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August 30, 1990

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Outfitters and Guides Licensing Board
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THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE
ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE

RE: Scope of Statutory Authority for Rule Making
AG Ref. No. 08056

Dear Mr. Sangrey:

This informal guideline is in response to your inquiry
submitting the following questions:

1. Does the Licensing Board have the statutory
authority to issue outfitter and guide licenses for the
conduct of bicycle touring activities?

2. Does the Licensing Board also have the
statutory authority to require safety inspections of
outfitter vehicles as part of the licensing procedures?

3. The Legislative Council has recommended that
a proposed addition to the Board's Rules and
Regulations establishing guidelines for guide
qualifications and training, and the conduct of bicycle
and mountain bike touring activities, be stricken from
the proposed rules package because, in their opinion,
the Board does not have the authority to promulgate
such rules. If this, in fact, is found to be the case,
what effect would this position have on the mountain
bike touring outfitter licenses that have previously
been issued by the Board and are currently active?

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CONCLUSIONS:

1. Yes. The term "hazardous desert or mountain excursions" contained in Idaho Code Section 36-2102(b) appears to be broad enough, and was intended, to allow the Idaho Outfitters and Guides Licensing Board ("Board") to address a variety of recreational activities conducted by outfitters and guides.

2. Yes. The Board is expressly authorized to prescribe rules and regulations concerning the condition and type of gear and equipment used by outfitters and guides. I.C. § 36-2107(b).

3. See 1. and 2. above. Because the Board appears to have statutory authority to license these activities, the currently issued mountain bike touring outfitter licenses remain valid.

ANALYSIS:

1. The determination of whether the Idaho Outfitters and Guides Licensing Board has the statutory authority to license bicycle touring activities requires an analysis of the Outfitters and Guides Act ("Act"), and the Board's Rules and Regulations. The legislative intent of the Act is set forth in I.C. § 36-2101:

The intent of this legislation is to promote and encourage residents and nonresidents alike to participate in the enjoyment and use of the deserts, mountains, rivers, streams, lakes, reservoirs and other natural resources of Idaho, and the fish and game therein, and to that end to regulate and license those persons who undertake for compensation to provide equipment and personal services to such persons, for the explicit purpose of safeguarding the health, safety, welfare and freedom from injury or danger of such persons, in the exercise of the police power of this state.

Notably, this statement of intent is not limited to the conduct of any particular activity.

The definitions of "outfitter" and "guide" set forth in I.C. § 36-2102 do address types of outdoor recreation activities suitable for licensing:

(b) "Outfitter" includes any person who, while engaging in any of the acts enumerated herein in any manner: (1) advertises or otherwise holds himself out to the public for hire; (2) provides facilities and services for consideration; and (3) maintains, leases, or otherwise uses equipment or accommodations for compensation for the conduct of outdoor recreational activities limited to the following: hunting animals or birds; float or power boating on Idaho rivers and streams; fishing on Idaho lakes, reservoirs, rivers and streams; and hazardous desert or mountain excursions....

(c) "Guide" is any natural person who is employed by a licensed outfitter to furnish personal services for the conduct of outdoor recreational activities directly related to the conduct of activities for which the employing outfitter is licensed....

(Emphasis added.)

As can be seen from the definitions, an activity must fall within the enumerated "outdoor recreational activities" for the Board to have statutory authority to address that activity. For the Board to have statutory authority to address bicycle touring, bicycle touring or other activities must fit within the term "hazardous desert or mountain excursion."

The Act does not define hazardous desert or mountain excursion. However, the Board's Rules and Regulations provide the following definitions:

"Desert" - shall mean a region of scarce rainfall and vegetation in areas often having great differences between day, night and seasonal temperatures. A desert is a land surface ranging from level, plateau lands, or undulating to sharply breaking hill-lands and sand dunes that, in addition, may be broken by poor to well-defined, deeply entrenched drainage systems, rims, cliffs and escarpments.

"Hazardous Excursions" - shall mean outfitted or guided activities conducted in a desert or mountainous environment which may constitute a potential danger to the health, safety, or welfare of participants involved. These activities shall include, but are not limited to: trail rides, backpacking, technical mountaineering/rock climbing, cross-country skiing, back country alpine skiing, llama packing, snowmobiling, survival courses, and motored and non-motored cycling.

