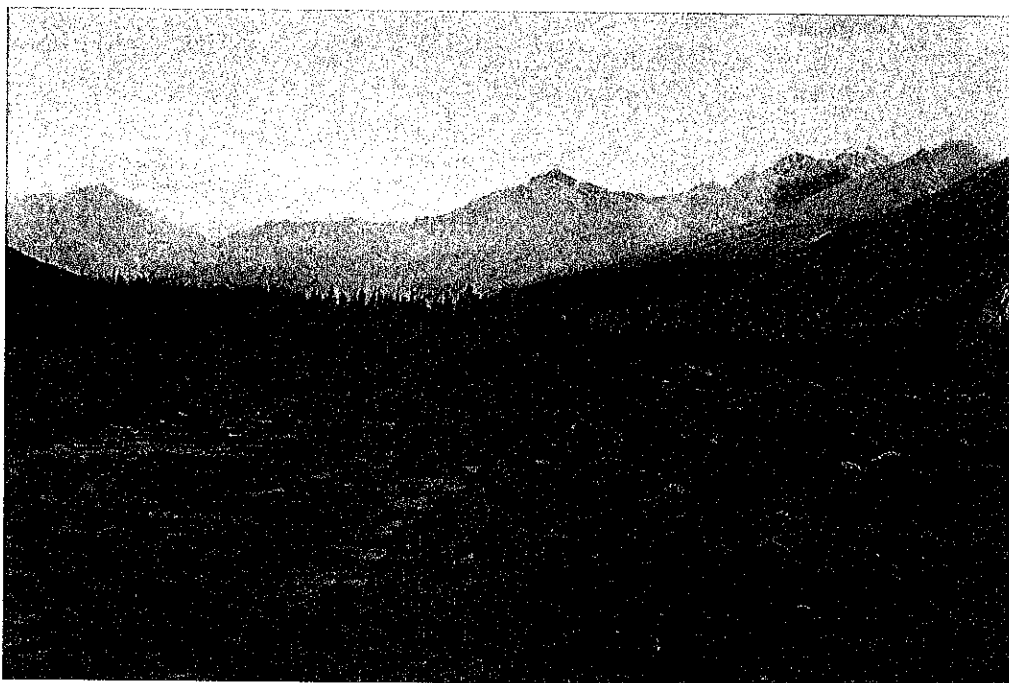


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Proposed Decision: Guide Concession Program

ADL 230869



February 15, 2012



**State of Alaska
Department of Natural Resources
Division of Mining, Land and Water**

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STATE OF ALASKA
Department of Natural Resources
Division of Mining, Land and Water
PROPOSED DECISION
GUIDE CONCESSION PROGRAM
ADL 230869

PROPOSED ACTION

Article VIII (Natural Resources), Section I of the Alaska Constitution states, "It is the policy of the State to encourage the settlement of its land and the development of its resources by making them available for maximum use consistent with the public interest." The Department of Natural Resources (DNR), Division of Mining, Land, and Water (DMLW), has been asked and has received letters from the Alaska Board of Game (BOG), the Big Game Commercial Services Board (BGCSB), and from members of the guiding industry to consider the development of an area based allocation system for commercial big game guides on state land. DNR is proposing a Guide Concession Program (GCP) that will competitively select qualified individuals to conduct big game commercial guiding on state land. The program's allocation process would involve qualified individuals submitting an application with supporting documentation to the DMLW Lands Section, which would then be reviewed and scored by a panel of agency personnel. Concessions would be awarded and managed by DMLW. A concession would grant access to the land within a guide concession area and permit commercial big game guiding. This program does not address any other commercial or private entities or any other non-participating landowners.

DMLW is currently working with the Bureau of Land Management (BLM) and DNR, Division of Parks and Outdoor Recreation (DPOR) on the potential of implementing the GCP on their lands. DMLW has conducted agency meetings with both landowners and is working towards Memorandums of Understanding that would outline how the GCP would apply to their lands. BLM staff has expressed interest and support of the GCP and are reviewing what its implementation on BLM land would require. DPOR staff are in the same process. If the GCP is implemented on these lands, it may be that only the concession permittees will be able to operate on BLM and DPOR lands.

SCOPE & AUTHORITY

Scope: This proposed decision is solely applicable and limited to the GCP in accordance with AS 38.05.035(e)(1)(A)(B), which is a subset of the power and duties of the director that applies to approving contracts and limiting the scope of administrative reviews and findings.

Administrative Record: Case file ADL 230869 constitutes the administrative record for the Guide Concession Program.

Authority: This proposed action will be authorized pursuant to: AS 38.05.020, Authority and duties of the commissioner, AS 38.05.035, Powers and duties of the director, and AS 38.05.850, Permits.

Location: This proposed decision will affect all tentatively approved and patented general state lands statewide. Memorandums of Understanding are currently under consideration between DMLW and BLM and DPOR to apply the GCP to those agency's lands.

