

ALASKA LEGISLATURE COMMITTEE FILES, 2003-2004 8672

11306 SENATE RESOURCES



# LEGISLATIVE BUDGET & AUDIT COMMITTEE

REPRESENTATIVE RALPH SAMUELS, CHAIR

## Senate Bill 303 Sponsor Statement

Sponsor Statement for Senate Bill 303, "An Act relating to the Big Game Commercial Services Board and to the regulation of big game hunting services; and providing for an effective date."

This bill would re-establish the Big Game Commercial Services Board to oversee an important industry that exists largely on the basis of a healthy wildlife population. The board was allowed to sunset a decade ago, and in the following years, professional hunters, wildlife biologists, public and private land managers and the hunting public themselves have discovered the problems associated with a decentralized, uncoordinated system of licensing and regulating guides and transporters.

An audit commissioned by the 23<sup>rd</sup> Alaska Legislature and released in December, 2003, recommends the board be re-established. Auditors concluded after extensive interviews with affected agencies, land owners and hunters that wildlife populations would benefit from more coordinated enforcement of existing laws, and that consumer protection and hunter-client safety could be improved. The Alaska Board of Game has also asked repeatedly that a guide licensing board be re-established.

This bill would create a seven-member board within the Department of Community and Economic Development. Two members would represent active registered guides, one member would represent a licensed transporter, one member would be assigned by the Board of Game, two members would represent private landholders, and one member would represent the public. The bill also increases from \$1,000 to \$5,000 the maximum civil penalty for disciplinary purposes.

Email: [Representative\\_Ralph\\_Samuels@legis.state.ak.us](mailto:Representative_Ralph_Samuels@legis.state.ak.us)

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## MEMORANDUM

February 17, 2004

**SUBJECT:** Sectional Summary of SB 303; An Act relating to the Big Game Commercial Services Board and to the regulation of big game hunting services and transportation services  
(Work Order No. 23-LS1655\A)

**TO:** Representative Ralph Samuels  
Attn: Henry Webb

**FROM:** George Utermohle *GU*  
Legislative Counsel

You have requested a sectional summary of SB 303; an Act relating to the Big Game Commercial Services Board and to the regulation of big game hunting services and transportation services.

As a preliminary matter, note that a sectional summary of a bill is not an authoritative interpretation of the bill. The bill itself is the best statement of its contents.

Throughout the bill wherever the terms "registered guide" or "master guide" are used in statute they are replaced by "registered guide-outfitter" and "master guide-outfitter," respectively.

Section 1 of the bill amends AS 08.01.010(7) to provide that the centralized licensing provisions of AS 08.01 apply to the Big Game Commercial Services Board that is created in sec. 3 of the bill.

Section 2 of the bill sets out the sunset date of the Big Game Commercial Services Board as June 30, 2007.

Section 3 of the bill adds news sections to AS 08.54 to create the Big Game Commercial Services Board, to set out the qualifications of the seven members of the board, and to provide that the board is to receive assistance, information, and data from certain state agencies.

Section 4 of the bill amends AS 08.54.600 to provide for the transfer of responsibility for licensing and regulation of big game commercial services from the Department of Community and Economic Development to the Big Game Commercial Services Board.

Sections 5 and 6 of the bill amend AS 08.54.605(a) and (c) respectively to insert the terms "registered guide-outfitter" and "master guide-outfitter" in lieu of "registered guide" or "master guide," respectively.

Section 7 of the bill amends AS 08.54.610 to provide for the transfer of responsibility for licensing and regulation of registered guides from the Department of Community and Economic Development to the Big Game Commercial Services Board and to replace the terms "registered guide" or "master guide" with "registered guide-outfitter" and "master guide-outfitter," respectively.

Section 8 of the bill amends AS 08.54.620 to provide for the transfer of responsibility for licensing and regulation of class-A assistant guides from the Department of Community and Economic Development to the Big Game Commercial Services Board and to replace the terms "registered guide" or "master guide" with "registered guide-outfitter" and "master guide-outfitter," respectively.

Section 9 of the bill amends AS 08.54.630 to provide for the transfer of responsibility for licensing and regulation of assistant guides from the Department of Community and Economic Development to the Big Game Commercial Services Board and to replace the term "registered guide" with "registered guide-outfitter."

Section 10 of the bill amends AS 08.54.640(a) to replace the term "registered guide" with "registered guide-outfitter."

Section 11 of the bill amends AS 08.54.640(b) to transfer authority from the department to the Big Game Commercial Services Board to adopt regulations regarding the suspension of guide licenses held by person who are or become law enforcement officers and to replace the term "registered guide" with "registered guide-outfitter."

Section 12 of the bill amends AS 08.54.650(c) to provide that the Big Game Commercial Services Board may specify the information to be supplied in transporter activity reports.

Section 13 of the bill amends AS 08.54.660 to provide that the Big Game Commercial Services Board shall approve the renewal of registered guide-outfitter licenses and transporter licenses and to replace the term "registered guide" with "registered guide-outfitter."

Sections 14 and 15 of the bill amend AS 08.54.670 and 08.54.680(b), respectively, to replace the term "registered guide" with "registered guide-outfitter."

Sections 16 and 17 of the bill amend AS 08.54.710(a) and (b), respectively, to provide that the Big Game Commercial Services Board is responsible for imposing disciplinary sanctions upon persons licensed under AS 08.54.

Section 18 of the bill amends AS 08.54.710(c) to raise the maximum civil fine that can

be imposed by the Big Game Commercial Services Board from \$5,000 to \$10,000 and to provide that the Big Game Commercial Services Board is responsible for imposing disciplinary sanctions upon persons licensed under AS 08.54.

Section 19 of the bill amends AS 08.54.710(d) to provide that the Big Game Commercial Services Board shall permanently revoke a transporter license or any class of guide license if the board finds after a hearing that the license was obtained through intentional misrepresentation and to provide that the Big Game Commercial Services Board is responsible for imposing disciplinary sanctions upon persons licensed under AS 08.54.

Sections 20, 21, and 22 of the bill amend AS 08.54.710(e), (h), and (i), respectively, to provide that the Big Game Commercial Services Board is responsible for imposing disciplinary sanctions upon persons licensed under AS 08.54.

Section 23 of the bill amends AS 08.54.720(a) to provide that it is unlawful for a person licensed under AS 08.54 to fail to report a violation of a state game, guiding, or transportation services statute by a client or employee within 40 days after the violation. Also, the term "registered guide" is replaced with "registered guide-outfitter" in several places.

Section 24 of the bill amends AS 08.54.720(f) to provide that the Big Game Commercial Services Board is responsible for suspending guide licenses and transporter licenses when ordered by a court.

Section 25 of the bill amends AS 08.54.730 to provide that the Big Game Commercial Services Board may obtain an injunction to halt certain violations of AS 08.54.

Section 26 of the bill amends AS 08.54.740(a) to replace the term "registered guide" with "registered guide-outfitter."

Section 27 of the bill amends AS 08.54.750 to make technical changes necessary to conform to the replacement of the term "registered guide" with "registered guide-outfitter" and with the transfer of authority from the Department of Community and Economic Development to the Big Game Commercial Services Board.

Section 28 of the bill adds a new sub section to AS 08.54.750 to provide that transporters must provide advance notice to the Department of Community and Economic Development before providing transportation services in a guide use area.

Section 29 of the bill amends AS 08.54.760(a) to make technical changes necessary to conform to the replacement of the term "registered guide" with "registered guide-outfitter" and with the transfer of authority from the Department of Community and Economic Development to the Big Game Commercial Services Board.

Sections 30 and 31 of the bill amend AS 08.54.770 and 08.54.790(2), respectively, to

Representative Ralph Samuels  
February 17, 2004  
Page 4

make technical changes necessary to conform to the replacement of the term "registered guide" with "registered guide-outfitter."

Section 32 of the bill amends AS 08.54.790 by adding a definition of "board."

Sections 33 - 37 amend AS 16.05.407(a), 16.05.407(f), 16.05.408(a), 16.05.408(c), and AS 23.10.055, respectively, to make technical changes necessary to conform to the replacement of the term "registered guide" with "registered guide-outfitter."

Section 38 of the bill amends AS 39.50.200(b) by adding the Big Game Commercial Services Board to the list of boards and commissions whose members are subject to public officers financial disclosure.

Section 39 of the bill amends AS 41.23.420(d) by substituting the Big Game Commercial Services Board for a reference to the Department of Community and Economic Development.

Section 40 of the bill amends AS 44.62.330(a)(35) by substituting the Big Game Commercial Services Board for a reference to the Department of Community and Economic Development in the list of agencies that are subject to the administrative adjudication provisions of the Administrative Procedure Act.

Section 41 of the bill repeals AS 08.54.680(a), relating to financial responsibility requirements for registered guides and transporters.

Section 42 of the bill provides for the initial appointment of the members of the Big Game Commercial Services Board.

Section 43 of the bill is the Savings Clause.

Section 44 of the bill provides that secs. 42 and 43 of the bill take effect immediately.

Section 45 of the bill provides that the remaining provisions of the bill take effect on the day that the Big Game Commercial Services Board holds its first meeting.

If I may be of further assistance, please advise.

GU:med  
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March 18, 2003

Senate President Gene Therriault  
Alaska State Legislature  
State Capitol (MS 3100)  
Juneau, AK 99801-1182

House Speaker Pete Kott  
Alaska State Legislature  
State Capitol (MS 3100)  
Juneau, AK 99801-1182

Dear Senator Therriault and Speaker Kott:

The Board of Game met in Anchorage from March 6 - March 15, 2003. One of the miscellaneous topics discussed in detail was the necessity for the reestablishment of a Big Game Commercial Services Board. The Board would once again like to request that this issue be seriously considered by the Legislature.

The Board of Game and the Department of Fish and Game are responsible for managing Alaska's varied wildlife resources. While the Department has the responsibility for implementation of the state's management programs, the Board has the responsibility for establishing hunting and trapping regulations in concert with the dictates of the Constitution and the statutes. We are also responsible for identifying and establishing intensive management programs, predator control programs and plowing through convoluted subsistence processes and procedures to establish coherent wildlife management policies and programs. One of the biggest stumbling blocks has been the inability of the state to establish some reasonable controls on the guiding and transporter industries.

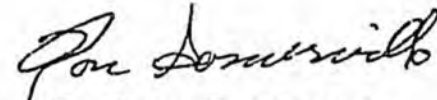
Unregulated guiding operations and uncontrolled access by transporters to the remote areas of our state have created significant and unnecessary conflicts. Congestion, wanton waste, complaints from clients, safety concerns and major conflicts with local hunters has created a climate of hostility in some areas. In addition, the present situation does little to improve the image of Alaskan fish and wildlife management programs and the users dependent on them.

The most logical solution is to recreate a Board that has the function of overseeing the big game guiding and transporter industries. Standards for licensing of guides, safety standards, testing where appropriate, monitoring and investigating client complaints, enforcing reporting requirements and the establishment and enforcement of ethics standards are some of the responsibilities that could be delegated to a Commercial Services Board.

With the complexities surrounding wildlife management in Alaska today, it only makes sense to exercise some regulatory control over all substantial commercial and non-commercial activities that create serious user conflicts and contribute to growing management problems. In addition, the maintenance of both healthy and well-regulated guide and transporter industries are important to the state.

Thank you for considering this recommendation from the Board of Game.

Sincerely,



Ron Somerville, Vice Chair  
Board of Game

cc: Senator Scott Ogan  
Representative Bud Fate  
Acting Commissioner Kevin Duffy

**Sec. 08.54.790. DEFINITIONS.** In this chapter,

(1) "big game" means brown bear, grizzly bear, caribou, moose, black bear, bison, Sitka blacktail deer, elk, mountain goat, musk-ox, and mountain or Dall sheep; "big game" includes wolf and wolverine when taken under hunting regulations;

(2) "big game hunting service" means a service for which the provider of the service must obtain a registered guide, class-A assistant guide, or assistant guide license; "big game hunting service" includes guiding services and outfitting services;

(3) "compensation" means payment for services including wages or other remuneration but not including reimbursement for actual expenses incurred;

(4) "department" means the Department of Community and Economic Development;

(5) "field" means an area outside of established year-round dwellings, businesses, or other developments usually associated with a city, town, or village; "field" does not include permanent hotels or roadhouses on the state road system or state or federally maintained airports;

(6) "game management unit" means one of the 26 geographic areas defined by the Board of Game for game management purposes;

(7) "guide" means to provide, for compensation or with the intent or with an agreement to receive compensation, services, equipment, or facilities to a big game hunter in the field by a person who accompanies or is present with the big game hunter in the field either personally or through an assistant; in this paragraph, "services" includes

(A) contracting to guide or outfit big game hunts;

(B) stalking, pursuing, tracking, killing, or attempting to kill big game;

(C) packing, preparing, salvaging, or caring for meat, except that which is required to properly and safely load the meat on the mode of transportation being used by a transporter;

(D) field preparation of trophies, including skinning and caping;

(E) selling, leasing, or renting goods when the transaction occurs in the field;

(F) using guiding or outfitting equipment, including spotting scopes and firearms, for the benefit of a hunter; and

(G) providing camping or hunting equipment or supplies which are already located in the field;

(8) "outfit" means to provide, for compensation or with the intent to receive compensation, services, supplies, or facilities to a big game hunter in the field, by a person who neither accompanies nor is present with the big game hunter in the field either personally or by an assistant;

(9) "transportation services" means the carriage for compensation of big game hunters, their equipment, or big game animals harvested by hunters to, from, or in the field; "transportation services" does not include the carriage by aircraft of big game hunters, their equipment, or big game animals harvested by hunters

(A) on nonstop flights between airports listed in the Alaska supplement to the Airmen's Guide published by the Federal Aviation Administration; or

(B) by an air taxi operator or air carrier for which the carriage of big game hunters, their equipment, or big game animals harvested by hunters is only an incidental portion of its business; in this subparagraph, "incidental" means transportation provided to a big game hunter by an air taxi operator or air carrier who does not

(i) charge more than the usual tariff or charter rate for the carriage of big game hunters, their equipment, or big game animals harvested by hunters; or

(ii) advertise transportation services or big game hunting services to the public; in this sub-subparagraph, "advertise" means soliciting big game hunters to be customers of an air taxi operator or air carrier for the purpose of providing air transportation to, from, or in the field through the use of print or electronic media, including advertising at trade shows, or the use of hunt broker services or other promotional services.

October 16, 2003

Members of the Legislative Budget  
and Audit Committee:

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

DEPARTMENT OF COMMUNITY AND ECONOMIC DEVELOPMENT  
DIVISION OF OCCUPATIONAL LICENSING  
GUIDES AND TRANSPORTERS

October 16, 2003

Audit Control Number

08-30025-03

This audit report addresses the specific areas related to game guiding enforcement such as determining the implications the absence of a board has had on enforcement of current guiding statutes and regulations; assessing the sufficiency of current-level enforcement activity related to illegal guiding; and, presumably, game violations. In addition, we reviewed the permit and evaluation process used by the various federal agencies in their respective game management areas.

In our opinion, the public protection and consumer safety aspects of the current guide service statutes should be improved. The legislature should also consider reestablishing a guide/transporter service licensing board.

The audit was conducted in accordance with generally accepted government audit standards. Fieldwork procedures utilized in the course of developing the findings and discussion presented in this report are discussed in the Objectives, Scope, and Methodology section.

Pat Davidson, CPA  
Legislative Auditor

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## OBJECTIVES, SCOPE, AND METHODOLOGY

In accordance with Titles 24 of the Alaska Statutes and a special request of the Legislative Audit and Budget Committee, we conducted a review of the licensing and/or permitting of guides and transporters by the Division of Occupational Licensing; Division of Mining, Land, and Water; federal agencies such as the National Park Service, National Wildlife Refuge, United States Forest Service; and, Bureau of Land Management.

### Objectives

Our specific audit objectives were:

1. To determine the implications the absence of a board has had on enforcement of current guiding statutes and regulations.
2. To assess the sufficiency of current-level enforcement activity related to illegal guiding violations by both licensed and unlicensed guides.
3. To determine the purpose for transporter activity reports and if these reports are sufficiently comprehensive and timely to meet achieve the intended purpose.

### Scope:

We focused our review on the permitting process by state and federal agencies during 2002 and 2003, hunt reports and transporter activity reports in 2002, and complaint case investigation from 1997 to 2003.

### Methodology:

To accomplish the audit objectives, the following documents were reviewed:

- Applicable federal regulations and state guiding/transporter statutes and regulations
- Other states' guide-outfitter statutes and regulations
- Annual reports
- Licensing and investigation files for guides and transporters
- Professional hunter publications
- 2002 Sunset Review of the Colorado Office of Outfitters Registration

We also compared 1995 provisions of the former Big Game Commercial Services Board (BGCSB) statute and regulations with the currently active guide/transporter statutes and regulations.

