ALASKA LEGISLATURE COMMITTEE FILES 1993-1994 8672
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permit action. The language adopted by the committee regarding who has an opportunity to appeal can be viewed as more of a parallel to federal law than current state law. In a split vote by the committee, the adopted language, which is germane only to air quality permits, would arguably have the effect of narrowing those who would have "standing" in state court.

Substance of Discussion and Resolution:

Section entitled **REVIEW OF PERMIT ACTION** - Upon reconsideration of this language, committee members representing the general public and the environmental community argued that it was not appropriate to reduce existing statutory opportunities for public participation in the permit review process. The committee sought the counsel of the assistant attorney general as to whether the words "who has private, substantive, legally protected interest under state law" is potentially more restrictive regarding who can obtain judicial review in comparison to federal law or existing state law. Counsel advised that it appears that this language could be argued as being more restrictive than "a person with standing" under state law (see State v. Enserch Alaska Const. Inc., 787 P.2d 624, 630 (Alaska 1989)). In comparison, when examining "standing" under federal law, this language appears to be comparable regarding who would be able to obtain judicial review (see Lujan, Secretary of the Interior v. National Wildlife Federation et. al., 497 U.S. _____ 110 S.Ct. 3177, 111L.Ed.2d 695 (1990)).

The environmental community and the representative of the general public argued strongly that the committee should not take an action that would narrow what is now existing Alaska law concerning who may obtain standing for judicial appeal. Committee members who supported the words "private, substantive..... protected interest" argued that it is not appropriate to expend state and other resources hearing arguments that potentially delay closure of a permit action when the objection either was not raised at the provided comment period or is otherwise not a private and substantive issue germane to air quality impacts and applicable laws.

An amendment was offered that would replace "who has a private, substantive and legally protected interest under state law" with "with standing under state or federal law". Under the proposed language, a judge of the court would make the final determination regarding if the person has standing. The motion to amend the language failed on a vote of 3 supporting, 6 opposed and one abstaining.

Perhaps it is of value to convey to readers other pertinent factors on this discussion. The issue of debate did not arise until the language was under reconsideration. Reconsideration occurred on the last meeting date of the committee, when all members were sensitive that the agenda items must move fairly rapidly in order to conclude the committee's work prior to onset of the legislative session. Those members who offered the amended language, still hold their views quite strongly that the committee is

unnecessarily adopting language which arguably restricts a widely applicable criteria of state law when the subject of contention is air quality permits. Throughout the committee's deliberations, the committee was quite successful in striving towards compromise language that ameliorated, as best as possible, strong opposing views. At this closing meeting, time constraints became a factor which perhaps shunted the opportunity to reach better compromise language.

Another point of clarification regarding the language of this section, but unrelated to the previous discussion, is that for purposes of this section "final agency action" is the issuance of an adjudicatory hearing decision.

Section entitled **OBJECTION BY THE FEDERAL ADMINISTRATOR** - This language indicates that the Environmental Protection Agency has veto authority on each and every operating permit. This is a mandatory provision if the state is to receive federal approval of the permit program. This feature only applies to operating permits, not construction permits.

Alaska Center for the Environment
519 West 8th Avenue, Suite 201 • Anchorage, Alaska 99501 • (907) 274-3621

PARTICIPATION OF THE ALASKAN ENVIRONMENTAL COMMUNITY
ON ALASKA'S DEPARTMENT OF ENVIRONMENTAL CONSERVATION'S
AIR QUALITY ADVISORY COMMITTEE

October 1, 1992

The Alaskan environmental community has agreed to find one, or potentially two members to sit on DEC's Air Quality Advisory Committee. We would like to have more seats, however our decision was based on the following understandings, and made with the following reservations:

Understandings:

I. Most significantly, citizen nonprofit groups can only afford to participate in this type of committee if all meetings are held in the city in which they reside, or if they state provides them with travel funds. It is not appropriate for industry representatives to pay for citizen travel. If the state truly desires citizens and nonprofit representatives as voting committee members, they will pay for our travel or hold all meetings in Anchorage.

II. We understand that the purpose of this committee is to draft an advisory statement on the Clean Air Act for the State of Alaska. We have been told that the committee will work on only the required sections of the bill to allow the state to retain primacy in air quality regulation of this state, and the right to set standards more stringent than the federal minimums. To work on controversial sections, beyond the required minimum, may result in gridlock among committee members (in the committee or during the legislative session). In addition, some significant groups (including the environmental community, citizen groups, small businesses and industry, and tourism representatives) are under-represented on the committee and their concerns will not appropriately be heard on the controversial sections.

III. We understand, after the assurance from Janice Adair, Tom Chapple and Robert Regis, that dissenting opinions or votes will be carried to the legislature, articulated comprehensively within the advisory statement or bill. This will allow legislators to understand the concerns of all committee members, rather than just the voting majority.

IV. We understand, that we are not using the version of last session's bill as provided in the committee by DEC as a working draft. Rather, this was used only to highlight required sections of the bill. No part of this version of the bill will

be carried further than that point by this committee.

Reservations:

I. The decision-making process for this committee, a 2/3 vote, is inappropriate. This committee is not comprised of elected officials, nor is it the final decision maker on this bill. Rather, it was claimed to be established as an advisory body to negotiate between interests to create a cooperative bill. The best forum for this type of negotiation and cooperation is a consensus process with an independent, non-voting chairperson mediating. Our desire for this committee to work within the consensus forum as stated above, has been suggested repeatedly in letters to DEC during the summer before the committee first met, and in the first two meetings as public testimony. A 2/3 voting process is particularly inappropriate in light of the following reservation.

II. The committee's member composition is inadequate. Citizen, environmental, public health, and clean air groups and terribly under-represented with only one seat offered. We requested more seats, by letter, before the committee began meeting. Our request received no response. During the first meetings, when we repeated our request, we were offered three seats - but no travel money for the citizen participants. In addition, small businesses who will also be affected by the new Clean Air Act are not appropriately represented on the committee. This is a gross oversight as both the groups (citizen and small business) cannot well afford to lobby the legislature in Juneau either.

