

**BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL
FROM THE BIG GAME COMMERCIAL SERVICES BOARD**

In the Matter of)	
)	
ERIK R. SALITAN)	OAH No. 15-1346-GUI
<hr style="width:40%; margin-left:0;"/>)	Agency No. 2014-000912

CORRECTED DECISION AFTER REMAND

I. Introduction

Erik Salitan is a licensed registered guide-outfitter, a level of guiding license he achieved in 2008 after working several years as an assistant guide. At 32 years old, he is one of the youngest, if not the youngest, registered guides in the state. His main residence is in No Name, Alaska, a small community in the southern Brooks Range. He offers guided hunts in the Brooks Range and in other areas of Alaska. His guiding business is named “Bushwack Alaska Guiding and Outfitting.”¹

This case concerns three different incidents involving Mr. Salitan. The first occurred during a 2012 sheep hunt, when, due to bad weather, two clients remained in a remote camp much longer than expected. The second occurred in early 2014 at two hunting trade shows in the Lower 48, when Mr. Salitan advertised and booked hunts even though his license was expired. The third occurred during a 2014 sheep hunt, when Mr. Salitan’s hunting party used a remote landing strip that was occupied by a different guide’s hunting camp.

Based on these three separate incidents, the Division of Corporations, Business and Professional Licensing filed a six-count accusation against Mr. Salitan. One of the counts was dismissed before the hearing. A three-day hearing on the remaining five-count accusation was held in Juneau on March 23-25, 2016. The accusation was amended after the hearing.

The evidence and arguments presented at hearing are analyzed below. The analysis shows that

- With regard to the 2012 hunt, Mr. Salitan’s failure to act within a reasonable time to ensure that the clients timely used the known alternative safe route out of hunting camp was a violation of his duties to the clients and to protecting the integrity of the meat and trophies. Because Mr. Salitan’s contracts promised assistance to the clients upon request, and included an implied promise that he would provide services consistent with the legal obligations of a licensed guide, he

¹ Salitan testimony.

has breached his contracts. He is subject to discipline for the violations related to the 2012 hunt. The Board imposes a fine of \$750, with \$250 suspended for a period of one year. A reprimand will be placed in Mr. Salitan's file.

- With regard to Mr. Salitan's activity of booking hunts in early 2014 while not currently licensed, the Division did not prove that Mr. Salitan violated guiding laws.
- With regard to Mr. Salitan's use of a landing strip in 2014 that was occupied by another guide's hunting party, the Division did not prove that Mr. Salitan violated guiding laws.

Because these three incidents are independent of each other, each incident is described and analyzed separately. For each incident, we will first discuss the facts of the incident, followed by a discussion of the law and the appropriate discipline. Included in the analysis of the 2012 hunt is a discussion of the limitations on the Board's authority to impose discipline.

II. Counts III and IV: The 2012 Lenz and Ketcher sheep hunt²

A. Facts regarding the 2012 Lenz and Ketcher sheep hunt

In early 2010, Craig Lenz and Shad Ketcher, two friends from Minnesota, attended a trade show sponsored by Safari Club International. At this show, they met Mr. Salitan and booked a guided sheep hunt for fall 2012.³

The hunt took place two years later. On August 8, 2012, Mr. Lenz and Mr. Ketcher arrived in No Name, a small town in the Brooks Range. Mr. Salitan met them and took them to his lodge in No Name for the first night. They would fly to sheep camp the next day. Because no hunting can occur on the same day that a hunter is airborne, the plan was for each hunter to fly out to camp on August 9 and then begin hunting on August 10, the first day of hunting season. Mr. Salitan explained that the time of departure on the next day would be determined by the pilots and the weather.⁴ The hunts were booked for 10 days.

The initial plan was for the hunts to take place at two remote sheep camps east of No Name. The two friends would hunt separately, each guided by a licensed assistant guide and assisted by a helper called a "packer." One camp was located on the No Name Creek drainage in the Brooks Range. No Name Creek flows toward No Name Lake, a large lake fed primarily by

² The incidents are addressed chronologically rather than in the order in which they are presented in the Accusation.

³ Lenz testimony; Ketcher testimony.

⁴ Ketcher testimony.

the No Name River. The second camp was located about five miles north of the first camp on a different drainage called “No Name Creek.”⁵ No Name Creek is separated from No Name Creek by a ridge. It flows northeast into the No Name River, several miles north of No Name Lake. Both sheep camps were located on primitive airstrips. About a week before the hunts were scheduled to start, the two packers were flown into the two camps. Each set up a stout tent, called an *Arctic Oven*, to serve as a base for one of the hunters.

The hunters were to be flown from an airstrip located on the highway north of No Name, called No Name Example air strip, to the two remote primitive strips. (No Name Example Airport is not the same as No Name Lake Airport. No Name Lake, which has both a wheeled strip and float plane access, is not on the highway.) In past years, Mr. Salitan had generally used Clint Mayeur, a pilot who has a base in No Name, to fly his hunters to sheep camp. Mr. Mayeur was not available in 2012, so Mr. Salitan engaged two other bush pilots, Richard Guthrie and Luke Miller.⁶ Dr. Guthrie is a retired dentist who works now as a registered guide and a transporter. During hunting season, Dr. Guthrie is based at No Name Lake, on the north side of the Brooks Range. He flies a small airplane called a Super Cub, which is configured to take only one passenger at a time. On August 9, 2012, Dr. Guthrie made three trips from No Name Example Airport to No Name Creek transporting Mr. Salitan’s assistant guides and clients.⁷

Mr. Miller made one aborted trip with Assistant Guide Glen Elliot to No Name Creek. They did not land. According to Mr. Salitan, Mr. Miller determined that the thermals (winds that rise from the surface and swirl unpredictably) were too strong to safely land the small plane on the No Name Creek strip.⁸ Mr. Salitan explained to the clients that the winds at No Name Creek made it unsafe to land there.⁹ Because Dr. Guthrie had made it into No Name Creek, however, Mr. Salitan and the pilots determined that the bad weather was isolated to No Name Creek. The plan changed so that both hunters and both assistant guides flew into No Name Creek.

Once in No Name Creek camp, Mr. Lenz paired up with Assistant Guide Elliot. Mr. Ketcher paired up with Assistant Guide Ron Douglas. Mr. Ketcher and Mr. Douglas began

⁵ Mr. Lenz testified that the No Name Creek camp was a 15 mile hike from the Baby Creek camp. Lenz testimony. The Division appears to adopt this testimony as accurate. Division Closing Argument at 11. Mr. Salitan testified, however, that he determined the hiking distance between the camps to be 4.6 miles; the distance as the crow flies would be shorter. Salitan testimony. The maps in the record support Mr. Salitan’s testimony. Salitan Exhibit D at 3.

⁶ Salitan testimony.

⁷ Guthrie testimony.

⁸ Salitan testimony.

⁹ Ketcher testimony. The clients understood about the dangerous thermals: Mr. Ketcher testified that he was told the plane had dropped out of the sky.

hunting toward the north in the direction of No Name Creek, sleeping under a makeshift shelter that Mr. Douglas had brought for that purpose.¹⁰ Mr. Lenz and Mr. Elliot hunted out of the No Name Creek camp. After about three days, Mr. Ketcher and Mr. Douglas returned to No Name Creek. Around that time, Mr. Lenz and Mr. Elliot had begun hiking toward the No Name Creek camp. According to Mr. Lenz, they were tasked with finding the No Name Creek camp because the packer who had set up that camp was lost and out of food. Mr. Lenz's written description described the search for the No Name Creek camp as arduous, involving several climbs and weather that turned from rain to snow.¹¹ They did not have any maps or Global Positioning System (GPS) equipment. He explained that it took them four days to find the camp. On the next day, they resumed hunting.¹²

Mr. Salitan, however, disputes that the Lenz/Elliot hunting party were tasked with finding the No Name Creek camp. In his view, they were hunting the entire time. He recommended that they go towards No Name Creek because, in addition to having a tent set up, the hunting was good.¹³

On August 17, 2016, the eighth day after being dropped off, Mr. Lenz shot a sheep.¹⁴ He then immediately called Mr. Salitan on the satellite telephone and asked that he be picked up at the No Name Creek strip and transported out of the field.¹⁵

Mr. Lenz explained to Mr. Salitan that food was low at the No Name Creek camp because no plane had landed there. The food supplied when the packer had landed, and the food that Mr. Lenz and Mr. Elliott had carried in, had been eaten or mostly eaten. The only food remaining would be the sheep they had just killed.¹⁶

Mr. Salitan agreed that he would send a plane in to pick up Mr. Lenz's party. The party prepared to leave the next day. No plane arrived, however. When the hunting party called Mr. Salitan, Mr. Salitan explained that weather prevented getting into the No Name Creek strip, but a pilot would be there as soon as a break in the weather occurred.¹⁷

¹⁰ Douglas testimony. Mr. Lenz understood that Mr. Douglas and Mr. Ketcher were looking for the No Name Creek camp, and that the only reason they slept under the makeshift shelter was because they were lost. Lenz testimony. Mr. Douglas testified that was not true. He was not lost and he was not searching for No Name Creek. They were hunting. Douglas testimony.

¹¹ Admin. Rec. at 441.

¹² Lenz testimony.

¹³ Salitan testimony.

¹⁴ Admin. Rec. at 321.

¹⁵ Lenz testimony; Salitan testimony.

¹⁶ Lenz testimony.

¹⁷ *Id.*

The next several days followed the same pattern. According to Mr. Lenz, however, because they had no wood for a fire (they were above treeline), all they had to eat was sheep meat that they boiled on a small gas-fired stove.¹⁸

Mr. Lenz also testified that he was concerned about preserving the sheep cape—the portion of the skinned hide that had been located up over the head, which is typically preserved as a trophy. He was surprised that no salt had been provided for this purpose. He testified that he rubbed ashes from the fire on the cape to help preserve it.¹⁹

Mr. Lenz recalls that the weather was beautiful during this time. According to his testimony, however, after six days of waiting, and eating nothing but boiled sheep, he decided that the party needed to hike to the No Name Creek camp. This camp was at a lower elevation, so it would be warmer. In addition, it likely still had some food. Mr. Lenz testified that he did not recall whether Mr. Salitan even knew that the party was leaving No Name Creek and walking down to No Name Creek.²⁰

Mr. Salitan remembers events differently. He remembers that his pilots were prevented by weather from landing at No Name Creek. He remembers that he instructed the No Name Creek party to hike down to No Name Creek. He explained to them the No Name Creek strip was easier to access and, because it was at a lower elevation, it might have better weather. He does not recall when he advised them to make this trek, although he does believe that the entire party was at the No Name Creek location before August 22.²¹ Assistant Guide Douglas, who was at the No Name Creek camp, confirmed that Mr. Salitan had told him that the No Name Creek party would be joining them at No Name Creek.²² Mr. Douglas said that the No Name Creek party showed back up at the No Name Creek location “about the seventh day of the 10 day hunt.”²³ This is clearly not accurate, because Mr. Lenz did not shoot his ram until August 17—the seventh day of the hunt—and everyone agrees that he remained at No Name Creek for a time after the kill. Mr. Douglas’s testimony indicates, however, that the No Name Creek party likely did return to No Name Creek earlier than Mr. Lenz now remembers. In addition, Mr. Douglas expressed an opinion that the No Name Creek party was almost certainly instructed by Mr. Salitan to return to

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ Salitan testimony.

²² Douglas testimony.