We interviewed the following individuals:

- Members of the Alaska Professional Hunters Association
- Staff of the Division of Occupational Licensing, Department of Community and Economic Development
- Staff of the Division of Mining, Land and Water, Department of Natural Resources
- Staff of the Division of Fish and Wildlife Protection, Department of Public Safety
- Staff at the Department of Fish and Game
- Staff of the U.S. Forest Service, National Park Service, U.S Fish and Wildlife Service, and U.S. Department of the Interior's Bureau of Land Management

Additionally, we conducted a survey of guide and transporter clients. Our survey sought responses to issues such as consumer protection, safety, fair guide practices, and overall hunt experiences.

## ORGANIZATION AND FUNCTION

The Big Game Commercial Services Board (BGCSB) was allowed to sunset on June 30, 1994. Under AS 08.03.020, the board continued in existence until June 30, 1995 in order to conclude its administrative operations. Chapter 33, Section 3, SLA 1996 transferred the board's regulatory responsibility for guides and transporters to the Department of Commerce and Economic Development (DCED).<sup>1</sup> Guides and transporters are regulated by the department through the Division of Occupational Licensing (OccLic).

A licensing examiner at OccLic is assigned the function of administering and grading the guide and game management unit examinations, issuing initial and renewal licenses for all classes of guides and transporters, reviewing hunt and transporter activity reports from guide and transporter licensees, and referring violations to the investigation section.

An investigator at OccLic is assigned to conduct investigations of complaints received from guide and transporter clients, other guides and transporters, the licensing examiner, and other state or federal agencies. Investigations resulting in accusations<sup>2</sup> are sent to the Attorney General's office for review and acceptance. The accusation is then filed and sent to the respondent<sup>3</sup> who may request a hearing or default by not responding.

### Duties of DCED

DCED's statutory responsibilities include:

1. Preparing, grading, and administering a qualification examination for a registered guide license and a certification examination for each game management units where registered guides intend to provide big game hunting services.
2. Issuing registered guide, master guide, class-A assistant guide, assistant guide, and transporter licenses.
3. Compiling, maintaining, and publishing an annual roster of registered guides and master guides licensed.
4. Impose appropriate disciplinary actions on a guide and transporter licensee.

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<sup>1</sup> The department was renamed Department of Community and Economic Development in 1999.

<sup>2</sup> According to *Black's law dictionary, Centennial Edition (1891- 1991)*, an accusation is defined as "A formal charge against a person, to the effect that he is guilty of a punishable offense, laid before a court or magistrate having jurisdiction to inquire into the alleged crime."

<sup>3</sup> According to *Black's law dictionary, Centennial Edition (1891- 1991)* a respondent is "In appellate practice, the party who contends against an appeal or the party against whom the appeal is taken."

5. Requiring that an applicant seeking issuance or renewal of any class of guide or transporter licenses provide a signed statement declaring whether his right to obtain a hunting, guiding, outfitting, or transporting license has been revoked in Alaska or any other state and Canada.
6. Regularly disseminating information regarding examinations and other qualifications for all classes of guide licenses to the residents of the rural areas of the state.
7. Adopting procedural and substantive regulations.
8. Administering examinations for registered guides at least twice a year.

## BACKGROUND INFORMATION

Alaska Statutes 16.05.407 and .408 require nonresident U.S. citizens and nonresident foreign nationals to be accompanied by a licensed guide when hunting specified species of big game in Alaska.<sup>4</sup> To hunt brown bear, grizzly bear, mountain goat or sheep in Alaska, nonresident U.S. citizens must obtain services of a guide unless they are accompanied by a state resident over 19 years of age who is within the "*second degree of kindred.*"<sup>5</sup> In addition to game listed for nonresident U.S. citizens, hunters who are foreign nationals must be accompanied by a licensed guide to hunt black bear, bison, caribou, deer, elk, moose, musk ox, wolf,<sup>6</sup> or wolverine.

### In 1973, the Legislature established the Guide Licensing and Control Board

In 1973, the legislature created the Guide Licensing and Control Board (GLCB).<sup>7</sup> The board was responsible for establishing guidelines for different classes of guide licenses, defining unlawful acts, and providing for the disciplining of guides. The board also had the authority to regulate guide activities through the adoption of regulations.

The prime sponsor of the legislation testified that the purpose of the board was to better manage the state's fish and game, in addition to seeking out competent guides for licensure. The board of seven was to be made up of "*no more than three*" individuals who were guides and the remaining four members were to have "*general knowledge of the game resources of the state.*" All members were required to have "*a minimum of 10 years residence in the state.*"

### In 1976, the Legislature authorized establishment of Exclusive Guide Areas

In 1976, the legislature authorized the establishment of exclusive guide areas (EGAs).<sup>8</sup> Under the authority of the new law, GLCB adopted regulations to establish a more uniform and consistent criteria for awarding EGAs that included a point system based on demonstrated prior hunting or guiding experience in a given region or area.

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<sup>4</sup> Licensed Guide refers to all licensing categories: a registered guide, master guide, class A assistant guide, and assistant guides. Class A assistants and assistant guides are typically employed by a registered or master guide.

<sup>5</sup> According to an Alaska Department of Fish and Game hunter information publication, a second-degree of kindred means in relation to the hunter. The other individual may be: father, mother, brother, sister, son, daughter, spouse, grandparent, grandchild, brother-in-law, sister-in-law, son-in-law, daughter-in-law, father-in-law, mother-in-law, stepfather, stepmother, stepsister, stepbrother, stepson, or stepdaughter.

<sup>6</sup> A guide is not required for hunting wolves in Game Management Units 13, 19, and 20.

<sup>7</sup> Chapter 17, SLA 1973

<sup>8</sup> Chapter 133, SLA 1976

Under the EGA system, licensed guides were given exclusive rights to conduct commercial hunts within a designated geographic area. Assignment of EGAs was done after the board evaluated criteria such as occupancy, historical use, and financial value of the guide's infrastructure in an area.

After nine years of litigation, the Alaska Supreme Court declared EGAs unconstitutional

In April 1979, a licensed guide and lodge owner named Owsichuk filed a lawsuit in Superior Court challenging the constitutionality of EGAs. Owsichuk sought authorization from GLCB to guide clients in a specific region and had been denied permission because another guide had exclusive rights to guide in that same area of the state.

In October 1988, the state Supreme Court issued a decision that the statute and related regulations establishing EGAs were unconstitutional. The court determined that EGAs were contrary to the "common use clause" provision of the Alaska Constitution since they provided big game guides the exclusive use of state resources in perpetuity.

EGAs had been granted to big game guides based on a seniority system. Big game guides were not required to pay any fees to the state for the EGAs nor were they restricted as to how long they could use the area. GLCB allowed guides to transfer or sell EGAs to other guides for a profit as though it were private property in which the state had no interest.

Justice Rabinowitz, in writing for the unanimous court, found this aspect of EGAs of particular concern. He stated in the court's opinion:

*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. ... 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, ... they are granted essentially on the basis of seniority, with no rental or usage fee, for 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 type of royal grants the common use clause [of the state constitution] expressly intended to prohibit. Leases and concession contracts do not share these characteristics. [emphasis added]*

Even before the Owsichuk decision was issued, the legislature had begun to reconsider public policy related to the guiding industry. In May 1988, the legislature established the Interim Task Force on Guiding and Game. The central objective of the task force was to examine the various problems and issues surrounding the commercial taking of big game in the state. The task force was also directed to evaluate how to deal with the businesses or professions that provided goods and services to big game hunters in the state.

At this time, GLCB was dealing with problems such as:

1. the best way to regulate air taxi operators who were operating very much like guides – calling themselves “outfitters;”
2. complaints from the general public that the current system of licensing guides or obtaining an EGA required an individual to “have the right connections” rather than necessarily being qualified to operate in a given area; and,
3. problems the Division of Fish and Wildlife Protection was having in enforcing guiding laws, due to the vague way in which they were written. The enforcement problems were due in large part to the difficulty in defining what constituted unlicensed guiding activity.

The legislative task force was given the responsibility to examine these problems and develop a proposed alternative regulatory approach. The task force recommended a new regulatory game board should be established with expanded regulatory authority over guide-outfitters (the new term for guides) and a newly designated licensing group – transporters.

#### Creation of the Big Game Commercial Services Board and the licensing of transporters

In 1989, the legislature established a new board with expanded authority in the wake of the Owsichuk decision and other changes taking place in the guiding industry. The new board was named the Big Game Commercial Services Board (BGCSB). The name change reflected the expanded scope of the board’s authority which, in addition to licensing guides and their assistants, now also licensed individuals who provided transportation services to hunters.

New legislation allowed for the establishment of guide use areas (GUAs)<sup>9</sup> which would permit certain license holders to guide in designated geographic areas within the state’s 26 Game Management Units (GMU). GUAs would be assigned to guide-outfitters on a nonexclusive merit basis, replacing the unconstitutional EGA system.

The BGCSB legislation also restricted the commercial use of the term “outfitter” only to licensed guides, resulting in a new statutory title of guide-outfitter. This was done to reduce confusion over what services a consumer could expect when contracting for a big game hunt in Alaska. The term outfitter was used in most other licensing jurisdictions for an individual who performed services similar to those provided by guides in Alaska. Previously, some individuals who were not licensed guides, but were operating as unlicensed transporters, had begun using the term outfitter in their advertising.

Like its GLCB predecessor, BGCSB was organizationally placed under the auspices of the Division of Occupational Licensing in the Department of Commerce and Economic

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<sup>9</sup> GUAs, currently used, were developed by the Alaska Department of Fish and Game at the request of the Legislative Task Force on Guiding and Game.

Development.<sup>10</sup> The legislature, in intent language accompanying the legislation creating the board, stated it wanted BGCSB to establish a resource-based management system for allocating big game hunting opportunities among guide-outfitters.

The BGCSB oversight regimen was to:

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 guide use areas within the department's game management units.
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.

The Department of Fish and Game, Department of Natural Resources, and Department of Public Safety were tasked with providing the board with information, data, or technical assistance for the purpose of licensing and regulating activities of guide-outfitters, assistant guides, and transporters

Under BGCSB guide-outfitters were certified to guide in any area for which they qualified

It was not until January 1992 that GUA maps were first developed. The first regulations establishing how guide-outfitters could apply and qualify to operate in a GUA were not fully in place until January 1993. In July 1993, the Division of Occupational Licensing began assigning areas, on a non-restricted basis, to licensed guide-outfitters. Under the BGCSB regulations guide-outfitters could obtain permits for up to three GUAs, as long as they met the qualification requirements to operate in that area. Between July and October of 1993, the division had assigned 720 GUAs to over 300 licensed guide-outfitters.

BGCSB was not extended beyond 1995, new guide oversight statutes were adopted in 1996

After being established in 1989, the BGCSB was scheduled to terminate on June 30, 1993. The 1993 legislature did not extend the termination date of the board. Accordingly, BGCSB

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<sup>10</sup> The Department of Commerce and Economic Development has since been renamed the Department of Community and Economic Development.

entered its "wrap-up" year and, as provided by statute, was set to cease operations June 30, 1994.<sup>11</sup> The 1994 legislature extended the termination to June 30, 1994 which extended the effective close-out to the end of FY 95.<sup>12</sup> Under HB 102, the 1995 legislature sought to extend the board to 1998, but the measure died in committee.

In 1996, the legislature developed new statutes for the oversight of guides (the term guide-outfitter was dropped) and transporters.<sup>13</sup> The Division of Occupational Licensing (OccLic) continued to have the administrative responsibility for regulating guiding and transporting activities under the new oversight regimen. Many of the statutory and regulatory requirements previously vested with the BGCSB were eliminated, particularly some specific practices that had been previously listed as unethical.<sup>14</sup>

Specific responsibilities of BGCSB or board-implemented requirements that were eliminated include:

- coordination responsibilities with other state agencies such as the Department of Fish and Game, the Department of Natural Resources, and the Department of Public Safety.
- various detailed operating standards that were previously set out in regulations.
- requirements that guide-outfitters submit a detailed operational plan to OccLic for each area they were authorized to guide hunters.
- statutory requirements that a guide's license be revoked for violation of federal game laws.

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<sup>11</sup> Under AS 08.03.020(a), upon termination, a board was allowed to "continue in existence until June 30 of the next succeeding year for the purpose of concluding its affairs."

<sup>12</sup> Chapter 95, SLA 94

<sup>13</sup> Chapter 33, SLA 96

<sup>14</sup> The BGCSB regulation addressing ethics reads as follows:

12 AAC 38.650 GUIDE OUTFITTING ETHICS Register 129, April 1994. "Unethical activity" includes 1) failing to assist the Department of Fish & Game, Public Safety, and Commerce & Economic Development in determining the truth of any statements; 2) not fully cooperating with state and federal wildlife officials, not abiding by and advising clients and personnel of all applicable conservation and game statutes and regulations, or condoning a violation of them; 3) misrepresenting or not clearly defining rates, accommodations, and services to prospective clients before booking and acceptance of a deposit, or otherwise misleading prospective clients through false or fictitious advertising; 4) failing to make financial restitution to a client for a breach of contract by the guide-outfitter or the guide-outfitters' employees, if the breach is not attributable to fault of the client.

Under current regulations, above items three and four are no longer listed as unethical activities. Accordingly, as discussed in the text under Recommendation No. 1, the Division of Occupational Licensing does not believe it has the regulatory authority to proceed against guides when receiving complaints from clients about contract breach or failure of a guide to deliver promised services.

Guides and transporters continued to be required to file activity reports with OccLic. These reports are required to be completed for each compensated hunt by guides and on an annual basis for transporters.

Regulation of guiding activity on federal land was left mostly to a variety of federal agencies

With the termination of a centralized guide board much of the regulation of guides and transporters fell on, or remained with, various federal agencies. The president of the Alaska Professional Hunters Association estimated that as much as 40% of all guiding activity takes place on lands managed by federal agencies. These lands are regulated by a variety of federal agencies, as follows:

1. Federal Wildlife Refuges – The U.S. Fish and Wildlife Service (USFWS) administers guiding activities on 16 federal wildlife refuges in the state.
2. National Parks – The National Park Service (NPS) administers guiding activities on the ten national parks located in the state.
3. National Forests – The U.S. Forest Service (USFS) administers guiding activities carried out on lands in the Chugach and Tongass National Forests.
4. Other Federal Lands – Guiding activities conducted on other federal lands in the state – not in national refuges, parks, and forests – are administered by the Bureau of Land Management (BLM).

Each federal agency brings a slightly different perspective to guide regulation. With the exception of BLM, the agencies begin with a primary focus on the client-hunter and the aesthetics of his or her experience. That is, the primary objective of NPS, USFWS, and USFS is to provide enjoyable and safe access to game in the national park, refuge, or forest.

USFS uses a carrying capacity analysis to determine the level of permitting activity in national forests. In determining how many guides are allowed to operate in the national parks and refuges, NPS and USFWS essentially adopted the state's old EGA concept. These two federal agencies: limit the number of guides that are allowed to operate; give each guide an exclusive area within the park or refuge; impose an extensive number of detailed operating requirements on the guides selected; and, if guides are found in violation of the agency's operating agreements, they may be subject to losing their right to guide altogether. See Exhibit I, for an expanded discussion of how the various federal agencies regulate big game guide operations.

### Federal Agencies Regulate Guides in a Slightly Different Ways

Four federal resource agencies regulate an estimated 40% of the guiding activity in the state through a variety of permits, leases, concessionaire agreements, and other contractual documents. Each federal agency requires guides to submit a detailed operating plan which outlines such things as the number of hunters they plan on guiding in specified season, how food will be stored, how waste products will be disposed of, etc. The agencies also require the guide to submit a safety plan outlining how they will respond to various health emergencies or possible hunting accidents that may take place in the field. All agencies require guides to provide proof of insurance for a minimum of \$300,000 in liability coverage. And, of course guides must show evidence of having a valid business license and the necessary state guide or transporter license. Specific requirements of each federal agency are as follows:

National Park Service (NPS) – The park service issues exclusive concession contracts to hunting guides and incidental business permits (IBP) to transporters. Concession contracts are awarded through a competitive process. NPS prepares a *prospectus* that outlines the requirements for operations. Interested individuals/entities apply by submitting written proposals that respond to the evaluation criteria of the *prospectus*. IBPs are generally issued in a noncompetitive manner and generally will be issued as long as the commercial activity is permitted under park regulations.

Concession contracts are issued for five-year periods and renewed by competitive selection. It may also be transferred or assigned with prior written approval of NPS. Outfitter and guides have received *preferential right* to renewal of contract. Concession contract franchise fee is based upon consideration of the probable value to the concessionaire of the value of the privilege granted by the contract.

United States Forest Service (USFS) – The Forest Service requires a Special Use Permit (SUP) for all guides and outfitters. Transporters providing only point to point service, such as air taxi operators are not required to have a special use permit. However, an air carrier advertising hunts is considered an outfitter and must have a SUP. Permits are issued by the respective ranger district office for a term of one year for two consecutive years. A five year permit may be issued only after a permittee receives two years of satisfactory evaluations by USFS. Competitive-use permits are issued only when there's a need to limit the number of guides/outfitters in an area. In addition, the USFS utilizes the carrying capacity to determine the number of permits that can be issued in each guide use areas.