Signed,

Aimee R. Boulanger

Aimee R. Boulanger
Community Coordinator for Pollution Issues

REQUIRED & ESSENTIAL FEATURES

Exclusive Fund for Air Permit Program

Create Small Business Assistance Program
- Create Advisory Panel
- Provide Assistance to Larger Group

Modify Criminal Provisions and Fines

Construction Permits v. Operating Permits
- Agency/Operator Emission Limits to Avoid Need for Permit

General Permits

Flexibility for Permit Fee Structure

Ability to Implement New Federal Rules in Permits
- Reopening of Permits

Emission Limits Based on Health Risks or Available Technology

Local Governments to be Implementing Partners

Administrative Penalties for Violations
- Deter EPA Intervention

Public Involvement in Permits
- Public Review of Permits
- Appeal through Adjudication
- Judicial Review
- EPA Review
- Public to Petition EPA

Retain & Update Existing Statutes

AIR PERMIT FEE STRUCTURE I.

Sec. 46.14____PAYMENT OF FEES AND FEE STRUCTURE

All costs of the air permit program under AS 46.14.200, direct and indirect, shall be allocated among all permittees pursuant to a formula, adopted in regulation, that divides the sum of all costs expected to be incurred for that billing year by the sum of all tons of contaminants permitted to be emitted that year and applies the per ton amount to a facility according to the tons per year that facility is permitted to emit.

This is the simplest way of allocating the costs of the program. It means that those facilities that bear the greatest responsibility for impact on the total air quality in terms of quantity of emissions pay the greater share of the costs.

This structure has the added advantage of being an incentive to facilities to make rational investments to reduce their total emissions.

AIR PERMIT FEE STRUCTURE II.

Sec. 46.14____ PAYMENT OF FEES AND FEE STRUCTURE

The department shall, by regulation, establish a graduated fee structure for the permit program pursuant to AS 46.14.200 based upon:

(a) the public health risk of the facility's permitted emissions as determined by a ranking system developed by the department;

(b) the tons per year of permitted emissions released by the permitted facility.

This structure requires two considerations of the department when assessing the permit fee. First, how hazardous is the emission? Obviously, small amounts of extremely dangerous emissions present a greater threat to the public health than relatively large amounts of less toxic emissions. It would require the department to develop a hazard ranking model for air emissions.

Secondly, the total amount of emissions, based on a ton per year computation, would be the major consideration for permit fees for most facilities.

Clearly, this system puts the greatest burden on facilities that pose the greatest potential threat or diminution of air quality. Once again, there is a built in incentive to reduce both quantity and toxicity of air emissions.

AIR PERMIT FEE STRUCTURE III.

Sec. 46.14____PAYMENT OF FEES AND FEE STRUCTURE

(d) Fees for direct costs, as defined in (__), shall be established by the department in regulation and shall be based on the previous fiscal year's gross operating revenues of the facility requiring a permit under AS 46.14.200. The fee structure shall be graduated in such a manner that facilities generating the greatest amount of annual gross revenues pay a proportionately greater share of the total permit program costs. In the case of a non-revenue generating facility, the permit fee shall be based on the gross operating revenues of the parent company that owns or operates the facility.

(e) For publicly owned or public service facilities as defined in (___)* direct cost fees, as defined in (___) shall not exceed $100.00.

(f) Fees for indirect costs, as defined in (___), shall be allocated among all permittees pursuant to a formula, adopted in regulation, that divides the sum of all indirect costs expected to be incurred for that billing year by the sum of all tons of contaminants permitted to be emitted that year and applies the per ton amount to a facility according to the tons per year that facility is permitted to emit.

This structure graduates the permit fee (for direct costs) according to the gross revenues generated by the permitted facility. The fee could be established as a straight percentage or facilities could be grouped in different classes according to revenues with all facilities in same class paying the same flat rate.

Publicly owned or public service facilities are billed a single flat rate that does not exceed $100.00. This way consumers of regulated utilities (sanctioned monopolies) do not bear the direct cost of regulation.

Indirect costs are allocated on tons per year of emissions with no cap on charge per ton of emissions. All facilities pay this portion of the fee structure on the basis of emissions per year, supporting the principle of equity and encouraging a reduction of emissions.

*Publicly owned=municipally owned utilities, schools, state and federal facilities etc.

Public service facility=utility providing service to public at no profit.

AIR PERMIT FEE STRUCTURE IV.

Sec. 46.14___PAYMENT OF FEES AND FEE STRUCTURE

(a) The department shall, by regulation, establish a fair and equitable fee structure, that in no way penalizes a facility because of geographic location or lack of technical expertise or resources.

(b) The permit fee structure shall be established by regulation in a manner that provides resources from a tons of permitted emissions per year fee sufficient to fund technical assistance programs to facilities that qualify.

This language will give the department the greatest flexibility to develop a fee structure in an open public forum pursuant to the Administrative Procedures Act. All interests, including the general public, would have an opportunity to testify and participate.

There are two major requirements:

1. That no facility would be economically penalized (charged more for a permit) simply because they are located farther from DEC regional or district offices or because they have neither the resources or technical expertise necessary to complete a permit application requiring minimum department attention. This eliminates the inherently unfair and impractical concept of an hourly charge for processing permits.

2. The second part establishes in statute the intent to fund technical assistance programs with revenue generated from the tons per year fee. "Sufficient" shall be taken to mean that the department will have a program that is adequate to meet the demand from qualifying small operators throughout the state.

Offered by C. Harmon

Operating Permit Program Fee Schedule Recommendations
DRAFT: November 17, 1992
Draft Language

Additions in Redline
Deletions in ~~Strikeout~~

Sec. 46.14.___. PERMIT FEES.

(a) The department shall determine, assess and collect from all owners or operators of facilities that are required to apply for a permit under AS 46.14.205 fees sufficient to cover the costs of a state operating permit program approved by the United States Environmental Protection Agency under Title V of the federal Clean Air Act. The department shall develop by rule a fee schedule allocating among permit program facilities the department's permit administration costs and permit program development and oversight costs.

