

## **APPENDIX D – GCP BACKGROUND & DISCUSSION**

### **Background**

#### *Current Agency Involvement and Management of State Land, the Guiding Industry, and Wildlife*

The commercial use and management of state land, the regulation of the commercial big game guiding industry, and the management of Alaska's wildlife are currently managed by three different agencies and two different boards. The state agencies involved are Department of Natural Resources (DNR) (land management), Department of Commerce, Community & Economic Development (DCCED) (guide industry), and the Alaska Department of Fish and Game (ADF&G) (wildlife management). The two regulatory boards are the Alaska Board of Game (BOG) and the Big Game Commercial Services Board (BGCSB). Each of these groups currently plays either a direct or indirect role in how big game guiding in Alaska is managed. DNR is the landowner who permits commercial use of state land and guides wishing to conduct their business on state land must go through the DNR permitting process in order to operate. Guide licensing and the government of the industry is carried out by the Division of Corporations, Business, and Professional Licensing (DCBPL) section of DCCED and the BGCSB, which functions as the regulatory and policy arm for guiding and transporting. Finally, the big game pursued by the guides and clients are regulated and managed by ADF&G and the BOG, who determine population objectives and set the seasons and bag limits for wildlife species. There is some overlap between the two boards as the BGCSB is required to have a board member that is also on the BOG. It is also often the case that one member of the BOG is also a big game guide.

#### *The Guiding Industry*

Alaska's professional hunting guide and outfitter industry has and will continue to provide a needed service to residents and visiting sportsmen. These visitors are attracted to the state for its outstanding wildlife resources and provide the state with revenue from license sales and by contributing to local economies and businesses. License and big game tag revenue from nonresident and nonresident alien hunters averaged \$5,711,478.10<sup>1</sup> annually between the years 2001 to 2010. Big game guiding not only contributes to the state's economy, but state law also requires that nonresident hunters be accompanied by a guide when hunting certain wildlife species. The mandatory guide requirement for Dall sheep, brown bears, and mountain goats is found in AS 16.05.407 and AS 16.05.408, which are the statutes administered by ADF&G. The justification for requiring a guide for these three wildlife species has been explained thusly: "The laws were justified on the basis that nonresidents and nonresident aliens, as a class, tend to be less familiar with Alaska's unique dangerous game (brown bears and grizzly bears) and with game inhabiting uniquely dangerous terrain under severe weather conditions (Dall sheep and

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<sup>1</sup> State of Alaska, ADF&G, 10 Year Recap (2001-2010) – Number Sold Sales Statistics for Sport Licenses, Stamps, and Big Game Tags Reported Sold; ADF&G website: <http://www/adfg.alaska.gov/static/license/pdfs/10yr2010gross.pdf>

mountain goats), and they also tended to be unfamiliar with Alaska's complicated game laws, as compared to state residents."<sup>2</sup>

The guiding industry also has a history of state management and regulation. In 1973 the legislature created the Guide Licensing and Control Board (GLCB). The intended purpose of this board was to, "protect fish and game management," and, "to get competent people as guides in Alaska."<sup>3</sup> The board was assigned the tasks of establishing guide licensing regulations, defining unlawful acts, providing for the disciplining of guides, and generally regulating guide activity in the state. In 1974, the GLCB established an area system for limiting guides to operations within Exclusive Guide Areas (EGAs). At the beginning this system was only applied in a few Game Management Units, but by the end of 1976, GCLB had extended the program and decided to grant EGAs to qualified guides anywhere in the state.

### *The Owsichek Decision*

This system of EGAs was found unconstitutional by the Alaska Supreme Court in 1988, in what is commonly known as the *Owsichek* decision<sup>4</sup>. The court found the program to be "in contravention of article VIII, section 3 of the Alaska Constitution," which is the common use clause. The clause states, "Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use." The decision cited four major reasons in support of the finding:

EGAs were

- Not subject to competitive bidding and were exclusive
  - Area grants allowed one guide to exclude all other guides
  - Area grants were based primarily on use, occupancy, and investment, favoring established guides at the expense of new entrants
- Assignments of EGAs were not based on wildlife management concerns
- The system of EGAs provided no remuneration to the state
- The EGAs were of unlimited duration and were not subject to any other contractual terms or restrictions

The court went on to say that the DNR leases and concession contracts did not share those characteristics, and further stated that, "Nothing in this opinion is intended to suggest that leases and exclusive concessions on state lands are unconstitutional. The statutes and regulations of the

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<sup>2</sup> 2002 Op. Alaska Att'y Gen (Apr. 25)

<sup>3</sup> Alaska Legislative Committee Minutes Microfiche No. 37, House Judiciary Committee, H.B. 1 at 20 (Feb. 2, 1973)

<sup>4</sup> *Owsichek v. State, Guide Licensing & Control Bd.*, 763 P.2d 488 (Alaska 1988).