²³ *Id.*

No Name Creek—they would not have voluntarily carried the gear and the carcass over that terrain.²⁴

Back at the No Name Creek camp, Mr. Ketcher had harvested a ram on August 18. Mr. Ketcher testified that he expected a pickup the next day, and that the weather was good. No plane arrived. Mr. Ketcher believed that the No Name Creek party arrived at No Name Creek about four days after the expected pickup, and, at that time, the No Name Creek camp still had some provisions other than sheep meat. Most of their diet, however, was sheep meat, supplemented by wild mushrooms and berries.²⁵

Around August 18-19, at the time that the Lenz/Ketcher hunt was expected to end, Mr. Salitan had two additional hunting parties arrive at his base camp at No Name. He planned to have these hunters and two new assistant guides fly out to the two sheep camps on the day that the Lenz and Ketcher hunt was scheduled to be picked up. The planes that dropped these parties off would pick up the Lenz and Ketcher parties.²⁶

Johnny Helton was one of the assistant guides that Mr. Salitan had hired to guide one of the second round of sheep hunts. Mr. Helton recalls that he arrived at No Name about seven days into the season. He expected to be flown out to sheep camp the day he arrived. They were unable to fly that day, however, because of high winds. Mr. Helton recalled six or seven days in a row of getting up each morning and seeing Mr. Salitan calling a pilot. Then Mr. Salitan would drive to the airport in anticipation of meeting the pilot so that the hunting party in the field would be picked up. He recalled at least three times going with Mr. Salitan to the No Name Example airport. On the other days, Mr. Helton remained at the house to answer phones. The weather was consistently windy, foggy, and rainy. On one day, a break in the weather allowed Mr. Helton and the pilot to take off and fly over the sheep camp. Up above the camp, however, they were rocked by turbulence, and the pilot returned to the base without landing.²⁷

Dr. Guthrie confirmed that weather prevented the pilots from being able to safely fly out to the sheep camp to retrieve the hunting parties. He explained that for him, part of the problem was that he was weathered in at No Name Lake, on the north side of the Brooks Range. He could not safely leave No Name to fly through the pass to No Name Example. On one day when he had clear weather at No Name, August 22, he received a call from a different hunting party to pick up

²⁴ *Id.*

²⁵ Ketcher testimony.

²⁶ Salitan testimony.

²⁷ Helton testimony.

a stranded hunter with a broken ankle, and he elected to make that rescue, which made him unavailable to help Mr. Salitan for that one day. He speculated that if he had been available on August 22, or perhaps had been parked at No Name rather than No Name, he might have found a break in the weather to get into No Name Creek.²⁸

Mr. Salitan, however, denied that having Dr. Guthrie available at No Name would have changed the outcome. He explained that he was also relying on Pilot Luke Miller, who was south of Atigun Pass, to be the primary pilot. Further, he believes that relying on Dr. Guthrie was reasonable—Dr. Guthrie is an excellent pilot, and the closest operator to the hunting camps. Mr. Salitan’s memory of the situation is similar to Mr. Helton’s. Mr. Salitan recalls that he “lived” at No Name Example airstrip everyday during what he termed “the ordeal.” He remembered his pilot, Luke Miller, taking naps on the airstrip in the rain while waiting for the weather to clear. Mr. Salitan confirmed that Mr. Miller did, in fact, fly out of No Name Example enroute to sheep camp several times, but was unable to land.²⁹

Bill Stevenson, an experienced pilot and guide who had mentored Mr. Salitan when Mr. Salitan first started working in the guiding industry, testified that Mr. Salitan spoke with him almost every day during the time that the hunting party was weathered in. Mr. Salitan was asking for advice. Mr. Stevenson described Mr. Salitan as being “beside himself” over the situation. He advised Mr. Salitan to keep the party safe and not push the pilots to fly when they were not comfortable doing so.³⁰ Dr. Guthrie, Mr. Helton, and Mr. Salitan all confirmed Mr. Stevenson’s testimony that Mr. Salitan was stressed and anxious about not being able to transport the Lenz and Ketcher parties out of the field.

On August 28, 2012, Dr. Guthrie was able to fly from No Name Lake to No Name Example Airport. He met Mr. Salitan there. They waited for a break in the weather to fly to No Name Creek to transport the hunting parties. Mr. Salitan had brought a couple trash bags of food. When they determined that the wind was not going to be acceptable for landing, Mr. Salitan joined Dr. Guthrie in the Super Cub, and they dropped the two bags of food at the camp.³¹

Mr. Salitan recalls that he dropped two large bags of food containing at least 50 packets of freeze-dried meals.³² It also had backup batteries for the satellite telephones. Mr. Ketcher, however, testified that he did a careful inventory of the food, and he counted exactly 12 freeze-

²⁸ Guthrie testimony.

²⁹ Salitan testimony.

³⁰ Stevenson testimony.

³¹ Guthrie testimony; Salitan testimony.

³² Salitan testimony.

dried meals, 12 packets of oatmeal, 12 gummy bears, 12 snickers bars, and back-up batteries.³³ Dr. Guthrie recalled that the food drop was two large garbage bags that were pretty full—limited by the size of the Super Cub.³⁴

Although a plane was unable to land at the primitive strip at No Name Creek, a relatively simple alternative route out of the camp was available. No Name Lake is about seven-eight miles from sheep camp.³⁵ The area around the lake is open, making it less susceptible to the dangerous wind conditions experienced in trying to get into the two strips located in bowls beneath ridges. In addition, a much larger plane could land on the lake than could land on the remote strips. On most, if not every one of these days, the party could have hiked to No Name Lake, and been picked up by a float plane.³⁶

According to Mr. Salitan, the hike from No Name Creek to No Name Lake was an easy walk, on a well-established game trail that lost elevation.³⁷ None of the hunting party was familiar with the hike, however, and the party had no maps with which to confirm the route or understand how easy a walk it was.³⁸

Who suggested the idea of hiking out to No Name Lake, when it was suggested, and why it was not pursued until the very end of August, are hotly disputed issues in this case. Mr. Salitan recalls that he first suggested that the party could hike out around August 22. The hunters did not want to hike, so Mr. Salitan did not force the issue. They had plenty of sheep meat to eat and a sturdy tent in which to stay dry and warm. Mr. Salitan expected a break in the weather could save his clients the hike.³⁹

Over the next few days, however, Mr. Salitan became aware that the situation in camp was deteriorating. The hunting party had called the state troopers to inquire about whether a helicopter rescue was a possibility. (It was not, because no emergency existed.) Mr. Salitan had an extensive telephone conversation about the situation with Lt. Dahl of the state troopers. Mr. Salitan recalls that Lt. Dahl was dismissive of the idea that this party, which was safe and dry, with plenty of sheep meat to eat, should need emergency services.⁴⁰

³³ Ketcher testimony.

³⁴ Guthrie testimony.

³⁵ Salitan testimony. Mr. Salitan told the party it was about eight miles; he testified that he later measured it on the map as seven.

³⁶ *Id.*

³⁷ *Id.*

³⁸ Lenz, Ketcher, and Douglas testimony.

³⁹ Salitan testimony.

⁴⁰ *Id.*

Mr. Lenz, Mr. Ketcher, and Assistant Guide Douglas had all called their wives, and calls were being made to air taxi operators around the state to see whether one of them could fly into sheep camp to extract the hunters. According to Mr. Salitan, when he spoke on the satellite telephone to Mr. Lenz, Mr. Lenz was verbally abusive.⁴¹

According to Mr. Lenz and Mr. Ketcher, Mr. Salitan never proposed that the hunting party could walk out to No Name Lake and be picked up by a float plane in spite of the inclement weather. They recall that they first learned of this possibility when they, on their own initiative, had made calls, and had their wives make calls, to the other air taxi operators. In their view, the dispatcher from Brooks Range Aviation—the firm that eventually picked them up—suggested that if they could not get into No Name Creek, they could walk down to No Name Lake, where a pilot could meet them with a float plane.

Yet, Mr. Douglas’s testimony provides some support that Mr. Salitan had proposed the walk out before the party heard it from Brooks Range Aviation. Mr. Douglas explained that yes, Mr. Salitan had proposed the walk to No Name Lake. Mr. Douglas testified, however, that he had lost faith in Mr. Salitan because he did not believe that the weather was actually preventing the planes from landing at No Name Creek. He therefore did not believe that there was a lake until he heard it confirmed from the air taxi operator. Only then was he willing to support the idea of a hike to No Name Lake. This testimony supports Mr. Salitan’s assertion that he was the first to have proposed the hike out to a float plane. Mr. Douglas remembers, however, that Mr. Salitan did not propose this idea until August 28—the day of the food drop.

Dr. Guthrie, on the other hand, recalled that the hunting party delayed the hike for about a week because they “weren’t wanting to do that.”⁴² Mr. Stevenson stated that during this time “I was on the phone with Eric and he was saying – explained that they could . . . simply walk down to the lake.”⁴³

Two other disputed issues involve who had made the arrangements with Brooks Range Aviation and the circumstances of Mr. Salitan’s offer to fly to No Name Lake to hike in and lead the party out to No Name Lake. Mr. Salitan recalls that he called Brooks Range Aviation and made arrangements to have the firm meet the hunting party with an Otter on No Name Lake.⁴⁴ Mr. Lenz, Mr. Ketcher, and Mr. Douglas all testified that if it had not been for them calling

⁴¹ Salitan testimony. Mr. Lenz denies that he ever used profanity when speaking to Mr. Salitan. Lenz testimony.

⁴² Exhibit B at 17.

⁴³ Stevenson testimony.

⁴⁴ Salitan testimony.

Brooks Range Aviation, the pick up on No Name Lake would not have occurred.⁴⁵ Mr. Salitan acknowledges that the hunting party and their wives had made a call to Brooks Range Aviation—as well as to several other air taxi operators, many of whom were calling him to get additional information, which he found to be a great annoyance. The hunting party acknowledges that Mr. Salitan paid all costs related to Brooks Range Aviation.

With regard to Mr. Salitan's offer to hike in and lead the party out, the parties agree that Mr. Salitan made this offer. Mr. Salitan acknowledges that he only made the offer at the very end, after Mr. Lenz's brother-in-law from Minnesota had suggested that he (the brother-in-law) would fly up and hike in to lead them out. Mr. Salitan thought that was unnecessary, and offered to do it himself. He counseled the party, however, that his hiking in would cause additional delay, that they could easily hike out just by following No Name Creek to No Name River, and then following the river a short distance to the lake. According to Mr. Salitan, the party agreed that additional delay was unnecessary, and declined his offer to hike in.⁴⁶ Mr. Lenz, Mr. Ketcher, and Mr. Douglas all testified, however, that Mr. Salitan had promised to hike in, but then called the next day to say (without consulting them) that he was not coming and they were to hike out on their own without him.⁴⁷

Regardless of when they learned about the option or who proposed it, eventually, the hunting party agreed to hike down to No Name Lake. The only hold-out was Assistant Guide Elliott, who would have preferred to remain where he had a good landing strip and good shelter. The others were able to persuade Mr. Elliot to join them.⁴⁸ They left No Name Creek on August 31 to hike to the lake. Mr. Lenz recalls the hike as difficult. Although No Name Creek flows into No Name, they were unable to stay low next to the creek, and had to hike up the benches.⁴⁹ Mr. Ketcher recalls that the packers took most of the weight.⁵⁰ The hike took the party all day.⁵¹

When they arrived at a small lake north of the main lake, they called Brooks Range Aviation. They were told to hike to the main lake. By the time they arrived at a suitable spot, it was too dark to fly. The party made camp, and were picked up the next day and flown to Grayling Lake. Mr. Salitan met them, drove them to his lodge, provided them with food, and retrieved their trophies for processing. Mr. Salitan fired Mr. Elliot and the two packers for not

⁴⁵ Lenz, Ketcher, and Douglas testimony.

⁴⁶ Salitan testimony.

⁴⁷ Lenz, Ketcher, and Douglas testimony.

⁴⁸ Lenz, Ketcher, and Douglas testimony.

⁴⁹ Lenz testimony.

⁵⁰ Ketcher testimony.

