. Keep that in mind when you remember how small for example, in other systems they manage, they have territorial sizes of from five to ten thousand hectares, that being ten to 20 thousand acres. Those are management units with competent staff in place just to find out what the dynamics of just a small area are. We are managing thousands of square miles with one biologist covering the whole thing.

A permit system requires a very very detailed knowledge which the department doesn't have right now, the staff nor the budget to do. We're trying to manage on a time-area concept. The other thing is it's not only expensive, a permit system is expensive from that standpoint. It's expensive to administer later on. You have to have staff in place just to handle that.

The third aspect from the guiding ..trying to come back with the guiding deal on those situations. How are they going to exist on the permit system from year to year. I said I was not going to touch on that aspect because it doesn't pertain to game management. It's a separate issue, but you can't keep out of mind what such a system does to an industry. It's valid in relation to the time element if we say it takes ten years or 15 years for species like sheep. Take 20 to 25 years for species like brown bear, and you have that type of uncertainty, and with subsistence and resident users taking non-selectively, animals, which is exactly contrary from a management standpoint what you want to do with the role of the guides. The guides you want to press into that role that the manager in the other areas of the state are taking. And that is through selective collecting to further the management aspect. We've got two contrary systems going here at the same time.

In the one that would be fulfilling the management principals, <the highers-?> is on the end of the resource allocation process. It's an incredible situation we're having here. And the only reason the system hasn't collapsed up to that point is that we enjoy still large, untouched areas where the population pressure is just not that big.

Though, to come back to the guides. The role that they fulfill and I think the Supreme Court probably recognized it, but I just want to emphasize again is that if they stay in one area for longer periods of time, the longer they stay the better the more knowledge they absorb. That's why all the other systems use that principal. Assign one person and keep him there. They are in the forefront to supplement the knowledge level the Department of Fish and Game needs and that comes out in part of the operations plan. That's where that would translate into. They by the nature of their job, are looking for trophies, and since trophy sizes in most cases, are related to age, that trophy management becomes a much greater tool in the welfare of a population than is generally recognized. Compared with the unselective taking by subsistence or non-trophy hunters. It's a very important aspect, especially in species like bear, sheep and goats and so on, where adult males have very pronounced and important roles. They are the ones who are able to, in contrary to the other users who work on a selective taking system, because of that implied deal. And they are also the best trained of anybody or most hunters in the average, in the judgement in the field. Obviously in most circumstances, it's not too hard to see which is a big sheep and which isn't. It becomes a different matter when for example, you try to judge bears or non-horn <-- ?> in the field. So, those are some factors.

Somebody said something should be said about the Canada system (British Columbia). We studied Canada in the first part of the task force pretty intensively what they are doing. Unfortunately, you can't extract too much out of it other than what we said about the lower 48, because they don't have a common use clause in their constitution either. But, they're going much further than we are. Number one, they are all of them, Alberta, Saskatchewan, Manitoba, British Columbia, they're all re-evaluating their systems, too. They had similar task forces going as this one, still have it going. They implemented in the last two years pretty drastic reforms. For example, in Saskatchewan and in Alberta and in B.C., no non-residents can hunt without guides for all big game species. Even deer hunters are required to have guides. And they have come to similar conclusions. It's not just because they're greedy or because the guides are especially powerful political lobby. They have come to the same conclusion that the guiding industry in the absence of other mechanisms, got to fulfill a part of the game management deal to supplement the governmental functions. They have some pretty close cooperation between those guides and the local governmental

managers in their relationships ..what quotas they should get the next year, how the hunting types should be restricted. They've got a closer relationship than the more formal relationship adopted than we have at the present. Out of that very reason. I could talk alot more, but you guys got a lot to do. I'd be glad to answer any questions in regards. I want to make clear again. All I wanted to do is establish some kind of a relationship of management with a time aspect and why maximizing time is not something the board wants to see from an economic aspect or to support guides or anything. It is strictly a very integral and very important part of game management. Especially for the larger species in Alaska like bears, moose, sheep, not to mention sea mammals. We don't want to get into those, but they would fall in that catagory.