(1) Permit administration costs are ~~those~~ the reasonable permit-specific costs incurred by the department in administering and enforcing the operating permit program. Costs associated with the following activities are permit administration costs:

[SPECIFY COSTS IDENTIFIED IN 40 CFR § 70.9(b)]

(2) Development and oversight costs are the reasonable program-wide costs incurred by the department in developing and administering the state operating permit program. Costs associated with the following activities are development and oversight costs, as these activities relate to the operating permit program:

[SPECIFY COSTS IDENTIFIED IN 40 CFR § 70.9(b)]

(b) The fee schedule shall recover from the permit program facilities the department's permit administration costs and the department's development and oversight costs according to the following formula:

1. Fifty percent of the department's costs shall be divided equally among all facilities;

2. Twenty-five percent of the department's costs shall be divided among all facilities in proportion to their complexity. In determining the complexity of a facility, the department shall consider

(A) the size, number, and geographic proximity of individual sources covered by the facility's permit;

(B) the amount of hazardous air pollutants emitted by the facility;

(C) whether the facility is covered by an individual or general permit;

(D) whether the facility is an "eligible electric utility", as defined in AS 44.83.162, entitled to receive power cost equalization; and

(E) any other factors that ensure the fair distribution of the department's costs attributable to each permit.

3. Twenty-five percent of the department's costs shall be divided among all facilities in proportion to the total of all assessable emissions of all regulated pollutants, as defined by Section 502(b)(3)(B)(ii) of the federal Clean Air Act, for each facility. The "assessable emission" of each regulated pollutant is the lesser of

(A) the annual rate of emissions (in tons per year) of each regulated pollutant authorized by the facility's operating permit;

(B) the actual annual rate of emissions (in tons per year) of each regulated pollutant by the facility over the preceding calendar year, if the facility can demonstrate its actual annual rate of emissions to the department through monitoring, modelling, calculations, or any other method acceptable to the department; or

(C) 4,000 tons per year of each regulated pollutant.

(c) The department shall, by regulation, establish a process for development and review of its operating permit program fee schedule, a methodology for tracking program revenues and expenditures, and a system of annual program audits and reports.

(1) The fee schedule development and review process shall include the following:

[SPECIFY]

(2) The methodology for tracking revenues and expenditures shall include the following:

[SPECIFY]

(3) The system of periodic reports and audits shall include the following:

[SPECIFY]

AIR QUALITY LEGISLATIVE WORKING COMMITTEE
TRANSMITTAL DOCUMENT ATTACHMENT #6

1. Agreements on Protocol, Agenda and Initial Language
   - A. Protocol
     - Meeting #1: Pages 21-39
     - Meeting #2: Pages 10 and 199-201
   - B. Agenda
     - Meeting #1: Page 25
     - Meeting #2: Pages 1-2
   - C. Initial Language
     - Meeting #1: Pages 39-43
     - Meeting #2: Page 27 and 124-127

2. The Small Business Assistance Program
   - Meeting #1: Pages 89-90 and 134
   - Meeting #2: Pages 41,103 and 104
   - Meeting #3: Pages 29-44, 57-61, and 124-184
   - Meeting #4: Pages 14-15, and 140-145

3. Fees Paid by Permit Holders
   - Meeting #2: Pages 204-239
   - Meeting #3: Pages 184-221
   - Meeting #4: Pages 148-207
   - Meeting #5: Pages 5-145
   - Meeting #6: Pages 2-197
   - Meeting #7: Page 91-129
   - Meeting #9: Pages 3-13

4. The Dedicated Fund & Special Account
   - Meeting #1: Pages 146-147
   - Meeting #3: Pages 14-71
   - Meeting #4: Pages 145-148

5. The Permit Program Components
   - Meeting #3: Pages 72-104 and 107-124
   - Meeting #4: 2-139
   - Meeting #7: Pages 8-80, and 129-136
   - Meeting #8: Pages 40-52, and 71-85
   - Meeting #9: Pages 14-40, and 74-77

6. Local Air Quality Programs
   - Meeting #8: Pages 106-178
   - Meeting #9: Pages 77-100

7. Criminal Penalties for Air Pollution
   - Meeting #5: Pages 145-173
   - Meeting #7: Pages 136-170
   - Meeting #8: Pages 8-40, 91-106, and 179-210
   - Meeting #9: Pages 63-74

8. Public Involvement in Permits
   - Meeting #8: Pages 52-58
   - Meeting #9: Pages 40-62 and 76-77

ATTACHMENT #5 - COMMITTEE VOTING RECORD

ALASKA AIR STATUTES REQUIRED & ESSENTIAL FEATURES	BILL SECTION TITLE	1ST CONSIDERATION VOTE	RECONSIDERATION VOTE	NOTES
Exclusive Fund for Air Permit Program	Clean Air Protection Fund	unanimous	unanimous	
	Special Account	unanimous	unanimous	
Create Small Business Assistance Program	Development of Program	unanimous	unanimous	
Create Advisory Panel	Scope of Program	unanimous	unanimous	
Provide Assistance to Larger Group	Power to Limit Program	unanimous	unanimous	
	Compliance Advisory Panel	unanimous	unanimous	
Modify Criminal Provisions and Fines	Criminal Penalties for Air Pollution	7 to 1	9 to 1	
Construction Permits v. Operating Permits	Classification of Facilities or Sources; Reporting	unanimous	unanimous	
Agency/Operator Emmission Limits to	Permits for Construction, Modifications or Operations	unanimous	6 to 3	Subsection (a) issue of debate
Avoid Need for Permit	Responsibilities of Owners and Operators	unanimous	9 to 1	
	Facilities Requiring Permits	unanimous	unanimous	
	Administrative Actions Regarding Permits	unanimous	unanimous	
	Emissions Control Permit Program Regulations	unanimous	unanimous	
	Air Pollution from Outer Continental Shelf Facilities	unanimous	8 to 0 w/1 abstention	
	Authority of the Department in Cases of Emergency	unanimous	unanimous	
General Permits	General Operating Permits	unanimous	8 to 1 w/1 abstention	
Flexibility for Permit Fee Structure	Payment of Fees and Fee Structures	7 to 2	unanimous	Amendment to (c)(4) adopted unanimously on 1st consideration, 7 to 1 w/2 abstentions on reconsideration
Ability to Implement New Federal Rules in Permits	Incorporated into other sections			
Reopening of Permits				
Emmission Limits Based on Health Risks or Available Technology	Existing Statute			
Local Governments to be Implementing Partners	Local Air Quality Control Programs	unanimous	8 to 2	subsection (l) issue for split vote
	Inadequacy of Local Program	unanimous	unanimous	
	State and Federal Aid	unanimous	unanimous	
Administrative Penalties for Violations Deter EPA Intervention	Not Scheduled for Agenda			Not in Final Product
Public Involvement in Permits				
Public Review of Permits	Review of Permit Action	unanimous	8 to 2	
Appeal through Adjudication				
Judicial Review				
EPA Review	Objection by Federal Administration	unanimous	unanimous	
Public to Petition EPA				
Retain & Update Existing Statutes				

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on a similar bill last year.