Department of Natural Resources authorize leases and concession contracts of limited duration, subject to competitive bidding procedures and valuable consideration.”

There has long been some level of interest within segments of the commercial hunting industry to re-create a program similar to the old EGA approach, but one that satisfies the deficiencies pointed out in the *Owsichek* decision and which works within the constraints of DNR’s statutory authority. In 2006, former DNR Commissioner Mike Menge initiated a review of whether the department’s authority was in fact sufficient to create such a program. In directing department staff to accomplish this task, Commissioner Menge recognized that the lack of direct funding would limit DNR’s ability to create such a new program, should it be found viable.

## **Discussion**

What follows is an in-depth discussion of the GCP. The program will require the development and adoption of regulations and support from the Legislature. There are currently no other proposed changes to existing DNR permitting or leasing processes affecting the big game guiding industry.

The GCP is an effort by DNR, ADF&G, and other agencies to design a program that addresses the main issues that have been identified throughout the program development process and from the *Owsichek* decision. The GCP process was started in 2006 and the issues discussed below have been brought forward through letters and comments from individuals, interest groups, boards, and from the 2009 and early 2012 public scoping processes. The issues identified below have been evaluated and addressed by either a specific program design element or by creating a process that serves to incorporate resource information into the program. The issues DNR has addressed with the GCP have been separated into two main categories:

- Issues identified by the public, guide industry, and regulatory boards
- Issues identified in the *Owsichek* decision related to the EGA system

### Public, Guide Industry, and Regulatory Boards

#### *Lack of wildlife conservation*

There is concern that wildlife conservation is not always a consideration in the operations plans of guides. This issue is addressed in several ways in the scoring process. First of all, applicants are given credit if they can demonstrate stewardship of wildlife resources and how they have minimized their impacts to those resources. Applicants are also given credit for tracking wildlife populations, using wildlife population factors to determine how many clients they will serve, demonstrating meaningful communication with wildlife managers, and for participating in state sponsored predator control efforts. Second, applicants have to provide a detailed operating plan that includes the number of clients and types of hunts that will be offered. The plan will be scored on whether or not the proposed operation is biologically feasible and then the plan itself, such as the number of clients proposed, will become binding terms in the concession permit.

### *Loss of quality of experience*

DNR has heard many comments relating to the quality of experience that guides are able to offer clients. It is important to note that quality of experience in this case relates to several factors. First, there is the perception that in popular hunting areas, there are too many guides operating, there are too many camps and the subsequent overcrowding leads to unhappy clients. Part of Alaska's attraction to hunters is its wilderness character and remoteness, and guides want to provide a positive experience to their clients. Second, quality of experience can relate to the services and support provided to clients. Some comments received by DNR are direct criticisms of guides that contract too many clients, use too many assistant guides, and do not adequately ensure their clients' comfort and safety. Finally, quality of experience can relate to the hunting ethics guides use in the field. Numerous comments received during the scoping process focused on ways to score applicants that would reward ethical guides who follow game laws and employ stewardship principles in their business. The GCP has several elements that attempt to address these issues. First, the number of concessions offered in most areas is less than the number of guides currently registered to operate in a given Guide Use Area (GUA). These restrictions will reduce the number of guides in the most crowded areas, where the impacts to quality of experience have been high. Second, guides operating a full concession will be restricted to six assistant guides with no limit on the number of clients, and those operating limited concessions will be allowed only one assistant guide and will be limited to four clients per GUA, again resulting in fewer personnel in the field. To address services and support to clients, applicants are asked in the scoring process to provide detailed operations plans, describing for example, how many clients they plan to serve, what kind of camp(s) they will have, what the guide to client ratio will be, and what safety measures and emergency procedures are in place. Finally, to address stewardship and ethical concerns, the applicants are asked to demonstrate their stewardship principles and provide reports on their violation and compliance histories.