Responsible Agency: The primary agency with direct management and responsibility of all general state lands is the DNR, DMLW. Under direction from the Commissioner, the DMLW manages both general and special use state lands within Alaska and has direct management responsibility for over 100 million acres of uplands, as well as state managed tidelands, submerged lands, and shorelands. The DMLW is directly responsible for accomplishing department and divisional missions within the State of Alaska.

BACKGROUND, PROBLEM STATEMENT, DISCUSSION, & ALTERNATIVES

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 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 DNR (land management), Department of Commerce, Community & Economic Development (DCCED) (licensing), and the Alaska Department of Fish and Game (ADF&G) (wildlife management). The two regulatory boards are the 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 – Land Management

DNR is tasked with managing state lands in public trust for the benefit of all Alaskans and is authorized under Alaska Statute, Title 38, Public Land. As the landowner, it falls to DNR to manage and regulate the use of state lands. Currently, this is accomplished through the regulations of, "Generally Allowed Uses of State Land," and by a permitting or leasing process. The permits that big game guides can apply for include: Commercial Recreation Permits (CRPs), Land Use Permits (LUPs), and Leases. Each of these authorizations for the use of state land has a set of stipulations, fees, and regulations that go with them. Other requirements include Commercial Recreation Registration, which is a registration system that allows DNR to track the commercial use of state land by all industries. There are no limitations on the number or type of authorizations a guide may apply for and hold, as long as they are in good standing with DNR

and are current on their professional licenses. DNR has no enforcement authority for their authorization system.

DCCED- Professional Licensing

The mission of the DCCED, Division of Corporations, Business and Professional Licensing (CBPL) is to ensure that competent, professional and regulated commercial services are available to Alaska consumers. The DCCED is authorized under the Centralized Licensing Statutes AS 08.01-03. Within the DCCED is the licensing section, CBPL, which currently issues all of the professional licenses that big game guides must have in order to operate. The CBPL also has an Investigations section that reviews and investigates complaints concerning violations of the Statutes and Regulations that govern professional and business licenses. Investigations may include: fraud, malpractice, negligence, misconduct, ethics, and noncompliance of various licensing provisions. Under AS 08.01.087, the department has the authority to investigate and enforce the statutes and regulations under its jurisdiction.

Big Game Commercial Services Board (BGCSB) – Governing Big Game Guiding Industry

The Big Game Commercial Services Board is staffed by the Division of Corporations, Business and Professional Licensing. The BGCSB's authority is within AS 08.54.591 – 680, Big Game Guides and Transporters and the board also falls under the Centralized Licensing Statutes AS 08.01 - 03. Board members are appointed by the Governor and confirmed by the Legislature. The Big Game Commercial Services Board consists of two licensed Registered Guide-Outfitters, two licensed Transporters, two private landholders, two public members, and one member from the Board of Game. In the interest of the state's wildlife resources, the BGCSB adopts regulations governing the big game commercial service industry in Alaska. These regulations include the methods and fees for obtaining a guide license, the definitions of unlawful acts, requirements for hunt records, and the establishment of professional ethics standards for guides.

The Board works with the Department of Law and the CBPL investigations section and makes final licensing decisions and takes disciplinary actions against big game guides and transporters who violate licensing laws. The BGCSB meets twice annually, once in December in Anchorage and once in March in Fairbanks, though additional meetings may be called throughout the year as needed and may be by teleconference.

ADF&G – Wildlife Management

The basic mission of ADF&G is to protect, maintain, and improve the fish, game, and aquatic plant resources of the state. The Division of Wildlife Conservation (DWC) is the section of ADF&G that deals directly with all aspects of wildlife management and their mission is to conserve and enhance Alaska's wildlife and habitats and provide for a wide range of public uses and benefits.

The DWC has four core services and they are:

- population assessment and applied research
- harvest management and harvest information
- wildlife information, education, viewing, and permitting
- habitat enhancement and management

ADF&G is authorized under Alaska Statute, Title 16, Fish and Game.

The core service related to guiding is the harvest management and information service. Under this, DWC is tasked with maintaining and enhancing the harvest of wildlife resources for subsistence and general use, as well as commercial purposes such as guiding and trapping, according to plans and regulations. They also maintain and administer databases on hunting-related lotteries, drawings, scoring, and allocation. ADF&G works closely with the BOG and provides the biological and harvest information the BOG uses in consideration of regulatory and allocative decisions.

Board of Game – Wildlife Conservation, Development, and Allocation

The Board of Game consists of seven members serving three-year terms. Like the BGCSB, members are appointed by the governor and confirmed by the legislature. Members are appointed on the basis of interest in public affairs, good judgment, knowledge, and ability in the field of action of the board, with a view to providing diversity of interest and points of view in the membership (see Alaska Statute 16.05.221).