U.S. Fish & Wildlife (USFWS) – The Fish and Wildlife service issues special use permits for the 16 national wildlife refuges (NWR) located in Alaska. USFWS has identified 99 guide use areas (GUA) within the refuges, and with one exception each GUA is assigned exclusively to a single guide. An individual or entity may apply for as many as 10 GUAs but can only be awarded a limit of areas. This model was similar to that used by the old Guide Licensing and Control Board.

Permits are issued on a competitive basis. The applicant's proposal is reviewed by a panel which ranks the proposal based on seven criteria with established ranking factors. Permits are issued for five years and are renewable for an additional five years if all terms and conditions have been complied with and a record of satisfactory performance met during the initial term of the permit.

Bureau of Land Management (BLM) – The bureau issues a special recreation permit (SRP) to individuals wanting to carry out guiding activities on federal lands outside of national parks, wildlife refuges, and forests. Such permits are generally issued on a first come first serve basis for a term of five years. The permit is validated annually. Validation is dependent upon payment of annual fees, submission of bonds (if required), policies, licenses, and receiving a satisfactory rating or probationary annual performance rating. Permits may be issued on a competitive basis when an area's desired use level has been reached. There are currently no BLM lands in Alaska requiring competitive bidding for an SRP.

Carrying out game management through guide oversight typically means limiting access

In a 1990 report to the 16<sup>th</sup> Legislature, the legislative task force stated the foremost purpose of any regulatory oversight system for guides was the "*conservation and management of big game resources.*" The report also stated in its preface that the directive to the task force had been to "*forge a new resource-based management system for allocating big game hunting opportunities among guide-outfitters.*"

This task force statement, regarding the allocation of opportunities among guides, reflects the central game management strategy involved with the regulation of the profession. Advocates for establishing more oversight of guides, in order to address game management concerns, invariably turn to the necessity of restricting commercial opportunities involved with guiding and transporting services. The 1990 task force stated it was important that a new guide oversight system "*ensure a viable industry, clearly basing any free market restrictions on wildlife management concerns*". [emphasis added]

Imposing free market restrictions in the interest of game management was ostensibly the central rationale: (1) for the establishment of EGAs under GLCB prior to the Owsichuk decision; (2) for the establishment of GUAs; and, (3) behind the 1998 Board of Game (BOG) resolution, See Exhibit 2, asking the legislature to reestablish a board for "*review of the number of current operations.*"

Limiting access is also seen as a way to develop a healthy, "world-class" industry<sup>15</sup>

Restricting the number of guides that can operate in a given region is also seen as a way to enhance and improve the guiding industry in Alaska. The guiding oversight structure of British Columbia, Canada, has been cited by knowledgeable guides as an example of a regulator's approach that has resulted in the development of a healthy, "world-class" big game guiding industry.

A prominent feature of the British Columbia system is use of exclusive guide areas. There are 245 guide-outfitters licensed to guide resident and nonresident hunters in an exclusive guide area with clearly defined and legally described boundaries within the province.<sup>16</sup>

Federal land managers, when taking over more responsibility for allocating regions to guides, in large part stayed with the precepts of the state's old EGA structure; because by doing so, this would not only limit the impact on game resources but also would, in their view, promote a better wilderness experience. A big concern of these managers is their agency's

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<sup>15</sup> We estimate that the guiding industry in Alaska takes in over \$40 million annually. This estimate is based on the average amount paid for a guided hunt reported by our survey respondents which is multiplied by approximately 5,000 activity reports received by the Division of Occupational Licensing each year. (See page 27, Appendix A)

<sup>16</sup> The information came from [http://wlapwww.gov.bc.ca/fw/home/becoming\\_guide\\_outfitter.htm](http://wlapwww.gov.bc.ca/fw/home/becoming_guide_outfitter.htm) (September 23, 2003), a British Columbia government website. The website goes on to state that guide areas vary considerably in size and availability of big game species. Guide outfitters in the province hire about 1,100 assistant guides each year and guide approximately 4,500 hunters annually.

### **Board of Game Has Repeatedly Sought Establishment of Oversight Board for Guides and Transporters**

A March 18, 2003 letter from Board of Game Vice-Chair Sonnerville to House Speaker Kott and Senate President Therriault stated in part

*[The board of game is] responsible for identifying and establishing intensive management programs, predator control programs and plowing through convoluted subsistence processes and procedures to establish coherent wildlife management policies and programs. One of the biggest stumbling blocks has been the inability of the state to establish some reasonable controls on the guiding and transporter industries. [emphasis added]*

*Unregulated guiding operations and uncontrolled access by transporters to remote areas of our state have created significant and unnecessary conflicts. Congestion, wanton waste, complaints from clients, safety concerns and major conflicts with local hunters has created a climate of hostility in some areas. In addition, the present situation does little to improve the image of Alaskan fish and wildlife management programs and the users dependent on them.*

*The most logical solution is to recreate a Board that has the function of overseeing the big game guiding and transporter industries. Standards for licensing of guides, safety standards, testing where appropriate, monitoring and investigating client complaints, enforcing reporting requirements and the establishment and enforcement of ethics standards are some of the responsibilities that could be delegated to a [guide] board.*

Earlier, in May 2002, Board of Game Chair Grussendorf submitted board resolution 98-127 which asked chairpersons of the Senate and House Resources Committees to reinstate a guide board, and even suggested that it would be most appropriate to place the board under the "auspices of the Alaska Department of Fish and Game." The cited resolution stated in part...

*...the board has received requests and concerns from guides and the public regarding commercial guiding, outfitting, and transporting activities and the impact that these activities have on game resources of Alaska and hunt conditions.*

*... the Board of Game requests that the legislature reinstate the Big Game Commercial Services Board or incorporate that responsibility to an existing board or agency, and*

*...that the legislature delegate authority over guides, outfitters, and transporters to a Big Game Commercial Services Board and that a review of the number of current operations to be considered to be a priority for that board. [emphasis added]*

inability to limit transporter<sup>17</sup> activity in the parks and refuges. This activity is seen as being beyond the control of the managers. They see its growth as threatening the aesthetic appreciation of the wilderness experience, because too many other hunters and users are being brought out to their lands at the same time. These managers would welcome a more vigorous state regulatory regimen over such activity, as a way to restrict transporter operations in their areas.

Representatives of the Alaska Professional Hunters Association (APHA) believe that reestablishment of restricted guide areas, if not EGAs, is critical to improving the guiding industry in Alaska. From their perspective, such action will give guides more of a stake in not only the number of game animals in their territory, but also in the size of the animals.

In APHA's view, the relaxed licensing and area assignment regimen that has been put in place since the sunset of BGCSB has been counterproductive to developing a healthy, viable guiding industry in Alaska. They recognize the constitutional defects in the old system, but believe an area assignment process could be established that satisfies the requirements set out by Justice Rabinowitz, in Owsichuk, and presumably pass constitutional review.

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<sup>17</sup> According to our survey approximately 66% of the clients of transporters are Alaskan residents.

## REPORT CONCLUSIONS

The primary objective of our review was to evaluate what impact, if any, has the absence of a professional licensing board for guides had in the enforcement of guiding and game statutes and regulations. As part of this objective, we were directed to evaluate the sufficiency of investigative and legal support related to the regulation of guiding and if penalties and enforcement mechanisms, currently available, are appropriate.

A secondary objective of our review was to evaluate the purpose and need for transporter activity reports – specifically, if the reports are sufficiently comprehensive and timely to accomplish reporting objectives.

As discussed in the Background Information section, with the termination of Big Game Commercial Services Board (BGCSB), oversight of licensed guides, assistant guides, and transporters has been left, for the most part, to the various governmental land-owner agencies at the state and federal level: (1) the National Park Service (NPS), (2) the U.S. Fish and Wildlife Service (USFWS), (3) the U.S. Forest Service (USFS), (4) the Bureau of Land Management (BLM), and, at the state level, (5) the Department of Natural Resources' Division of Mining, Land and Water.

In this decentralized, uncoordinated regulatory climate, we were repeatedly told by various agencies that they would welcome a more vigorous, centralized licensing and regulatory board in order to better carry out oversight over transporters, and to a lesser extent, licensed guides.

Guiding activities that take place in national parks, wildlife refuges, and forests were, with the exception of transporter activity, still highly regulated. Staff of NPS, USFWS, and USFS – utilizing many of the operating restrictions and requirements that were part of BGCSB regulations – has put in place systems emphasizing hunter safety and maximization of the “wilderness experience.” To a large extent, these agencies also provide an avenue for handling client complaints.

Most guiding activity takes place on state land. This activity is regulated primarily under the guiding statutes and regulations initiated after the sunset of BGCSB. As discussed on the following page, because of this, guiding is being done with less emphasis on consumer protection or hunter-client safety.

Annual activity reports from transporters are sufficient for occupational licensing purposes for which they are being used. Although the reporting requirements for guides is relatively more stringent, we do not see a clear reason why guide activity information needs to be collected as often as is currently required.

Further discussion and analysis related to our conclusions is as follows:

Overall, the oversight of guides and transporters has lessened without a licensing board

New statutes and regulations put in place with the termination of BGCSB are not as rigorous as those that existed when the board was in place. Because of the way in which statutes and regulations are currently structured, the Division of Occupational Licensing (OccLic) has difficulty imposing any disciplinary actions against guides or transporters who may be operating in an unsafe or unethical manner.

We reviewed all complaints received by OccLic involving guides and transporters between 1997 and through 2003. A total of 50 complaints were received from clients about guides. For the 34 cases closed at the time at fieldwork, 12 had been closed because OccLic had no authority in statute or regulation to proceed against the guide involved.<sup>18</sup> Most, if not all, of these cases could likely have been more vigorously investigated under the prior BGCSB regulations and statutes. Primarily, the less stringent guide ethics requirements currently in place, undercut the division's authority and ability to actively investigate hunter-client complaints about guide activities.<sup>19</sup>

Under current statutes and regulations, put in place after the sunset of BGCSB, hunter safety is less of a priority. Present statutes require only the assistant guide to have a first aid card issued by the Red Cross or a similar organization at initial licensure. Previously, all licensees were required to obtain such certification. Cardiopulmonary Resuscitation (CPR) certification is also not required for licensure of all guides. There is no requirement upon license renewal that any licensee possess current certification on first aid and CPR. In other jurisdictions that license guides, such requirements are a standard.

As discussed in the Background Information section, consumer protection and safety were more of a priority under the former BGCSB. Unethical activity<sup>20</sup> was clearly defined in statutes, and guide ethic standards were established in regulations. For example, under BGCSB, guides were required by law to have a signed written contract with clients prior to

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<sup>18</sup> At the time of fieldwork, in addition to the 34 cases closed after investigative activity, another six were administratively closed because they had been open for longer than a year and did not represent an imminent danger to public health.

<sup>19</sup> OccLic initiated licensing sanctions in ten of these cases because the guide involved had been adjudicated by the courts or departmental hearing officer as being in violation of a state guiding, game law(s), or regulation(s).

<sup>20</sup> 1995 Alaska Statute 08.54.590 (14) defined *Unethical Activity* as specifically including:

*(1) a deception or misrepresentation involving prospective or actual clients either before, during, or following the provision of big game commercial services, including misrepresentations through private or public advertising of the type, duration, cost, or conditions of the services (2) making a guaranty that species or certain number of species will be taken on a hunt (3) engaging in unsafe or unsportsmanlike activities ... including violations of state hunting or big game commercial services statutes or regulations or (4) accepting a deposit for big game commercial services [without a signed written contract].*

accepting a deposit from them (see footnote 20). Now, written contracts are often not used – 21% of the clients we surveyed reported they did not have a written contract with their guide.

#### Transporter activity reports are appropriately sufficient and timely for the purposes involved

Under current regulation, licensed guides and transporters are required to file what are termed activity reports with OccLic. These reports set out information about what guiding and transporter activity is taking place, what assistants are being used, how much game is being taken, and other information about guide and transporter-accompanied hunters. While guides are required to complete their activity reports within 30 days of the end of their hunt, transporters are only required to file an activity report annually.

The primary use of these reports is for OccLic internal review and investigative purposes. When guides send in activity reports in advance of their hunts, OccLic does check the intended GUA, specified in the report, against the regions qualified for the guide involved. According to OccLic staff we interviewed, the Department of Fish and Game makes no use of the game information set out in the reports. Transporters are not limited to specific GUAs and the information on their reports is typically not critical to any internal review process by OccLic. Accordingly, the annual reporting required of transporters is adequate, given the needs of OccLic for the information.

#### Using an occupational guide board to manage game is problematic

Since establishment of the original guide board in the early 1970s, game management has been part of the public policy rationale for regulating guides and transporters. This may be attributable to finding the statute that officially recognizes and requires guiding services be used by certain types of hunters in the wildlife management section of state law. The requirement that nonresident hunters be accompanied by guides is set out in Title 16 and actually predates the legislation establishing the statute that set up the first guide board.

All state and federal resource agency managers we interviewed believe that an active oversight board, with the authority to restrict guiding and transporting activities through the licensing process, would be a valuable tool in managing game resources. Specifically, most commented that more control was needed over the activities of licensed transporters. Both federal and state resource managers saw possibilities that an active board, with broad authority to limit where transporters operated, could be valuable in reducing pressure on game resources<sup>21</sup>.

The Board of Game (BOG) has repeatedly taken the position that a guide board would help them in their job of managing the state's game resources. Since 1998, on three separate occasions, BOG has either adopted a formal resolution or written a letter to legislative leaders asking that a guide board be reestablished. On each of these occasions, BOG stated

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<sup>21</sup> Using the addresses of clients obtained for our survey, Alaska residents are a majority of the transporter's clients, while non-Alaskans are a majority of a guide's clients.

such a board was needed to alleviate and better manage the impacts that guides and transporters were having on state game resources. This emphasis on a guide board's prospective impact of game management is particularly reflected in the text of former BOG Chairman Grussendorf's letter which suggested that any such reconstituted board be placed under the auspices of the Department of Fish and Game.

When implementing a drawing permit hunt for brown bears in the Haines area (Game Management Unit 1D), the BOG findings stated that *"a lack of [a guide services board] and the inability to limit the scope of operation pertaining to individual big game commercial service providers has detrimentally affected guide hunter allocation."* Accordingly, the 2002 board limited nonresidents to 20 bear permits, to be distributed on the basis of a drawing.

Utilizing an occupational licensing board, to achieve game management objectives, may limit employment access to the profession. One of the primary responsibilities of any occupational board is to enhance public health and safety by setting and maintaining minimum competency requirements for the profession. In Alaska's sunset process, one of the criteria used to evaluate a board is *"the extent to which the board, commission that regulates entry into an occupation or profession has presented qualified applicants to serve the public"*<sup>22</sup>.

Imposing dual responsibilities on an occupational board to issue licenses to all individuals that meet the minimum competency requirements for licensure, while at the same time restricting employment opportunities to meet game management objectives, would be difficult. While it is likely a EGA-like system could be developed that would pass constitutional review, it is just as likely that many of the individuals currently licensed as guides, or many assistants who aspire to be licensed guides, will be prevented from operating because of a return to restricted operational access to state-owned lands.

Essentially, land-management agencies at both the state and federal levels, are acting in a game management role through the restrictions they place on permits and the number of permits they issue in a given area. A reestablished guide board, with statutes and regulations updated to include business best practices, would improve the tools available to land managers regarding the quality of the licensed guides to whom they issue permits. But, we believe the current separation of game management objectives (currently done by the land managers) from an occupational licensing function is prudent.

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<sup>22</sup> Alaska Statute 44.66.050(c)(7)

## FINDINGS AND RECOMMENDATIONS

### Recommendation No. 1

The legislature should consider enhancing the public protection and consumer safety aspects of current guide services statutes. Additionally, the legislature should consider reestablishing a guide/transporter services licensing board.

After BGCSB ceased to operate at the end FY 95, new statutes and associated regulations were put in place by the legislature and DCED, respectively. The statutes and regulations set the parameters for guiding practices in Alaska. With the new statutes and regulations, key requirements and standards which had previously existed under the auspices of the board were no longer in place. Many of the omitted requirements were key to enhancing consumer protection and safety. Additionally, some of the missing requirements promoted more compliance among guides and transporters with land and game management requirements.

Key requirements, currently no longer in place with the sunset of BGCSB, are as follows:

1. There are no "business ethics" standards established for how guides must conduct their operations. Previously, BGCSB adopted guide-outfitting ethics included what could be termed "best practice" provisions. These unethical activities included the following practices:
  - misrepresenting or not clearly defining rates, accommodations, and services to prospective clients before booking and acceptance of a deposit
  - misleading prospective clients through false or fictitious advertising
  - failing to make financial restitution to a client for a breach of contract by the guide-outfitter or the guide-outfitter employees, if the breach is not attributable to the fault of the client
  - contracting for more hunts or for more hunters at any one time than the guide-outfitter or the guide-outfitter employees can adequately serve
  - not maintaining and providing livestock, mechanical equipment, hunting and camping gear, food supplies, and cooking facilities of a quality and condition necessary to provide services equal to or better than those described in the guide-outfitter's advertising, correspondence, verbal declaration, or contractual agreements.

