

**HB**

**146**



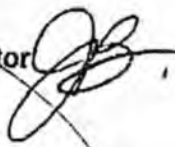
# Alaska Action Trust

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## FAX MEMORANDUM

Date: April 16, 1999

To: Rep. Kott, Rep. Green, Rep. James, Rep. Murkowski, Rep. Rokeberg,  
Rep. Croft and Rep. Kerrtula

From: Jan Bouch, Executive Director 

Re: HB 146

# of pages: 4

*Did you have  
a good weekend?*

To follow is an AATL position paper on HB 146, scheduled for hearing on Monday, April 19, 1999. The position paper is to provide information to you regarding HB 146's impact.

APR 19 1999



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### Position Paper on House Bill 146

Prepared by Russell L. Winner  
April 12, 1999

This bill would limit the liability of an operator of a commercial recreational activity if one of its customers is injured or dies. The customer would be deemed contributorily negligent, and his damages would be reduced, to the extent that the inherent risks of that activity were or should have appeared to him.

The bill is unwarranted special interest legislation. It is poorly drafted and will raise more questions than it answers. The bill is unnecessary and should not be enacted into law. What follows is a section-by-section analysis of the bill.

**Purpose.** The stated purpose of the bill is to establish responsibilities of operators and consumers of commercial recreational activities, to decrease the uncertainty regarding legal responsibilities for injuries, and to encourage the continued availability of businesses in this area. The existing tort law of Alaska, however, already governs liability in this area. Under existing law, an operator of a commercial recreational activity is liable only for its percentage of fault in causing the injury or death. To the extent that injury or death was caused by the inherent risks of the activity, and not by the fault of the operator, the operator is not liable under existing law.

Further, the tort law of Alaska was recently amended by enactment of a comprehensive bill. It places caps on non-economic damages and punitive damages. It allows fault to be allocated to non-parties. It shortens the statute of limitation for suits for breach of express or implied contract. And it requires minors, or their representatives, to bring suit sooner than was required under prior law. There is no need for further restrictions on the liability of commercial recreational operators. In fact, such legislation would be subject to challenge as unconstitutional special interest litigation. Turner Construction Company, Inc. v. Scales, 752 P.2d 467 (Alaska 1988)

The proposed legislation is not necessary to encourage the continued availability of businesses that offer commercial recreational activities to the public. We are not aware that operators are being driven out of business as a result of litigation over injuries or death. In fact, there is very little litigation in this area. In the event of injury or death, however, the most prudent protection for an operator is insurance. Such insurance has not become unavailable or significantly more expensive. Further, enactment of this bill would have no effect on premium rates. Most insurance companies set their rates on a regional basis, not on a state-by-state basis. Finally, if the legislature wishes to encourage commercial recreational businesses in Alaska, it seems counterproductive to

tell members of the public that they are contributorily negligent just by choosing to be a customer of such a business.

**Acceptance of inherent risks.** The bill states that participation in a commercial recreational activity constitutes acceptance of the inherent risks of the activity that are or should be apparent to an ordinarily prudent person. This, however, is unnecessary, as it would be the case under the existing tort law.

**Contributory negligence.** The bill states that customer's participation in a commercial recreational activity will be deemed contributory negligent to the extent that his injuries or death were caused by the inherent risks of that activity. It is, however, inappropriate to say this constitutes contributory negligence on the part of the customer. Instead, as is true under the existing tort law, the inherent risks of the activity should be taken into account when allocating fault to all persons, including the customer. Again, does Alaska really want to be known as the State where tourists are statutorily defined as being contributorily negligent merely by participating in commercial recreational activity in the State.

**Responsibilities of participants.** The bill sets out five responsibilities of consumers of commercial recreational activities. Items 2 through 5 are unnecessary, as they would be considered anyway under the existing tort law in allocating fault. Item 1 is confusing: It requires the consumer to "learn about and expressly accept the risks of the activities." From whom is she to learn about this? From the operator? What if the operator doesn't tell her? What other source is she supposed to consult? What if she doesn't learn about these risks from another source? How is she to expressly accept these risks? In writing? What if she does not? And what risks are we talking about, anyway? The inherent risk which should be apparent to an ordinarily prudent person, or other non-obvious risks?