The Board of Game's main role is to conserve and develop Alaska's wildlife resources. This includes establishing open and closed seasons, areas for taking game, setting bag limits; and regulating methods and means. The board is also involved with setting policy and direction for the management of the state's wildlife resources. The board is charged with making allocative decisions, and the Department of Fish and Game is responsible for management based on those decisions. The Board of Game's statutory authority to adopt regulations is described in AS 16.05.255. The regulations they create can be found under 5 AAC Chapters 84, 85, 92, and 99.

The board meeting cycle generally occurs from October through March. The board considers changes to regulations on a region-based schedule with every region being considered every two years. Board of Game meetings vary in duration from 5 to 11 days and occur in communities around the state. The board may also meet due to a court action, legislation or an emergency situation. The board uses biological and socioeconomic information provided by the Alaska Department of Fish and Game, public comment received from people inside and outside of the state, and guidance from the Alaska Department of Public Safety and Alaska Department of Law when creating regulations that are sound and enforceable.

Summary

The guiding industry has three agencies and two boards whose actions and management impact their activities. 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 CBPL 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 within 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 visiting sportsmen and women. 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 non-resident and non-resident alien hunters averaged over \$5,000,000¹ per year from 2001 to 2010. Big game guiding not only contributes to the state's economy, but state law also requires that non-resident 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. 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 mountain goats), and they also tended to be unfamiliar with Alaska's complicated game laws, as compared to state residents."²

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."³ 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, the board had extended the program and decided to grant EGAs to qualified guides anywhere in the state.

The Owsichuk Decision

This system of EGAs was found unconstitutional by the Alaska Supreme Court in 1988, in what is commonly known as the *Owsichuk* Decision. 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, stating the EGAs were:

¹ *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>

² *2002 Op. Alaska Att'y Gen (Apr. 25)*

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

- 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 were not based on wildlife management concerns
- Provided no remuneration to the state
- 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 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 *Owsichuk* 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 implement such a new program, should it be found viable.

DMLW staff, working with the Department of Law (DOL), concluded that the department does have sufficient authority to create and manage a program that distributes big game guiding use of state lands. With monetary support from the Legislature, the department has committed to developing the necessary elements of a new guide concession program.

The first drafts and concepts of what a DNR led program could look like were published and presented to the public in a White Paper and other supporting documents in December of 2009. This scoping effort was intended to get feedback from the public, other agencies, and members of the guide industry. Informational meetings were held in Anchorage, Fairbanks, Juneau, Tok, Dillingham, Kodiak, and Kotzebue. In order to give industry members who live outside of Alaska a chance to contribute, a meeting was also held in Little Rock, AR, in conjunction with the Western States Land Commissioner Association meeting. The public and agency comment period was open from December 8, 2009 through March 31, 2010. Comments generated during this time period have been considered in the formulation of this proposed decision. DMLW responses to these comments are in Appendix A, with the information organized by topic and issue. Many of the comments received resulted in changes

to the proposed program and an extensive review and edit of the scoring criteria and guide concession maps.

Problem Statement

Currently there is no process by which commercial use of state land is allocated among big game hunting guides and there are no limits on the number of DMLW authorizations a guide can have on state land. This method of management has led to overcrowding and overutilization in some areas and underutilization in others. A number of related issues have been identified by members of the guide industry, the Big Game Commercial Services Board, and the Alaska Board of Game, including: a decreased incentive to practice wildlife conservation, decreased quality of experience for guided clients, conflicts between user groups, an overall lack of land stewardship, and difficulties in enforcing game laws. The Commissioner of DNR has been asked, as the manager of state lands, to consider, develop, and propose a program that would address these issues. The management and distribution of these commercial uses may reduce overall participation by licensed guides and for that reason it is also important to consider the issues brought forward in the 1988 Alaska Supreme Court ruling, *Owsichek v. State of Alaska*, which found a system of exclusive guide areas unconstitutional.

DNR may not be able to effectively address all of the issues noted but the management of commercial uses of state land for big game guiding connects into DNR's overall mission to manage state lands for multiple use and for the maximum use and benefit of Alaskans. DNR has and continues to consult with other agencies during the development of this program, including: ADF&G, DCCED, DPOR, DOL, and BLM. The mission of the GCP program is to encourage land stewardship, support wildlife conservation, and to promote a healthy guiding industry to benefit the people of Alaska.

Discussion

What follows is an in-depth discussion of the GCP. If this program is not implemented for any reason, including a lack of funding, there are currently no other DMLW proposed changes to existing state permitting or leasing processes affecting the big game guiding industry.