Currently, no such "best practices" regulation is in place. As a result, OccLic investigators have no basis to proceed on many of the various complaints received by the

division. Previously, OccLic investigators could conduct a formal investigation of many of the practices which might serve as a basis for some licensing action against the guide or transporter involved. Now, typically OccLic must advise people with these type of complaints to consult their contract and take costly legal action against the individual involved.

An example of the above "best practice" situation in our guide survey is that of a client who had contracted for and prepaid for a hunt scheduled after the September 11, 2001 terrorist attack. He canceled his trip but was denied a refund or a rescheduled hunt. The client filed a complaint with OccLic, and the division was forced to advise the complainant that there was no administrative basis for possible sanction under current statutes and regulations.

2. Requirements for GUA registration have been significantly reduced. Qualifying to register for GUAs has become much easier under the new regulations. Guides are no longer required to:

- Provide proof of access to land. Previously, guides were required to provide evidence that they had appropriate authority to operate in their assigned GUA. For federal lands the guide had to file, with OccLic, documentation showing they had authority from the federal agency involved. For individuals operating on state lands, the guides had to show they had the necessary permits from DNR.

It is unlawful, under current statute, to knowingly enter or remain without a prior authorization while providing big game hunting services on private land only. There are a number of guides currently delinquent in payment of their DNR land use permits and using state land without appropriate permits which are, accordingly, in trespass status. Although state law requires payment-in-full of all license fees before a license is renewed,<sup>23</sup> it does not require guides to be current on fees owed for special or land use permits issued by DNR. There is currently no statutory licensing requirement tying the guide's outstanding state land use permit fee with their license issuance or renewal.

- Submit an operational plan for the GUA. Previously, guides were required to file an operational plan with OccLic outlining how they intended to operate within their assigned region(s). Submission of operational plans for GUAs is no longer required.

Plans were required to include such information as: (1) the location and type of base camps to be used; (2) the estimated number of clients to be guide-outfitted; (3) big game species to be hunted and the estimated number of animals to be taken; and, (4) methods used to transport people, equipment, and supplies. Additionally, previous regulations had sanctions in place, and would give OccLic a basis for investigative

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<sup>23</sup> AS 08.54.660 (b)4

action, in the event a guide deviated from an operations plan without notifying the department.<sup>24</sup>

Under current statutes and regulations, a guide only needs to notify OccLic within 30 days before conducting big game hunting services in his authorized GUA. Annually, he is required to submit his registered guide number, guide areas registering for, and the location of his camp. Guides operating on federal lands are, comparatively, very regulated. Many of the requirements that were dropped by the state after the board's termination can be found in various federal permits and/or concessions. Currently, guides who hunt on federal land are required to submit operational plans with very similar content.<sup>25</sup>

- Hold valid first aid and cardiopulmonary resuscitation (CPR) certification. Previously, guides were required to obtain and maintain appropriate certification in first aid and CPR training. They were required to show documentation of such certification to OccLic to keep their license in good standing. As with the operational plan requirements, this is a standard requirement for guides seeking operating permits from federal resource agencies – but is not necessary for conducting hunts on state-owned lands. Currently, only the assistant guide is required by statute to have a first aid card issued by the Red Cross or a similar organization. The CPR requirement was eliminated for all classes of guides.
3. License sanctions for multiple consumer complaints or federal violations are no longer in place. Under the prior BGCSB statutes, following a hearing, the board could discipline guides after receiving written complaints from clients from three separate hunting parties over a two-year period. Also, a guide or transporter previously faced possible sanctions from BGCSB if they violated federal game laws or guide services regulations. Current state law and regulation have no such provisions. OccLic cannot sanction a guide or transporter who has violated a federal game law unless the court orders license suspension or revocation as part of its sentencing
  4. Civil fines for violations of guide statutes reduced dramatically<sup>26</sup>. Currently, a guide or transporter violating professional statutory provisions can be fined up to a maximum of \$1,000. Under BGCSB regimen the maximum fine was set at \$30,000.

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<sup>24</sup> 12 AAC 38.880, GROUNDS FOR REVOCATION OR SUSPENSION OF A USE AREA REGISTRATION, Register 129, April 1994

(a) *The board will, in its discretion, revoke or suspend a use area registration for the following reasons: ...*  
(2) *a deviation from an operations plan without notifying the department under 12 AAC 38.830(b).*

<sup>25</sup> The mandatory operating plan must include, as an example, the following: 1) *the uses allowed, the total amount of use authorized, in terms of service days, hunts, or other appropriate unit of measure...*; 3) *description of authorized area of use*; 4) *liability insurance ...*; 8) *operating and safety plans ...*; 11) *compliance with federal, state, and local laws and ordinances.*

<sup>26</sup> To provide a perspective on the \$1,000 fine, the average cost of a guided hunt based on our survey results is over \$7,500.

5. Qualification examination is required only for registered guides. Qualification requirements under BGCSB oversight were more stringent. Under BGCSB regulations, both assistant and registered guides were required to pass an examination that included an oral examination for the guide-outfitter category. Currently, only the registered guide is required to take a qualification and GUA examination. Class-A assistant guides, and assistant guides, do not have to pass a qualification examination; all that is required is for them to pay the necessary licensing fee and certify they have had some hunting experience in the state.
6. Scope of services for guides and transporters. The BGCSB established license requirements for guides and those individuals who provided transportation services to hunters. While the current licensing structure maintains both guide and transporter licenses, there is a lack of clear distinction between the services that can be provided by a guide versus a transporter. Both the Department of Public Safety, Fish and Wildlife officers and OccLic investigators report difficulties in investigating potential violations of transporters providing guide services because they view the current statutes as vague and complicated.

Revisions to current state law and regulation could put back in place important consumer protection and hunter safety elements that previously existed but are currently absent. While a guiding industry oversight board is not necessary to address the concerns set out above, a licensing-oriented board will likely provide a more dynamic regulatory regimen – allowing the revision of regulations on a regular basis to enhance professionalism by guides, consumer protection, and hunter safety. Accordingly, we further recommend that the legislature consider amending the current guide and transporter statute to reestablish a guide service licensing board

## APPENDICES

As part of our audit, we surveyed guide and transporter clients regarding their concerns on issues such as consumer protection, safety, and fair trade practices related to big game hunting and transportation services. We also asked about their overall hunt experience and the related costs.

Identifying the clients to survey was a two-step process. First, guides<sup>27</sup> and transporters were randomly selected from the Division of Occupational Licensing database. Then client names were selected from either the hunt reports submitted by guides or from activity reports submitted by transporters. There were 332 guide client surveys and 165 transporter client surveys distributed.

Appendix A reports the results of the guide surveys. A total of 158 (48%) guide-clients responded to the 332 surveys distributed.

Appendix B reports the results of the transporter surveys. A total of 50 (31%) transporter-clients responded to the 165 surveys distributed.

In both appendices, the number of responses will not reflect the total number of surveys received since some questions may have multiple responses.

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<sup>27</sup> Guide under this context means both registered and master guides who are the only ones with authority to contract for guided hunts.

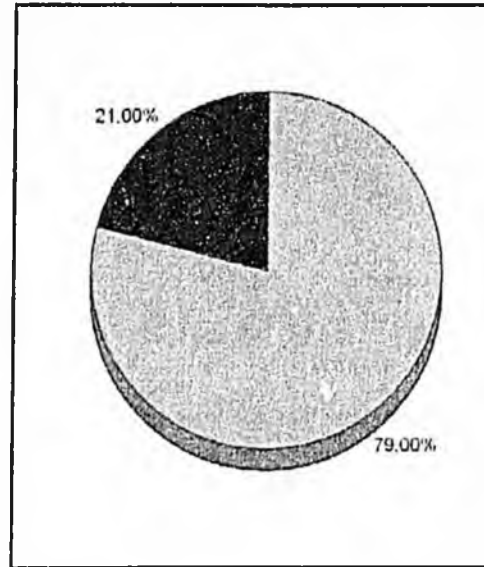
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Appendix A

Department of Community and Economic Development  
Guide Clients – Survey Results

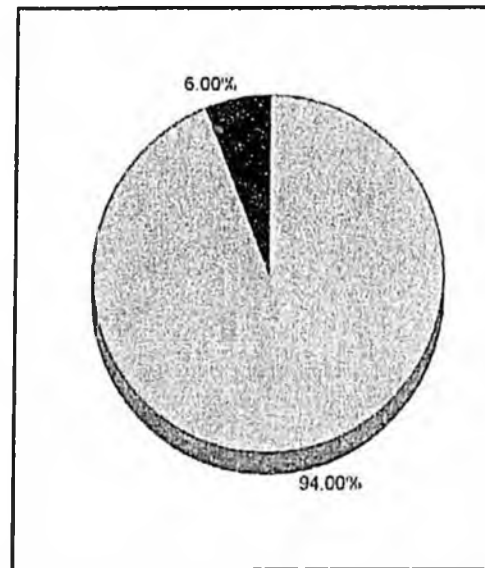
Question No. 1 – Did you have a written contract with the guide?

	Responses	Number	Percent
■	Yes	123	79.00%
■	No	32	21.00%



Question No. 2 – Were you satisfied that you received all of the hunt and camp services set out in the contract?

	Responses	Number	Percent
■	Yes	116	94.00%
■	No	7	6.00%



## Appendix A

### Department of Community and Economic Development Guide Clients – Survey Results

Question No. 3 - If you did not receive all the services that were contracted for, please list or summarize deficiencies. Some of the comments on deficiencies are listed below:

- *No place or way to dry clothes. Lack of communication between camps. Guide didn't want to get game animal out and had to flag airplane to get guide to get animals out.*
- *The combination brown bear and caribou hunt in 1998 was contracted with master guide. Master guide dropped client off with another guide. Expected client to carry his gear and guide supplies equipment a couple of miles to make camp. Guide was supposed to fly back every day and bring supplies. Never showed up for 5 days. Showed up on 6<sup>th</sup> day and client told guide to bring him back to Anchorage.*
- *They advertised home cooked meals, shower, sauna, their own string of mountain horses. But I was stuck with two boys that never cooked a meal, they boiled some water, most of the time I fixed peanut butter and jelly sandwiches. If you will take the time to watch the video I am sending you and read my letter and daily notes you will understand why I am upset.*
- *Outfitter had me with a guide who did not know the river or how to handle large raft. He was also arrogant and put my life in jeopardy on more than two occasions. Consequently we lost 5 days of hunt or ½ of what I have contracted for. I have written and discussed with Alaska Fish and Game<sup>1</sup> and they tell me there is nothing they can do. This outfitter is well known and I believe he is being protected.*
- *Lack of equipment, guides' owner was physically unable to perform his duties.*

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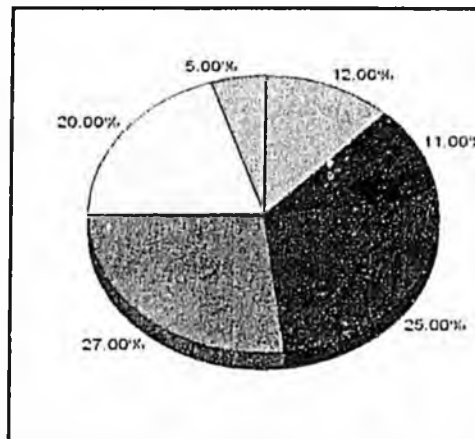
<sup>1</sup> DOL Investigator called client in February 2003 and indicated that he would interview the guide in March but didn't think he could do anything.

Appendix A

Department of Community and Economic Development  
Guide Clients – Survey Results

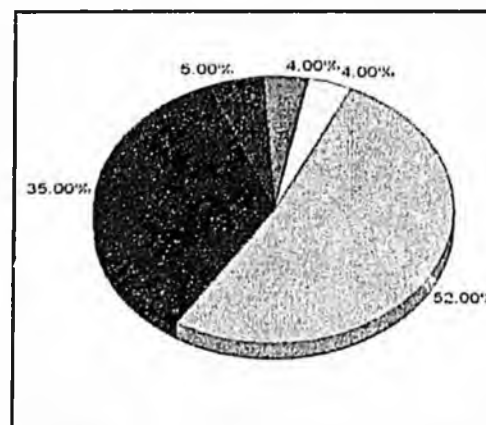
Question No. 4 – How much did you pay your guide for your hunt?

Dollar Range	Number	Percent
0 - 2,999	18	12.00%
3,000 - 4,999	17	11.00%
5,000 - 7,999	38	25.00%
8,000 - 9,999	41	27.00%
10,000 – 14,999	31	20.00%
15,000 and over	7	5.00%



Question No. 5 – How much do you estimate that you spent in Alaska related to your hunt (excluding airfare to/from the state and guided hunt cost)?

Dollar Range	Number	Percent
0 - 1,999	80	52.00%
2,000 – 4,999	55	35.00%
5,000 – 7,499	8	5.00%
7,500 - 9,999	6	4.00%
10,000 and over	6	4.00%



Question No. 6 – What was the ownership status of the land you hunted on?

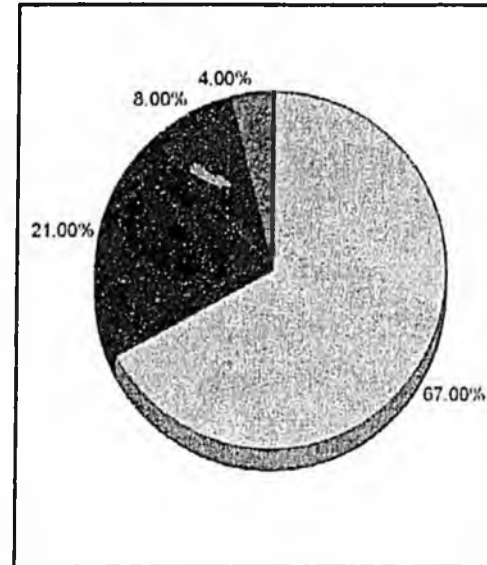
Responses	Number	Percent
Do not know	73	42.94%
Other State Owned	25	14.71%
Alaska Native Owned	18	10.59%
Nat'l Wildlife Refuge	15	8.82%
Nat'l Park Service	10	5.88%
Other Federal Land	10	5.88%
U.S. Forest Service	7	4.12%
Other	7	4.12%
State Park Service	5	2.94%
Private	0	0.00%

Appendix A

Department of Community and Economic Development  
Guide Clients -- Survey Results

Question No. 7 – How would you rate your overall hunt experience?

Satisfaction	Number	Percent
Very Satisfied	105	67.00%
Somewhat Satisfied	33	21.00%
Not Very Satisfied	12	8.00%
Not At All Satisfied	6	4.00%



Question No. 8 – Please indicate the factors that resulted in a less than satisfactory hunt experience.

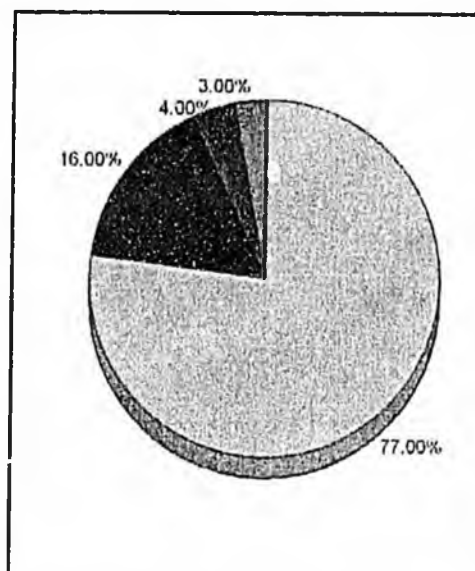
Responses	Number	Percent
Unsuccessful Hunt	12	22.0%
Lack of game animals in the area	11	20.0%
Bad weather	6	11.0%
Other	6	11.0%
Incompetent guides and/or assistant guides	5	9.0%
Poor camp conditions (inadequate shelter, poor or limited food)	4	7.0%
Inadequate or poor equipment	4	7.0%
Put in an unsafe situation	3	5.5%
Presence of too many other hunting parties	3	5.5%
Lack of proper physical conditioning necessary for the hunt	1	2.0%

Appendix A

Department of Community and Economic Development  
Guide Clients – Survey Results

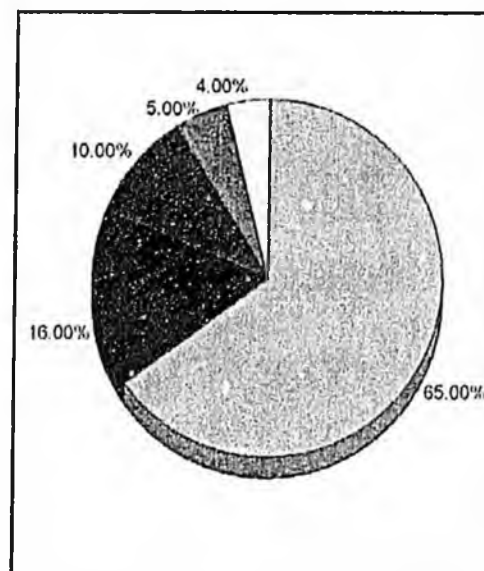
Question No. 9 – Based on your experience with this guided hunt, how likely would you return in the future to hunt big game in Alaska with a guide?