There was also general agreement on DEC's ability, in certain cases, to go beyond the minimums established in federal law. This was another feature that blocked the 1992 measure.

Near-consensus was established on limits to the ability of unaffected third parties to make appeals of permits, on the ability of local governments to

Clean air group followed U.S. legislation

By Tim Bradner
Alaska Journal of Commerce

State environmental officials and the working group involved in writing the proposed new air quality regulation law say it accomplishes the minimum changes needed to allow Alaska to implement the new federal Clean Air program.

"It's hard for this bill to get any cleaner," said Harry Noah, an environmental consultant to mining companies, who represented the Producer's Council, a mining group, in the working panel. "It's as close to the federal legislation as possible," he said.

Besides miners, other members of the working group included representatives of the oil industry, fish processors, large and small electric utilities, muncipalities, federal agencies, the military, and environmental groups.

"Going into this process, I didn't see much of a chance for success," said Steve Taylor, BP's Alaska environmental affairs manager, who represented oil interests in the group.

"The issue is so complex, with many people coming to the table who didn't have the background. After two or three meetings, I thought we were doomed.

"But after that, we got around to dealing with specific sections of the bill, and we started to come together," he said.

Taylor, and others, gave high marks to DEC's Tom Chapple, who moderated — and mediated — the sessions.

"Chapple was extremely patient, and extremely well prepared," Taylor said.

Noah thinks the working group has come up with a good law.

"The new clean air act is one of the most far-reaching, complex environmental laws I'm aware of," he said. "It restricts things to a far greater degree than past clear air laws. A lot of people—certain dry cleaners, fish processors, rural utilities, mining companies—are going to be regulated who were never regulated before. It's a big deal for Alaska, from a regulation standpoint."

The state doesn't have a choice in accepting the program, he said.

"The federal government has issued a mandate that this will be done, so DEC is caught in the middle, and is trying to develop a program that will be as acceptable to Alaskans as possible."

emissions fee, which would load most of the program costs on heavy industry.

The group agreed on a novel two-part fee structure. To pay direct costs of issuing a permit and carrying out inspections, DEC would impose a fee based on hours actually spent on the permit. This would be followed by an ongoing annual permit fee based on tons of emissions, which would pay indirect costs of the program.

The hourly-charge fee would spread costs sufficiently wide that many businesses, utilities and municipalities would bear enough costs that they would concern themselves with how DEC was administering the program.

The follow-on per-ton charge would provides criminal penalties for violations.

The proposed bill would impose misdemeanor penalties for lesser violations and felony charges for more serious, willful wrongdoing, but also require verification that workers and facility managers are informed of the law and potential penalties.

"We were trying to develop a scheme that would provide significant penalties but also recognize that the state of mind in important, whether an action is reckless or knowingly in violation," said Eric Meyers, a member of the working group designated to represent general public interests.

Other features of the bill would allow DEC to go beyond minimum

Editorial

State clean air bill is good work

Legislators in Juneau should give prompt attention to a bill making major changes in Alaska's air regulatory programs, that are required by 1990 amendments to the federal Clean Air Act. A working group of affected interest groups, including industry and environmental groups, labored through lengthy technical sessions in November and December to arrive at a "compromise" bill all felt they could live with.

They've done it, and our congratulations to members of the group and to the Department of Environmental Conservation, which directed the effort. Now it's up to the legislature to pass the bill so that Alaska can meet a November 1993 deadline in submitting its new program to the Environmental Protection Agency.

There's no doubt Alaskans won't like this program. It imposes new requirements for air quality permits on hundreds of Alaskan businesses and institutions — school districts, utilities, fish processors, dry cleans, auto body shops — not required to get permits now. DEC has no choice in this — federal law says we must do it.

The trick is to first take control of administration of the program, so Alaskans are in charge (if we don't, EPA will run it for us), and then modify the program to meet unique Alaska conditions. For example, one important provision in the bill legislators will consider is a general permit for small businesses, which allows a number of similar facilities (small diesel generators, for example) to tie onto a single statewide permit, rather than have to apply for an individual permit. Some other things in the bill: A provision for a "construction" permit will allow work on a facility to get under way, while work on the "operations" air quality permit, which also EPA approval, proceeds; maximum time-periods for processing of permits, so DEC will not dither and delay a project; requirements that appeals on permits are filed by parties genuinely affected. That will help discourage frivolous appeals.

There are some other good things in this bill, which will make the new program, as difficult as it will be, easier to Alaskans to deal with. We hope legislators will look at it carefully, and speed it through to passage.

THE ALASKA
JOURNAL OF COMMERC

Vol. 17, No. 2 Alaska's Paper of Recor

DEC working group agrees on air quality

Readies draft bill to meet federal requirements

By Tim Bradner
Alaska Journal of Commerce

A working group of affected interest groups, including Alaska industry and environmental organizations, utilities and municipalities, has completed work on a proposed new state air quality regulation law.

The draft bill would make sweeping changes in Alaska air quality laws mandated by the 1990 federal Clean Air Act. It will be submitted for consideration in January, as the Legislature convenes in Juneau.

Amendments by Congress to the Clean Air Act make major expansions in the types of chemical emissions brought under government regulation, and lowers the volume threshold of annual emissions under which a permit would be required.

The result will be many more Alaskans having to get air quality permits than is presently the case.

Federal law also requires the program to be "self-funding," or paid for by fees received for permits.