**Responsibilities of operators of commercial recreational activities.** The bill also sets out certain responsibilities of operators. One is to explain to participants the "fundamental inherent risks of the commercial recreational activity." Again, this is confusing. Does the operator also have to explain the non-obvious risks? Are these the same risks the customer is required to learn about? What if the operator does not explain the risks that give rise to an injury or death? Must these be explained in writing? If not, how does the operator prove it explained these risks? What if the customer disputes that the operator explained the risks? What if the customer has died? Does the fact or adequacy of the operator's explanation affect the contributory negligence of the customer in participating in the activity?

This section also requires that the operator ensure the proper training of its employees, that its equipment and facilities are in good repair, and that it acts in a reasonably safe and competent manner. This is unnecessary as these factors would be taken into account in allocating fault under the existing tort law. Again, what is the effect under the proposed legislation if the operator does not do these things? Does it affect the contributory fault of the customer?

It is instructive to compare this bill with the Alaska statutes dealing with the liability of ski operators, AS 05.45. There, a ski operator is entitled to the statutory shield of liability only if it complies with the specific, detailed, mandatory duties set out in that statute. In contrast, an operator's duties under this proposed legislation are only generally worded and the bill is silent on the consequences of the operator's failure to comply with those duties.

**Definitions.** The bill defines recreational activity as "an outdoor activity undertaken for the purpose of exercise, education, relaxation, pleasure, or sport or as a hobby." This definition is so broad and ambiguous as to invite litigation over its meaning.

What is not defined is "inherent risk of a commercial recreational activity." When will it be defined? When the customer engages the operator? During litigation? Who defines it? What if the operator tries to define it too broadly, say in a consent form signed by the customer? For example, the inherent risks of white-water rafting should not include drowning in cold water if the proximate cause of the death is the negligent maintenance or operation of the raft by the operator. Yet, if the operator defines the inherent risk of white-water rafting to include simply "drowning in cold water, the victim of a negligent operator may have no remedy.

For the above reasons, HB 146 should not become the law of Alaska.

AMENDMENT #1

OFFERED IN THE HOUSE  
TO: CSHB 146 (L&C)

BY Representative Croft

*4/19 adopted*

1. Page 3, line 9  
Insert

**Sec. 05.50.060**

“A person who operates a business that offers a commercial recreational activity and violates a requirement of this chapter is negligent and civilly liable to the extent the violation causes injury to a person or damage to property.”

## Sponsor Statement

### HB 146 - An Act relating to civil liability for commercial recreational activities

One of Alaska's major draws is outdoor adventure and recreation which carries some level of inherent risk for participants. Many businesses, the majority of which are small, offer commercial recreational activities to the public such as river rafting, guided hiking, kayaking, snowboarding and sport fishing, to name a few. HB 146 has been introduced to establish the responsibilities of commercial recreation businesses and the responsibilities of persons who elect to participate in recreational activities. It addresses specific guidelines operators and participants must follow to minimize the possibility of accidents. Commercial businesses are still responsible for meeting safety standards and providing trained and competent personnel, as outlined in Section 05.50.040.

The legislation will decrease uncertainties regarding the legal responsibilities for injuries and encourage the continued viability of responsible businesses that offer commercial recreational activities to the public. Existing legal uncertainties have resulted in high liability insurance costs which are prohibitive, especially for smaller businesses. This bill will help avoid unfair and unreasonable claims that make it increasingly difficult to provide recreational and outdoor activities that are synonymous with Alaska lifestyles and visitor expectations.

# Alaska State Legislature



## House of Representatives

HB 146

### SECTIONAL ANALYSIS

**Section 1:** This establishes the purpose of the bill, which is to decrease legal uncertainty regarding liability for injuries that result from participation in commercial recreational activities.

It is also the purpose of this act to encourage the continued availability of businesses that offer commercial recreational activities to the public.