Return To Alaska	Number	Percent
Very Likely	119	77.00%
Somewhat Likely	25	16.00%
Not Likely	6	4.00%
Very Unlikely	4	3.00%



Question No. 10 – How would you rate the overall competency of your guide and/or assistant guide?

Guide Competency	Number	Percent
Excellent	99	65.00%
Very Good	25	16.00%
Good	15	10.00%
Fair	8	5.00%
Poor	6	4.00%



Appendix A

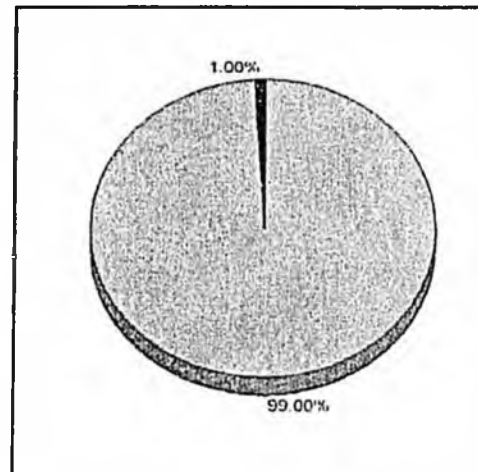
Department of Community and Economic Development  
Guide Clients – Survey Results

Question No. 11 – How much contact did you have with the registered guide?

Responses	Number	Percent
In the field for all or most of the time	115	76.16%
In the field less than half the time	17	11.26%
In the field at least once during the hunt	5	3.32%
Brief contact in person at the beginning/end of hunt	11	7.28%
Brief contact by phone at the beginning/end of hunt	1	.66%
No contact	2	1.32%

Question No. 12 – Were you aware that guides are licensed by the State of Alaska?

Responses	Number	Percent
Yes	152	99.00%
No	1	1.00%

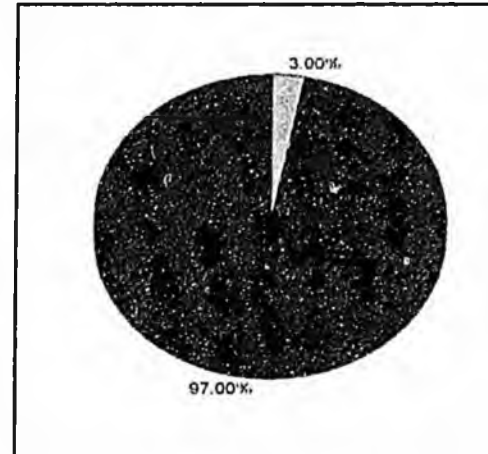


Appendix A

Department of Community and Economic Development  
Guide Clients – Survey Results

Question No. 13 – Did you file a complaint with the State of Alaska, Division of Occupational Licensing, regarding some aspect of your guided hunt?

Responses	Number	Percent
■ Yes	4	3.00%
■ No	148	97.00%



None of the clients who filed a complaint were satisfied with how the complaint was handled. Dissatisfaction was due to the client's perception of Occupational Licensing's inaction and/or lax licensing standards.

We asked the guide clients to provide any other comments that they would like to share about their guided hunt experience in Alaska. Fifty-one clients provided additional comments, most of which were positive about the hunt experience, the guide's competence and Alaska's scenery. Some commented that, "it was the hunt of a lifetime." Those that made negative comments were typically related to unsuccessful hunts and related to either the lack of game animals or the high-price of the hunts.

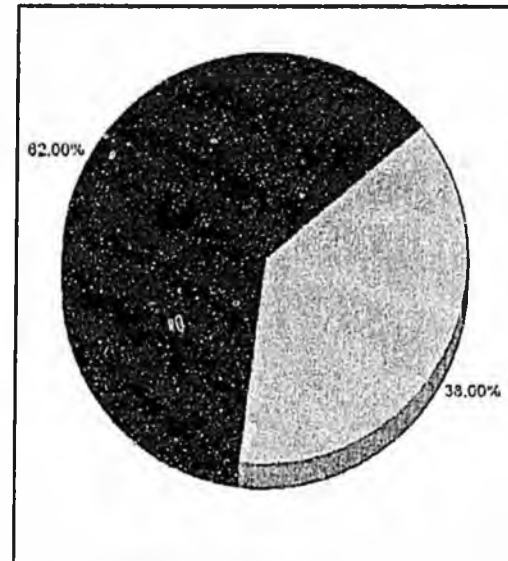
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Appendix B

Department of Community and Economic Development  
 Transporter Client – Survey Results

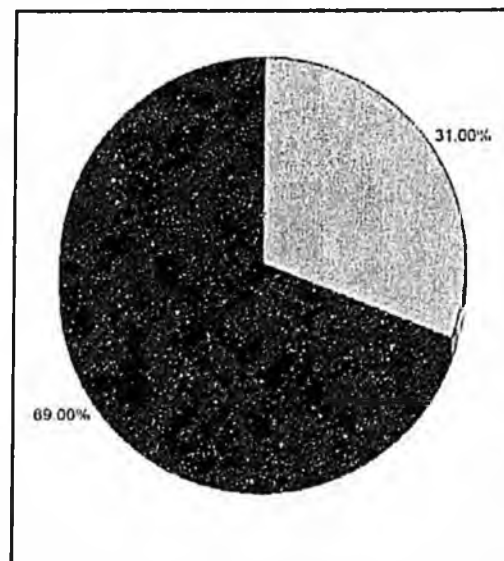
Question No. 1 – Did you have a written contract with the transporter?

Responses	Number	Percent
■ Yes	19	38.00%
■ No	31	62.00%



Question No. 2 – Transporters can also provide accommodations in the field to big game hunters. Such accommodations can involve things as a permanent lodge, house, or cabin owned by the transporter. Additionally, accommodations can be provided on a boat with permanent living quarters as long as the boat is navigating salt water. Were such accommodations part of the transportation services you received?

Responses	Number	Percent
■ Yes	15	31.00%
■ No	34	69.00%

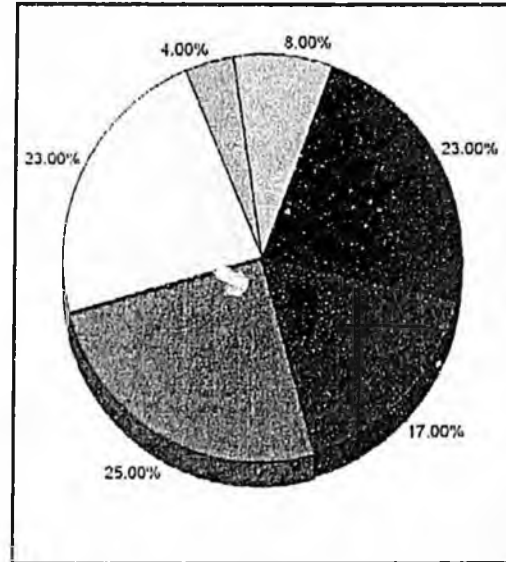


Appendix B

Department of Community and Economic Development  
Transporter Client – Survey Results

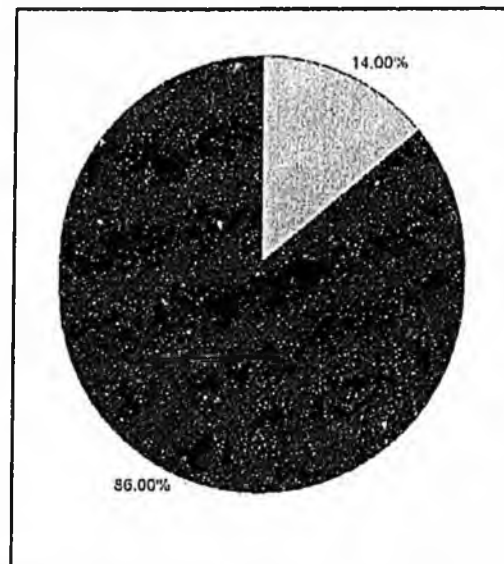
Question No. 3 – How much did you pay the transporter for all transportation, and if applicable, accommodations in the hunt area?

	Dollar Range	Number	Percent
■	Less than \$250	0	0.00%
■	\$250 - \$499	11	23.00%
■	\$500 - \$999	8	17.00%
■	\$1,000 - \$1,999	12	25.00%
■	\$2,000 - \$2,999	11	23.00%
■	\$3,000 - \$3,999	2	4.00%
■	Do Not Know	4	8.00%



Question No. 4 – Was the provided transportation part of a hunt contract with a guide?.

	Responses	Number	Percent
■	Yes	7	14.00%
■	No	43	86.00%

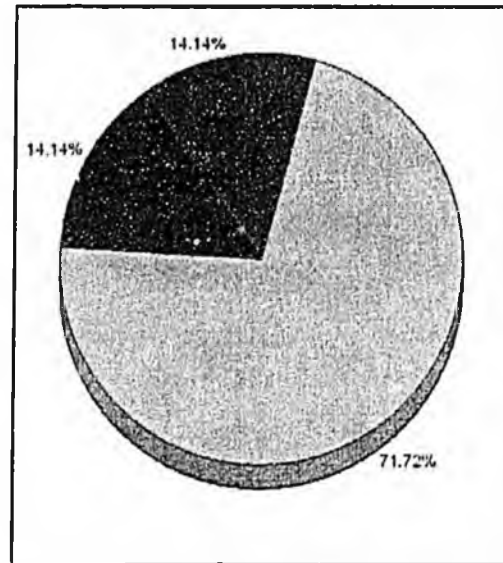


Appendix B

Department of Community and Economic Development  
 Transporter Client – Survey Results

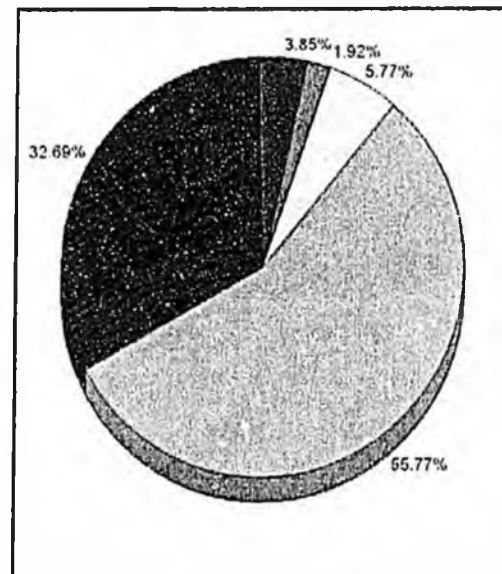
Question No. 5 – If transportation was part of the guided hunt contract, how much did you pay the guide for the hunt?

	Dollar Range	Number	Percent
■	Less than \$3,000	5	71.72%
■	\$3,000 - \$3,999	1	14.14%
■	\$5,000 - \$7,999	1	14.14%



Question No. 6 - What mode of transportation was used by the guide or transporter?

	Transportation	Number	Percent
■	Airplane	29	55.77%
■	Boat	17	32.69%
■	Horse	2	3.85%
■	All-Terrain Vehicle	1	1.92%
	Other	3	5.77%



Appendix B

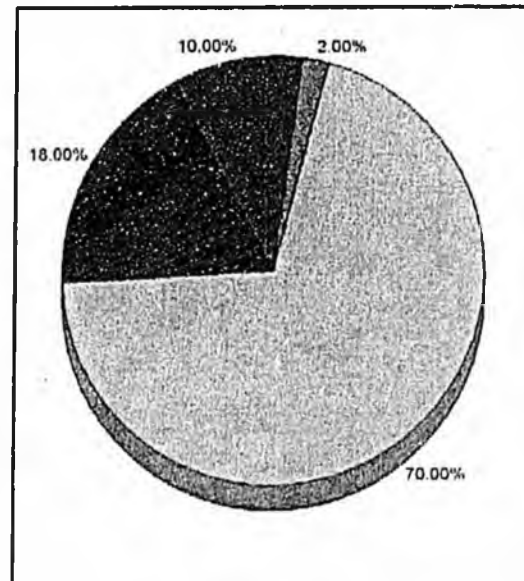
Department of Community and Economic Development  
Transporter Client – Survey Results

Question No. 7 - What was the ownership status of the land you hunted on?

Responses	Number	Percent
Do Not Know	18	31.03%
Other State Owned	15	25.86%
National Wildlife Refuge	9	15.52%
U.S. Forest Service	5	8.62%
Other	3	5.17%
National Park Service	2	3.45%
Other Federal Land	2	3.45%
Private	2	3.45%
Alaska Native Land	1	1.72%
State Park Service	1	1.72%

Question No. 8 – How would you rate your overall hunt experience?

Satisfaction	Number	Percent
Very Satisfied	35	70%
Somewhat Satisfied	9	18%
Not Very Satisfied	5	10%
Not At All Satisfied	1	2%



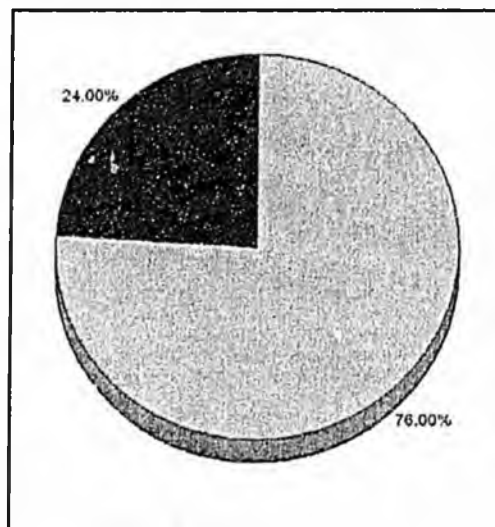
Some of the reasons identified for those who indicated less than satisfactory hunt or transporter experience were: lack of game animals, too many other hunters, bad weather, or wrong location.

## Appendix B

### Department of Community and Economic Development Transporter Client – Survey Results

Question No. 9 – Were you aware that transporters are licensed by the State of Alaska?

	Responses	Number	Percent
■	Yes	38	76.00%
■	No	12	24.00%



We asked the transporter clients to provide any other comments that they would like to share about their transporter or hunt experience. The following are some of the client comments:

- *“Transporters have no obligation to stay out of areas where someone is already camped out or they have already dropped off customers. Other outfitters actually landed on the place our tent was set up and dropped people off right in front of us. This was a super cub not a highway.”*
- *“All outfitters and transporters I speak to warn of other people getting dropped off on top of you. Is there anyway of designating areas, or having drop fees in areas? That would help deter these businesses from piling into one area. They would then be forced to find new areas. They could claim these as theirs.”*
- *“Was charged a 10% surcharge for my hunting license and moose tag in Iliamna because I chose to pay by credit card. I was under the impression that hunting licenses and tags was regulated by the State of Alaska and that surcharges were not allowed (even when paying by credit card) ...”*

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November 17, 2003

Ms. Pat Davidson, Legislative Auditor  
Division of Legislative Audit  
PO Box 113300  
Juneau, AK 99811-3300

RE: GUIDES AND TRANSPORTERS – PRELIMINARY AUDIT

Dear Ms. Davidson:

Thank you for the opportunity to comment on your preliminary audit report on Guides and Transporters. We appreciate the thoroughness of your review and discussion of the various aspects related to this industry.

Although the Department does not support reestablishing a licensing board, we concur that statutes could be enhanced to provide more aggressive enforcement of unethical or unsafe practices. While we support authority for additional enforcement and for the public health, safety and consumer protection, we are concerned that new laws not be enacted which would be used to regulate the supply of practitioners for game management purposes or solely for the economic benefit of licensees.

Again, thank you for the opportunity to comment on your review and findings. I will make my staff available to provide information and assist the committee as requested.

Sincerely,

Edgar Blatchford  
Commissioner

cc: Rick Urion, Director  
Division of Occupational Licensing

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# STATE OF ALASKA

FRANK H. MURKOWSKI  
GOVERNOR

DEPARTMENT OF FISH AND GAME  
OFFICE OF THE COMMISSIONER

P.O. BOX 25526  
JUNEAU, AK 99802-5526  
PHONE: (907) 465-4100  
FAX: (907) 465-2332

November 7, 2003

Pat Davidson, Legislative Auditor  
Legislative Budget and Audit Committee  
Division of Legislative Audit  
P.O. Box 113300  
Juneau, AK 99811-3300

Dear Mr. Davidson:

Thank you for the opportunity to review the preliminary audit report on Occupational Licensing and Oversight of Alaska Big Game Guides and Transporters. Your report is accurate, thorough, and well-written. The Department of Fish and Game agrees with the recommendation that the legislature consider reestablishment of a guide/transporter services licensing board (Guide Board). Creation of a Guide Board with authority to regulate guide/transporter activities would improve wildlife management, benefit hunters, and bolster the economy of the state.

The Guide Board should have the authority to determine how many hunters a transporter can drop off in an area. The Guide Board and the Board of Game would work cooperatively to insure that Alaskan wildlife are harvested at the appropriate level to safeguard sustained yield, and that hunters can enjoy a high quality hunting experience without unnecessary crowding.