"Mountainous" - shall mean a region receiving limited to abundant annual precipitation with an associated vegetative cover of grass, weeds, shrubs or trees. Cool summer temperatures and cold winter temperatures prevail. A mountainous area is a land surface ranging from level to gently rolling low hills to elevated lands that are often broken with poor to well-developed, deeply entrenched drainage systems, rims, cliffs, and escarpments to steep-sided land masses of impressive size and height.

The definition of "hazardous excursions" was first adopted on March 1, 1986. The definition of "hazardous excursions" expressly includes non-motored cycling conducted in a desert or mountainous environment.

The Board is expressly granted the power to adopt rules and regulations to effect the provisions of the Act. I.C. § 36-2107 provides that the Board shall have such powers:

(d) The Board is expressly vested with the power and authority to enforce the provisions of this chapter and make and enforce any and all reasonable rules and regulations which shall by it be deemed necessary and which are not in conflict with the provisions of this chapter, for the express purpose of safeguarding the health, safety, welfare and freedom from injury or danger of those persons utilizing the services of outfitters and guides, and for the conservation of wildlife and range resources.

Thus, the Board is empowered to adopt reasonable rules and regulations regarding hazardous desert or mountain excursions if the Board deems such rules necessary and not in conflict with the Act.

A review of some of the rules of statutory construction is necessary for further analysis of this question. Generally, a statute should be construed as a whole, giving meaning to all of its parts, if possible, in light of the legislative intent. Legislative intent "may be discerned from the occasion and necessity of the law, from the mischief felt and the remedy in view," and by tracing the history of the pertinent legislation. Bastian v. City of Twin Falls, 104 Idaho 307, 310, 658 P.2d 978 (Ct.App. 1983); Mix v. Gem Investors, Inc., 103 Idaho 355, 647 P.2d 811 (Ct.App. 1982). Absent express indication to the contrary, an amendment to a statute is evidence of a changed legislative intent. Nebeker v. Piper Aircraft Corp., 113 Idaho 609, 747 P.2d 18 (1987). In Kopp v. State, 100 Idaho 160, 163, 595 P.2d 309 (1979), the court noted:

The construction given a statute by the executive and administrative officers of the State is entitled to great weight and will be followed by the Court unless there are cogent reasons for holding otherwise.

Applying these rules of construction to the Act, it is clear that the legislature intended the Board to license outfitters and guides conducting hazardous desert or mountain excursions. The legislature did not define the meaning of hazardous desert or mountain excursions. However, the Board has defined these terms. The Board's definition of "hazardous excursions" includes non-motored cycling. Further, the Board's construction of the statute is entitled to deference. Therefore, the Board appears to have statutory authority to issue outfitter and guide licenses for the conduct of bicycle touring.

This conclusion is further supported by the legislative history of the Act. In 1976, the Act was amended to include the term "hazardous mountain excursions." This amendment was intended to address the question of whether the Board would be responsible for recreational excursions. House Resources and Conservation Committee Minutes, March 15, 1976. The purpose for

this amendment was previously addressed in an informal guideline directed to Mr. Glen R. Foster, Chairman, Idaho Outfitters and Guides Board, dated September 19, 1983, which states in part:

The interpretation that hazardous modifies mountain excursions is supported by James Baughman, vice-chairman of the Board when that statute was modified in 1976 to include this category. He indicated that the amendment was intended as a housekeeping measure to clarify the Board's right to regulate any activities conducted in a mountain terrain that imposed a significant risk of harm to the consumer. At the time of the amendment, the Board was uncertain as to its power to regulate backpacking, survival schools, cross-county skiing, and helicopter skiing.

Idaho Attorney General's Opinions and Annual Report 1983, pp. 226-234.

The 1976 amendment to the Act was repealed on January 1, 1977, as a result of the recodification of the fish and game laws which included the chapter governing outfitters and guides. The Act was "reamended" in 1977 to again include the term "hazardous mountain excursions." The 1977 amendment was not intended to change the law, but to correct the repeal of the 1976 amendment to the Act. House Resources and Conservation Committee Minutes March 9, 1977.