**Section 2:** This section amends a chapter to AS 05 which sets forth guidelines which include acceptance of inherent risks, contributory negligence, responsibilities of participants, responsibilities of operators of commercial recreational activities, interactions with other laws and lastly, the definitions for certain terms in all of the above.

**Section 3:** This section defines the act as applicable to acts or omissions that occur after the effective date of this act.

**Section 4:** This is the enabling portion of the bill.

HOUSE BILL NO. 146

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-FIRST LEGISLATURE - FIRST SESSION

BY REPRESENTATIVE KOTT

Introduced: 3/19/99

Referred: Labor and Commerce, Judiciary

A BILL

FOR AN ACT ENTITLED

1 "An Act relating to civil liability for commercial recreational activities; and  
2 providing for an effective date."

3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

4 \* Section 1. PURPOSE. It is the purpose of this Act to establish the responsibilities of  
5 persons who operate commercial recreational activities and persons who participate in those  
6 recreational activities and to decrease uncertainty regarding the legal responsibility for injuries  
7 that result from participation in commercial recreational activities. It is also the purpose of  
8 this Act to encourage the continued availability of businesses that offer commercial  
9 recreational activities to the public.

10 \* Sec. 2. AS 05 is amended by adding a new chapter to read:

11 Chapter 50. Civil Liability for Commercial  
12 Recreational Activities.

13 Sec. 05.50.010. Acceptance of inherent risks. Participation in a commercial  
14 recreational activity constitutes acceptance of the inherent risks of the commercial

1 recreational activity that are or should be apparent to an ordinarily prudent person.

2 **Sec. 05.50.020. Contributory negligence.** (a) A person who accepts an  
3 inherent risk of a commercial recreational activity as described in AS 05.50.010 is  
4 contributorily negligent to the extent that the inherent risk causes injury, death, or  
5 property damage.

6 (b) In an action seeking to recover damages for injury or death to a person or  
7 harm to property resulting from an inherent risk of a commercial recreational activity,  
8 compensatory damages shall be reduced for contributory negligence as provided under  
9 AS 09.17.060.

10 **Sec. 05.50.030. Responsibilities of participants.** A participant in a  
11 commercial recreational activity has the responsibility to

12 (1) learn about and expressly accept the risks of the activities;

13 (2) act within the limits of the person's abilities;

14 (3) heed all warnings regarding participation in the commercial  
15 recreational activity;

16 (4) maintain control of the participant's person, the participant's  
17 children, and any equipment, devices, or animals the participant is using;

18 (5) refrain from acting in a manner that may cause or contribute to  
19 injury of the participant or another person.

20 **Sec. 05.50.040. Responsibilities of operators of commercial recreational**  
21 **activities.** A person who operates a business that offers a commercial recreational  
22 activity shall

23 (1) explain to a participant

24 (A) the fundamental inherent risks of the commercial  
25 recreational activity; and

26 (B) the skills or equipment required to participate in the  
27 commercial recreational activity that are not apparent to an inexperienced  
28 participant;

29 (2) require that employees who are responsible for assisting participants  
30 in the actual performance of a commercial recreational activity have training in basic  
31 first aid and cardiopulmonary resuscitation and explain to those employees how to use

1 emergency medical services available in the area;

2 (3) maintain recreational equipment and facilities in good repair;

3 (4) provide trained and competent personnel; and

4 (5) act in a reasonably safe and competent manner.

5 **Sec. 05.50.050. Interaction with other laws.** This chapter does not affect the  
6 immunity of an owner of unimproved land under AS 09.65.200 or of a ski area  
7 operator under AS 05.45.

8 **Sec. 05.50.100. Definitions.** In this chapter,

9 (1) "children" means persons under 18 years of age;

10 (2) "commercial recreational activity" means a recreational activity for  
11 which the participants pay compensation;

12 (3) "recreational activity" means an outdoor activity undertaken for the  
13 purpose of exercise, education, relaxation, pleasure, sport, or as a hobby.

14 \* **Sec. 3.** This Act applies to acts or omissions that occur on or after the effective date of  
15 this Act.

16 \* **Sec. 4.** This Act takes effect July 1, 1999.