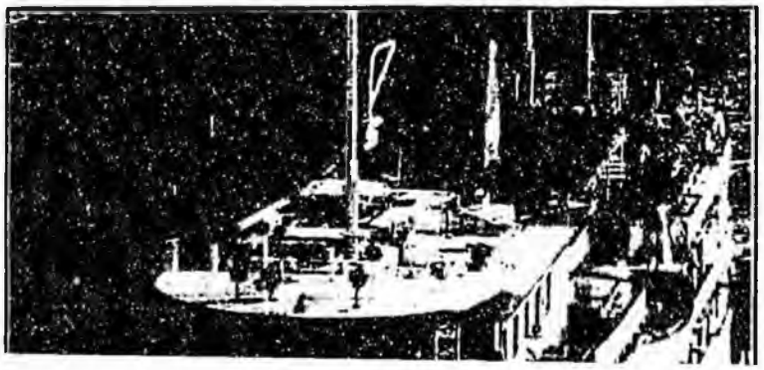
The proposed Alaska bill provides the statutory framework for required new state regulations, and was developed through some 20 working sessions through November and December, in coordination with the state Department of Environmental Conservation.

DEC's goal, and that of regulated industries, was to have Alaska be able to take over and manage the program, rather than pay penalties under the federal law and have the federal Environmental Protection Agency manage Alaska air quality permits.

State lawmakers must act on the bill this spring or face sanctions that could include a cutoff in federal funds such as highway construction money.

State failure to carry out the mandated Clean Air Act

Continued on Page 3



MarkAir scheme pays off

By Margaret Bauman
Alaska Journal of Commerce

MarkAir's offer to ex-

Insuranc wins acc

Could bring mc

By Margaret Bauman
Alaska Journal of Com merce

Accreditation fo Alaska by the National As sociation of Insuranc Commissioners shoul bring more internationa insurance carriers into th state in 1993, a key Hicke administration officia says.

"The division's success ful bid for accreditation i a step forward in our com mitment to attract inter national carriers and bri said Paul Fuhs, acting co of Commerce and Econor

And accreditation may for insurance consumers the division.

"This is significant be know we have national here," Walsh said. "Comp able doing business in t number of companies th competition and ultimate consumers."

Walsh said he also hop insurance firms.

"This doesn't cure our

Continu

Lawmakers

DEC group prepares draft of air quality legislation

Continued from Page 1

gram would lead to its implemen-ion by the federal Environmental tection Agency.

Consensus was established on a fee ucture so that the program would self-funding, a controversial ele-nt that was largely responsible for stalemate that blocked progress a similar bill last year.

There was also general agreement DEC's ability, in certain cases, to eyond the minimums established ederal law. This was another fea-e that blocked the 1992 measure.

lear-consensus was established on its to the ability of unaffected third ties to make appeals of permits, he ability of local governments to

exceed state requirements on air quality measures protecting the environment and human health, and on criminal penalties.

The most potentially explosive issue was the fee structure. The 1990 Clean Air Act amendments require states to fund their programs through fees. Were EPA to run the program, they would levy an annual per-ton emissions fee, which would load most of the program costs on heavy industry.

The group agreed on a novel two-part fee structure. To pay direct costs of issuing a permit and carrying out inspections, DEC would impose a fee based on hours actually spent on the permit. This would be followed by an ongoing annual permit fee based on tons of emissions, which would pay indirect costs of the program.

The hourly-charge fee would spread costs sufficiently wide that many businesses, utilities and municipalities would bear enough costs that they would concern themselves with how DEC was administering the program.

The follow-on per-ton charge would require operators of major facilities, like oil installations or pulp mills, to pay more, offsetting indirect costs. The per-ton charge would help carry the overall costs of the program, to the benefit of smaller businesses or installations, but committee members felt the two-part fee also avoided having major industry carry all the costs.

Another sensitive part of the bill provides criminal penalties for violations.

The proposed bill would impose misdemeanor penalties for lesser violations and felony charges for more serious, willful wrongdoing, but also require verification that workers and facility managers are informed of the law and potential penalties.

"We were trying to develop a scheme that would provide significant penalties but also recognize that the state of mind in important, whether an action is reckless or knowingly in violation," said Eric Meyers, a member of the working group designated to represent general public interests.

Other features of the bill would allow DEC to go beyond minimum standards in federal law where a showing can be made that a threat to the environment or human health exists, and a provision for municipalities with managing their own clean air program to exceed state minimums.

The bill would require municipalities to get DEC concurrence before imposing standards or emission controls beyond what the state requires. Also, only DEC can collect fees charged under the program, another safeguard against a municipal government using the program for political purposes.

The group further agreed on a general permit provision to allow many small facilities, such as operators of diesel generators in rural Alaska, to come under a blanket state permit for similar facilities.

Senior Hickel administration officials have not yet decided whether the bill will be introduced by the governor, or whether the administration will ask a legislator to be prime sponsor, according to Tom Chapple, DEC official in charge of the project.

lean air group llowed U.S. egislation

Tim Bradner
ska Journal of Commerce

State environmental officials and working group involved in writ-the proposed new air quality regu-on law say it accomplishes the imum changes needed to allow ska to implement the new federal an Air program.

It's hard for this bill to get any ner," said Harry Noah, an envi-mental consultant to mining com-ies, who represented the

AIR QUALITY LEGISLATIVE WORKING COMMITTEE

February 2, 1993

The Honorable Senator Mike Miller
The Honorable Representative Kay Brown
Alaska State Legislature
Box V
Juneau, AK 99811

Dear Senator Miller and Representative Brown:

Since the citizen Air Quality Legislative Working Committee's draft legislation was submitted, some questions regarding the Working Committee's work effort have come to our attention. In particular, the purpose of this letter is to clarify certain aspects of the Working Committee's position as it relates to the state's ability to adopt regulatory standards more stringent than federal standards or to regulate a source otherwise unregulated by the federal government.

In order to resolve any potential ambiguity or misunderstanding about the Air Quality Legislative Working Committee's view of this issue, we want you to know that this issue was the subject of many lengthy discussions and, in the Working Committee's view, was adequately addressed by the Working Committee. After substantial debate, the Working Committee members adopted a unanimous position in support of the right to enact standards more stringent than federal standards or to regulate a source that may be otherwise unregulated by the department, supported by technically and scientifically sound analysis subject to an open, public process.

During the most recent meeting of the Working Committee, we revisited this issue and reaffirmed our previous position. At the same time, discussions of the Working Committee brought to light the concerns of some members that permit standards and emissions limitations should be implemented in a manner that ensures a fully public process. During our discussions it was noted that the proposed AS 46.03.156(a) specifically requires that "the department shall adopt regulations to address all substantive and procedural elements of the emission control permit program not addressed in statute [and that] regulations must include . . . standard permit conditions including conditions for emission standards and limitation." Notwithstanding this clear directive, the Working Committee will continue to address the best mechanisms to ensure that permit restrictions are subject to appropriate technical review and public scrutiny and will respond back to the legislature.