The Big Game Commercial Services Board, before it ceased to exist, did an excellent job of monitoring the ethical behavior and business practices of guides. A new Guide Board could fill that same role. It is important that hunters hiring the services of a guide have confidence that their guide meets high standards of conduct.

Each year, about 11,000 non-residents hunt in Alaska, and about two-thirds hire a guide. Their activities generate over \$100 million dollars to the Alaska economy, provide about 800 year-round jobs and many more seasonal jobs. I believe that establishing a Guide Board will help insure the long-term viability of the guiding industry in Alaska.

Sincerely yours,

Wayne Regelin  
Deputy Commissioner

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part of  
memo

To: Linda Haye

From: Rob Hardy

RE: SB 303

Ms. Haye,

Sen. Ogan requested a written copy of my testimony presented to the Senate Resource Committee hearing Friday 3/5/2004, and in relation to CS For SB 303.

My testimony is contained within the following three (3) pages of this fax. Please forward to Sen. Ogan. Thankyou.



3/6/2004 AM

**Public Testimony  
CS For Senate Bill 303  
03/05/2004**

**Senate Resource Committee Hearing**

Thankyou Mr. Chairman:

I will make my comments as brief as possible. I apologize to the committee for not being able to attend the last hearing, as I was in Washington DC at the time lobbying on behalf of state's wildlife grants and appropriations.

I would like to encourage the committee to consider other possibilities with which to regulate and control the big-game commercial service provider industry, than through the current legislation which creates just another public board. The legislation before you does not address the real and present issue of user-conflicts which are the central focus relating to problems occurring in the field, and that are associated with an aggressive expansion and capitalization by the industry.

A means of controlling the industry through joint effort between the Department of Commerce and the Department of Fish & Game, need be considered. By crafting tools under statute that could limit the aggregate number of big-game commercial service providers by area - only as deemed necessary by a determination made through the Board of Game process - would go much further toward arresting user-conflicts in the field. The legislation at present does not take that step. There is no measure within the current legislation that would effectively control the industry, or the conflicts its expansion creates.

However, if this committee chooses to move this bill forward, I would like to see several changes made:

- I have a real concern as to the overly competitive nature that **Sec. 29 (Pg 18, Lines 23-31, and Pg 19, Lines 1-5)** create. In my guide use area - Game Management Unit 13, The Nelchina Basin - where I am both a subsistence user and an active registered big-game guide, virtually all that we have left to hunt are bears. Moose and caribou are off limits to non-resident hunters and sheep are at very low density. Increasing competition among guides for the one specie that is the mainstay of our commercial viability, is unacceptable. There are other ways

within the Board of Game process to address an abundance of bears within a management unit, rather than increasing competition among commercial operators which already experience an overly competitive situation.

- Slight modifications to the members portion of the Big-Game Commercial Services Board; Pg 2, Lines 6 and 9. Line 6, change from [one] to two members which are licensed transporters (especially in consideration of equitable ownership considering the Board's authority over Transporter Use Areas - Pg 19, Line 10). Page 2, Line 9, change from [two] to one representative of private landholders, and define the term "landholder".
- Authorizing the Department to request a copy of a contractual agreement between parties (Pg 4, Lines 8-10), then becomes part of the public record and could be made available to the public and/or media per stipulations of the *Administrations Act*. This may be in violation of the federal *Privacy Act*. I would like to know Department of Law's interpretation.
- Pg 12, Lines 4 and 5 need clear definition. What exactly does "breached a contract" mean? Who is the arbitrator, the Big-Game Commercial Service Board or the State and/or Federal judicial system? I see huge problems with this.
- Pg 13, Line 26 relating to reporting time of violations committed; this needs further amendment to reduce the time frame to ten days. In this day of satellite phones, cellular phones, VHF surface-to-air radios, and High Frequency over-the-horizon radio capabilities now available, a contracting and participating, supervising registered or master guide should be able to make communication with the State and or Federal agencies within 24 hours. I am sure that if a bodily accident were to occur, especially to the guide, communication would be made available almost immediately. I know that in my operation, I have several communications devices at my disposal that will function no matter my location. *Communications equipment such as thator similar to which I operate, should be manadatory of every guide in Alaska!*
- Pg 17, Line 28 should be amended from [one] calendar year, to five calendar years. The one calendar year registration requirement per use area, per operator does not provide incentive for stewardship of the resource. Stewardship of resources is lacking under the current sytem and a Big-Game Commercial Service Board will not fix that. However, by changing the registration to five calendar years, the "pilage and plunder" concept held by the industry will cease to some degree.
- Pg 18, Lines 21 and 22 should not be included in the legislation. By allowing the Big-Game Commeercial Service Board jurisdiction over the draft and creation of Guide Use Area boundaries (expansin of area size, or the shrinking of area size) is fraut with complications, misuse and likely to create civil unrest. I would encourage the committee to delete this portion of the legislation.

With all of that said, I would like to thank the Chairman for his time and that of the committee, and for hearing my concern.

Sincerely,

Rob Hardy

PO Box 876485  
Wasilla, Ak 99687  
(907) 376-8986  
(907) 355-5291  
[rhardy@ideafamilies.org](mailto:rhardy@ideafamilies.org)

SB

305

## SENATE COMMITTEE REPORT First Committee of Referral

DATE: 2/6/04

FURTHER: Finance

Date of 5-Day Notice: \_\_\_\_\_  
(in accordance with Uniform Rule 23)

DATE TURNED  
IN TO OFFICE: 2-19-04

Resources Committee considered      SENATE BILL NO. 305

### SB 305 ASSERTING STATE TITLE TO SUBMERGED LAND

"An Act relating to state ownership of submerged land underlying water that was navigable at the time Alaska achieved statehood."

and recommends:

- be replaced with \_\_\_\_\_ CS \_\_\_\_\_ (\_\_\_\_\_)
- adopt previous \_\_\_\_\_ CS \_\_\_\_\_ (\_\_\_\_\_)
- attached amendment(s)
- adopt Letter of Intent by \_\_\_\_\_ Committee
- further referral to \_\_\_\_\_ Committee

**Senate Bill:**  
 Same Title  
 New Title

**House Bill:**  
 Same Title  
 Technical Title Change  
 New Title w/ SCR # \_\_\_\_\_

**NEW FISCAL NOTE(S):**

Department	Date	Fiscal	Indet.	Zero	FN#
DOR	2/17/04	✓			

**PREVIOUS FISCAL NOTE(S):**

Department	Date	Fiscal	Indet.	Zero	FN#

APPROPRIATION - no fiscal note

SIGNATURES AND RECOMMENDATIONS:	Do PASS	Do NOT PASS	No REC	AMEND
<i>Joseph Deekin</i>	✓			
<i>Ben Stevens</i>			✓	
<i>William H. ...</i>	✓			
<i>...</i>	✓			
<i>...</i>			✓	
CHAIR: <i>...</i>	✓			

# FISCAL NOTE

**STATE OF ALASKA**  
**2004 LEGISLATIVE SESSION**

Fiscal Note Number: \_\_\_\_\_  
 Bill Version: SB305-DNR-MLW-02-17-04  
 () Publish Date: \_\_\_\_\_

Revision Date/Time (Note if correction): \_\_\_\_\_ Dept Affected: Natural Resources  
 Title: ASSERTING STATE TITLE TO RDU: Resource Development  
SUBMERGED LAND Component: RS2477 and Navigability  
 Sponsor: Sen. Therriault  
 Requester: Sen. Resources Component No.: 2226

**Expenditures/Revenues** (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010
Personal Services	141.5	111.5	74.5			
Travel	5.0	3.0	3.0			
Contractual	25.0	25.0	10.0			
Supplies	5.0	5.0	5.0			
Equipment	10.0	3.0	2.0			
Land & Structures						
Grants & Claims						
Miscellaneous						
<b>TOTAL OPERATING</b>	<b>186.5</b>	<b>147.5</b>	<b>94.5</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

<b>CAPITAL EXPENDITURES</b>						
-----------------------------	--	--	--	--	--	--

<b>CHANGE IN REVENUES ( )</b>						
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**FUND SOURCE** (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	186.5	147.5	94.5	0.0	0.0	0.0
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
<b>TOTAL</b>	<b>186.5</b>	<b>147.5</b>	<b>94.5</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

Estimate of any current year (FY2004) cost: 0.0  
 Check this box (X) if funding for this bill is included in the Governor's FY 2005 budget proposal:

**POSITIONS**

Full-time	2	2	1			
Part-time						
Temporary						

**ANALYSIS:** (Attach a separate page if necessary)

This bill requires the department to maintain an inventory and maps of navigable waters in Alaska, and to notify ANCSA corporations about state ownership. DNR will need to review DNR, ADF&G and BLM files to locate, compile and map (in GIS) all existing state, federal, and court navigability determinations. Though some of this work has been completed through the Recordable Disclaimer project and DNR staff work, substantial additional work is needed to complete this project.

This project will require the following positions:

- One (1) Natural Resource Specialist for 1.5 years (FY05 and FY06) at a cost of \$90,000 (\$60,000/year) to complete the research and compile the determinations

CONTINUED

Prepared by: Bob Loeffler, Director Phone 269-8600  
 Division: Mining, Land and Water Date/Time 2/17/04  
 Approved by: Thomas Irwin, Commissioner Date 2/17/04  
 Agency: Natural Resources

## FISCAL NOTE

STATE OF ALASKA  
2004 LEGISLATIVE SESSION

BILL NO. SB305-DNR-MLW-02-17-04

### ANALYSIS CONTINUATION

- One Cartographer II position for 2 years (FY05 and FY06) at a cost of \$74,500/year to create and depict the information on 1:63,360 scale maps or photo imagery, and
- One Analyst Programmer III for two months (one month each in FY05 and FY06) at a cost of \$7,000 per month to create corresponding data base.

In FY07, one Cartographer II position would be requested to add this compiled information to DNR's land status plats. The primary work associated with this is the need to create new status plats for the many areas of the state where they do not currently exist. State status plats exist primarily for areas where there is already a state ownership interest or water right. DNR does not have plats for townships where there is currently no state land depicted.

Other costs include travel to research navigability information in BLM, DNR or ADFG files in Fairbanks, Glennallen, Nome, or other communities. Contractual includes office space rental (\$6,000 per person/year), phones, photo-copying (we intend to xerox any navigability information in BLM's files), postage, etc. Supplies include basic office supplies and computer/software purchases.

# ALASKA STATE LEGISLATURE

SENATOR  
**Gene Therriault**  
119 N. Cushman Suite 101  
Fairbanks, Alaska 99701  
(907) 488-0857  
FAX (907) 488-4271



White in Juneau  
State Capitol  
Juneau, Alaska  
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Senate  
Senate District F

Senate Bill 305

"An Act relating to state ownership of submerged land underlying water that was navigable at the time Alaska achieved statehood."

SPONSOR: Senator Gene Therriault

## SPONSOR STATEMENT:

With the exception of withdrawn federal lands, at statehood in 1959 Alaska received title under the equal footing doctrine to all submerged lands under state navigable waters and marine waters out to three miles. Unfortunately, the federal government has been slow to concede any navigability determinations. Since Alaska entered the Union, the federal courts have determined fewer than 20 rivers navigable. Unless the state is pro-active in asserting its claims, it stands to lose up to 60 million acres of its statehood entitlement.

In some cases, the federal government has used every possible legal tactic under the Federal Quiet Title Act to impede the state's assertion of ownership. The Black, Kandig and Nation Rivers in northeast Alaska are examples. These three Rivers clearly meet the criteria established by the federal courts for determining navigability in Alaska. Although no one contested the state's claim that these streams met the federal criteria, this case took nine years and millions of state and federal dollars to litigate. Eventually the state won two of the three cases. The third was resolved by a Federal Recordable Disclaimer of Interest in 2003.

In addition, prior to 1989 the federal government applied incorrect standards to determine navigability and may have mistakenly conveyed state-owned land to Native corporations, clouding the title to hundreds of thousands, if not millions, of acres. This is a critical topic as Congress considers a deadline for completing the land selection and conveyance processes.

Contributing to the problem is the lack of a reasonable and efficient way for the state to secure title to its submerged lands. SB 305 takes three steps to begin the process of identifying state claims.

First, SB 305 provides notice to all parties that the state is laying claim to all submerged lands, except those withdrawn at the time of statehood, that meet the standards and criteria established in the Submerged Lands Act and in various federal court decisions.

Second, it provides authority for state agencies to identify, in accordance with the appropriate federal and state laws, which waterbodies the state claims as navigable and non-navigable. This will help the state clarify criteria for identifying navigable waters, address conflicts involving clouded titles due to inaccurate conveyances from the Bureau of Land Management, and more clearly delineate its title claims.

Third, the bill directs the Department of Natural Resources to give notice to all private property owners, including native corporations created under the Alaska Native Claim Settlement Act, that may have received title to lands that could have erroneously included state submerged lands in their conveyances. This is critical to resolve future problems regarding mineral development, gravel extraction, access and other related land uses.

This legislation is only one step for the state to eventually resolve the title disputes over its submerged lands, and deals only with the issue of state title to submerged lands. It does not address conflicts over federal fish and wildlife management in state navigable waters created by federal reserved water rights claims.

# ALASKA STATE LEGISLATURE

## CONFLICTS CONCERNING TITLE TO SUBMERGED LANDS IN ALASKA

By: Ron Somerville, Resource Consultant  
and  
Ted Popely, Legal Counsel

Updated: 02/11/04

### Statehood Entitlement – Submerged Lands

Alaska became a state in 1959 and under the Equal Footing Doctrine and the Submerged Lands Act inherited title to almost 60+ million acres of submerged lands. Unfortunately, since statehood, less than 20 rivers have been determined to be navigable by the federal courts. Although BLM has made numerous navigability determinations and the Department of the Interior is presently working positively with the state to identify and issue a "Recordable Disclaimer of Interest" for navigable waterways, the process is still painfully slow. Considering the fact that Alaska contains 20,000+ potentially navigable rivers and well over 1,000,000 lakes that could qualify as navigable, it could take several life-times and billions of litigation dollars before Alaska realizes its entitlement, if at all. In addition, the passage of time weakens the state's ability to provide the factual determinations necessary to prove in a federal court that a waterbody was navigable at the time of statehood.

### Issues of State Ownership of Submerged Lands

Alaska faces two types of legal hurdles in establishing its entitlement to submerged lands. Its most critical problem is to establish, in an efficient and timely manner, which of the state's rivers and lakes are navigable. Alaska's second hurdle is to determine which submerged lands the United States legally withdrew prior to statehood. The state's attempts to resolve these issues are thwarted by the extremely narrow interpretation the United States gives to the federal Quiet Title Act and by the lack of a non-judicial process to determine title.

### The Basis of the State's Claim of Title to Submerged Lands

Alaska owns the submerged lands underlying navigable waters and marine waters seaward three miles by virtue of the Equal Footing Doctrine and the Submerged Lands Act of 1953. The Equal Footing Doctrine dictates that new states enter the Union with all of the powers of sovereignty and jurisdiction that pertain to the original states. When a state enters the Union, it takes title to the lands underlying navigable waters and between mean high and mean low tide as a matter of constitutional right, subject only to the paramount federal power to control the waters for navigation in interstate and foreign commerce. The Submerged Lands Act conveys lands under marine waters and also includes lands underlying inland navigable waters to confirm their automatic passage under the equal footing doctrine.

For purposes of title to submerged lands, waters are navigable when they are used or susceptible of being used in their natural and ordinary condition as highways for commerce over which trade and travel may be conducted. Unfortunately, only a handful of waterways have been adjudged navigable since Alaska's statehood, because of the unwillingness of the United States to settle navigability issues outside litigation, and because of the jurisdictional difficulties of litigating navigability against the United States.

Despite the Equal Footing Doctrine and the Submerged Lands Act, the United States claims title to most or all of the state's submerged lands within the 25% of Alaska that the federal government had reserved before statehood. This issue is governed by *Utah Division of Lands v. United States*, 482 U.S. 193 (1987). Commonly referred to as the "Utah Lake" case. In Utah Lake, the court held that in order to establish that it retained title to submerged land within a reservation, the United States must establish (1) that Congress clearly intended to include submerged lands in the withdrawal, and (2) that Congress affirmatively intended to defeat the future state's title to submerged lands. In Utah Lake, the court found that the United States did not establish congress' intent to include the lake-bed in the reservation, despite the fact that the purpose of the reservation was to preserve the lake for a reservoir.

### Navigable Waters Jurisdictional Issues

Some federal agencies have issued regulations governing activities on navigable waters flowing through federal lands. The extent of their authority to do so is unclear. In some instances the agency may have Commerce Clause authority (e.g. promulgating regulations to implement environmental laws) but the more difficult question is the scope of an agency's authority whose mandates are not directly related to water, but are tied to land management, such as the National Forest Service, National Park Service, National Fish and Wildlife Service and Bureau of Land Management. The Court of Appeals for the Eighth Circuit has held that some agencies may regulate non-public lands under the Property Clause if the activities could negatively affect the purpose of the federal reservation. In Alaska, the more common scenario is an agency restricting public access on navigable waters within a reservation, such as requiring restrictive permits to conduct commercial activities on a waterway.