# ALASKA VISITORS ASSOCIATION

## 1999 STATE LEGISLATIVE PRIORITIES

The Alaska Visitors Association (AVA) is a statewide, private, non-profit trade association representing the common interests of Alaska's tourism industry. Nearly 92 percent of AVA's 650-plus members are small Alaskan businesses. Collectively, they encompass all sectors of travel and tourism and employ more than 25,000 Alaskans.

The visitor industry is one of the most significant industries in Alaska, providing one in eight private-sector jobs. AVA urges the Alaska State Legislature and Administration to demonstrate their commitment to helping tourism realize its full potential as an employer and contributor to the state's economy. The following are priorities in accomplishing this goal.

### **Enact legislation that will help Alaska regain its competitive position as a visitor destination and consolidate statewide tourism organizations**

Last year the Legislature approved an industry-led plan to increase private-sector contributions and consolidate the Alaska Tourism Marketing Council (ATMC), the Alaska Visitors Association (AVA), and the marketing functions of the State Division of Tourism into a single non-profit entity. However, the bill failed to receive final concurrence before the session ended. This year, AVA again supports passage of legislation provided that *all* marketing functions are offered in a fee-for-service contract with the state, as called for in the plan. To do otherwise will leave the industry unable to raise the required funds.

State funding for tourism promotions in Alaska has declined by 60 percent over the last decade, dropping the state from 7th place in state spending in 1989 to 27th in 1998; this decrease in funding corresponds with a drop in Alaska's annual rate of visitor growth from 13 percent to less than 6 percent. By increasing private-sector contributions to \$6 million through pay-to-play programs and increased contributions from businesses, communities, and cruise companies, the plan will help return Alaska's tourism marketing to a more competitive position. A transition team with representatives from ATMC, AVA, AWRTA, and the Department of Commerce has already begun work to set up the new non-profit organization should legislation be enacted.

### **Continue to provide core funding for destination marketing**

Under the New Millennium Plan, the industry proposes increasing private-sector funds while gradually decreasing state general fund participation. While the industry recognizes that overall state funding may decrease in the face of budget shortfalls, AVA believes the state has a vested interest in maintaining core funding for tourism marketing:

- The industry's direct contributions to government (more than \$124 million in taxes and fees to state and local governments) demonstrate that funds spent on tourism promotion are a long-term investment that will come back to the state in increasing amounts.
- The state will ultimately save money through lower unemployment and decreased state social services expenditures.
- The state needs to help level the playing field as Alaska competes with other states and countries who are spending millions of general fund dollars.
- Nearly everyone benefits from tourism, although not everyone pays. From gas stations and florists to construction companies and caterers, businesses that may not contribute to tourism funding still profit from the money visitors inject into Alaska's economy.

The entire state gains by being able to compete with other destinations, creating a healthier economy with greater numbers of people employed. As businesses – even those not generally viewed as tourism-related – benefit from the dollars visitors put into Alaska's economy, the industry maintains that the state has a responsibility to assist the tourism industry with the financial burden of marketing a product which benefits all Alaskans. The New Millennium Plan calls for phasing in a decrease in state funding by 25 percent over three years, reducing the state's current general fund contribution from \$5.3 million in FY00 to \$5.0 – FY01, \$4.5 – FY02, and \$4.0 thereafter. Conversely, the private sector's contribution would increase by 300 percent, with a target of \$6 million by FY03. The base-level funding would be in the form of a fee-for-service contract with the state.

### **Enact legislation to reform recreation liability laws**

AVA continues to support passage of legislation to decrease legal uncertainties for commercial recreation businesses and to acknowledge some level of inherent risk on the part of those participating in recreational activities. One of Alaska's major visitor draws is outdoor adventure, yet high liability insurance costs are prohibitive, especially for smaller businesses offering commercial recreation opportunities. Recreational liability reform legislation should also include indemnification for private landowners who allow a public trail across their property. Alaska is the only state in America that does not provide this indemnification.