⁵¹ Lenz testimony.

following his instructions. He kept Mr. Douglas on that fall to guide a moose hunt, but has not employed Mr. Douglas since.⁵²

Upon arriving at No Name, the parties had no sheep meat with them. During the 12 days after Mr. Lenz shot his ram, and 11 since Mr. Ketcher shot his, the meat on one of the carcasses had started to spoil. The three members of the hunting party generally agreed that they had completely eaten one of the two rams, and that only one carcass had meat remaining that was spoiling.⁵³ They disagree, however, about which ram it was that spoiled. Mr. Ketcher believes that his ram was completely eaten.⁵⁴ Mr. Lenz says his was completely eaten. Each thinks that the other's ram was partially eaten before it spoiled. All three members of the party agree, however, that some meat spoiled. They describe it as having a putrid odor. They described how Assistant Guide Elliot—who had been cooking the meat, putting it in ziplock bags, and loading the meat in his pack—eventually threw spoiled meat in the creek as the party was beginning its hike out.⁵⁵

Mr. Salitan testified that he was never informed by any of the hunting party that meat was starting to spoil or that any member of the party had discarded sheep meat. He believed that the party had completely consumed both sheep in their entirety.⁵⁶ The three members of the hunting party confirmed that they never told Mr. Salitan that any meat had been wasted.⁵⁷

Mr. Salitan took possession of Mr. Ketcher's cape, and attempted to preserve it with salt. He later shipped the cape to Mr. Ketcher.⁵⁸ Mr. Ketcher's taxidermist told him the cape had slipped—meaning the hair was sloughing off the hide.⁵⁹ Mr. Ketcher informed Mr. Salitan, and Mr. Salitan purchased a replacement cape and sent it to Mr. Ketcher at no charge.⁶⁰

Upon his return, Mr. Lenz filed a lengthy report of the hunt with the Safari Club and the Alaska Professional Hunters Association, seeking to have Mr. Salitan disciplined or disbarred from membership. Both organizations investigated, and both declined to pursue the matter.⁶¹ In addition, Mr. Lenz's complaints were at some point forwarded to the Alaska State Troopers. The

⁵² Douglas testimony.

⁵³ Lenz, Ketcher, and Douglas testimony.

⁵⁴ Ketcher testimony.

⁵⁵ Lenz, Ketcher, and Douglas testimony.

⁵⁶ Salitan testimony.

⁵⁷ Lenz, Ketcher, and Douglas testimony.

⁵⁸ Salitan testimony.

⁵⁹ Ketcher testimony.

⁶⁰ Salitan testimony.

⁶¹ Salitan Exhibits A, C.

troopers conducted a criminal investigation. No criminal charges were ever filed against Mr. Salitan, however, based on the Lenz and Ketcher hunts.

In 2014, Mr. Lenz and Mr. Ketcher both filed complaints with the Division. The Division investigated and issued an Accusation. A three-day hearing on the Accusation was held in Juneau on March 23-25, 2016. Following the hearing, the Division amended the Accusation. On April 15, 2016, the Division submitted a brief that set out the Division’s view of the circumstances under which the Board is authorized to impose discipline. Both parties submitted written closing arguments. During the process, Mr. Salitan filed seven different motions, seeking rulings of law on a variety of issues.⁶² The record closed on April 15, 2016.

B. Did Mr. Salitan’s action during the 2012 Lenz and Ketcher hunt violate the laws regarding obligations of guides?

1. What laws does the Division accuse Mr. Salitan of having violated during the Lenz and Ketcher hunts?

The Division has alleged that Mr. Salitan violated at least 13 different guiding laws in the course of the Lenz/Ketcher hunt. Count III of the Amended Accusation focuses on the shortcomings of the services that Mr. Salitan provided during the Lenz and Ketcher hunts. It alleges that Mr. Salitan failed to provide adequate food and shelter and “placed the health and safety of Lenz, Ketcher, the assistant guides and packers at risk.”⁶³ Count III identifies the following statutes and regulations as having been violated:⁶⁴

Statute or Regulation	Summary of Statute or Regulation Described in Accusation
AS 08.54.610(e)	Contracting guide must be physically present in the field with the client at least once during the hunt and in the field and participating in the hunt
AS 08.54.710(a)(4)	Board may impose a disciplinary sanction if a guide has breached a contract to provide big game hunting services
AS 08.54.720(a)(7)	Guide may not knowingly fail to comply with AS 08.54.610(e) (which

⁶² The seven motions and disposition are as follows:

1. Motion to accept Exhibit KK. Denied because the exhibit was not received before the hearing.
2. Motion to preclude application of AS 08.54.710(j) to Counts III and IV. Denied as moot. The statute was not applied to the counts that occurred before the statute became effective.
3. Motion to preclude application of 12 AAC 75.340 to Counts III and IV. Denied. The regulation was adopted at the time of the 2012 hunt.
4. Motion to preclude application of the term “unprofessional” on grounds of vagueness. Denied as moot.
5. Motion to bar the breach of contract claims in Counts III and IV because statute of limitations has run. Denied for the reasons explained in section II(B)(8) of this decision.
6. Motion for summary adjudication on Counts I and II on grounds of lack of jurisdiction. Denied for the reasons explained in section III(B) of this decision.
7. Motion for summary adjudication on Count V on grounds that video does not show obstruction. Denied because the issue was a factual issue to be determined at hearing.

⁶³ Amended Accusation ¶ 26.

⁶⁴ *Id.*

	requires guide to be in field supervising hunt and to conduct hunt unless class-A assistant is conducting hunt)
AS 08.54.720(a)(8)(A)	Guide may not knowingly commit a violation of AS 08.54, or a regulation adopted under AS 08.54
12 AAC 75.250(d)(1)	Guide must advise client, before leaving him in the field, of the date, time and location of the pick up and the course of action client should follow if guide is unable to pick up as planned ⁶⁵
12 AAC 75.250(d)(2)	Guide must transport the client in and out of the field at the planned date, time, and location unless prevented by weather, mechanical problems, or safety concerns
12 AAC 75.340(a)	Ethical activity includes guide's duty to take every reasonable measure to assure the safety and comfort of the client
12 AAC 75.340(a)(2)(C)	
12 AAC 75.340(b)(1)	
12 AAC 75.340(c)(1)	
12 AAC 75.340(d)(2)	Ethical activity includes preparing antlers, horns, hides, and capes in satisfactory and unspoiled condition
12 AAC 75.340(d)(10)	Ethical activity includes responding within a reasonable amount of time to requests for assistance communicated during the hunt

Count IV of the Amended Accusation alleges that Mr. Salitan failed to ensure that Mr. Ketcher's sheep's cape was properly prepared or preserved, which led to the loss of the cape.⁶⁶ It alleges that his failure to retrieve the clients from the field in a timely manner, combined with his failure to supply preservatives, led to the wasting of approximately 30 pounds of edible sheep meat. It alleges that he violated the following statutes and regulations:⁶⁷

Statute or Regulation	Summary of Statute or Regulation Described in Accusation
AS 08.54.710(a)(4)	Ethical duty includes guide's duty to salvage all meat of animals taken by clients
AS 08.54.720(a)(8)(A)	
AS 08.54.720(c)	
12 AAC 75.340(a)	
12 AAC 75.340(2)(C)	
12 AAC 75.340(b)(1)	
12 AAC 75.340(d)(2)(3)	

2. Did Mr. Salitan violate the law by failing to have a pilot fly into sheep camp and remove the hunters earlier than September 1?

The basis for the Division's allegations in Counts III and IV of the accusation is that Mr. Salitan left clients in the field in violation of the law and in breach of his contract. Mr. Salitan,

⁶⁵ The Amended Accusation mischaracterizes 12 AAC 75.250(d) as applying to a guided hunt. Amended Accusation ¶ 26. This subsection, however, applies only to a guide-outfitter when acting solely as an outfitter.

⁶⁶ *Id.* ¶ 26.

⁶⁷ *Id.* ¶ 30.

however, argues that this action was justified because bad weather made removal of the clients by plane unsafe. The issue of whether Mr. Salitan should have picked the clients up by plane shortly after the hunt ended was the primary issue disputed by the parties at the hearing.

A guide's first obligation is to safety.⁶⁸ A guide should not endanger the health or safety of a client, employee, or agent merely to remove an otherwise safe and healthy client from the field. A corollary of this rule is that a guide should defer to the judgment of a pilot. A guide should not pressure a pilot into attempting a trip when the pilot has stated an opinion that the trip is too risky for the pilot to attempt. It follows from these rules that a guide should not attempt to fly into camp for the purpose of removing healthy and safe clients when the pilot has informed the guide that flying is unduly risky or dangerous.⁶⁹

Here, the Division, citing Mr. Lenz's statements, alleges that "the weather was perfect" and there was "no reason why they were not picked up."⁷⁰ Thus, the Division is asserting that Mr. Salitan's claim that weather prevented a safe and timely pick up by plane was a ruse and a sham. This theory would be viable if it were supported by facts—if Mr. Salitan's excuse was a sham, then he would be in violation of several guiding laws. To evaluate this theory, we must determine whether the Division has proved that the weather was suitable for landing and takeoff, and that no reason existed for why the hunting party was not picked up.

Each member of the hunting party who testified—Mr. Lenz, Mr. Ketcher, and Mr. Douglas—made clear that they never believed Mr. Salitan when he told them that the reason for the delay was weather. To this day, they still do not believe it. Although they acknowledge that the weather eventually turned windy and stormy, in their view, the weather was fine for many days. All three believe that the story regarding the weather was just a flimsy excuse. Mr. Salitan simply left them out in the field for an extra twelve days for no reason. They are very angry with Mr. Salitan.

The testimony of the three members of the hunting party, however, cannot be relied upon as a basis for concluding that it would have been safe to land an airplane at the No Name Creek or

⁶⁸ 12 AAC 75.340(c)(1).

⁶⁹ *Cf.*, e.g., 12 AAC 75.250(d)(2). Under this regulation, for outfitters who have arranged to pick up a hunter, the duty to timely transport is suspended when removal would be unsafe: "(d) A registered guide-outfitter who contracts to outfit a hunt shall . . . (2) either personally or through a class-A assistant guide, an assistant guide, or a licensed transporter, transport the client into and out of the field at the planned date, time, and location, unless prevented by weather, mechanical problems, or other safety concerns." *Id.* Although the requirements in this regulation do not explicitly apply to guiding services, the implicit general principle established by this regulation is that if a timely and safe pick up is prevented by weather, the requirement for timeliness is excused.

⁷⁰ Amended Accusation ¶¶ 17, 20; *See also* Division's Closing Argument (basing the claim of negligent and unethical guiding on Mr. Lenz's view of the facts).

No Name Creek strips after the hunt ended. None of these three have expertise in weather patterns in the Brooks Range or bush piloting a small plane in the Brooks Range. None understood that the weather up above the mountain ridge may prevent a plane from landing on a remote strip located in a bowl, even when the weather is calm down below at the strip itself. The Division did not offer any evidence regarding the weather conditions in the Brooks Range during this time from an expert source.

The Division did offer the testimony of guiding expert Richard Rohrer, who testified that he had checked the paperwork for Coyote Air, an air-taxi operator based in No Name, who also flies in the Brooks Range. That paperwork noted that August 22 was the only day on which Coyote Air was grounded because of weather. Mr. Rohrer offered an opinion that this makes it likely that Mr. Salitan could have found a window to fly to No Name or No Name Creeks if he had been diligent.

Although Mr. Rohrer was a credible witness, here, his reliance on notes from Coyote Air is not sufficient to prove that the No Name Creek or No Name Creek strips were accessible. The Division did not present the testimony from the operator of Coyote Air. It did not establish that he would have been willing to land at these remote strips using the aircraft that he pilots.

Mr. Salitan offered the testimony of Dr. Guthrie. Dr. Guthrie is a well-respected bush pilot. He has expertise in piloting in that area and he has first-hand knowledge of the weather during the time that the hunting party was weathered in at No Name Creek.

First, with regard to the issue of whether landing and then taking off (with a load) at the No Name Creek strip may be dangerous in bad weather, Dr. Guthrie explained that, “No Name Creek is a one-way strip. You can only land going up the valley, and can only take off going down the valley.” In Dr. Guthrie’s opinion, taking off with a load with a tail wind would be impossible. Dr. Guthrie described the strip as “pretty much a Super Cub strip.” Mr. Stevenson confirmed that an isolated strip could be unapproachable even when the weather at the strip was ideal.

Second, with regard to the weather conditions, Dr. Guthrie explained, “Luke and I both made attempts.”⁷¹ Speaking about his own experience, he explained “the winds were wrong for trying to get in and out of that place.”⁷² On many days, it was not possible for him to reach the south side of the range because he was grounded at No Name by fog or snow. On other days,

⁷¹ Salitan Exhibit A at transcript page 5.