The GCP is an effort by DMLW to propose 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 public scoping process. 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 DMLW 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 a segment of the guiding industry that does not take wildlife conservation into consideration when planning out the number of clients they take or the number of hunts they plan and offer. The GCP addresses this issue in the Scoring Criteria in several ways. First of all, applicants are given credit if they can demonstrate how they have conserved wildlife and minimized their impacts to wildlife resources (Criteria 2). In that same Criteria, applicants are also given credit for tracking wildlife populations, using wildlife population factors to determine how many clients they will serve, demonstrated meaningful communication with wildlife managers, and for participating in state sponsored predator control efforts. Second, in Criteria 3, 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 contract.

Loss of quality of experience

DMLW 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 DMLW 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 that GUA (see the Guide Concessions – Mapping section below, for a full discussion on the number of concessions per area). 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 three assistant guides and those operating limited concessions are allowed only one assistant guide, again resulting in fewer personnel in the field. To address services and support to clients, the Scoring Criteria asks that applicants 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 Scoring Criteria requires applicants to demonstrate their stewardship principles and has a section that deducts points for violations, citations, convictions, and default history.

Conflicts between user groups

One of the issues identified by the BOG is that there are conflicts between guides and residents 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. The GCP Scoring Criteria addresses this issue in several ways. In Scoring Criteria 1, Sub-factor B, applicants are required to describe how they train their employees and educate clients on local customs, traditions, and courtesies. Criteria 3 asks applicants to document how their business practices demonstrate cooperation with local communities. They also have to describe their methods of handling conflicts with other user groups. The solution offered by the GCP is to reward those guides and businesses that respect other users and identify and address conflicts between users.

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. DMLW is very familiar with these issues and has addressed them when possible. However, DMLW does not have enforcement authority and cannot issue citations for permit non-compliance or trespass issues. The GCP addresses land stewardship through the scoring criteria and through the program design and restrictions. Scoring Criteria 1 through 3 all have questions that directly pertain to land stewardship, such as awarding points for past land use authorization performance, requiring applicants to provide documentation of previous land stewardship activities, and asking applicants to provide a plan for the future of the area they plan to operate within. There is also a question in Scoring Criteria 4 where points will be lost by applicants who have been in non-compliance or default with any public land agency. The GCP will also seek limited enforcement authority over program regulations.

Owsichek Decision

There are four main reasons that the earlier EGA program was found unconstitutional and in violation of the common use clause of the Alaska Constitution. They are enumerated and discussed 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.

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 board based their assignments of EGAs on use, occupancy and investment (see reason number one).

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.

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 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, the design of the fee structure, and permit stipulations and terms. Each of the *Owsichek* deficiencies and the GCP solutions are further elaborated upon below.

I. Competitive Bidding, Entrance of New Guides to the Industry & Exclusivity

In the first 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 variety of subjects. The GCP is designed to select qualified individuals for each concession and the process proposed is a competitive one.

DMLW 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 compete for a concession and that we have a fair competitive process for all sizes of operations. Another concern stated in the *Owsichek* decision is that the original Exclusive Guide Areas (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, DMLW 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 and a full discussion of those details can be found beginning on page 21.

The original EGA system of area allocation gave guides exclusive use of the assigned area. This is one 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. 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 34 GCAs (11% of the total) having only one concession offered due to a combination of: a lack of state land, a record of few contracted hunts, low numbers of guides registered for the area, or from the identification of a biological issue. Even though only one concession is offered, the program as proposed addresses all of the other concerns the court had with EGAs.

II. *Wildlife conservation*

The development process of the GCP has relied heavily on the cooperation and involvement of ADF&G, DWC. ADF&G has been engaged in program design discussions and will be directly involved in the program as it is implemented. ADF&G biologists have reviewed the GCP maps and have provided feedback on area wildlife populations and have assisted DMLW 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 criteria 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 concession numbers and will be able to add or subtract opportunities where necessary to assist ADF&G in meeting management goals.

III. *Remuneration to the state*

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 provided. As designed the GCP is

expected to generate sufficient revenues to not only pay for all costs associated with the administration of the program, but provide additional revenue back to the state. See the detailed discussion of the fee structure under: Fee Structure, page 17.

IV. Unlimited duration and the lack of other contractual terms and restrictions and transferability

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 authorizations will be staggered so that approximately one third of them are authorized for four years, one third for seven years, and one third for 10 years. Once that initial stagger is complete, all concessions will be authorized for 10 years and subject to review and renewal at five years. The renewal at five years is not automatic or competitive but is 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 awarded will consist of an authorization between DMLW and the recipient. The authorization will have terms and conditions, such as payment schedules, annual reporting requirements, and if appropriate, may also incorporate terms from the applicant's proposed operating plan. DMLW reserves the right to eliminate, add or otherwise change any stipulations of an authorization at any time during a concession term.

There were several public comments stating that the 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, DMLW and the Department of Law do not view a concession as a conveyance of interest in state land; concessions are not a "right," to an area that can be transferred or sold. Instead they are grants of access to state land for the purpose of commercial use and they must be competed for by interested parties. In the *Owsichek* decision, the buying and selling of EGAs like they were property rights was determined to be an unconstitutional, monopolistic attribute. GCP concessions will not be transferable.