### **Implement a two-year Alaska Marine Highway schedule**

AVA supports changes that will allow the Alaska Marine Highway System to implement a two-year ferry schedule. According to the AMHS, the current legislative funding cycle prevents this. Visitor use of the ferry system is the primary revenue generator for the Alaska Marine Highway System, yet the lack of a two-year schedule significantly inhibits advance sales and bookings and prevents appreciable increases in revenues. When attracting visitors, Alaska must compete with adventure tours to places around the world in both cost and quality. Surveys show 60 percent of visitors coming to Alaska start their planning six to 12 months prior to departure. Tourism operators have to prepare business plans, make itinerary decisions, and develop and distribute brochures marketing their products in advance of client bookings. Under the current planning cycle, businesses and communities are unable to make these advance preparations.

### **Increase access to public lands**

Alaska is largely composed of public lands, making access critical to tourism activities within the state. The public has a desire to engage in a variety of outdoor activities on these lands. Although there is tremendous pressure to restrict further access to public lands for commercial use of any kind. The tourism industry provides an opportunity for people to participate in guided outdoor experiences they might not be able to enjoy on their own and in a manner that has a relatively low impact on the land. While AVA appreciates the initial efforts of the Alaska Land Managers Forum in focusing on tourism/public land issues such as permitting, the association encourages the Legislature to promote use of public lands for tourism and require public agencies to include tourism components in all government and public planning documents.

### **Address important capital budget projects**

Adequate infrastructure is crucial to all of Alaska's basic industries. The association supports the concept of a fuel tax with revenues dedicated to a highway maintenance fund and the creation of a proposed state highway system funding category. AVA has also identified these transportation projects as top priorities:

- Petersburg Road rehabilitation and extension to Tokositna and construction of a visitor facility
- Denali Highway hard surfacing
- McCarthy Road hard surfacing and wayside construction
- Alaska Marine Highway's continued Lynn Canal day boat service and fleet-wide vessel maintenance and safety improvements
- Parks Highway and Denali National Park Gateway road and pedestrian improvements
- Taylor Highway reconstruction and Top of the World Highway improvements from Tetlin Junction to Jack Wade Junction
- Implementation of the Southeast Alaska Transportation Plan
- Statewide system of rest and information stops
- Statewide system of snow machine trails utilizing snow machine registration fees for trail development
- Hatcher Pass road improvements and driving loop through Willow

### **Maintain State Park funding**

AVA supports the governor's budget for State Parks. Although parks are utilized by 30 percent of residents, they are also important attractions to Alaska's visitors.

ALASKA VISITORS ASSOCIATION  
phone: 907-561-5733 ☐ fax: 907-561-5727

# FISCAL NOTE

No: 1

STATE OF ALASKA  
1999 LEGISLATIVE SESSION

Bill Version: CSHB 146 (L&C)  
(H) Publish Date: 4/14/99

Revision Date	Dept. Affected <u>Alaska Court System</u>
Title <u>Civil liability for commercial recreational activities</u>	BRU <u>Alaska Court System</u>
Sponsor <u>Rep. Pete Kott</u>	Component <u>Trial Courts</u>
Requester <u>House Labor and Commerce</u>	Component Serial No. <u>769</u>

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

OPERATING EXPENDITURES	FY 2000	FY 2001	FY 2002	FY 2003	FY 2004	FY 2005
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
<b>TOTAL OPERATING</b>	0.0	0.0	0.0	0.0	0.0	0.0

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

1002 Federal Receipts						
1003 GF Match						
1004 GF	0.0	0.0	0.0	0.0	0.0	0.0
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type)						
<b>TOTAL</b>	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY99) cost: None

**POSITIONS**

Full-time						
Part-time						
Temporary						

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

No fiscal impact anticipated.

Prepared by: <u>Doug Wooliver, Administrative Attorney</u>	Phone: <u>264-8265</u>
Agency: <u>Alaska Court System</u>	Date/Time: <u>4/8/99 3:08 PM</u>
Approved by: <u>Stephanie J. Cole, Administrative Director</u>	Date: <u>4/8/99</u>
Agency: <u>Alaska Court System</u>	

**COMMITTEE COPY**