### *Conflicts between user groups*

One of the issues identified by the Alaska BOG is that conflicts between guides and residents occur in some areas. The negative perceptions result from interactions between residents and guides or guided hunters in the field, in local towns, or along transportation corridors. Conflicts occur over hunting areas, landing strips, meat care, trespass, and the perceived over-harvest of game animals. Conflicts are addressed in several ways. In the scoring process, applicants are required to describe how they train their employees and educate clients on local customs, traditions, and courtesies. They also have to describe their methods of handling conflicts with other user groups and how their businesses cooperate with local communities. The solution offered by the GCP is to reward those guides and businesses that respect other users and identify and address conflicts between users in productive and successful ways.

### *Lack of land stewardship*

Another issue that has been raised by members of the public is a perception that there is a lack of land stewardship in the field. Industry members report examples of trail degradation from motorized vehicle use, poorly maintained camps with inadequate waste storage, and guides who

stay longer in one location than permitted or who utilize camps that are permitted to other guides or are in trespass. DNR is very familiar with these issues and has addressed them administratively. Currently DMLW can monitor and permit commercial recreation operations on state land (including hunting camps) but has no citation authority on those lands. Citation authority is an indispensable tool which improves compliance with applicable land use regulations and permit stipulations and enhances stewardship of state land. The Management Framework Document outlines and provides the basis for program specific statute development and amendment related to confidentiality, program receipt, and enforcement authorities.

The GCP addresses land stewardship in the application scoring process and through the program design and restrictions. Forms A through C all have questions that directly pertain to land stewardship and points are awarded for past land use authorization performance. This requires applicants to provide documentation of previous land stewardship activities, and asks applicants to provide a plan for the future of the area they plan to operate within. In Form D, points will be lost by applicants who have been in non-compliance or default with any public land agency. Formal adoption of agency regulations will be the next step toward bringing the program forward. In order for these regulations to become enforceable, statutory authority must be granted by the Alaska Legislature and a Bail Forfeiture Schedule adopted by the Alaska Supreme Court. Once the regulations are adopted and enforceable, citations may be issued by designated Peace Officers of the State and by Alaska State Troopers, imposing penalties for violations.

### Owsichek Decision

The GCP has been designed to address issues with big game guided hunting on state land. In doing so, most of the issues raised by the court in *Owsichek* have also been addressed through elements of the program design, such as full and limited concessions or the fee structure. Each of the *Owsichek* deficiencies and the GCP solutions are further elaborated upon below.

#### **I. EGAs were not subject to competitive bidding and were exclusive**

The court reasoned that because the assignment of EGAs was based on use, occupancy and investment, the areas were in essence granted solely on the basis of seniority. The court found that granting such a special privilege based primarily on seniority ran counter to the notion of common use. The court found that this would clearly favor established guides at the expense of new entrants. Moreover the EGA system allowed one guide to exclude all other guides from leading hunts in “his” area.

In the first application scoring criteria published by DMLW in 2009 during the scoping process, it was proposed to have a competitive bid in the scoring criteria to address the concerns of *Owsichek*. Applicants would bid the amount they were willing to pay annually for a concession and the highest bidder would gain the full amount of points for that question. The competitive bid was almost entirely rejected in the public comments received. There were many concerns over fairness between large and small operators, concerns that large outside corporations would form agreements with guides and buy up concession areas for their client’s exclusive use. In response to the public comments, the

bid was removed from the scoring criteria. However, the whole application process is in itself designed to be competitive. Applicants are scored on their experience and their documented records on a myriad of subjects. The GCP is designed to select qualified individuals for each concession and the process will be competitive.

DNR recognizes that there are many types of guide operations in the state. The GCP seeks to ensure that the opportunity exists for all types of operators to be able to successfully compete for a concession and that we have a fair and competitive process for all sizes of operations. Another concern stated in the *Owsichek* decision is that the original EGAs did not allow new entrants into the guiding industry. “These grants are based primarily on use, occupancy and investment, favoring established guides at the expense of new entrants into the market, such as *Owsichek*. To grant such a special privilege based primarily on seniority runs counter to the notion of, ‘common use.’” In order to address these three concerns, DNR has decided to create two types of concessions within many of the GCAs. The types are: “Full Concession,” and “Limited Concession.” There are different rules and restrictions for each type.