### Navigability Criteria Conflicts

Where title to submerged lands is at stake, the dispositive issue is usually the navigability of the waters that overlie them. The United States Bureau of Land Management (BLM) makes navigability determinations infrequently, only for lakes less than 50 acres and rivers less than three chains (198 feet) wide, and only when it is conveying the adjacent uplands. When waterways are larger than these measurements BLM conveys the adjacent and non-submerged land without navigability determinations. Even when BLM finds a smaller waterway non-navigable, however, it maintains that the determination is relevant only to the amount of acreage it is conveying and does not reflect a federal position on title.

The greatest hurdle to overcome in the State's efforts to identify and manage navigable waters has been the long-standing differences of opinion between the State of Alaska and the United States regarding the application of the test for determining title navigability. Navigability is a question of fact, not a simple legal formula. Variations in waterbody use that result from different physical

characteristics and transportation methods and needs must be taken into account. There are many legal precedents for determining navigability in other states based upon the particular facts presented in those cases.

The physical characteristics and uses of a waterbody used by the State for asserting navigability "criteria," are based upon legal principles that have been established by the federal courts. These criteria are applied to rivers, lakes, and streams throughout the State and take into account Alaska's geography, economy, customary modes of water-based transportation, and the particular physical characteristics of the waterbody under consideration.

To resolve these navigability criteria disputes, the State has actively pursued a limited number of court cases challenging particular findings of non-navigability by the federal government. Some of the important cases are:

**Gulkana River.** In this case, both in the U.S. District Court and on appeal to the U.S. Court of Appeals, the federal courts rejected the federal government's restrictive interpretation of the phrase "highway of commerce" in the title navigability test. The federal district court stated that to demonstrate navigability, it is only necessary to show that the waterbody is physically capable of "the most basic form of commercial use: the transportation of people or goods." Because the Gulkana River can be used for the transportation of people or goods, the Gulkana River was found navigable. The court of appeals found that the modern use of the Gulkana River for guided hunting, fishing, and sightseeing trips is a commercial use and, since the physical characteristics of the river have not significantly changed since 1959, provides conclusive evidence that the river was susceptible of commercial use at statehood. The court also found that modern inflatable rafts can be used to establish navigability. In 1990, the U.S. Supreme Court denied the request to review and overturn the decision and, thus, the Gulkana River precedent is now binding on all future navigability determinations in Alaska.

**Kandik, Nation and Black Rivers.** In this case, the State and Doyon Limited successfully established that the use or susceptibility of use of a river or stream by an 18-24 foot wooden riverboat capable of carrying at least 1,000 pounds of gear or supplies is sufficient to establish navigability. Based upon the use of these types of boats for the transportation of goods and supplies by trappers, as well as extensive historic and contemporary canoe use, the federal courts found the Kandik and Nation rivers navigable and, due to a technical interpretation of the federal Quiet Title Act, failed to rule on the Black River. The Department of the Interior issued a "Recordable Disclaimer of Interest" for the Black River, however, in 2003.

**Alagnak River, Nonvianuk River, Kukaklek Lake and Nonvianuk Lake.** In this federal district court case, the Alagnak River, Nonvianuk River, Kukaklek Lake and Nonvianuk Lake were all found navigable. Their primary transportation use is for commercially guided hunting, fishing, and sightseeing and for government research and management. They also serve as a means of access for local residents to their homes and to the surrounding areas for subsistence hunting and fishing.

From the standpoint of the public, the state and the federal governments both contribute to the confusion over navigability determinations. The State Policy on Navigability adopted by the Alaska Department of Natural Resources includes the following explanations:

“When information is lacking, and it must make a navigability determination, the state is forced to rely solely upon the physical characteristics shown on maps and aerial photographs. In these cases, the state identifies as navigable all streams depicted on the U.S.G.S. maps with double lines (generally at least 70 feet wide) and having an average gradient over the length of the stream of no more than 50 feet per mile.”

“Streams depicted with single lines, although narrower in width, may also be listed as potentially navigable if they have gradients of substantially less than 50 feet per mile and are at least 10 miles.”

“If a lake is totally isolated, it will be included on the state’s navigability maps if it is at least 1 ½ miles long. That length insures that the lake can be used as a highway.”

“An isolated lake might need to be 2-3 miles long to be included on the state’s navigability maps.”

“...those lakes which are shown on maps and aerial photographs as having a navigable water connection with other navigable waters, or which are accessible by short overland portages, are considered navigable regardless of the size of the lake.”

#### Clouded Titles Due to Erroneous Navigability Determinations

The standard procedures for surveying and conveying federal land are found in the Manual of Instructions for the Survey of the Public Lands of the United States. Under those procedures, consistently used in every public land state except Alaska, only uplands are surveyed and conveyed in fulfillment of acreage entitlements, not submerged lands. The survey rules require that all lakes 50 acres or larger, and rivers and streams three chains (198 feet) in width or wider, regardless of navigability, be meandered rivers, lakes, and streams is not included in computing the amount of land involved in the conveyance.

In Alaska, however, the federal government had not consistently followed these survey rules. Until 1983, the federal government treated submerged lands the same as uplands. All bodies of water that were considered non-navigable by the federal government, regardless of size, were surveyed as though they were uplands and the acreage of submerged lands were charged against the total acreage entitlement.

Because of these conveyance procedures, the navigability of waterbodies in Alaska has been an issue of contention since the enactment of the Alaska Statehood Act and ANCSA. In addition to the problems caused by a lack of information about many waterbodies, the situation was exacerbated by the narrow definition of navigability used by the federal government. Hundreds of rivers, lakes and streams considered navigable by the state were determined non-navigable by the federal government.

In 1983, the Department of the Interior agreed that the standard rules of survey should be followed for land conveyances in Alaska. The recipients of conveyances from the federal government are charged only for the amount of public land is calculated by the survey, which does not include the areas of meandered rivers, lakes and streams. This decision by the Department of the Interior was legislatively approved in 1988.

Despite the fact that the use of these survey procedures has eliminated many of the land conveyance problems after 1983, a major problem concerning navigability decisions made by the federal government under the old system remains unresolved. At issue are the hundreds of erroneous non-navigability decisions and the resulting submerged land conveyances made to ANCSA corporations in previous years. This issue becomes more critical as efforts are made by the federal government to establish a deadline for completing land conveyances. ANCSA corporations may be unable to replace erroneously conveyed submerged lands if the selection process had been terminated.

### Difficulties Quieting Title to Submerged Lands

The State must file a Quiet Title Action in federal court to definitively resolve a dispute with the federal government regarding ownership of a navigable water body. The federal government has made it very difficult to quiet title. The Quiet Title Act provides that the United States may be named as a party defendant in a civil action "to adjudicate a disputed title to real property in which the United States claims an interest." 28 U.S. C. § 2409a(a). The United States has adopted a very narrow view of the term "claims and interest," asserting that the federal court has no jurisdiction to hear quiet title actions against it unless the federal government actively and expressly asserts an interest in the lands. In the context of the submerged lands, this will occur only in rare circumstances.

While the Ninth Circuit Court of Appeals has decided that a federal non-navigability decision is a sufficient federal claim of interest to give the court jurisdiction under the Quiet Title Act, for these few waterways the State still may be unable to get a judgment, for the following reason. The State receives notice of a non-navigability determination when BLM issues a conveyance decision. Both because the State must give 180 days notice under the Quiet Title Act before filing a complaint, and because a preliminary injunction to prevent the conveyance is unavailable under the Quiet Title Act, the United States will likely convey the lands to a third party before the State can do anything to prevent it, and the State could arguably lose its cause of action against the United States.

Therefore, the State rarely has a viable cause of action to quiet title to submerged lands. The United States is in virtually the same position it was before the Quiet Title Act was passed: it controls when and how a court resolves title disputes. The exception to this general rule will be title disputes based on the issue of whether the United States defeated the State's right to submerged lands before statehood, where the United States has expressly taken a position.

The final legal determination of whether a water-body is navigable is a complex process requiring factual determinations that a waterway had been effectively used for commerce prior to statehood. In the States' litigation to quiet title to the Black, Kandik, and Nation Rivers in northeast Alaska, a panel for the Ninth Circuit Court of Appeals noted in January, 2000:

“There is also a serious policy concern in favor of allowing resolution of disputes based on the United States’ inchoate claim to everything in Alaska but what it has disclaimed. Eventually, all the witnesses will be dead, reducing the reliability of litigation. Someone who used one of these rivers in 1959 at age 20 is now 60. The population in the area was so sparse at all relevant times – probably no more than a couple of hundred people who might have used the three rivers during the relevant time, most too young to have relevant knowledge or too old to have survived the forty years since statehood – that a few deaths by old age can remove most or all the knowledgeable witnesses. Also, a state entitled as of 1959 to all the incidents of ownership in its rivers, yet still deprived of clear title forty years later, is effectively deprived of what it is entitled to under the equal footing doctrine.”

In addition, the process has become incomprehensibly complicated and expensive. A case in point is the quiet title action by the State to resolve submerged lands ownership under the Black, Kandik and Nation rivers in northeast Alaska. These three rivers clearly meet the criteria established by the federal courts for determining navigability in Alaska. Despite the fact that no one contested the State’s claim that these three rivers met the federal courts criteria for determining navigability, this case took nine years and upwards of a million of state and federal dollars to litigate, eventually resulting in the State winning two of the three cases and achieving no solution on the third.

#### **Solutions Through Administrative Action – Recordable Disclaimer of Interest**

Following meetings with the Legislative leadership in 2002, the Department of the Interior offered to examine the possibility of using a “Recordable Disclaimer of Interest” as a means of resolving submerged lands title disputes between the state and the federal government. In 2003, the Department of the Interior issued a “Recordable Disclaimer of Interest” in the Black River located in Northeast Alaska. This River was one of three rivers in that region that the ownership of the submerged lands was not resolved through litigation.

The legislature, through Legislative Budget and Audit, has funded a special project for the Alaska Departments of Natural Resources and Fish and Game to expedite the petition process to the Department of the Interior for issuing “Recordable Disclaimers of Interest” for navigable waters and RS 2477 Rights-of-way. The major emphasis of the project has been directed at navigable waters. Some petitions are pending and others are due to be submitted early in 2004.

#### **Solutions Through Federal Legislation**

- A. **Changes to the Quiet Title Act.** The precise issue in dispute between the state and the United States is what should require the United States to “claim an interest” so as to trigger jurisdiction under the Quiet Title Act. A provision in the Quiet Title Act that defines this phrase broadly enough to permit the state to quiet title to its submerged lands would resolve the issue. This would require a definition that makes the existence of a legal cloud on title sufficient to constitute a federal claim of interest, so that the United States’ refusal to take a position as to navigability for title purposes of waters on federal lands would give the state a cause of action in federal court.

**B. Joint State/Federal Navigable Waters Commission.** In 1971, Congress and the State of Alaska respectively created a Joint Federal/State Land Use Planning Commission for Alaska to assist in the massive land-use planning process following passage of the Alaska Native Claims Settlement Act. The State Legislature passed a bill in 2002 to create a similar State/Federal Commission for the purpose of expediting navigability determinations and providing recommendations for ways to improve the process of making water use and navigability decisions in Alaska. Similar legislation was introduced in Congress by the Alaska delegation to create the federal portion of the Commission. Unfortunately, this legislation did not pass as the federal and state administrations looked for other ways to accelerate title dispute resolutions.

#### Examples of Navigability Complexities & Additional Information

Appendix A is a copy of the State of Alaska's August 27, 1992 notice to Secretary of the Interior, Manuel Lujan, Jr. of its intent to quiet title to submerged lands described under 194 specific water-bodies in Alaska. Similarly, Appendix B contains a copy of the official notice to Secretary of the Interior Bruce Babbitt of the State's intent to quiet title to submerged lands described under an additional 9 water-bodies. Most of the water-bodies listed in Appendix A and Appendix B have been recognized by the Bureau of Land Management as being navigable for land conveyance purposes but have maintained that this assertion is not for title purposes.

THE  
FOLLOWING  
DOCUMENT(S)  
ARE  
POOR  
ORIGINAL  
COPIES

# STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

WALTER J. HICKEL, GOVERNOR

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August 27, 1992

*Appendix A*

Manuel Lujan, Jr., Secretary  
Department of the Interior  
1849 C Street NW  
Washington, D.C. 20240

Dear Mr. Lujan:

The State of Alaska intends to file real property quiet title actions as to the submerged lands described on the list attached as appendix A, and is providing you this notice pursuant to 28 U.S.C. §2409a(m). Title to these lands passed to Alaska at statehood based on the equal footing doctrine, the Submerged Land Act of May 22, 1953, P.L. 83-31, 67 Stat. 29, 43 U.S.C. §§1301 et seq., and the Alaska Statehood Act of July 7, 1958, P.L. 85-508, 72 Stat. 339, 48 U.S.C. note preceding §21.

Sincerely,

CHARLES E. COLE  
ATTORNEY GENERAL

By: *Joanne M. Grace*  
Joanne M. Grace  
Assistant Attorney General

JMG/sh  
Attachment

cc: J. T. Tangen, Regional Solicitor, Department of Interior  
Edward F. Spang, State Director, Bureau of Land Management  
Niles Cesar, Area Director, Bureau of Indian Affairs  
Walter Stieglitz, Regional Director, Fish and Wildlife Service  
John Morehead, Regional Director, National Park Service

*8/27 mailed cert return receipt*

Appendix A to letter of August 27, 1992.

Colville Region

Mouth of Colville River to Nuka River  
Mouth of Kuna River to Chefarnak

Northwest Region

Mouth of Agiapuk River to American River  
Mouth of American River to Budd Creek  
Mouth of Buckland River to West Fork  
Mouth of Fish River to Omilak Creek  
Mouth of Niukluk River to Council  
Mouth of Kobuk River to Lower Kobuk Canyon  
Mouth of Koyuk River to Dime Landing  
Mouth of Kuzitrin River to Noxapaga River  
Mouth of Noxapaga River to Turner Creek  
Mouth of Noatak River to Aniuk River  
Mouth of Selawik River to Kugarak River  
Shaktoolik River  
Throat River  
Ungalik River  
Mouth of Unalakleet River to Termile Creek

Koyukuk River Region

Mouth of Hogatza River to Hog Landing  
Mouth of Koyukuk River to Bettles  
Mouth of Middle Fork to Wiseman

Upper Yukon Region

Mouth of Bearpaw River to Diamond  
Mouth of Beaver Creek to Victoria Creek  
Birch Creek  
Mouth of Black River to Boundary  
Mouth of Chandalar River to North and West Forks  
Mouth of Charley River to Bear Creek  
Mouth of Chatanika River to Steese Highway Bridge  
Christian River  
Mouth of Coleen River to Lake Creek (59 miles)  
Mouth of Crooked Creek to Bridge  
Grass River  
Mouth of Hess Creek to North and South Forks  
Mouth of Hodzana River to Pitka Fork (79 miles)  
Jim Lake  
Mouth of Kandik River to Boundary  
Mouth of Nation River to Boundary

Mouth of Porcupine River to Boundary  
Ray River  
Mouth of Seventymile River to Barney Creek  
Mouth of Sheenjek River to Thluickohnjik Creek  
Mouth of Tatorduk River to Boundary

40 Mile Area

Forty Mile River  
Mouth of North Fork Forty Mile River to Kink  
Mouth of South Fork Forty Mile River to Mosquito Fork

South Central Region

Mouth of Chulitna River to Tokositna River  
Mouth of Kasilok River to Tustumena Lake  
Mouth of Kenai River to Kenai Lake  
Kenai Lake  
Knik River  
Lake Louise and outlet  
Lake Tustumena  
Mouth of Skwentna River to Portage Creek  
Susitna Lake  
Mouth of Susitna River to Indian River  
Mouth of Talkeetna River to Chumilna Creek  
Mouth of Tokositna River to Home Lake Outlet  
Tyone Lake  
Mouth of Tyone River to Tyone Lake  
Mouth of Yentna River to confluence of its East and West Forks  
Johnson River  
Red River

Tanana Region

Mouth of Chena River to North Fork  
Mouth of Chisana River to Scottie Creek  
Mouth of Goodpasture River to Central Creek  
Harding Lake  
Healy Lake and outlet  
Johnson River  
Mouth of Kantishna River to Lake Minchumina  
Lake George and outlet  
Lake Mansfield and outlet  
Mouth of Nabesna River to Nabesna Mine  
Mouth of Nenana River to Healy River  
Mouth of Salcha River to Paldo Creek  
Mouth of Tanana River to Nabesna and Chisana Rivers  
Mouth of Teklanik River to near Comma Lake  
Mouth of Tetlin River to Tetlin Lake  
Mouth of Tolovana River to West Fork  
Mouth of Wood River to Fish Creek