As you are aware, Commissioner Sandor has asked that the Air Quality Legislative Working Committee continue to provide the department and the legislature with the perspective of the many and various broad-based interests represented by the committee members. In that capacity we wanted to provide you with this letter and to let you know that we look forward to working with you in your consideration of the air quality legislation.

Sincerely,

Lee Browning,
Alaska Municipal League

Steven Taylor,
Alaska Oil & Gas Assoc.

Harry Noah,
Council of Alaska Producers

Orally Approved by Rick Lauber 2/2/93 T Chapple

Rick Lauber,
Pacific Seafood Processors Association

Linda Dianne Rabb,
Rural Alaska Power Association

Carl H. Harmon,
Alaska Rural Electric Cooperative Association

Larry Opperman,
U.S. Air Force

Aimee Boulanger,
Alaska Center for the Environment/
Alaska Environmental Lobby

Eric Myers,
General Public

Tom Chapple,
Alaska Dept. of Env. Conservation -
Committee Chair

cc: Members of Alaska State Legislature
ADEC Commissioner John Sandor
ADEC Assistant Commissioner Janice Adair

HB

41

HOUSE COMMITTEE REPORT

2/10

(7)

Date Referred: January 11, 1993 FURTHER REFERRALS: Judiciary, Finance

Date of Committee Action: 2/09/93

The LABOR AND COMMERCE Committee considered: HB 41

HOUSE BILL NO. 41 CIVIL LIABILITY FOR SKIING ACCIDENTS

"An Act relating to civil liability for skiing accidents, operation of ski areas, and duties of ski area operators and skiers; and providing for an effective date."

RECOMMENDATIONS: CSHB41 (L+C) [X] the same title
be replaced with _____ [ ] a new title

[ ] have attached amendments(s)

[X] do pass

[ ] do not pass

[ ] no recommendations

[ ] individual recommendations

[ ] additional referral to the _____ Committee

ADOPTS: _____ letter of Intent

ATTACHES NEW FISCAL NOTE(s): (Dept) APPROVES PREVIOUS: (Dept/Date)

[ ] fiscal impact _____ [ ] fiscal note(s) _____

5 [X] zero fiscal note UNR Court System DCED Dept of Law Dept Labor [ ] zero fiscal note(s) _____

SIGNING DO PASS	DP	OTHER RECOMMENDATIONS	DNP	NR	AM
Porter	✓				
Green	✓				
Mulder	✓	Joe Sutton Sitton	✓		
Maclcie	✓				
Hudson	✓				

Hudson

CHAIRMAN'S SIGNATURE

FISCAL NOTE

STATE OF ALASKA
1993 LEGISLATIVE SESSION

Bill No. HB 41

Revision Date:
Title: An Act relating to civil liability for skiing accidents...
Sponsor: Phillips
Requestor: Labor & Commerce

Department Affected: Alaska Court System
BRU: Trial Courts
Components:
COMPONENT SERIAL NO. 000 | 000 | 000 | 768

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 94	FY 95	FY 96	FY 97	FY 98	FY 99
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS & CLAIMS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUNDS	0.0	0.0	0.0	0.0	0.0	0.0
FEDERAL FUNDS						
OTHER						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current year impact: None

ANALYSIS: (Attach a separate page if necessary)

No fiscal impact.

Prepared by: C. S. Christensen III, Staff Counsel
Division: Alaska Court System
Phone: 264-8228
Date: 01/22/93

Approved by: Arthur H. Snowden, II, Administrative Director
Agency: Alaska Court System
Date: 01/22/93

Distribution (by preparer): Legislative Finance, Legislative Sponsor, Requestor, OMB, & Impacted Agency(ies).

Rev 1/93

FISCAL NOTE

STATE OF ALASKA
1993 LEGISLATIVE SESSION

BILL NO. HB 41

Revision Date: ____

Title: An Act relating to civil liability for skiing accidents . . . .

Sponsor: Reps. Phillips, Hudson, Porter

Requestor: Labor and Commerce, Judiciary, Finance

Department Affected: Commerce and Economic Development

BRU: Insurance

Component: Insurance Operations

COMPONENT SERIAL NO. 354

EXPENDITURES/REVENUES:

OPERATING	FY 94	FY 95	FY 96	FY 97	FY 98	FY 99
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL	0	0	0	0	0	0
CONTRACTUAL	0	0	0	0	0	0
SUPPLIES	0	0	0	0	0	0
EQUIPMENT	0	0	0	0	0	0
LAND & STRUCTURES	0	0	0	0	0	0
GRANTS, CLAIMS	0	0	0	0	0	0
MISCELLANEOUS	0	0	0	0	0	0
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL	0	0	0	0	0	0
REVENUE FUND SOURCE:	0	0	0	0	0	0
FUNDING:						
1002 Federal Receipts	0	0	0	0	0	0
1003 GF Match	0	0	0	0	0	0
1004 GF	0	0	0	0	0	0
1005 GF/Program Receipts	0	0	0	0	0	0
1006 GF/MHTIA	0	0	0	0	0	0
OTHER	0	0	0	0	0	0
TOTAL	0	0	0	0	0	0
POSITIONS:						
FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

Estimate of current year (FY93) impact: 0.0

ANALYSIS: (Attach a separate page if necessary.)
No fiscal impact.

Prepared by: Dave Walsh
Division: insurance

Phone: 465-2515
Date: January 21, 1993

Approved by Commissioner: Paul Fuhs
Agency: Commerce and Economic Development

Date: 1-22-93

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Rev 11/92
TL\fg\012FN.INS

FISCAL NOTE

STATE OF ALASKA
1993 LEGISLATIVE SESSION

BILL NO. HB 41

Revision Date: January 22, 1993
Title: "... relating to liability for skiing accidents, operations of ski areas..."
Sponsor: Representative Phillips
Requestor: House Labor & Commerce

Department Affected: Department of Law
BRU: Legal Services
Component: Operations
COMPONENT SERIAL NO. 0093

EXPENDITURES/REVENUES:

OPERATING	FY 94	FY 95	FY 96	FY 97	FY 98	FY 99
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE FUND SOURCE:						
FUNDING:						
1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1006 GF/MHTIA						
OTHER						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-
FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

Estimate of current year (FY93) impact: -0-

ANALYSIS: (Attach a separate page if necessary.)
Please see the attached analysis.