Alternatives

The GCP is the course of action that DNR is proposing in order to address the issues brought to our attention. However, there are a number of possible alternatives to the GCP that address some of the problems, each to varying scope and degree. Five alternatives that we considered are beyond the authority of DMLW/DNR and would fall to other agencies or boards to implement. Four of the alternatives considered, including the null, or change nothing alternative, fall under DMLW authority and are evaluations of the different ways in which the GCP could be implemented. These alternatives are not exhaustive but are several of the options that have been identified through public comments and agency discussions. The full evaluation of these alternatives is in Appendix B.

PROGRAM DESIGN

Application Process

To Apply

Each person wishing to apply for a concession will be required to meet a set of minimum requirements and submit an application that includes an application fee, the responses to Forms A-D of the Scoring Criteria, and all supporting documents (hunt records, violation reports, criminal history, etc). Applications will be received by mail or hand delivery to DMLW and must be submitted by the published deadline. Submissions must be made in hard copy and in a digital .pdf format. In the initial implementation of the program, applicants may apply for and be awarded up to two concessions. This is to reduce the administrative burden of reviewing and scoring applications during the initial phase when the program is implemented statewide. In future offerings, applicants may be able to apply for additional concessions.

Minimum Requirements

In order to be considered for a concession, applicants must meet several minimum requirements. First, they must have a current state of Alaska business license. Second, they must be a current master or registered guide in good standing with the CBPL and the BGCSB (applicants with suspended licenses or who are on probation due to disciplinary actions are not eligible to be awarded a concession). Third, they must be certified to conduct hunts in the Game Management Unit (GMU) that the concession area they are applying for falls within. Fourth, applicants must be in good standing on any land use authorizations with DMLW, DPOR, and BLM. Good standing includes at least that the applicant, for the land owners above, is not currently in trespass status and is not delinquent on any fees owed. Fifth, applicants must be registered for Commercial Day Use Activity on state land if applicable. Lastly, the applicant must provide proof of current commercial liability insurance.

Scoring Process & Evaluation Panel

Once the application deadline closes, all of the applications will be reviewed to ensure that the minimum requirements are met and that the application is complete, with all supporting documentation. The applications will then be grouped by concession area and type of concession applied for (full or limited, see page 21). The full and limited concession applicants will be scored and considered separately. The scoring of applications will be conducted by an evaluation panel of agency personnel. There may be more than one panel, representing different regions of an agency's jurisdiction. Panel participants may be employees of: DNR, ADF&G, DCCED, Department of Law, Department of Public Safety (DPS), and the BLM. The panel(s) will use a standardized scoring system when reviewing and scoring applications. The review panel members and the scoring standards will remain confidential.

The evaluation panel will select the highest scoring applicant(s) based on the scoring criteria (see Appendix D) and points are awarded out of a maximum of 300 points. In order to be

awarded a full concession, applicants must earn a minimum score of 230. Applicants will be scored on their responses to Forms A-D of the Scoring Criteria, except for that subset of limited concession applicants where only Form A, Sub-Factor A, and Form D are required (Limited Scoring and Award Alternatives 1 and 3, see page 23). The members of the evaluation panel will score each application independently and the average of these scores will be used to determine the score for each individual scoring criteria. For example, an applicant will receive a score from each panel member on Form A. All of those scores will be averaged together and that will be the final score for Form A. The sum of all of these average scores for all forms, minus the averaged deductions from Form D, will be the applicant's final score. Concessions will be offered to the highest scoring applicants within each GCA and according to the number and type of concessions offered. See the discussion of Full and Limited Concessions for a description of concession types, beginning on page 21. If a concession offer is not accepted, the next highest scoring applicant will be considered eligible for an offer.

Ties in scores for the same concession area and type will be settled in the following manner:

1. If a concession area has more than one available concession and the two highest scores are the same, both applicants will be offered a concession.
2. If a tie occurs between applicants and there are not enough concessions to make an offer to all applicants with the same score, the tie will be broken by the scores on pre-determined questions from the scoring criteria. DMLW will determine which questions are the tie-breakers prior to the panel(s) reviewing of any applications. The applicant who had the highest combined score on the pre-determined questions will be offered a concession.
3. If a tie has occurred on the combined scores of the pre-determined questions, then the winning applicant will be selected by lottery.

Once the scores have been determined for all GCAs, the results will be published in a single notice sent to all applicants statewide. Individual applicants may request their complete scores but only the total scores of concession winners will be published. The results will be published on the DNR Guide Concession website and letters will be sent to all applicants.

Once concession winners are published, applicants may file an appeal of the results within twenty days of the publication. An applicant may only appeal the results for a concession area and type that they applied for. The appeal process does not stay the implementation of the concession awards.