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QUESTION: from Randall Burns: "Henry, if, lets take the issue of the length of time. Do you think the Game Board would be capable of, if called to the stand to testify and justify the length that was established for a guide-outfitter use area, could present valid data that would support the kind of statements you just made?"

RESPONSE: Springer: "Why, I would, what do you think, I was bullshitting you here?" (laughter)

Burns: "No, I'm asking if -- the Game Board could get their biologist to present, you'd have that data."

Springer: "You better believe it. That stuff I didn't dream up while I was sitting on the crapper, I got a lot of material at home and.."

Burns: "We're creating a record here, Henry."

Springer: "You better believe it."

QUESTION: from Bob Hinman: "Henry, I had a comment or question or whatever. We have discussed numerous times the desirability of stability in the guiding industry. One important element obviously, is length of tenure of a permit. And, also that factor as an incentive for husbandry of game resources. The longer the guide he must depend upon that area and the longer he has to work with it, the better care he is likely to take of the resources within it. At least to some degree. Wouldn't you agree that the need for this concern for husbandry varies considerably between species and is greatest with those that are longest lived, because they develop slowly, especially develop to a either a reproductive state or to trophy status whichever you're looking at, much more slowly. And the classic of course here, is brown bear. But, unless one then issues permits - use area permits - only for that species, at a certain length, and then for other species of a shorter length, which would be a rather cumbersome

system, to say the least, then you're really looking at the requirements of the longest lived species as the ideal time period. Is that along something what your're thinking of?"

Springer: "Well, that's by just the sheer power of logic that's the way it would come out, except that I could see.... Let's take as an interesting example Kodiak for example. The main two species being brown bear and black tail deer. On the opposite sides of the spectrum. To call for an integrated management plan there and trying to design something - yes, if you want to do it, you would have to design it for brown bear. But, I would also venture to say strictly from an industrial standpoint, that there would be a guiding industry that would be interested in just furnishing black tail deer hunts without bothering the brown bear population. You can have very well, under a multiple use concept, situations where they are sharply enough divided where you don't have a predator/prey relationship and you have extreme part of the spectrum. So, I think in a case like Kodiak, for example, you could have separated guiding assignments and like that. If you get into more typical Alaskan areas where you have grizzly bear, moose, caribou and whatever together obviously, you don't have that type of an extreme situation. And, in a case like that where you probably have multi-species assignment to a guide, yeah, you would have to look at the upper end. And for example, well, if we take a look at a moose maybe for 12, 13, 14, 15 years and bear 20 years, you're far apart, yes, but not that far apart as you would be for example between deer or brown bear on the extreme. But, you would have to look from strictly a game management standpoint. Yes, you would have to look at the species with the higher longevity and the most pronounced slowness in reproductivity and such like that.

Hinman: "And for units that were on the other end of the spectrum - wolves for example, and you could have a one-year permit then."

Springer: "I aint gonna say a God-damn thing about wolves today." (laughter)

QUESTION: from Pete Buist : "We have had a few minor duels here about specifically allocation of permits to take individual beasties as apposed to permits for areas, and its one of my pet topics, and I'm sure most people are tired of hearing it. But, we have Nelchina caribou as an example of where the reason we have permits is because demand exceeds supply. There are some who would argue that, but that's basically the reason for the permit system there. We have other permit areas where the reason for the permits, and I'm speaking specifically of sheep here, is to provide an aesthetically pleasing hunt. There's not going to be as many people there you gonna have to walk in and so forth. One of my pet projects is to somehow by the time we're done here try and assure that, again, in the interest of stability in the

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industry - that when we get finished that somehow there is some reasonable expectation of the guide who's assigned that area getting some of those permits, and not having to wait until 30 days before the season opens to know whether his clients drew permits in that particular area. Maybe what we're going to end up with is just guides aren't going to hunt in permit areas. Now, that would be unfortunate, particularly on Kodiak for example. But, do you see the Board as being at all receptive to somehow doing a 10% or 20% allocation to non-residents? If for no other reason than to somehow maximize the revenue situation on the sale of tags in some of those areas.