The original EGA system of area allocation gave guides exclusive use of the assigned area based primarily on seniority. This is another of the faults found unconstitutional in the *Owsichek* decision because EGA grants allowed a guide to exclude all other guides from leading hunts in an area and that exclusivity was determined to fall within the category of grants prohibited by the common use clause. When evaluating the number of concessions to offer within a GCA, DMLW decided that in all areas where there was more than 5,000 contiguous acres of state land, there would be a minimum of two concessions offered. There are a few GCAs that have only one concession offered due to a combination of: a lack of state land, a low number of contracted hunts and guides registered for the area, or from the identification of a biological issue. Even though only one concession is offered, the program by design addresses all of the other primary concerns the court had with EGAs.

## **II. EGA assignments were not based on wildlife management concerns and therefore could not be justified as a wildlife management tool like other constitutional restrictions on common use (such as hunting seasons and bag limits)**

The court found the GLCB based their assignments of EGAs on use, occupancy and investment, not wildlife conservation (see reason number one).

The development process of the GCP has relied heavily on the cooperation and involvement of ADF&G, Division of Wildlife Conservation. ADF&G has been engaged in program design discussions and will be directly involved in the program as it continues. In 2009 and for the Proposed Decision ADF&G biologists reviewed the GCP maps and provided feedback on area wildlife populations and assisted DNR in identifying areas where other issues occur such as social conflicts or land stewardship problems. It is expected that ADF&G personnel will participate on the evaluation panel and will provide biological information to assist in scoring applicant’s operating plans. There are many

aspects of the scoring process aimed at addressing wildlife conservation, such as giving credit to applicants who can demonstrate that they track wildlife populations in their area and use stewardship principles to determine the number of clients they serve. There are also program design elements that address wildlife conservation. The number of concessions in an area has been determined by many factors, including feedback from ADF&G biologists. The program will build flexibility into the number of concessions offered and will be able to add or subtract opportunities where necessary to assist ADF&G in meeting their game management goals.

### **III. The EGA program provided no remuneration to the state**

Specifically the court pointed out the absence of any rental or usage fee associated with the granting and use of an EGA.

The original EGAs provided no monies to the State and it was an issue that state land and wildlife resources were being used with no remuneration return. As designed, the GCP is expected to generate sufficient revenues to pay for costs associated with the administration of the program.

### **IV. EGAs were grants of unlimited duration and were not subject to any other contractual terms or restrictions and were transferred as if owned**

The governing statutes for the EGA program allowed holders of EGAs to sell their improvements. Furthermore, the GLCB routinely would transfer an EGA to the purchaser of those improvements or the EGA holder's designated successor. The court found that this practice allowed a guide to effectively sell his EGA as if it were a property interest.

The *Owsichek* decision found that EGAs were unconstitutional in part because they had no restrictions on how long a guide area could be held by any one guide, making the EGAs essentially monopolistic. In contrast, the GCP concessions have a well defined duration. In the initial offering, the concession permit terms will be staggered so that approximately one third of them are authorized for four years, one third for five years with a two year reissue, and one third for five years with a five year reissue. Once that initial stagger is complete, all concessions will be permitted for five years with a review and reissue for a second five years. The reissue for the second five years is not automatic or competitive but subject to a review of compliance and violation history.

To address the lack of contractual terms and restrictions that concerned the court in *Owsichek*, each concession will consist of a permit between DNR and the permittee. The permit will have terms and conditions, such as payment schedules, annual reporting requirements, and will incorporate terms from the applicant's proposed operating plan. DNR reserves the right to eliminate, add or otherwise change any terms and stipulations of a permit at any time during a concession permit term to allow for flexibility for the department and the permittee.

In the public comments from the Proposed Decision many individuals stated that GCP concessions should be transferable. Individuals regard the concessions as business investments and in order to maximize their economic return, they believe that they should be able to sell their investment at the end of their use period. However, the transferability of EGAs, combined with their unlimited duration, was an attribute rejected by the court in *Owsichek*.