Fee Structure

There were many public comments received regarding fees and the GCP. Comments were made on several financial aspects of the proposed program, including comments related to the previously proposed bid, to the economic feasibility of the whole program, to whether or not a guide would be able to afford to operate, and to loss of revenue to the state. All comments

were considered and several changes to the fee system were made as a result, including the removal of a bid and an increase of the per client fee.

All fees amounts mentioned below are not final and are presented for the purposes of this proposed decision. The goals of the GCP fee structure are to cover the cost of the GCP and provide a reasonable return to the state. DMLW will be requesting that all fees will be solely program receipted to the GCP and not to the state's general fund. All of the final fee amounts will be established in regulation, following the Final Decision for this program. The proposed fees for the GCP are as follows:

1. Application Fee: Every application must be accompanied by a proposed \$250 application fee. This fee is to cover the administrative costs for handling and preparing applications for the evaluation panel(s).
2. Annual Fee: All concession holders will be required to pay an annual fee for the duration of the concession permit. This fee will be based upon the actual program cost of running the GCP, including: staff salaries, administrative costs, calculated loss of revenue from decreased permit fees, inflation proofing for the program and accounting for concession vacancies. Currently, the annual program cost is estimated at \$1,000,000.00. The annual fees for full and limited concessions are different due to the level of administrative costs for each permit type. The proposed annual fee for full concessions (215 offerings) is \$4000.00 and is \$2000.00 for a limited concession (85 offerings) based on the preferred scoring option. See discussion of Limited Concession Scoring and Award Alternatives on page 23.
3. Client Fee: There is a proposed per client fee assessed annually. These fees would apply to both resident and non-resident clients. The proposed client fee is \$750 per client for those species that require a guide for non-residents (brown bear, Dall sheep, mountain goat) and \$500 per client for all other species. This fee is per client/per contracted hunt only, no matter the number of animals pursued by that client within that contracted hunt. For example, if a client is pursuing a brown bear and a Dall sheep, the client fee is \$750 for that contracted hunt. If a client is pursuing a brown bear and a moose the client fee is also \$750 for that contracted hunt. If a client is pursuing a moose and a caribou the client fee is \$500 for that contracted hunt.
4. Liability Insurance: Per 11 AAC 96.065, concession holders shall secure, and maintain in force, insurance during the term of the authorization.
5. Bonding: After consideration of the potential risk to the state, per 11 AAC 96.060(a), the department may require bonding for GCP concessions. Bonds for any other authorizations such as land use permits or leases will still be necessary.

Concession Authorizations

The initial concession offerings will be staggered. All of the concessions in the state will be offered in the first year but one third of those will be authorized for four years, one third for seven years, and one third for 10 years. At the end of the four and seven year terms, the next concessions offered for those same areas will be authorized for 10 years. This means that once the first concession period is complete, all of the concessions statewide will be authorized for 10 years.

DMLW has decided to make the initial three GCA groups by using the existing ADF&G Regions. ADF&G divides all of their Game Management Units (GMUs) into Regions I, II, III, IV, and V. The first group, where the initial concessions will be offered for four years, will consist of all GCAs that fall within Regions I, II, and V (approximately 66 concessions). The second group, whose initial concession duration will be seven years, will be all GCAs in Region IV (approximately 118 concessions). Finally, the last group will be all GCAs in Region III (approximately 116 concessions) and the concessions will be for 10 years. These groupings were made based on the number of concessions that fell within each ADF&G Region.

Once the results of the scoring process have been published, those applicants offered a concession will have 45 days to sign a permit with DMLW, agreeing to the terms of the concession. Authorizations will be binding and at the minimum will be subject to the following:

1. Authorizations and/or concessions will not be transferable.
2. There will be annual requirements that will include but are not limited to: an annual report, insurance, client fees, commercial recreation day use registration, and an annual concession fee.
3. Authorizations will be revocable and are subject to review and renewal at year five of the 10 year authorization. The renewal is not guaranteed but will be non-competitive. Revocations may be appealed.
4. Where appropriate, the answers that pertain to what the applicant is proposing to do for the next 10 years, given in Scoring Criteria 3, Sub-Factor D, Operations Plan, will be incorporated into the stipulations and terms of the final contract. These terms will be amendable.
5. All other land use authorizations must be current and remain in good standing.
6. Concessions must be used; the holder of a concession is required to conduct big game guiding activity unless there is a land or wildlife conservation concern. Concessions where hunts are not conducted may be subject to revocation for non-use.

Concession Vacancies

There are several cases where concessions may go vacant. The first case is if a concession that is offered does not get applied for. For instance, one GCA may have two full concessions

offered and only one application is received. In this instance, the vacant concession will be offered again in the next scheduled offering.