⁷² *Id.* at 8.

although he had limited access to weather reports while at No Name, he received reports of winds that showed that it was not possible to get a plane in, both from Mr. Salitan and from the flight service station in Fairbanks.⁷³

Dr. Guthrie also wondered whether his being marooned on the north side of the range might have been a factor. He speculated that if he had been on the south side, he might have found a window. Mr. Helton's testimony, however, tended to confirm Mr. Salitan's statements that Mr. Salitan had his alternative pilot, Mr. Miller, standing by during this time. Mr. Helton also confirmed that the weather was bad. Therefore, although the Division argues that Mr. Salitan negligently failed to take advantage of opportunities to retrieve the clients by air, the Division has not proven that any opportunities occurred or that Mr. Salitan was not reasonably prepared to take advantage of any opportunities that might have occurred.

In a related argument, the Division asserts that the reason Dr. Guthrie did not pick up the clients was that he was too busy. It cites to Dr. Guthrie's having checked "drop-off service only" on his transporter report as evidence that Mr. Salitan never had a plan for getting the hunters out of the field.⁷⁴ Dr. Guthrie testified, however, that his checking that box was either an error or was checked to allow for a different pilot to do the pick up if that turned out to be more convenient. He and Mr. Salitan had always understood, however, that he was available to assist in picking up the hunters. Therefore, the Division has not shown that it was unreasonable for Mr. Salitan to have relied on Dr. Guthrie (in addition to Mr. Miller).

Because the Division has not proved that Mr. Salitan would have been able to safely retrieve the clients by air with reasonable care, the Division has not proved that Mr. Salitan violated a legal duty to the clients by not doing so. Therefore, the Division's main theory for liability under Count III is dismissed.

3. Did Mr. Salitan fail to provide adequate food and shelter, and did he place the health and safety of the hunting party at risk?

The Board's regulations require that a guide provide adequate provisions and shelter for both emergencies and normal field conditions.⁷⁵ The Division alleged that Mr. Salitan violated these requirements, and put the health and safety of the hunting party at risk.

⁷³ Guthrie testimony.

⁷⁴ Division Closing Argument at 8.

⁷⁵ 12 AAC 75.340(a) states:

All classes of guides shall

(1) take every reasonable measure to assure the safety and comfort of the client, including ensuring that during the hunt

The Division did not, however, prove that the amount of food was insufficient. Although the party may have been somewhat under-provisioned, the No Name Creek camp had food other than sheep meat when Mr. Lenz and Mr. Elliot arrived back from No Name Creek, which was at least two or three days after the hunt was scheduled to end.⁷⁶ Although this surplus may have been created in part because the No Name Creek party had run out of the food it had taken to No Name Creek, and Mr. Ketcher had begun rationing the remaining food, it does tend to show that the initial food supply was adequate.

The parties dispute how much food Mr. Salitan dropped on August 28. Regardless of who is correct about the amount of food dropped, however, it was sufficient. The party had food left at the end of the hunt.⁷⁷ Mr. Lenz's testimony that he was starving and at-risk is not credible. Moreover, the party did have adequate shelter—a sturdy “Arctic Oven” tent, which Mr. Lenz referred to as a “bomb shelter.” This shelter clearly meets the requirements of 12 AAC 75.340(c)(1)(C) to provide shelter that is normally considered satisfactory under field conditions. In addition, the two assistance guides were both experienced and capable woodsmen who could take care of the party. Mr. Douglas testified that he could have remained safely in camp for longer than he did.⁷⁸ Mr. Elliot was reluctant to leave camp, which indicates that camp was adequately provisioned and had adequate shelter.⁷⁹ The party had satellite telephones and an air-transport radio for emergency communication should a true health/safety emergency occur. Therefore, allegations relating to health and safety are dismissed.

4. Did Mr. Salitan violate regulation 12 AAC 75.250(d), regarding advising clients of pick up and alternatives if pick up is unavailable?

(A) adequate supplies are present to provide first aid for injuries that are reasonably expected in the field;

(B) sufficient supplies are present to provide for emergencies, including food, clothing, and a source of heat; and

(C) food and shelter are present that are normally considered satisfactory under field conditions.

⁷⁶ The record includes a complaint filed by packer Robert Horne, in which he alleged that he was not provided sufficient provisions for his assignment at No Name Creek. Admin. Rec. at 432. The Division did not present any testimony from Mr. Horne, nor was his allegation included in the factual recitation contained in the Amended Accusation. Therefore, Mr. Horne's situation will not be discussed.

⁷⁷ Helton testimony.

⁷⁸ Douglas testimony.

⁷⁹ Mr. Rohrer affirmed in his expert opinion that Mr. Elliot's willingness to remain in camp is an indication that the party had a sufficient variety of food. He further clarified that, given the clients had not actually run out of food, his opinion that Mr. Salitan was negligent would be based strictly on the consideration that the situation had gone on too long.

The Division has alleged that Mr. Salitan violated 12 AAC 75.250(d). This regulation sets requirements for outfitters regarding communication to the clients of the expected pick up and alternative exit strategies. Under 12 AAC 75.250(d)(1), “[a] registered guide-outfitter who contracts to outfit a hunt shall (1) before leaving a client in the field, advise the client . . . [of] the course of action the client should follow if the registered guide-outfitter is unable to pick up the client as planned.”⁸⁰

The Division’s theory of the law, however, is not viable. This regulation applies only to a guide-outfitter who contracts to *outfit* a hunt.⁸¹ Here, Mr. Salitan contracted to *guide* these hunts.⁸² Therefore, 12 AAC 75.250(d) does not apply to this case, and the Division’s allegations that Mr. Salitan violated 12 AAC 75.250(d) are dismissed.

5. Did Mr. Salitan breach a duty to timely employ an alternative means to transport the clients out of the field?

The Division has an alternative theory, independent of whether the party was at-risk or whether Mr. Salitan was excused because of weather from sending a plane in to remove the parties. In the Division’s view, Mr. Salitan should have arranged for the parties to walk out to No Name Lake earlier than September 1. It believes that his duty to the clients required him to take

⁸⁰ 12 AAC 75.250(d)(1).

⁸¹ See AS 08.54.790(11) (2011):

"outfit" means to provide, for compensation or with the intent to receive compensation, services, supplies, or facilities, excluding the provision of accommodations by a person described in AS 08.54.785, to a big game hunter in the field, by a person who neither accompanies nor is present with the big game hunter in the field either personally or by an assistant.

⁸² See AS 08.54.790(9) (2011):

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

- (A) contracting to guide or outfit big game hunts;
- (B) stalking, pursuing, tracking, killing, or attempting to kill big game;
- (C) packing, preparing, salvaging, or caring for meat, except that which is required to properly and safely load the meat on the mode of transportation being used by a transporter;
- (D) field preparation of trophies, including skinning and caping;
- (E) selling, leasing, or renting goods when the transaction occurs in the field;
- (F) using guiding or outfitting equipment, including spotting scopes and firearms, for the benefit of a hunter; and
- (G) providing camping or hunting equipment or supplies that are already located in the field.

action. His failure to do so led to the parties being in the mountains much longer than necessary, and also led to meat and one trophy being spoiled.

In Mr. Salitan's opinion, however, a guide is not required to force unwilling clients to hike out of sheep camp. He believes that a guide's duty under the law, and his duty under his contracts with Mr. Lenz and Mr. Ketcher, was to provide an alternative if one existed. If the client refused to use the alternative, the guide has not violated any duty to the client.

The Division's theory of the law appears to some extent to be based on 12 AAC 75.250(d), which, as explained above, is not applicable. Yet, the general concept that a guide should have a reasonable alternative plan for bad weather can be inferred from the regulations that do apply to guiding contracts. Under 12 AAC 75.340(c)(1), for example, guides are required to "take every reasonable measure to assure the safety and comfort of the client." Here, although this regulation does not require taking extraordinary measures during bad weather just to allay moderate discomfort, it certainly establishes a requirement to take reasonable measures when a client communicates a desire to leave the field. Moreover, 12 AAC 75.340(d)(10) requires that a guide must timely respond to requests for assistance during a hunt. Here, given that the clients requested to be transported out of the field, if Mr. Salitan had a reasonable alternative to comply with this request, this regulation requires that he not ignore the request. Thus, the Division's theory of the law—and theory of violation of the law—is a tenable theory.

On the other hand, a client could repudiate the requirement that a guide must timely facilitate removal from the field after a hunt. If a client who is safe and comfortable informs the guide that his or her preference would be to stay in sheep camp and wait for the weather to clear, that statement would release the guide from the guide's duty to use other reasonable means to remove the client from the field. Excusing nonperformance of a duty, or modification of a duty by mutual agreement, are common contract doctrines that would relieve a person of a duty to perform.⁸³ If leaving the client in the field was a reasonable alternative, the client's request to remain would release the legal duty. Thus, Mr. Salitan's theory of the law—and theory for why he did not violate the law—is also a tenable theory. Which approach to the law applies here will depend on the facts.

⁸³ Cf., e.g., *Conam Alaska v. Bell Lavalin, Inc.*, 842 P.2d 148, 157 (Alaska 1992) (holding that nonperformance of the contract was excused by commercial impracticality). Note that here we are discussing whether the duty to remove by an alternative means was excused by Lenz's and Ketcher's refusal to hike out—we have already concluded that the duty to timely remove by aircraft was excused by bad weather.

One fact that is in dispute is whether Mr. Salitan advised the hunting party of the option to hike to No Name as an alternative exit strategy. This fact is important because in order for Mr. Salitan to establish that his duty to remove his clients by an alternative means was excused, he must prove that the clients knew of the alternative route, and refused to take it. The two clients do not recall being informed of this option until they learned about it from Brooks Range Aviation.⁸⁴ Mr. Salitan, on the other hand, testified that he brought up the No Name Lake option early during the weather delay, and that the clients rejected it. Mr. Salitan claims that he kept a log, and wrote down the date of this communication, but that a former attorney lost the relevant pages of the log book.

None of the testimony regarding the timing of the communication about the hike-out option is reliable. The three members of the hunting party are not reliable historians. Mr. Lenz, on whom the Division relies almost exclusively, exaggerated the direness of the situation. He speaks of starving while in sheep camp and having lost 45 pounds—a claim not made by the others, and difficult to believe given that there was food other than sheep for most of the 23 days, and sheep meat for 14 of the 23 days. Mr. Lenz claims to have rubbed his cape down with ashes while at the No Name Creek camp, but then says that he had no wood and no fire at No Name Creek. He reported the distances from No Name Creek to No Name as 15 miles (actually about five) and the distance from No Name Creek to No Name as 15 miles (actually about seven).

Although not as zealous as Mr. Lenz, Mr. Douglas and Mr. Ketcher were also unreliable in their desire to prove the case against Mr. Salitan. For example, Mr. Douglas claimed that the party threw away almost an entire sheep's worth of meat—a claim that is clearly wrong, and not backed by the other witnesses. Mr. Ketcher testified that he and Mr. Douglas spent the first three days being lost while searching for the No Name Creek camp, but Mr. Douglas said that was not true—he was never lost and he never had intended to hike to No Name Creek.

As for Mr. Salitan's claim that his former attorney lost crucial evidence, that claim is difficult to credit. The former attorney did not testify. Preservation of evidence is extremely important to attorneys.⁸⁵ Mr. Salitan's preservation of his log notes for August 30, but not for the earlier days that are important to this inquiry, makes his testimony more difficult to accept. To be clear, I am not implying that Mr. Salitan has destroyed evidence or lied under oath. Indeed, but for this incident of the missing log notes, I generally found Mr. Salitan to be a credible witness. I

⁸⁴ Lenz, Ketcher testimony.

⁸⁵ Under the doctrine of spoliation, an attorney can be sanctioned for failing to preserve evidence.

am saying, however, that his inability to provide a more complete and persuasive explanation for why the important log notes were not provided raises some doubt about his testimony on this issue.