RESPONSE: Springer: "No, I can only speculate on it, but the handwriting's on the wall as far as we can see. You're going to see more and more of those situations that happened with the Nelchina caribou, assignment in Unit 11 last spring for all species. It used to be that for example, there was no high demand for sheep from a subsistence end of things. You're seeing that changing very very rapidly because the word is out, and there's going to be more and more pressure from subsistence users for their priority allocations. And that's going to be a real tricky part of the whole thing. I would be less than candid if I would paint you a rosey picture.

I think the guiding industry is really, regardless of what happens here, in those aspects, is really going to be going through some rough waters with the allocation process in the future for a whole variety of reasons. It may very well have to come to a real blowup into a head, but the way ANILCA and the subsistence law is written, you guys are suck'n hind tit, I can tell you that right now."

Hinman: warned that the task force had only 15 minutes left to use the room.

QUESTION: from Steve White (Asst. AG): "Henry, my challenge is going to be to sell the court the idea that it serves 'sustained yield' to have guide A in an area for 20 years as opposed to having "A" in for 10 years and then "B" in for the next 10 years. Okay. I'm going to have to sell it. It's going to have to make a logical connection. It has to be tied to something the courts can get their handle on.

One thing you said this having a guide in there for a longer period of time makes, gives him higher knowledge of the area and game, now logically doesn't that mean he's going to be a more efficient harvester of game in that area?

RESPONSE: Springer: "That absolutely means that he's going to be more efficient with it, in doing that activity. Absolutely. But, he also will just like similar to what European managers or other managers are doing. He will know

how many curl and a quarter rams he can expect next year, especially for that species, because they're non-migratory. They're a fairly stationary. He knows the predation situation. He knows which one produces good areas. He for example, may leave a gang of 3 or 4 rams by themselves in that hunting season and concentrate over in another hunting season, to build them up. He knows how many made it through the winter okay. That is that type of a management line where it's in his own interest to produce the best trophies. As a consequence, he is able to use that knowledge for propagation purposes just like a rancher with cattle would.

White: "Maybe I don't understand the biology here. If he decides to let an animal grow older because he knows that he can take that animal at a later time for his client, but he goes and takes a younger animal now, for his current client, what does that have to do with whether there's a sustainable yield herd up there?"

Springer: "No, no. The sustainable yield doesn't say anything about trophies. That's just total population. And he'd <garbled - rather?> integrate that with subsistence hunters than other hunters that come in his area. He doesn't own that whole stock of sheep, right? So he is out there in that area. The subsistence hunters and the resident hunters most likely take what is easiest available to them - the closest. But, what he knows is that let's say there are 20 rams that are 6 or 7 years old, and he gets a client in here who just wants a sheep, period. That's one of them he's going to pick. But he makes sure 4 or 5 of them he's not going to pick out of that group because that's what he needs for coming through. He's going to harvest let's say 60% of the rams that are in the 11th year or something like that and will die off anyway. Because that's the crown of the whole management system. But, he keeps enough of the old ones and sub-adults alive to have that progression come through. That's exactly the difference between the harvest level and the rams which should reproduce not those underlings, not those secondary ones. And that's exactly what he's doing. He's pushing it to the longevity limit where he produces the best harvest, the best trophies consistently without affecting the breeding biology of that group. Did I lose you?"

Okay. Let's say there's a correlation between a curl and a quarter ram being the 11th year or the 12th year being the best time from a standpoint of longevity in obtaining trophy size. So that's when you want to knock them off. If you knock one off at 9 years you have knocked him off prematurely. Okay. So you are going for that optimum in a harvest level to trophy size. You can't expect that from a random hunter. Random hunter will find one of those rams, too but most likely it's not going to happen. That's where the guide fulfills a completely different management function than the statistical approach to management.