The second case is if a full concession is awarded that falls vacant for any reason (e.g. death, default, revocation) within the first year of the authorization, it may be offered to the next highest scoring applicant from the previous scoring results. In the case of a limited concession, vacancies in the first year will be awarded either to the next highest scoring applicant or by lottery, according to the original award method. If vacancies occur after the first year, the concession will be offered at the next scheduled offering, which should occur every three years once the stagger period for concessions is complete (see Duration, page 22).

Partnership with BLM and DPOR

BLM and DPOR are potential partners in the GCP. If those land managers decide to commit to the GCP, all hunting guides who wish to operate on their lands will need to show that they hold the applicable GCP concession authorization. In addition, there may be other authorizations, stipulations and fees that these landowners may require of concession holders in order to operate.

Guide Concession Areas - Mapping

History

The original guide concession map areas and numbers were drafted during a BGCSB Board Meeting in March of 2008 and input was received from all meeting attendees. The BGCSB then approved these maps and forwarded them to DMLW as proposed GCAs. The resulting maps were published during the 2009 - 2010 GCP public comment period along with all other information pertaining to the proposed program. Comments received during that review were categorized by topic and issue and the maps were adjusted to reflect many of the concerns and issues raised (See Appendix A).

In addition to adjusting the maps based on public comments, DMLW staff reviewed the proposed areas and numbers of guides based on data obtained from DCCED. DMLW requested the following:

- Number of licensed assistant, class A assistant, registered, and master guides in 2009 & 2010
- Number of guides registered for each Guide Use Area (GUA) for 2009 & 2010
- Number of actual contracted hunts by GUA 2009 & 2010
- Number of contracted hunts per guide 2009 & 2010 (names or guide license # not required or needed)
- Number of clients broken down by type of species taken 2009 & 2010

- The same historical information for the operating years of 1990 & 2000

We received the requested data on June 9, 2011 with an exception of data from 1990, which was unavailable (Appendix C).

Decision Process

After reviewing the data received from DCCED, DMLW staff re-considered the map concession boundaries, the number of concessions within each GCA, and the proposed full and limited types of concessions. Several adjustments were made and it was decided to implement the two types of concessions. It was also decided, to ensure a fair and competitive experience for both the guide and client, that all areas with more than 5,000 contiguous acres of state land would have at least two concession opportunities. There are a few GCAs that have only one concession offered due to a combination of: a lack of state land, a very low number of contracted hunts, low numbers of guides registered for the area, or from the identification of a biological issue.

Another factor considered was that BLM and DPOR have shown interest in joining in the department's efforts in establishing the GCP. The interest of BLM and DPOR increases the amount of land guides could access in each area and therefore the number of offered concessions should reflect the increased acreage. In cases where the number of hunts conducted was large, concession areas with large amounts of BLM or DPOR managed lands were given an increased number of opportunities tentative to BLM & DPOR signing a Memorandum of Agreement with DMLW.

In addition to internal DMLW review, ADF&G Area Biologists were given the GCA maps to review. DMLW requested that the biologists review the number of proposed concessions within each GCA and provide feedback related to biological population information for the area and any known social issues or conflicts. The maps were also provided to BLM and DPOR staff for review. The agency comments were reviewed by DMLW staff and final adjustments to the maps were made.

GCA concession numbers will be flexible. In cases where there is a biological issue identified by ADF&G, the number of full or limited concessions can be amended to address concerns. The process for amending concession numbers in response to biological issues will involve ADF&G personnel and potentially the BOG if allocation of wildlife resources is involved. Concession numbers may also be amended by DMLW if the need arises to address land stewardship or other concerns.

Guide Concession Areas - Types of Concessions

The Full Concession

The full concession is the primary type of concession that will be offered. Full concessions will consist of the following:

General Terms

1. Access is granted to general state lands within a designated Guide Concession Area for the purpose of conducting big game guided hunts.
2. On DMLW lands: the ability to utilize short term portable camps within the same concession area for periods of up to 14 days in one location. Stipulations similar to those in the existing Commercial Recreation Permit (CRP) will apply. Other participating agency lands are subject to those agency's permitting requirements.
3. Access to other agency lands such as BLM and DPOR may be granted with additional authorizations from the landowner.

Restrictions

1. Full concession holders will be allowed up to three assistant guides per concession. These may be assistants with any class of license including master, registered, class-A, or assistant guides. There are no limits on employees or staff that are not required to hold a professional license by statute (AS 08.54.605 – AS 08.54.640). Examples of these types of staff include, but are not limited to: camp-host, packer, or cook.
2. If a base camp of longer than 14 days is desired, the concession holder will be required to obtain the appropriate land owner authorization and will be subject to each agency's or landowner's regular permitting process and fee structure. There is no limit on the number of base camps or authorizations that a full concession holder may apply for.

Duration

1. There will be a review and renewal at five years required on the seven and 10 year concessions in their first term and then on every concession thereafter. The review will consist of a records check for compliance with the concession permit stipulations and program regulations and a check for any changes in violation history. If the concession holder is in good standing and wants to continue the permit, a renewal for the second five years will be issued non-competitively.