Both Dr. Guthrie and Mr. Stevenson affirm that they were speaking with Mr. Salitan regularly throughout this process and that the option to hike to No Name came up during these conversations. Yet, neither of them were able to nail down precisely when the suggestion was made to the clients or when or how the clients repudiated the hike-out alternative. Mr. Douglas's testimony corroborates that Mr. Salitan had mentioned the option of hiking to the lake, and that he (Mr. Douglas) did not believe that it was possible until it was affirmed by Brooks Range Aviation. This supports Mr. Salitan's testimony that he had suggested the option and that it was not initially well-received, but, again, it does not establish when this occurred.

To prove that he was excused from his duty to facilitate the clients' exit from No Name Creek by arranging for the hike-out to No Name Lake earlier than August 31, Mr. Salitan must prove that the clients actually repudiated the option.⁸⁶ Here, based on the totality of the evidence, he has not done that.

First, he has not proved that he communicated the option to hike persuasively and clearly at an early enough time to make a difference with regard to excusing his duty to make it happen. Second, he has not proved that the clients clearly repudiated the hike-out option. Third, and most important, based solely on his own testimony, he has not proved that his delay in facilitating the hike-out option was reasonable.

Mr. Salitan testified that the situation back at sheep camp was out of control. He knew that the clients, his assistant guide, and the clients' families were calling the state troopers and air-taxi operators across the state. He knew the clients wanted out of sheep camp. Moreover, his own testimony established that he had concerns for their safety—he was worried that an inexperienced air-taxi operator would respond to their pleas for help, and risk landing at the strip during inclement weather, putting the pilot, and his clients, at risk. Therefore, Mr. Salitan should have acted much earlier (ideally before the situation unraveled, and certainly upon learning that the situation was beginning to disintegrate) to take additional steps to get them out of sheep camp.

⁸⁶ In legal proceedings, we call this concept the “burden of proof.” For the purpose of proving the violations of law alleged in the Accusation, the Division has the burden of proof. Here, however, Mr. Salitan is trying to prove that he is excused from meeting a requirement in the law. On that issue (which, in legal terminology, is called an “affirmative defense”), Mr. Salitan has the burden of proof.

Moreover, Mr. Salitan himself emphasized several times that the hike to No Name Lake was a very easy, available hike. Accordingly, within the first few days after the party had been weathered in, Mr. Salitan should have ensured that the party began its hike out. Although breaks in the weather usually occur, here, where no break occurred in a reasonable time, and the alternative exit was so simple, his duty to his clients required him to take expedient measures to remove the clients from the field.

Mr. Salitan faults his assistant guides for letting the situation get out of control. Those assistants, however, were his agents, and any fault attributable to them is directly attributable to him—either for not training the assistants, hiring the wrong assistants, or failing to take control of the situation as he should have. If his assistant guides were not willing to get behind the plan to hike out (which Mr. Salitan should have made clear was required), then Mr. Salitan himself, or a more trustworthy assistant guide, should have hiked in, taken control, and facilitated the hike out.

Mr. Salitan also argues that he acted reasonably because he was strongly motivated to retrieve these clients and execute the next hunt. He lost money because one of the hunters scheduled for the next hunt came back the next year and did not have to pay a fee. Yet, Mr. Salitan's lack of motive here is not relevant. He had a duty to use an alternative route to remove the clients, and he could have fulfilled that duty in a reasonable time frame.

Two witnesses with expertise in guiding, Mr. Rohrer (who was qualified as an expert in guiding in Alaska), and Mr. Stevenson, an experienced guide and pilot (who was qualified as an expert in piloting sheep hunters) testified about the standard of care that a guide should exercise when clients are stuck in the field longer than expected. Each was an excellent witness, providing opinion testimony based on experience and knowledge. Each confirmed that having clients stuck in the field for 12 days was an unusually long time. Mr. Rohrer testified that in the guiding industry, this incident was an “*extreme* length of time.”⁸⁷ In his view, after waiting three to four days for the weather to clear, the contracting guide had an obligation to take action. Having Mr. Salitan hike in from No Name was, in his opinion, an obvious and simple solution to the dilemma. Mr. Rohrer concluded that Mr. Salitan was negligent—his failure to take action fell below the standard of care for a registered guide.⁸⁸

Mr. Stevenson also testified that, in his opinion, the hunting party had ample options. He agreed that “by all means” the guide has a responsibility to find an alternative way out of the

⁸⁷ Rohrer testimony.

⁸⁸ *Id.*

hunting grounds when circumstances change. He explained that he has frequently had, and expected that all guides have had, hunters picked up from different locations from where they were dropped off. If he had been in this situation, he would have started working on the hike-out option right away.⁸⁹ Thus, based on the expert testimony, the standard of care for a guide is to employ reasonable alternatives to meet unforeseen circumstances when they arise. Mr. Salitan's delay in arranging for his clients to hike to No Name Lake fell below this standard of care.

In sum, Mr. Salitan breached his duty under the law (and, as explained below, his duty under his contract), when he did not take action earlier and more effectively to facilitate the exit of the hunters from sheep camp.

6. Did Mr. Salitan violate AS 08.54.610(e) by not being in the field with the clients?

The Amended Accusation alleges that Mr. Salitan violated AS 08.54.610(e). As that statute existed in 2012, it required a guide to be “physically present in the field with the client at least once during the contracted hunt.”⁹⁰ The Division argued that Mr. Salitan was with the clients only at his lodge in No Name or at a maintained airport. Under AS 08.54.790(7), “‘field’ means an area outside of established year-round dwellings, businesses, or other developments associated with a city, town, or village; ‘field’ does not include permanent hotels or roadhouses on the state road system or state or federally maintained airports.”

As Mr. Salitan pointed out, however, he met the clients at Grayling Lake after they were dropped off by Brooks Range Air Service. Therefore, he was in the field with the clients. Mr. Salitan did not violate AS 08.54.610(e) during the Lenz and Ketcher hunts.

7. Was Mr. Salitan's failure to keep the meat and Mr. Ketcher's cape from spoiling a violation of law?

Count IV of the Amended Accusation alleges that Mr. Salitan violated his ethical and contractual duties to endeavor to salvage all meat and trophies.⁹¹ Under the Board's regulations, a guide has an ethical duty to “endeavor to salvage all meat of animals taken by clients, in accordance with state statutes and regulations.”⁹² Under fish and game statutes, a hunter commits a class-A misdemeanor if the hunter “fail[s] intentionally, knowingly, recklessly, or with criminal

⁸⁹ Stevenson testimony. Mr. Stevenson also testified that “we can't force 'em to walk out.” He explained that he was in communication with Mr. Salitan, and understood that the clients were refusing to walk out.

⁹⁰ AS 08.54.610(e) (2012).

⁹¹ Amended Accusation ¶ 30.

⁹² 12 AAC 75.340(d)(3).

negligence to salvage for human consumption the edible meat of the animal or fowl.”⁹³ The law provides, however, that a defense to a charge of wanton waste would be

that the failure to salvage or possess the edible meat was due to circumstances beyond the control of the person charged, including

- (1) theft of the animal or fowl;
- (2) unanticipated weather conditions or other acts of God;
- (3) unavoidable loss in the field to another wild animal.⁹⁴

The Board’s regulations also address preservation of trophies:

All classes of guides shall . . . (2) barring unforeseen conditions, properly prepare according to generally accepted procedures, all antlers, horns, hides, and capes to be delivered to the taxidermist or to the client at the conclusion of a hunt in a satisfactory and unspoiled condition, unless the guide is providing only outfitting and transportation services for the client.⁹⁵

Here, the parties agree that Mr. Ketcher’s cape spoiled. The testimony of all three members of the hunting party confirms that some sheep meat had spoiled and the spoiled meat was discarded before the party began its hike out. How much meat was wasted was not clear. According to Mr. Douglas, the party threw away almost a whole sheep. The other two hunting party witnesses, on the other hand, testified that one sheep was completely consumed and the other partially eaten. If, as at least one witness suggested, it was Mr. Ketcher’s sheep that was completely eaten, then a substantial portion of the other sheep had to have been eaten as well because, according to Mr. Lenz, three hungry men were eating nothing but that sheep for four to six days at the No Name Creek camp. Moreover, Mr. Douglas’s own testimony contradicts his assertion that a nearly a whole sheep was wasted—he described how when Mr. Elliot was preparing for the hike, he was cooking the remaining sheep meat and placing it in zip-loc bags because Mr. Elliot felt an obligation to salvage the meat even though it was spoiling. Mr. Douglas persuaded Mr. Elliot to discard the meat because it was pointless to carry extra weight. Because Mr. Elliot did not testify we do not know how much meat he discarded or whether he did carry some meat out. All we can conclude is that some meat spoiled and was discarded.

Mr. Salitan asserts that he did not violate 12 AAC 75.340(d)(3) because he did not discard any meat. He argues that he cannot be vicariously liable for something his assistants did because

⁹³ AS 16.30.010(a).

⁹⁴ AS 16.30.017(a).

⁹⁵ 12 AAC 75.340(d)(2).

his assistants' failure to salvage meat, if true, was outside the scope of their employment. He described how he and his wife have very high personal ethical standards when it comes to salvaging and using all meat and other products from wild animals. They would never tolerate any waste.

As for the failure to preserve the cape, he cites to the unfortunate weather. He purchased a replacement cape for Mr. Ketcher, so Mr. Ketcher received all that he had bargained for in purchasing the hunt.

Mr. Salitan has a point when he argues that circumstances outside his control, such as bad weather, can excuse a failure to preserve game or a trophy.⁹⁶ Moreover, although he can be vicariously liable for acts of his assistants, at least one superior court has declined to uphold the Board's finding of vicarious liability when the assistant guide was acting on his own outside the scope of his duties, and the registered guide-outfitter did not know of the assistant guide's bad acts.⁹⁷

Here, however, the controlling statute, AS 16.30.010, applies whenever a failure to salvage is "criminally negligent." A person acts with criminal negligence "when the person fails to perceive a substantial and unjustifiable risk that the result will occur."⁹⁸ For the failure to perceive the risk to amount to criminal negligence, it must be "a gross deviation from the standard of care that a reasonable person would observe in the situation."⁹⁹

Mr. Salitan knew that two rams had been harvested on August 8-9. Although he believes that if he had been in sheep camp, he could have kept the meat from spoiling before September 1 by keeping it dry, he knew, or should have known, that meat is at risk to spoil. He knew that 14 days is a long time to keep meat fresh without refrigeration. He knew that he could easily retrieve the meat and trophies by hiking into sheep camp himself from No Name Lake. He was in constant communication with his assistant guides. Given his ethical obligation to preserve the meat, and given the substantial and unjustifiable risk that some meat might spoil, he should have inquired about the condition of the meat, and taken steps to ensure that either the assistants, or, if necessary, he himself, salvaged the meat. His failure to do so was a violation of his obligation under 12 AAC 75.340(d)(3).

⁹⁶ See AS 16.30.017; 12 AAC 75.340(d)(3).

⁹⁷ *Reel v. Big Game Comm. Servs. Bd.*, Case No. 3AN-11-10124 CI at 24-25 (January 31, 2013; Alaska Superior Ct., Guidi, Judge).

⁹⁸ AS 11.81.900(a)(4).

⁹⁹ *Id.*

As for Mr. Salitan’s failure to preserve the cape, unlike the wanton waste statute, the governing regulation, 12 AAC 75.340(d)(2), does not specify what mental state (such as “criminal negligence” or “knowledge”) must be proved to prove an ethical violation for failure to preserve a cape. The experts in this case, Mr. Rohrer and Mr. Stevenson, acknowledged that capes will slip, sometimes in a matter of days, and sometimes in spite of care taken by the guide to preserve the cape.