The Act was again amended in 1988, in part to "better accommodate the needs of the industry." Statement of Purpose RS21006C2, Senate Bill 1333. The 1988 amendment included the addition of the term "desert," thereby creating the term "hazardous desert or mountain excursions." The Senate Resources and Environment Committee Minutes of March 2, 1988, provide the following discussion of the amendment:

The purpose and intent of the proposed amendments to the Outfitters and Guides Act is to update and clarify board authority in the implementation and enforcement of the Act....

Bill Meiners, Outfitters and Guide Board, explained the bill in detail going through the bill section by section noting the changes and the reasoning behind same.

There was discussion regarding the intent of the legislation and declaration of policy. Also what activities are covered and the procedure to determine if an activity should be covered by the Act. It was noted by Rules and Regulation hazardous excursions has been identified.

(Emphasis added.)

Clearly, the legislature intended these amendments to broaden the Board's authority to address diverse recreational activities conducted in desert or mountainous regions. The legislature was specifically informed of the Board's rules defining the term "hazardous excursions" and the legislature did not object to the Board's definition.

The Board's authority to license bicycle touring is further supported by its previous licensing of diverse activities as hazardous desert or mountain excursions without challenge. For years, the Board has licensed trail rides, llama packing, snowmobiling (Rules 45 and 61), cross-country ski touring (Rules 42, 43 and 58), technical mountaineering/rock climbing (Rules 44, 59 and 60) and Jeep tours. None of these recreational activities is expressly enumerated in the Outfitters and Guides Act but, like bicycle touring, each is regulated by the Board as part of its statutory mission to safeguard the health, safety and welfare of residents and non-residents who use the services of outfitters and guides.

2. The question whether the Board has the statutory authority to require safety inspections of outfitter vehicles requires an analysis of the powers of the Board. Pursuant to I.C. § 36-2107(b) the Board is empowered:

To prescribe and establish rules of procedure and regulations to carry into effect the provisions of this Act, including but not limited to regulations

prescribing all requisite qualifications of training, experience, knowledge of rules and regulations of governmental bodies, condition and type of gear and equipment, examinations to be given applicants whether oral, written or demonstrative, or a combination thereof.

(Emphasis added.)

Applying the rules of construction outlined previously, this section must be construed with the entire Act, including the intent to safeguard the health, safety, welfare and freedom from injury or danger of persons utilizing the services of outfitters and guides. Clearly, the legislature intended the Board to regulate the condition of gear and equipment utilized by outfitters and guides for the protection of persons utilizing their services. The terms "gear" and "equipment" are not defined by the Act or the Board's Rules and Regulations. Outfitters and guides normally utilize a variety of gear and equipment in providing their services, including float boats, power boats, horses, llamas, tents, cooking equipment, buses, other motor vehicles and trailers. Black's Law Dictionary (Rev. 4th Ed.) defines equipment as "Furnishings, or outfit for the required purposes. An exceedingly elastic term, the meaning of which depends on context."

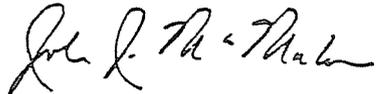
Given the intent of the Act, a reasonable construction of the terms "gear" or "equipment" should include vehicles utilized by outfitters and guides to provide services to their clients. The condition of outfitter vehicles clearly may affect the health, safety, welfare and freedom from injury or danger of clients.

Additionally, you represent that the Board worked with the Idaho Public Utilities Commission in proposing a rule concerning safety inspections of outfitter vehicles and that the actual inspections would be performed by the Idaho Public Utilities Commission, the Port of Entry, or the Idaho State Police. The Board was not attempting to become a vehicle safety inspection entity, but was merely proposing a rule to require safety inspections.

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3. As explained above, the Board has the statutory authority to license bicycle touring and to require safety inspections of outfitter vehicles. The Legislative Council's opinion that these Board actions exceed its statutory authority is not persuasive. Pursuant to Idaho Code § 67-5203(a)(2), the Legislative Council is directed to analyze and refer proposed administrative rules to the germane joint subcommittee. The Legislative Council's opinion does not affect the validity of currently issued licenses. However, the Legislative Council's opinion will be considered by the legislature, which has the power, pursuant to Idaho Code § 67-5218, to reject, amend or modify agency rules by concurrent resolution it determines that the rule violates the legislative intent of the statute under which it was made.

Sincerely,



JOHN J. McMAHON
Chief Deputy Attorney General

JJM/dks