The Limited Concession

The limited concession is the secondary type of concession that will be offered and there are approximately 85 statewide. In order to address the concerns of smaller operators and to allow entry to new guides, DMLW is considering three alternatives for what method will be used to award the limited concession opportunities. The general terms and the duration of the

concessions are the same for all of the alternatives and are the same as those listed above for full concessions.

Restrictions

1. Limited concession holders will be allowed one assistant guide per concession. There are no limits on employees or staff that are not required to hold a professional license by statute (AS 08.54.605 – AS 08.54.640). Examples of these types of staff include, but are not limited to: camp-host, packer, or cook.

Limited Concession Scoring and Award Alternatives

Alternative 1: Minimum Score and Lottery Draw

The first award alternative is to require applicants to reach a minimum score of 35 in order to be eligible for a concession. All applicants meeting the minimum score would then be placed into a random lottery draw for the concession of interest. The minimum requirements that applicants would be scored on would be the same as found on the application cover sheet for full concessions and applicants would also be required to complete Sub-Factor A of Form A and all of Form D, Violations, from the scoring criteria. DMLW proposes that the minimum score to enter the drawing is a 35 (there are 45 points total available from Sub-Factor A). This ensures that any guide applying for a limited concession meets the basic requirements to be a contracting guide and can demonstrate knowledge and experience in the area for which they are applying. The lottery draw ensures that all qualified applicants have an equal chance at winning a limited concession.

Alternative 2: Highest Scoring Applicants

The second alternative for awarding limited concessions is identical to the method of awarding a "Full Concession," as outlined above, The Application Process. All applicants will submit applications addressing Forms A-D and the highest scoring applicant(s) will be awarded the concession. The sole use of this method of award may limit the ability of guides new to an area to compete for a concession.

Alternative 3 (Preferred): Combination of Lottery and High Score

This alternative for awarding limited concessions is to have a combination of Alternatives 1 and 2. There are approximately 85 limited concessions offered statewide and roughly half would be awarded to the highest scoring applicant and the other half by a lottery of those applicants meeting the minimum score of 35. It is intended that the determination of which limited concessions are awarded by score or lottery will result in an even distribution statewide. By using both systems to determine limited concession winners, DMLW is able to address both the concerns of smaller operators and the problems brought up in the *Owsichek* decision with the previous EGAs.

ENFORCEMENT:

For the GCP to be administratively feasible, DMLW must be granted limited enforcement authority over the program. This means that DMLW must be given citation authority over regulations specific to the GCP.

Currently DMLW can monitor commercial recreation operations on state land (including hunting camps) but has no citation authority on those lands. Citation authority is an indispensable tool in helping to create compliance with applicable land use regulations and permit stipulations. Citations would only be issued under the regulations developed specifically for the GCP.

LEVELS OF APPEAL:


The final decision to implement the program, or not, will be appealable by interested parties. Subsequent decisions about scoring and awarding concessions, if any, will be appealable and addressed more specifically during the regulations drafting process. All initial appeals will be to the Commissioner of the Alaska Department of Natural Resources. Appeals will not stay the implementation of the program or the awarding and operation of concessions.

PROPOSED DECISION

Recommendation

Managing big game guiding activity on state lands in accordance with the guidelines and management set forth herein will help to encourage sound wildlife conservation, good stewardship of lands, reduce user conflicts, increase the quality of experience for all involved, and promote a healthy guiding industry to benefit the people of Alaska. After consideration of the Guide Concession Program and other alternatives brought to the division's attention, DMLW finds the proposed GCP, as outlined above, to be consistent with the Department of Natural Resources management authority and is in the best interest of the state.

I find this decision is consistent with applicable state laws, agency regulations, department policies and management authority and is in the best interest of the state.



Date: 15 FEB 2012

Brent Goodrum
Director, Division of Mining, Land, and Water
Department of Natural Resources

THE PROCESS & NOTICE

Agency Review: Agency review will be concurrent with public review.

Public Review: Public review will begin February 15th, 2012 and end April 23rd, 2012. There will be three public meetings held during the comment period, one in Anchorage, Juneau, and Fairbanks, locations and times to be announced. Please check the program website regularly for all information updates and meeting times, locations, and dates.

Comment Process: During this open public review process comments may be submitted until 5:00 pm on April 23rd, 2012. To be considered comments must be in writing and timely submitted. DNR has created a project website, <http://www.dnr.alaska.gov/mlw/gcp/>, where documentation may be reviewed, and comments may be submitted. Comments may also be submitted in writing, email or fax to:

State of Alaska
Department of Natural Resources
Division of Mining, Land and Water
Attn: Guide Concession Program
550 W. 7th Ave., Suite 900C
Anchorage, AK 99507
Email: dnr.mlw.gcp@alaska.gov
Fax: (907) 269-8913