One factor in determining whether Mr. Salitan fell below the level of care required under 12 AAC 75.340(d)(2) is that the hunting party had no salt with which to preserve the capes. The experts disagreed about whether Mr. Salitan should have packed salt to sheep camp. Mr. Rohrer believes it is necessary.¹⁰⁰ Mr. Stevenson testified that he has rarely seen salt at sheep camp and will not allow it on board his aircraft because salt is so corrosive.¹⁰¹ Mr. Salitan testified that the extra weight of salt is not justified on a sheep hunt where a plane must be kept as light as possible.¹⁰² Regardless of whether the failure to provide salt was error, however, because Mr. Salitan was aware that the party had no salt, aware that with each passing day it became more likely that a trophy would spoil, and aware that an easy alternative existed to get the party out of the mountains, his failure to employ that option in a timely manner fell below the standard of care that he is required to exercise. Therefore, he violated his ethical duty to preserve trophies under 12 AAC 75.340(d)(2).

8. What discipline should the Board apply to Mr. Salitan for Counts III and IV?

Above, we have concluded that the Division proved violations in both Count III and Count IV. The next step is to address disciplining Mr. Salitan for those violations. Before determining the appropriate level of discipline, however, we must first determine an issue of law. Mr. Salitan has argued the Board cannot impose discipline on a guide in these circumstances in the absence of a conviction. That issue is addressed first; following that discussion, we will discuss the appropriate discipline for Mr. Salitan’s violations.

a. Does the Board have authority to impose discipline for a circumstance that is not listed in AS 08.54.710(a)?

Alaska Statute 08.54.710(a) gives the board authority to impose discipline in four circumstances:

- (a) The board may impose a disciplinary sanction in a timely

¹⁰⁰ Rohrer testimony.

¹⁰¹ Stevenson testimony.

¹⁰² Salitan testimony.

manner under (c) of this section if the board finds that a licensee

- (1) is convicted of a violation of any state or federal statute or regulation relating to hunting or to provision of big game hunting services or transportation services;
- (2) has failed to file records or reports required under this chapter;
- (3) has negligently misrepresented or omitted a material fact on an application for any class of guide license or a transporter license; or
- (4) has breached a contract to provide big game hunting services or transportation services to a client.¹⁰³

Mr. Salitan argues that none of these circumstances is present here. He has not been convicted of violating any statute or regulation. He has not failed to file records, misrepresented facts on an application, or, in his view, breached a contract. Therefore, he concludes, the Board has no authority to impose discipline on him, even if the Board finds that he violated a statutory or regulatory provision.

The Division argues that AS 08.54.710(a) is not a jurisdictional limitation. In its view, in addition to the authority granted under AS 08.54.710, the Board has implied authority to impose discipline under its enabling statute (AS 08 54.600), the statute that lists the substantive guiding requirements (AS 08.54.720), and the statute that imposes vicarious liability for the acts of an assistant guide (AS 08.54.740).

The Division's arguments are not persuasive. The Board's enabling statute, AS 08.54.600(a)(3), simply lists imposing discipline under AS 08.54 as a duty of the Board.¹⁰⁴ It does not purport to broaden or limit the circumstances in which the Board may impose discipline. If the Division's reading of AS 08.54.600(a) were adopted, it would nullify the list of circumstances described in AS 08.54.710(a)—instead of limited circumstances, the Board could impose discipline for any circumstances. Because the plain language of AS 08.54.600(a) does not address when the Board has authority to discipline, and because one statute should not be interpreted to nullify another, the Division's interpretation of AS 08.54.600(a) is rejected.¹⁰⁵

¹⁰³ AS 08.54.710(a). Under AS 08.54.710(d), the Board has authority to permanently revoke a license obtained by fraud. This disciplinary authority does not apply here. In 2013, another provision for discipline, AS 08.54.710(j) became effective. Under this statute, "The board may suspend or permanently revoke a transporter license or any class of guide license if the board finds after a hearing that the licensee engaged in conduct involving unprofessionalism, moral turpitude, or gross immorality." This authority does not apply here because the statute did not become effective until after the 2012 Lenz/Ketcher hunt.

¹⁰⁴ "AS 08.54.600. **Duties of board.** (a) The board shall . . . (3) impose appropriate disciplinary sanctions on a licensee under AS 08.54.600 - 08.54.790."

¹⁰⁵ *C.f., e.g., Warren v. Thomas*, 568 P.2d 400, 403 (Alaska 1977) ("The implied repeal of an act is disfavored.).

As for the statute that lists the various criminal offenses for which the Board may impose discipline, AS 08.54.720, the Division believes that the lead-in language to subsections (b) – (e) of that statute grants authority for discipline. These subsections describe when a person is guilty of a criminal offense. Each subsection begins with the language “[i]n addition to a disciplinary sanction imposed under AS 08.54.710,” and then describes the level of criminality (misdemeanor or felony) and the punishment that a court may impose for a conviction. The Division is correct that the term “in addition” means that the disciplinary sanction is independent of the criminal conviction punishment. The Division, however, then draws the incorrect conclusion from this grammatical construction that the independence of the two sanctions means that these subsections nullify AS 08.54.710(a)(1), and allow imposition of discipline for conduct made criminal under AS 08.54.720 even in the absence of a conviction. It does not. All that the phrase “in addition” tells us is that both discipline and a conviction can occur. Subsection 710(a) tells us, however, that discipline can only occur under four circumstances (subsection 710(d) provides a fifth in cases of fraud, and 710(j) adds a sixth after April 1, 2013). Thus, the subsections cited by the Division, AS 08.54.720(b)-(e), clarify that the *only* route to discipline is through AS 08.54.710.

With regard to its argument regarding AS 08.54.740, the statute making guides liable for infractions committed by assistant guides, the Division does not actually suggest that the text of AS 08.54.740 grants independent authority to discipline a guide. Although the Division is correct that the liability of guides for violations committed by assistant guides is broader than criminal convictions, so too is the grounds for discipline under AS 08.54.710(a), which allows discipline for breach of contract, false statements on an application, and failing to file records. Therefore, AS 08.54.740 does not provide an alternative route to authority to discipline a guide.

The Division does make a very strong policy argument that the Board should have authority to discipline guides in the absence of criminal convictions. The Division has provided a very thorough examination of legislative history, and this history shows that the statutory scheme was originally designed so that the Board would have independent authority to discipline a guide for incompetence, which was later amended to allow discipline for unethical behavior.¹⁰⁶ This authority was not dependent on whether a prosecutor was able to obtain a conviction. Nor was

¹⁰⁶ See former AS 08.54.710(b). In 1996, this statute provided: “(b) The department may impose a disciplinary sanction in a timely manner under (c)(3) - (7) of this section if the department finds after a hearing that a licensee is incompetent as a registered guide, class-A assistant guide, assistant guide, or transporter.” Subsection (b) was amended in 2005 to read: “(b) The board may impose a disciplinary sanction in a timely manner under (c)(3) - (7) of this section if the board finds, after a hearing, that a licensee has acted unethically as a registered guide-outfitter, class-A assistant guide, assistant guide, or transporter.”

this authority limited to suspension or revocation—under this statute, in 2006, the Board could impose its full range of discipline for an ethical violation.

This statute (AS 08.54.710(b)), however, was repealed in 2008. The Division’s thorough research has revealed no explanation or purpose for its repeal.¹⁰⁷ The Division argues that the only rational explanation for the repeal is that AS 08.54.710(b) was superfluous because, in its view, the Board had authority from other sources to impose discipline for ethical violations.¹⁰⁸ This explanation is not persuasive. As stated above, the statutes cited by the Division do not provide any such authority. In addition, this would mean that the adoption of AS 08.54.710(j) in 2013, which provides explicit authority to suspend or revoke for unprofessional behavior, would be superfluous. Although the Division is certainly correct that former AS 08.54.710(b) provided a rational system of authority for disciplining guides, the repeal of this statute in 2008 left a void. At this time, the Board can only impose discipline if it finds that one of the circumstances described in AS 08.54.710 exists. For purposes of Counts III and IV, where no conviction was obtained (and for an incident that occurred before the adoption of AS 08.54.710(j)), that means that the Division must prove a breach of contract in order to impose discipline. We turn next, therefore, to the question of whether Mr. Salitan breached his contracts with Mr. Lenz and Mr. Ketcher.

b. Was Mr. Salitan’s failure to meet the standard of care a breach of his contracts with Mr. Lenz and Mr. Ketcher?

Mr. Salitan’s contracts with Mr. Lenz and Mr. Ketcher advised that “[a]ny special needs, or concerns are only a phone call away, and help is readily available. If a kill occurs, the planes are standing by.”¹⁰⁹ This statement sets out a promise that Mr. Salitan would provide reasonable assistance to help hunters exit the field after the kill.

Mr. Salitan does not deny that his contracts promised readily available help. He argues, however, that breach of contract is not a viable theory because the statute of limitations for a contract has passed. In addition, he continues to assert that the delay in providing help was caused by the weather. He invokes the doctrine of “*force majeure*” to argue that his failure to fly the hunters out of sheep camp was due to unforeseen circumstances beyond his control.

Mr. Salitan’s argument regarding the statute of limitations is not on point. The statute of limitations in AS 09.10.053 applies only to “an action upon a contract” for recovery of contract

¹⁰⁷ Division’s Post-hearing Brief at 9. Independent research also found no explanation for the repeal of AS 08.54.710(b).

¹⁰⁸ *Id.*

¹⁰⁹ Admin. Rec. at 383; Lenz testimony; Ketcher testimony.

damages. Here, this action is an administrative action against his license. Therefore, AS 09.10.053 would not prevent the Division from imposing discipline if Mr. Salitan breached his contract, regardless of whether a timely action for damages for breach of contract was filed.

With regard to Mr. Salitan's argument that the bad weather excused his failure to facilitate the timely removal of the clients from the field, his contract did advise that "[w]eather plays a role on ease of air travel, and it is not uncommon for storms to ground planes for a day or two."¹¹⁰ As extensively discussed above, however, the weather only excused his failure to remove by air. His contract promised "readily available" help for any needs or concerns. Moreover, every guide contract includes an implied promise that the guide will provide guiding services consistent with his legal and ethical obligations to the clients. As we have already discussed, Mr. Salitan's failure to timely use the hike-out option was not consistent with the standard of care he owed to his clients under the law. It also was not consistent with his explicit promise to provide help.

In short, a breach of contract is established when a party fails to meet his or her promises under the contract. Here, the clients clearly expected better service, and that expectation was reasonable under the contract. Even though Mr. Salitan was excused from picking the clients up by air, and even though the expectation of removal by air remains the clients' main focus and source of their discontent, Mr. Salitan did not prove that the clients clearly repudiated his obligation to take additional steps to facilitate their timely exits by hiking out. Therefore, he has breached his contract.

Because Mr. Salitan has breached his contract, the Board may impose discipline under AS 08.54.710(a)(4). We turn next to a discussion of the appropriate level of discipline for his breach of contract.

c. What level of discipline is appropriate to address Mr. Salitan's failure to meet the standard of care required by law and his contract?

The Division did not provide guidance on the appropriate level of discipline for any of the alleged offenses. It suggested that the Board be guided by its discipline guidelines, which describe possible disciplinary ranges for violations of statute. Because discipline is so dependent on the facts of the case, however, these guidelines do not shed light on what level of discipline is appropriate in this case.

Mr. Salitan has made some good points regarding the facts presented at hearing. First, Mr. Salitan points out that he did many things correctly. His assistant guides were well-qualified

¹¹⁰ Admin. Rec. at 383.

woodsmen. He ensured that the hunting party had working communication equipment—an air radio in addition to satellite telephones—and he stayed in communication with the party throughout the process. He provided the party with what he characterized as the best possible shelter in a mobile sheep camp—an *Arctic Oven*, which is a tent that would keep them warm and dry even in extreme adverse fall weather. He consulted with experts, including Dr. Guthrie, Mr. Stevenson, and Lt. Dahl, for advice during the time his hunting party was stranded. He did not take chances or try to talk a pilot into flying when the pilot determined that flying was risky. Thus, Mr. Salitan complied with his most important ethical obligation of keeping the hunting party safe.

Second, although Mr. Salitan did show bad judgment in not facilitating the hike-out option earlier, the magnitude of the breach here is relatively slight in comparison to other errors made by guides. Mr. Salitan could reasonably expect a break in the weather—in general, bad weather usually does break in a few days, and a pilot usually has an opportunity get in. Although in hindsight we can agree that after three to four days a guide must take action, during the time, with clients who were in two different camps and unenthusiastic about hiking, it would not have been as immediately obvious that delay was an error.