Middle Yukon River

Mouth of Innoko River to Cripple Creek  
 Mouth of Iditarod River to Iditarod  
 Khotol River  
 Little Melozitna River  
 Melozitna River  
 Mouth of Nowitna River and Sulstna Rivers to Tamarack Creek  
 Tozitna River

Lower Yukon Region

Anvik River  
 Bonasila River  
 Kotlik River  
 Nulato River  
 Pastolik River

Kuskokwim River Region

Mouth of Aniak River to Salmon River  
 Mouth of Big River to Otter Creek  
 Mouth of Chukowan River to Gemuk River  
 Crooked Creek  
 Mouth of East Fork Kuskokwim River to Slow Fork and Tonzona River  
 Mouth of Gemuk River to Beaver Creek  
 Mouth of George River to Julian Creek  
 Mouth of Holitna River to Chukowan River  
 Hoholitna River  
 Mouth of Johnson River from Mud Creek Portage to Crooked Creek  
 Mouth of Johnson River to Nunapitchuk and Atnautluak  
 Kisaralik River ✓  
 Mouth of Kuguklik River to Kipruk  
 Kulik Lake ✓  
 Mouth of Kuskokwim River to North Fork  
 Little Tonzona River  
 Mouth of Middle Fork and Big River to Salmon River  
 Mouth of Middle Fork Kuskokwim River to Pitka Fork  
 Mouth of Nixon Fork to its West Fork  
 Mouth of North Fork Kuskokwim to Lake Minchumina Portage  
 Mouth of South Fork Kuskokwim River to Tatina River  
 Mouth of Stoney River to Lime Village  
 Mouth of Swift Fork to Highpower Creek  
 Mouth of Tokotna River to Fourth of July Creek  
 Mouth of Talbiksok River to Yukon-Kuskokwim Portage  
 Mouth of Tuluksak River to Upper Land  
 Whitefish Lake and outlet

Bristol Bay Region

Alec River *chignik*  
 Aniakchak River *chignik*

Black Lake Chignik  
 Mouth of Chignik River to Black Lake chignik  
 Chikuminuk Lake  
 Chilikadrotna River  
 Chulitna River  
 Clark River  
 Mouth of Copper River to Falls  
 Dago Creek - ugashik  
 Dog Salmon River ugashik  
 Eek River  
 Egegik River and Becharof Lake Naknek  
 Gibraltar Lake and outlet  
 Mouth of Goodnews River to Watlamuse Creek  
 Mouth of Igushik River to Amanka Lake  
 Illiamna Lake  
 Mouth of Illiamna River to Forks  
 Mouth of Kanektok River to Kagati Lake  
 Kakhonak Lake  
 Mouth of King Salmon River to Olds Creek ugashik  
 Mouth of Kvichak River to Illiamna Lake  
 Lake Aleknagik  
 Lake Chavakuktuli  
 Lake Clark  
 Lake Beverly  
 Lake Kulik Mt. Katmai  
 Lake Nerka  
 Lower Pike Lake and outlet ugashik  
 Kokwak River  
 Kuktuli River  
 Muklung River  
 Mouth of Mulchatna River to Summit Creek  
 Mouth of Naknek River to Naknek Lake Naknek / Mt. Katmai  
 Negukthlik River  
 Newhalen River  
 Nishlik Lake  
 Mouth of Nushagak River to New Stuyahok  
 Mouth of Nuyakuk River to Nuyakuk Lake  
 Ongoke River  
 Osviak River  
 Quigmy River  
 Pile River  
 Ruth Lake and outlet ugashik  
 Mouth of Smelt Creek to Smelt Lake Naknek  
 Mouth of Snake River to Munavaugaluk Lake  
 Stuyahok River  
 Tazmina River  
 Mouth of Togiak River to Togiak Lake  
 Tunuk River  
 Ualik Lake  
 Mouth of Ugashik River to Lower and Upper Ugashik Lakes ugashik  
 Upruk Lake  
 Weary River

Mouth of Wood River to Lake Aleknagik

Copper River Region

Mouth of Bering River to near Bering Lake

Mouth of Chitna River to Tana River

Mouth of Copper River to Batzulnetas (above Slana)

Crosswind Lake

Mouth of Eyak River and Eyak Lake

Mouth of Klutina River to Klutina Lake

Lowie River

Miles Lake and outlet

Nelchina River

- Tasmuna River

- Mouth of Tazlina River to Tazlina Lake

Southeast Region

Chilkat River

Chilkoot River

Stikine River

Kodiak Island and Shelikof Strait Region

Afognak Lake

Mouth of Afognak River to the remains of the Bridge

Akalura and Red Lakes

Mouth of Aniakchak River to Albert Johnson Creek

Karluk Lake

Mouth of Karluk River to Karluk Lake

Statewide Region

Yukon River

# STATE OF ALASKA

## DEPARTMENT OF LAW

### OFFICE OF THE ATTORNEY GENERAL

December 17, 1996

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Bruce Babbitt  
 Department of the Interior  
 1849 C Street NW  
 Washington, D.C. 20240

Dear Mr. Babbitt:

The State of Alaska intends to file real property quiet title actions as to the submerged lands described on the list attached as appendix A, and is providing you this notice pursuant to 28 U.S.C. § 2409a(m). Title to these lands passed to Alaska at statehood based on the equal footing doctrine, the Submerged Land Act of May 22, 1953, P.L. 83-31, 67 Stat. 29, 43 U.S.C. §§ 1301 et seq., and the Alaska Statehood Act of July 7, 1958, P.L. 85-508, 72 Stat. 339, 48 U.S.C. note preceding §21.

Sincerely,

BRUCE M. BOTELHO  
 ATTORNEY GENERAL

By:

*Joanne M. Grace*  
 Joanne M. Grace  
 Assistant Attorney General

Attachment

cc: Laurie Adams, Regional Solicitor, Department of Interior  
 Tom Allen, State Director, Bureau of Land Management  
 Niles Cesar, Area Director, Bureau of Indian Affairs  
 David B. Allen, Regional Director, Fish and Wildlife Service  
 Robert Barbee, Regional Director, National Park Service

TONY KNOWLES, GOVERNOR

PLEASE REPLY TO:

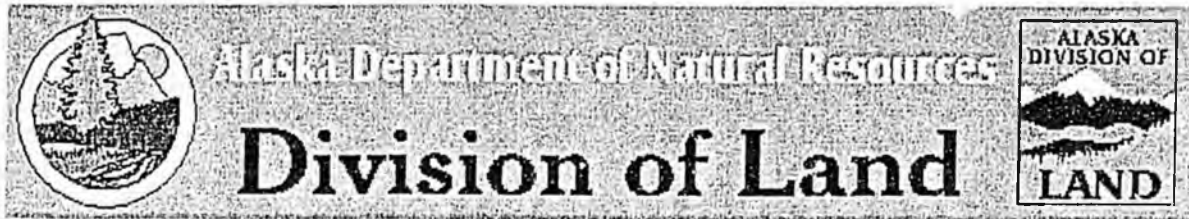
- 1031 WEST 4TH AVENUE, SUITE 200  
 ANCHORAGE, ALASKA 99501-1994  
 PHONE: (907) 269-5100  
 FAX: (907) 276-3697
- KEY BANK BUILDING  
 100 CUSHMAN ST., SUITE 400  
 FAIRBANKS, ALASKA 99701-4679  
 PHONE: (907) 451-2811  
 FAX: (907) 451-2846
- P.O. BOX 110300-DIMOND COURT HOI  
 JUNEAU, ALASKA 99811-0300  
 PHONE: (907) 465-3600  
 FAX: (907) 465-6735

APPENIDIX A

Copper River Region  
Copper River

Northern Region  
Kuk River  
Meade River  
Kukpowruk River

Bristol Bay Region  
Arolik River  
Kanektok River  
Kisaralik River  
Goodnews River  
Togiak River



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## State Policy on Navigability

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    - Riparian Rights and Statute of Limitations
    - Navigability Criteria
    - Navigability Criteria Disputes
    - Identification of Navigable Waters
    - Navigable Waters within Pre-Statehood Federal Withdrawals
    - Navigable Waters within ANILCA Conservation System Units
  
  - II. Legal and Policy Guidelines Governing Management of Submerged Lands and Public Waters
    - Public Trust Doctrine
    - Public Waters
    - Boundaries of Navigable Waters
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## Policies and Procedures on Ownership and Management of Navigable and Public Waters

June 18, 1996 State ownership of the beds of navigable waters is an inherent attribute of state sovereignty protected by the United States Constitution. *Utah v. United States*, 482 U.S. 193 (1987). Under the doctrine, all states enter the Union on an equal footing with respect to sovereign rights and powers, title to the beds of navigable waters in Alaska vested in the newly formed State of Alaska in 1959. In addition, under the Alaska Constitution and the public trust doctrine, all waters in the state are held and managed by the state in trust for

the use of the people, regardless of navigability and ownership of the submerged lands under the Equal Footing Doctrine.

The purpose of this paper is to describe the State of Alaska's policies and procedures for identifying and protecting the state's title to the beds of navigable waters. In addition, this paper outlines the legal and policy considerations which guide the ownership and management of submerged lands and public waters.

## I. IDENTIFYING AND PROTECTING STATE TITLE TO THE BEDS OF NAVIGABLE WATERS

Identification and management of the beds of navigable waters is an important policy of the State of Alaska. In 1980, the state established a comprehensive navigability program to respond to federal land conveyances and land management activities under the Alaska Statehood act, the Alaska Native Claims Settlement Act (ANCSA), and the Alaska National Interest Lands Conservation Act (ANILCA). Pursuant to the provisions of those acts, the federal government has issued navigability determinations for thousands of lakes, rivers, and streams throughout the state in an effort to determine whether the state or federal government owns the submerged lands. Navigability determinations are also made prior to many state land disposals to insure that adequate public use easements are reserved.

The basic purpose of the state's program is to protect the public rights associated with navigable waters, including, in particular, the state's title to the submerged lands. Because state and native land selections and federal conservation units blanket the state, navigability questions have arisen for rivers, lakes, and streams throughout Alaska. The navigability of many of those waterbodies has already been established. There are hundreds of others, however, where navigability is not yet determined.

To help resolve these navigability disputes, a major goal of the state's navigability program is to identify the proper criteria for determining title navigability in Alaska and to gather sufficient information about the uses and physical characteristics of individual waterbodies so that accurate navigability determinations can be made as disputes arise. Other important aspects of the program include monitoring federal land conveyance and management programs to identify particular navigability disputes, seeking cooperative resolution of navigability problems through negotiations and legislation, and preparing for statewide navigability litigation.

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## RIPARIAN RIGHTS AND STATUTE OF LIMITATIONS

Disputes over ownership of submerged lands in Alaska have arisen under a variety of circumstances. The principal source of the disputes in Alaska is the survey and acreage accounting system used by the federal government for conveying land to the state and native corporations.

The standard procedures for surveying and conveying federal land are found in the Manual of Instructions for the Survey of the Public Lands of the United States, generally known as the BLM Manual of Surveying Instructions. Under those procedures, consistently used in every public land state except Alaska, only uplands are surveyed and conveyed in fulfillment of acreage entitlements, not submerged lands. The survey rules require that all lakes 50 acres or larger, and rivers and streams three chains (198 feet) in width or wider, regardless of navigability, be meandered and segregated (excluded) from the surveyed public lands. Only the surveyed uplands are conveyed. The acreage of meandered rivers, lakes, and streams is not included in computing the amount of land involved in the conveyance.

In Alaska, however, the federal government had not consistently followed these survey rules. Until 1983, the federal government treated submerged lands the same as uplands. All bodies of water that were considered non-navigable by the federal government, regardless of size, were surveyed as though they were uplands and the acreage of submerged lands was charged against the total acreage entitlement.

Because of these conveyance procedures, the navigability of waterbodies in Alaska has been an issue of contention since the enactment of the Alaska Statehood Act and ANCSA. In addition to the problems caused by a lack of information about many waterbodies, the situation was exacerbated by the narrow definition of navigability used by the federal government. Hundreds of rivers, lakes, and streams considered navigable by the state were determined non-navigable by the federal government.

In 1983, following years of negotiations, lawsuits and legislative attempts to solve the navigability problems created by the unusual survey and conveyance procedures in Alaska, the State of Alaska, the United States Department of the Interior and the Alaska Federation of Natives (AFN) agreed that the standard rules of survey should be followed for land conveyances in Alaska. The effect of that decision was to treat Alaska surveys and land conveyances like federal land surveys and conveyances in other states. The recipients of conveyances from the federal government are charged only for the amount of public land that is calculated by the survey, which does not include the areas of meandered rivers, lakes and streams.

The use of these survey procedures has eliminated many of the problems associated with the federal land conveyance programs in Alaska. Submerged lands are no longer being conveyed to fulfill acreage entitlements. With the exception of lakes smaller than 50 acres and streams narrower than 198 feet, navigability determinations are no longer being made prior to federal land conveyances. Determinations of ownership of submerged lands can be put off until a natural resource use or conflict requires resolution, such as issuance of an oil and gas

lease, mining claim, or a gravel sale.

Through the joint efforts of the State of Alaska, AFN, and the Department of the Interior, the 1983 decision to use the standard survey procedures for land conveyances in Alaska was legislatively approved in August 1988 when the United States Congress passed legislation (94 Stat. 2430) amending Section 901 of the Alaska National Interest Lands Conservation Act, codified at 43 U.S.C. 1631. The 1988 amendment, sometimes referred to as the Alaska Submerged Lands Act, requires that the standard rules of survey in the BLM Manual of Surveying Instructions be used for all federal surveys under the Alaska Statehood Act and ANCSA. The 1988 amendment also repealed the Section 901 statute of limitations that would have required the state to file a lawsuit within a very short period of time in order to preserve its title to the beds of navigable waters conveyed to native corporations by the federal government as a result of erroneous navigability determinations, poor maps, surveys or whatever.

Even with this legislation, a major problem concerning navigability decisions made by the federal government under the old system remains unresolved. At issue are the hundreds of erroneous non-navigability decisions and the resulting submerged land conveyances made to ANCSA corporations in previous years. In addition, to comply with the meandering requirements of the BLM Survey Manual, the federal government is still required to make navigability determinations for lakes smaller than 50 acres and rivers or streams narrower than 198 feet in width to determine if these waters must be meandered.

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## NAVIGABILITY CRITERIA

The greatest hurdle to overcome in the state's efforts to identify and manage navigable waters has been the long-standing differences of opinion between the State of Alaska and the United States regarding the application of the test for determining title navigability. Navigability is a question of fact, not a simple legal formula. Variations in waterbody use that result from different physical characteristics and transportation methods and needs must be taken into account. There are many legal precedents for determining navigability in other states based upon the particular facts presented in those cases. In Alaska, though, we are just beginning to get the final court decisions that are necessary to provide legal guidance for accurate navigability determinations.

The physical characteristics and uses of a waterbody used by the state for asserting navigability, commonly referred to as navigability "criteria", are based upon legal principles that have been established by the federal courts. These criteria are applied to rivers, lakes, and streams throughout the state and take into account Alaska's geography, economy, customary modes of water-based transportation, and the particular physical characteristics of the waterbody under

consideration.

The federal test for determining navigability was established over a hundred years ago. In the landmark decision of *The Daniel Ball*, 77 U.S. (19 Wall.) 557, 563, (1870), the Supreme Court declared:

Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways of commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.

Although *The Daniel Ball* test is accepted as the correct standard for determining navigability, there has been a lot of disagreement over application of many of the terms and phrases used in *The Daniel Ball* test to the specific uses of Alaska's lakes, rivers and streams. The State of Alaska uses the following interpretation of that test as the basis for its navigability program.

The Waterbody Must Be Usable As a Highway For the Transportation of People or Goods. Interpreting the requirements that navigable waterbodies be used or usable as "highways of commerce", the courts have ruled that the central theme of title navigability is that the waterbody be capable of use as a highway which people can use for transporting goods or for travel. Neither the types of goods being transported nor the purpose of the travel are important in determining navigability. Transportation on water associated with recognized commercial activities in Alaska, such as mining, timber harvesting, and trapping is, evidence of navigability. The use of waterbodies for transportation in connection with natural resources exploration or development, government land management, management of fish and game resources, or scientific research is also evidence of navigability. Travel by local residents or visitors for the purpose of hunting, fishing, and trapping, or as a means of access to an area can be used to establish navigability. The same holds for recreational transportation, including personal travel and professionally guided trips.

Waters Which Are Capable of Being Used For Transporting Persons and Goods, Although Not Actually Used, Are Navigable. It is not necessary that a waterbody be actually used for transportation to be found navigable. It is enough that it is susceptible, or physically capable, of being used. Whether a waterbody is susceptible of use for transportation depends upon the physical characteristics of the water course such as length, width, depth, and, for a river, current and gradient. If those physical characteristics demonstrate that a waterbody could be used for the transportation of persons or goods, it is legally navigable. 5

The susceptibility element of title navigability is very important for the identification of navigable waterbodies in Alaska. Because of Alaska's sparse population and lack of development, there are hundreds of remote rivers, lakes, and streams where there is little or no