Third, not all clients would have reacted as negatively to the delay as Mr. Lenz and Mr. Ketcher. Acknowledging that this matter has some subjectivity does not mean, however, that I accept Mr. Salitan's assertion that these clients' personalities (which he characterized as "affluenza") were to blame for their own dissatisfaction. As Mr. Rohrer explained, although these clients were somewhat demanding, a guide should expect that clients would be inexperienced with Alaska weather conditions. Yet, while I do not blame the clients, I agree with Mr. Salitan that with different clients, the outcome might have been different, perhaps because they might have been more willing to hike out earlier or because they might not have minded staying in the mountains for an extra 12 days. The point is not that Mr. Salitan was unlucky—a guide exercising a reasonable standard of care would not have needed luck to avoid this situation. The point here is that the Division has proved only an ethical breach with regard to a client's comfort. Although reasonable comfort (not luxurious comfort) is important and breaching the standard of care for reasonable comfort warrants discipline, the inherently subjective nature of comfort means that the Board will not impose significant discipline for this breach. Discipline would be much greater if the breach of contract implicated an objective standard such as a client's safety.

Fourth, although the Division is correct that Mr. Salitan did not express remorse, empathy, or sympathy at the hearing, he clearly has received the message that he erred. He has been through two investigations (Alaska Professional Hunters Association and Safari Club International) before this one. He has had to hire attorneys to represent him, and he has had to invest considerable time and resources in his own defense. Moreover, Mr. Salitan understands the importance of bonding with the client so guided hunts go well, and he emphasized several times his commitment to ethical practices. In the future, he will take steps to avoid having the difficulty that he experienced here.

None of this, however, excuses Mr. Salitan's conduct. Not only did he make an error in judgment in failing to timely facilitate the hike-out option, he also made several errors in planning and executing this hunt. He did not adequately communicate with the clients in advance of the hunt and warn them of the consequences of adverse weather. He did not have sufficient knowledge of his two assistant guides to predict how they would respond, and did not have control over them when the situation deteriorated. He did not provide the party with maps of the area, which would have made the hikes into and out of No Name Creek, and out to No Name Lake, easier and less intimidating. In short, his inadequate planning, and his error in judgment, led to a situation where discipline must be imposed.

When asked about appropriate discipline, the Division's expert, Mr. Rohrer, emphatically responded that Mr. Salitan should not lose his license over this incident. He suggested that what occurred should be a good lesson to Mr. Salitan: "this should be a learning experience for him. There should be something more than a verbal reprimand to make sure that he's prepared the next time something like this happens." Mr. Rohrer's comments are consistent with the analysis here that Mr. Salitan's errors require discipline, but do not require significant discipline.

Under AS 08.01.075(f), a board is required to "seek consistency in the application of disciplinary sanctions." That requires comparing the discipline imposed in prior similar adjudications and memoranda of agreement with the facts of this case.

As the Division has explained, no comparable cases—cases of failure to meet the standard of care by not removing a client from the field—have been found in the database of Board discipline. Three memoranda of agreement from the last four years, however, are instructive: *In re French*, Case No. 1700-08-028 (Dec. 4, 2012); *In re Lovett*, Case No. 2012-000748 (July 2, 2012); *In re Wheeler*, Case No. 2011-001229 (March 13, 2012). In each of these cases,

prosecutors obtained a conviction of a licensed guide or assistant guide for a guiding or hunting law violation. In each, the Board subsequently imposed discipline.

In *French*, the respondent was convicted for failing to salvage all edible meat from a big game animal he had killed. The Board fined him \$1,000, all of which was suspended. In *Lovett*, the respondent was convicted of assisting a hunter take a sub-legal moose. The Board fined him \$500, all of which was payable. In *Wheeler*, the respondent was convicted of assisting a hunter take a sub-legal sheep. The Board fined him \$500, all of which was payable. All three respondents were reprimanded. In addition, the respondents in *Wheeler* and *Lovett* were required to obtain additional education.

We must be cautious about relying on negotiated agreements to set the precedent for discipline because many factors beyond the issue of appropriate discipline can affect the outcome of a negotiation. In addition, each of these three respondents was fined by the criminal court, so the size of their fines may reflect a view that an additional substantial fine was not necessary. Yet, the two fines serve different purposes—the criminal fine is punitive; the civil fine is for remediation. Moreover, the important fact here is that in *French*, *Lovett*, and *Wheeler*, the infractions were clear violations of substantive hunting laws, each of which warranted a criminal conviction. Here, in contrast, the issue was one of whether the care provided to a client fell below the standard of care. No criminal conviction was obtained.

In some cases, the lack of a conviction would not affect the extent of the discipline. For example, a clear and significant breach of ethical standards, or a criminal matter that was never charged because of evidentiary issues, could well result in significant discipline. The point here, however, is that Mr. Salitan's breach is less significant than the breaches of hunting and guiding laws, and of the ethical standards for guides, than the matters for which convictions were obtained in *French*, *Lovett*, and *Wheeler*. Therefore, the discipline here should not exceed the discipline imposed in those cases.

The Board will fine Mr. Salitan \$500 for the breaches of his contracts in the 2012 Lenz/Ketcher hunts relating to his failure to timely remove the hunters. \$250 of the fine will be suspended for one year, contingent on Mr. Salitan not violating a guiding or hunting law during this time. A reprimand will be placed in Mr. Salitan's file.

- d. Was Mr. Salitan's violation of 2 AAC 75.340(d)(3) by not being more vigilant in preserving the meat or cape a breach of his contracts warranting further discipline?**

We have already determined that Mr. Salitan's failure to facilitate the hunters' exit earlier than he did was a violation of his ethical obligation to endeavor to preserve the meat and trophies. As to whether this was a breach of his contracts, based on 2 AAC 75.340(d)(3), the clients had a reasonable expectation that Mr. Salitan would recognize the risk to the meat and the cape, and take action earlier than he did. Therefore, Mr. Salitan's failure to take steps within a few days to facilitate the client's exit was a violation of his contractual obligation with regard to the meat and the trophies (in addition to his obligation to the client's comfort), and the Board may impose discipline under Count IV of the Amended Accusation.

Yet, certain aspects of this record must be considered before imposing discipline for this breach of contract. First, the promise to endeavor to preserve the meat and the cape is not a guarantee that all meat will survive and that the cape will not spoil. Second, no evidence was received regarding the clients' expectation for the meat, or whether they considered the spoilage of some meat to be a breach of contract. Indeed, the person most concerned by the evidence that some meat had spoiled was Mr. Salitan. Third, the Division did not prove how much meat had spoiled. Fourth, with regard to Mr. Ketcher's cape, Mr. Salitan provided Mr. Ketcher with a replacement cape at his own expense. Fifth, Mr. Salitan did not know that meat was spoiling. His ethical violation stems from his failure to inquire about or appreciate the risk that the meat might spoil and to take steps earlier than he did. No violation of criminal statutes was charged. This is less culpable than a typical case of waste.

Although these considerations reduce the extent of discipline, the failure to take steps to inquire or protect the meat or trophy is an ethical breach that the Board must address. Mr. Salitan is fined \$500 for his violation of Count IV. A reprimand will be placed in his file.

III. Counts I and II: Mr. Salitan's 2014 advertising and booking of hunts at trade shows in Nevada and Texas while his license was expired

A. Facts regarding the charge of guiding and advertising without a license in 2014

The facts regarding Mr. Salitan's unlicensed guiding activity are not in dispute. In early 2014, Mr. Salitan attended two trade shows held by Safari Club International. In January 9-12, he exhibited at a trade show in Dallas, Texas, for the purpose of selling and booking guided hunts in Alaska.¹¹¹ On February 5, 2014, he was exhibiting at a trade show in Las Vegas, Nevada.¹¹² Nevada Game Warden Nicholas Gilliland, working under cover on behalf of the Division,

¹¹¹ Zweng testimony. Mike Zweng is a licensed guide who also attended the Dallas show, where he observed Mr. Salitan.

¹¹² Gilliland testimony.

approached Mr. Salitan posing as a prospective client. He recorded his conversations with Mr. Salitan. Mr. Salitan was attempting to sell a guided hunt to Mr. Gilliland. The recordings are part of the record.

Mr. Salitan's registered guide license had expired on December 31, 2013. He did not renew his license until February 27, 2014. Therefore, during the time he was advertising and booking Alaskan guided hunts in Dallas and Nevada in January-February 2014, he did not have a current license. Although the Alaska State Troopers investigated this incident for criminal wrongdoing, no charges were filed against Mr. Salitan.

B. Did Mr. Salitan violate guiding laws by advertising and booking hunts without a current license in 2014?

Under the law that addresses guiding without a license, “[i]t is unlawful for a . . . person without a current registered guide-outfitter license to knowingly guide, advertise as a registered guide-outfitter, or represent to be a registered guide-outfitter.”¹¹³ Mr. Salitan does not contest that he advertised and represented himself to be a registered guide-outfitter, and booked guiding contracts, during a time when he did not have a current registered guide-outfitter license.

Mr. Salitan raises two legal arguments for why his conduct of selling guided hunts while not having a license should not be considered a violation of AS 08.54.720(a)(9). First, he argues that the Board does not have jurisdiction to punish acts that occurred outside of Alaska. Second, he asserts that he did not knowingly violate AS 08.54.720(a)(9) because he did not know that his license had expired.

Mr. Salitan's argument regarding the Board's jurisdiction is frivolous. Licensing boards frequently discipline licensees for conduct that occurred in other states.¹¹⁴ The purpose of a license is to protect the public.¹¹⁵ The public in Alaska needs to be protected from an unethical, incompetent, or unlawful guide regardless of where that guide committed his or her bad acts.

With regard to Mr. Salitan's argument that the Division must prove that his failure to renew was done knowingly, the Alaska Supreme Court has explained that “consciousness of wrongdoing is an essential element of penal liability.”¹¹⁶ A violation of AS 08.54.720(a)(9) can

¹¹³ AS 08.54.720(a)(9).

¹¹⁴ *E.g. In re Cooper*, OAH No. 10-0148-MED at 14-16 (2011 Alaska State Med. Bd.) (denying license based in part on acts that occurred in Maine); *In re Meyer*, 12-0042-MED (2012 Alaska State Med. Bd.) (revoking license based in part on incompetent acts that occurred in New York).

¹¹⁵ *See, e.g., Wendte v. State, Bd. of Real Estate Appraisers*, 70 P.3d 1089, 1094 (Alaska 2003) (recognizing case law that “professional license revocation does not punish the licensee, but rather serves the regulatory goal of protecting the public from unfit practitioners”).

¹¹⁶ *State v. Rice*, 626 P.2d 104, 107 (Alaska 1981).

be a serious crime for which a significant punishment could be imposed.¹¹⁷ This means that the Division must prove what is called a “culpable mental state” with regard to conduct or circumstance that are elements of the crime of guiding without a license. Because not having a current license is an element of the crime, the Division must prove that Mr. Salitan had some level of culpable mental state with regard to his license not being current. The question here is, what level of culpability must the Division prove for that element?

In Mr. Salitan’s view, the Division must prove that he *knew* his license was not current. He reaches this conclusion because the statute includes the term “knowingly.” Yet, a careful reading of AS 08.54.720(a)(9) reveals that the culpable mental state of “knowingly” in this statute applies only to the actions of guiding, advertising, or representing: “[i]t is unlawful for a . . . person without a current registered guide-outfitter license to *knowingly guide, advertise as a registered guide-outfitter, or represent to be a registered guide-outfitter.*”¹¹⁸ The requirement of “knowingly” does not apply to the circumstances of being without a current license. Under AS 11.81.610, when an offense does not specify a culpable mental state with regard to a circumstance, the default culpable mental state that must be proved is “recklessness.”¹¹⁹

Whether Mr. Salitan was *reckless* with regard to his license could be a closer question than whether he *knew* that his license was not current. The Division could establish that Mr. Salitan was reckless with regard to this circumstance if it showed that he was aware of, and consciously disregarded, a risk that his license was not current.¹²⁰ The Division did not, however, put on any evidence of reminders or other circumstance that would indicate Mr. Salitan took a risk that he was not meeting his obligation to renew his license. The only evidence regarding Mr. Salitan’s mental state is his own testimony that he thought he was current. He simply forgot that he had to renew at the end of 2013. Immediately after receiving a call from the trooper investigating the matter, and learning that his license was not current, he obtained a cashier’s check for the purpose of mailing in his license renewal (which again was delayed another week when he overlooked putting the check in the mail).¹²¹ Although forgetting could be innocent, negligent, or reckless, to prove recklessness requires proof that the subject knew of and

¹¹⁷ *Brown v. State*, 693 P.2d 324, 330 (Alaska Ct. App. 1984) (advising that “an aggregate term of ten and one-half months’ imprisonment” for crime of guiding without a license was not excessive). Note that if the Division had cited Mr. Salitan with a violation under AS 08.01.102 for practicing without a license it would not have to prove a culpable mental state.

¹¹⁸ AS 08.54.720(a)(9) (emphasis added).

¹¹⁹ AS 11.81.610(b)(2).

¹²⁰ AS 11.81.900(a)(3).

¹²¹ Salitan testimony.

appreciated the risk. The Division's only evidence that Mr. Salitan was aware of the risk was that Mr. Salitan knew that guide licenses had to be renewed biennially. This does not prove, however, that he was aware of, and disregarded, the risk that his license was not current. Accordingly, the Division has not met its burden of proving that Mr. Salitan was reckless with regard to renewal of his license. Therefore, Counts I and II are dismissed.

IV. Count V: Mr. Salitan's 2014 use of a landing strip occupied by a camp established by another guide

A. Facts regarding Mr. Salitan's 2014 use of the occupied landing strip

Henry Tiffany is a licensed master guide-outfitter. For about 20 years, Mr. Tiffany has guided sheep hunts in the Brooks Range in the general vicinity of the No Name Creek drainage.¹²² Mr. Tiffany accesses the No Name Creek drainage by air, landing on a lake near the mouth of the creek. His hunting parties then hunt by hiking in and around the No Name Creek drainage. He does not use the primitive landing strip accessible to wheeled aircraft at the head of the creek that Mr. Salitan uses to access the area (which was extensively discussed in section II of this decision). He considers that strip dangerous.¹²³ Several parties acknowledged that parts from a wrecked aircraft are visible on the strip.

On July 29, 2014, several days in advance of the August 10 opening of sheep hunting season, Mr. Tiffany's assistant guide Bob Horne landed at the lake at the mouth of No Name Creek. He then hiked the seven or eight miles to the landing strip at the head of the creek.¹²⁴ He set up a spike camp and was joined by packer Todd Wright.¹²⁵

On August 4, 2014, pilot Clint Mayeur flew into the No Name Creek strip and dropped off a packer who worked for Mr. Salitan. The packer set up a tent to be used for supplies and as an access camp for Mr. Salitan's client and assistant guide to enter and exit the field via the No Name Creek strip.¹²⁶ Mr. Salitan's packer stayed in the tent for the next several days. The tent was 58 yards away from the Tiffany tent.¹²⁷ Mr. Wright filmed the plane and the packer as he had been instructed to do by Mr. Tiffany.¹²⁸

¹²² Tiffany testimony.

¹²³ *Id.*

¹²⁴ Wright testimony. Todd Wright worked for Mr. Tiffany as a packer in 2014.

¹²⁵ *Id.*

¹²⁶ Mayeur testimony.

¹²⁷ Tiffany testimony.

¹²⁸ Wright testimony. The videos shot by Mr. Wright, and those shot by Mr. Tiffany, are in the record. These show the plane landing and taking off, and include discussions between the Tiffany party and Mr. Mayeur.

On August 8, Mr. Tiffany and his client flew into the Tiffany base camp at the lake up near the mouth of No Name. They hiked to the spike camp on the No Name Creek strip on August 9.¹²⁹ The Tiffany party hunted out of the No Name Creek camp for about a week and then moved locations.

Also on August 9, Mr. Salitan's assistant guide and client landed at the No Name Creek strip.¹³⁰ Consistent with Mr. Salitan's instructions to avoid contact with the Tiffany party, they did not camp at the strip.¹³¹ They hiked out of No Name Creek that day. Over the course of their hunt, they hiked a distance that Mr. Salitan estimated to be about 20 miles, and were about 10 miles from the No Name Creek strip when the client shot a ram.¹³² Rather than return to No Name Creek, the Salitan party hiked another five miles to a different strip for a pick up.¹³³

Mr. Tiffany's party never saw the Salitan party or hear them hunting.¹³⁴ Mr. Tiffany did, however, see a hunting party hiking on a ridge too distant to identify.¹³⁵

Shortly after dropping off the Salitan hunting party on August 9, Mr. Mayeur had flown back to the No Name Creek strip to drop off food at the tent to have in case of emergencies. On August 15, 2016, Mr. Mayeur again returned to the No Name Creek strip. He removed the Salitan tent and picked up garbage.¹³⁶

Mr. Mayeur testified that the intent of landing at the No Name Creek strip was not to hinder Mr. Tiffany. When Mr. Mayeur first started working for Mr. Salitan a few years earlier, Mr. Salitan advised Mr. Mayeur that Mr. Tiffany hunted a particular part of the valley—the low end, about 13 miles away. Mr. Salitan's hunting parties staged their hunts from the other end of the valley, and deliberately stayed several miles away from the areas where they knew Mr. Tiffany staged his hunts.¹³⁷

B. Was Mr. Salitan's 2014 use of the occupied landing strip a violation of law?

The Division has charged that Mr. Salitan intentionally hindered or obstructed Mr. Tiffany's hunting party.¹³⁸ Hindering or obstructing a hunt is illegal.¹³⁹ Mr. Tiffany testified,

¹²⁹ Wright testimony. Mr. Wright was not sure if they might have arrived on August 10.

¹³⁰ Mayeur testimony.

¹³¹ Salitan testimony.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ Wright testimony; Salitan testimony. Mr. Wright never saw the Salitan hunting party, other than the packer who stayed at the No Name Creek strip. Wright testimony.

¹³⁵ Tiffany testimony.

¹³⁶ Mayeur testimony; Salitan testimony.

¹³⁷ Mayeur testimony.

¹³⁸ Amended Accusation ¶ 34.

however, that Mr. Salitan’s hunting party did not hinder or obstruct his hunt.¹⁴⁰ Based on Mr. Tiffany’s testimony, the allegation that Mr. Salitan violated AS 08.54.720(a)(2) is dismissed.

The Division has also charged that Mr. Salitan acted unethically and unprofessionally by failing to allow an appropriate buffer area between hunters and camps.¹⁴¹ The ethical standards for guides require that a guide “allow appropriate buffer areas between hunters and camps in order to avoid disrupting hunts and hunting experiences.”¹⁴² Whether Mr. Salitan violated the buffer zone requires further analysis.

Mr. Tiffany testified that Mr. Salitan’s hunting party’s tent and presence at the No Name Creek strip was disruptive to his hunt. Mr. Tiffany had expected that his client could have a wilderness experience without having an aircraft fly in and out early in the morning, and without having to look at someone else’s brightly-colored tent 58 yards away. He considered it unprofessional, discourteous, and unethical for Mr. Salitan to have landed his party at the No Name Creek strip and set up a tent so close to his. In his view, when Mr. Salitan’s party saw Mr. Tiffany’s party already at the No Name Creek strip, Mr. Salitan should have found an alternative entry point to the field.

Mr. Tiffany described the underlying problem as overuse of the area and failure to establish or adhere to “gentlemen’s agreements” among guides. He explained that Mr. Salitan had begun using the No Name Creek drainage for sheep hunting a few years earlier, even though Mr. Salitan knew that Mr. Tiffany hunted in the area. In previous years, Mr. Salitan’s party had arrived first at the No Name Creek strip, so Mr. Tiffany was not able to exclude him. This year, however, Mr. Tiffany’s party arrived first and occupied the strip. Mr. Tiffany clearly expected Mr. Salitan’s party to use the strip, however, and his packer was ready with video cameras when the party arrived.

The legal question presented here is whether the Board’s ethical standards require a guide to avoid using a known landing strip in a remote hunting location when the strip is occupied by another hunter. Although two well-qualified independent experts in guiding (Mr. Rohrer and Mr. Stevenson) testified at the hearing, neither was asked to offer an opinion on the standard of care for a buffer zone at a known landing strip.

¹³⁹ AS 08.54.720(a)(2). (“(a) It is unlawful for a . . . (2) person who is licensed under this chapter to intentionally obstruct or hinder or attempt to obstruct or hinder lawful hunting engaged in by a person who is not a client of the person”).

¹⁴⁰ Tiffany testimony.

¹⁴¹ Amended Accusation ¶ 34.

¹⁴² 12 AAC 75.340(d)(7).

Three witnesses who did not testify as experts, but who have expertise in guiding, offered opinions on this issue: Mr. Tiffany, Mr. Mayeur, and Mr. Salitan. Mr. Mayeur and Mr. Salitan both believe that the No Name Creek strip was open for other guides to use even when Mr. Tiffany was camped on the strip. Mr. Tiffany, on the other hand, believes that his employee's presence on the No Name Creek strip should prevent other guides from landing on the strip. He further believes that other guides are prohibited from setting up a tent within sight of his camp, even when his camp is located on a landing strip, and even when the other guide's party does not occupy the tent during hunting season.

Applying common sense to the facts of this case, a known landing strip is an area of common use. A hunter who chooses to camp at a known strip should expect that others may use the strip. Therefore, a guide may use a known landing strip to access the field even if another guided hunting party is staging its hunt from a camp set up at the strip.

Here, in addition to using the No Name Creek strip for access, Mr. Salitan set up a tent to facilitate entry and exit to the hunting area and for emergency reprovisioning. He did not, however, use the tent at the strip for a base camp after hunting season began. Although the unoccupied tent may not have been aesthetically pleasing, it was no more objectionable than other tents on the strip. Setting up the tent for emergency purposes on a known landing strip did not violate 12 AAC 75.340(d)(7).

Mr. Tiffany's packer also complained that the overlapping presence of Mr. Salitan's packer on the strip before the clients arrived was disruptive. Because both packers were there for set-up and scouting purposes before hunting season began, however, 12 AAC 75.340(d)(7) does not protect either's preseason wilderness experience. In sum, Mr. Salitan's actions here did not violate 12 AAC 75.340(d)(7). Count V is dismissed.

V. Conclusion and Order

1. Counts I, II, and V are dismissed.
2. Mr. Salitan is fined \$500 with \$250 suspended for one year of probation for his violation of Count III. The fine is due 30 days after the Board adopts this order, and is late if not paid within 30 days after it is due. The probationary period begins the day after the Board adopts this order, and ends one year later. If Mr. Salitan pays his fine on time, and completes the one-year probation period without a further violation of a guiding or hunting law, the \$250 suspended fine will be dismissed.

3. Mr. Salitan is fined \$500 for his violation of Count IV. The fine is due 30 days after the Board adopts this order, and is late if not paid within 30 days after it is due.
4. The following reprimand is placed in Mr. Salitan's file:

Mr. Salitan, during a hunt that took place in 2012, you failed to adequately plan for a change in circumstance and did not facilitate removing the clients, the meat, and the trophies from the field in a timely manner after the hunt ended and bad weather set in. Your conduct in that hunt fell below the standard of care that the Board has established for licensed registered guides. You are admonished to exercise greater care in future hunts.

DATED this 10th day of May, 2016.

By: Signed
Stephen C. Slotnick
Administrative Law Judge

Adoption

The Alaska Big Game Commercial Services Board adopts this Decision under the authority of AS 44.64.060(e)(1), as the final administrative determination in this matter.

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 22nd day of July, 2016.

By: Signed
Kelly Vrem
Chair, Alaska Big Game Commercial Services Board

[This document has been modified to conform to the technical standards for publication.]