Richard L. Pegues

Prepared by: Richard I. Pegues, Director
Division: Administrative Services Division
Phone: 465-3672
Date: January 22, 1993

Richard L. Pegues /FOR/

Approved by Commissioner: Charles E. Cole, Attorney General
Agency: Department of Law
Date: January 22, 1993

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FISCAL NOTE

STATE OF ALASKA
1993 LEGISLATIVE SESSION

BILL NO. HB 41

ANALYSIS (Continued):

This bill adds a new chapter to AS 05 that defines the responsibilities of ski area operators and defines the responsibilities of skiers using ski areas. The bill further defines the liabilities of both ski operators and skiers, and the bill excludes comparative negligence or comparative fault analysis where an injury is the result of an inherent ri.k of skiing. The bill has the effect of reversing Hiibschman v. City of Valdez. The bill should not have a direct fiscal impact on the Department of Law, because the state is not a ski area operator in the sense of commercially or municipally operated ski areas.

It should be noted, however, that dedicated trails on state lands, or in state parks, may fall within the definition of ski area when the trails are used for cross country skiing. The bill does require ski area operators to extensively mark skiing routes with signs. It is doubtful that the Department of Natural Resources will have adequate funds for staff to comply with this requirement. Failure to do so could result in liability for the state in the event of an accident. Consequently, the Department of Law could be called upon to defend such liability claims at some time in the future. The department's defense costs are passed on to the Division of Risk Management in cases involving personal injury claims. We cannot predict these possible costs at this time, because information is not available which would indicate the number or severity of future claims.

FISCAL NOTE

STATE OF ALASKA
1993 LEGISLATIVE SESSION

BILL NO : HB 41

Revision Date:
Title: "An Act relating to civil liability for skiing accidents..."
Sponsor: Representatives Phillips, Hudson, Porter
Requestor: Representative Phillips

Department Affected: Labor
BRU: Labor Standards & Safety
Component: Mechanical Inspection

COMPONENT SERIAL NO. 346

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 94	FY 95	FY 96	FY 97	FY 98	FY 99
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS,CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL						
REVENUE FUND SOURCE:						

FUNDING: (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipt						
1006 GF/MHTIA						
Other						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current year (FY93) impact: $ None

ANALYSIS: (Attach a separate page if necessary)

Prepared by: Donald G. Study, Director Phone : 465-6003
Division: Labor Standards and Safety Date : 1/22/93

Approved by Commissioner: Charles W. Mahlen
Agency: Department of Labor Date: 1/25/93

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Department of Commerce & Economic Development / POSITION PAPER

HB 41: **"An Act relating to civil liability for skiing accidents, operation of ski areas, and duties of ski area operators and skiers; and providing for an effective date."**

HB 41 sets duties of ski operators and skiers. The bill removes the liability of ski operators for injuries resulting from an inherent danger and risk of skiing. The department has no position on SB 44.

C E Bard for
Paul Fuhs, Acting Commissioner

Date: 1-22-93

PF/TL/dgl010PP.INS
012193a

BILL NO: House Bill No. 41 **DATE:** January 26, 1993

TITLE: "An Act relating to civil liability for skiing accidents, operation of ski areas, and duties of ski area operators and skiers; and providing for an effective date." **CONTACT:** Arbe Williams 465-2700

House Bill No. 41 recognizes the hazards inherent to the sport of skiing and proposes to limit the liability of ski area operators to injuries caused by the operators' negligence. The bill would also require a ski area owner who operates a tramway to maintain a sign system for the protection and instruction of passengers and would require a ski area operator to post signs for trails and slopes.

The Department of Labor presently inspects equipment at ski areas. Section 05.45.020(b) provides that a ski area operator who violates the department regulations related to the construction, operation and maintenance of recreational devices is negligent and civilly liable to the extent the violation causes injury to a person or damage to property. This section would provide greater weight to such violations in court proceedings.

As this legislation does not assign additional responsibilities or duties to the department, it does not have a fiscal impact on the Department of Labor.

APPROVED:

Charles W. Mahlen, Commissioner

POSITION PAPER/Department of Labor

HOUSE COMMITTEE REPORT

2/10

(7)

Date Referred: January 11, 1993 FURTHER REFERRALS: Judiciary, Finance

Date of Committee Action: 2/09/93

The LABOR AND COMMERCE Committee considered: HB 41

HOUSE BILL NO. 41 CIVIL LIABILITY FOR SKIING ACCIDENTS

"An Act relating to civil liability for skiing accidents, operation of ski areas, and duties of ski area operators and skiers; and providing for an effective date."

RECOMMENDATIONS: CSHB41 (L+C) [X] the same title
be replaced with _____ [ ] a new title

[ ] have attached amendments(s)

[X] do pass

[ ] do not pass

[ ] no recommendations

[ ] individual recommendations

[ ] additional referral to the _____ Committee

ADOPTS: _____ letter of Intent

ATTACHES NEW FISCAL NOTE(s): (Dept) APPROVES PREVIOUS: (Dept/Date)

[ ] fiscal impact _____ [ ] fiscal note(s) _____

5 [X] zero fiscal note DNR Court System DCED Dept of Law Dept. Labor [ ] zero fiscal note(s) _____

SIGNING DO PASS	DP	OTHER RECOMMENDATIONS	DNP	NR	AM
Porter	✓				
Green	✓				
Mulder	✓	for Sitton Sitton	✓		
Mackie	✓				
Hudson	✓				

Bill Hudson

CHAIRMAN'S SIGNATURE

IN YOUR PACKETS YOU WILL FIND:

* A COPY OF HOUSE BILL 41
* ZERO FISCAL NOTES (IN BLUE) FROM THE DEPARTMENTS OF LAW AND COMMERCE & ECONOMIC DEVELOPMENT, AND LABOR AND POSITION PAPER BY COMMERCE AND ECONOMIC DEVELOPMENT, LETTER FROM THE DEPARTMENT OF LAW
* **TAB NUMBER 1** IS AN ANALYSIS BY LEGAL SERVICES
* **TAB NUMBER 2** ACTUALLY WAS WRITTEN FOR LAST YEAR'S BILLS BUT WILL GIVE YOU GENERAL BACKGROUND INFORMATION ABOUT WHAT PROMPTED THIS LEGISLATION. IT WAS PREPARED BY DELANEY WILES HAYES, ATTORNEY FOR ALYESKA SKI RESORT, AND OFFERS A JUSTIFICATION FOR LEGISLATION REGARDING THE INHERENT RISK OF SKIING
* **TAB NUMBER 3** IS A ONE-PAGE SUMMARY OF SKI RESORT NEGLIGENCE LIABILITY BASED ON THE HIBSCHMAN CASE AND IS FOLLOWED BY THE HIBSCHMAN V. CITY OF VALDEZ CASE
* **TAB NUMBER 4**: LETTERS IN SUPPORT OF SB 44, THE COMPANION LEGISLATION
* **TAB NUMBER 5** IS TESTIMONY IN OPPOSITION TO HB 41, SUBMITTED BY THE ALASKA TRIAL LAWYERS, DIANNE HOLMES OF ANCHORAGE, AND PATTI RIZER ALSO OF ANCHORAGE

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

WALTER J. HICKEL, GOVERNOR

PLEASE REPLY TO:

☐ *1031 WEST 4TH AVENUE, SUITE 200*
ANCHORAGE, ALASKA 99501-1994
PHONE: (907) 269-5100
FAX: (907) 276-3697

☐ *KEY BANK BUILDING*
100 CUSHMAN ST., SUITE 400
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FAX: (907) 451-2846

☐ *P.O. BOX 110300 - STATE CAPITOL*
JUNEAU, ALASKA 99811-0300
PHONE: (907) 465-3600
FAX: (907) 463-5295
465-3603

January 25, 1993

The Honorable Gail Phillips
Alaska House of Representatives
P.O. Box 113100
Juneau, Alaska 99811

Re: HB 41 - An Act relating to civil liability for skiing accidents, operation of ski areas, and duties of ski area operators and skiers

Dear Representative Phillips:

Your office has asked the Department of Law to look at HB 41 regarding ski areas and to identify any legal concerns. Assistant Attorney General Susan Cox and I have reviewed the draft bill as of this date and offer the following comments:

1. Proposed AS 05.45.100(h) [p. 11, l. 23] provides that a skier who violates (c) or (g) of that section is guilty of a violation, referring to a definition in the criminal code. It is not clear, however, just how this section will be enforced or how a skier may be cited for a violation. Currently, the bill does not designate responsibility for enforcement of this provision to a particular state agency. Though the Department of Public Safety has general enforcement powers when violations are committed in the presence of a trooper, it may be important to designate a responsible department and more explicitly set out a citation process. (Please see AS 18.35.340 and 18.35.341 for an example.)

2. The proposed definitions at AS 05.45.100(6), (7), and (9) address "ski area", "ski area operator", and "ski slopes or trails." These definitions are general and appear to be circular. One concern is that hiking trails on state owned land that are used as cross-country ski trails in the winter may be required to post signs and hire ski patrol staff under these all-inclusive definitions (i.e., the trail at Point Bridget State Park in Juneau is used as a cross-country

ski trail in winter). Furthermore, the state could encounter liability in some unexpected circumstances in areas that have unimproved trail systems. If this bill is not intended to have the impact of requiring all hiking trails that may be used as cross-country trails in the winter to be posted with signs and hire ski patrol staff, it will be necessary to address this in these definitions .

Please feel free to contact me with any questions.

Sincerely,

CHARLES E. COLE
ATTORNEY GENERAL

By: Kristen F. Bomengen
Kristen F. Bomengen
Assistant Attorney General

KFB:jh

cc: Susan Cox
Assistant Attorney General

Deborah Behr
Assistant Attorney General

Kris Lethin, Legislative Liaison
Office of the Governor

Sandy Nusbaum
Office of Representative Phillips

DIVISION OF LEGAL SERVICES

LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

JAN 20 1993

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101

130 Seward Street, Suite 409
Juneau, Alaska 99801-2105

MEMORANDUM January 20, 1993

SUBJECT: Civil liability for skiing accidents (HB 41)

TO: Representative Gail Phillips
Attn: Sandy

FROM: Michael F. Ford
Legislative Counsel

This memo is in response to your request for an explanation of the effects of the attached draft. In general, the draft revises the existing law regarding the liability of a ski area operator to an injured skier. By clarifying the duties of ski area operators and skiers, and by expanding the definition of "inherent danger and risk of skiing" the draft is intended to provide greater protection against lawsuits for ski area operators.

In 1975, the Alaska Supreme Court adopted a doctrine called the doctrine of comparative negligence. Kaatz v. State, 540 P.2d 1037, 1049 (Alaska 1975). This doctrine actually evolved over a long period in which courts struggled to determine how to balance the negligence of the party being sued with the negligence of the party bringing the lawsuit. Instead of denying any recovery to a person who was partially at fault, the court adopted a policy under which any recovery would be reduced by the negligence of the person bringing the lawsuit. In short, the negligence of each party is compared, and any recovery is reduced by the percentage of fault that is attributed to the party who was injured.

In 1980, the legislature enacted AS 09.65.135, a statute that barred claims by injured skiers, if the claim arose from "an inherent risk of skiing" unless the ski area operator failed to post required warning signs. This statute appeared to remove these type of cases from the usual comparative negligence system adopted by the Alaska Supreme Court. Instead, in these cases if a skier was injured due to an inherent risk of skiing the skier was barred from any recovery as opposed to simply reducing the recovery by the negligence of the skier.

In 1986 the legislature codified the comparative negligence doctrine, as AS 09.17.060. In doing this the legislature did not preclude application of comparative negligence to the immunity granted under AS 09.65.135.

This was the situation when the Alaska Supreme Court decided Hiibschman v. City of Valdez, 821 P.2d 1354 (Alaska 1991). In this case an injured skier brought suit against a ski area operator. The ski area operator asserted the immunity of AS 09.65.135 and argued that the skier's injuries were as a result of an inherent risk of skiing. The court held that AS 09.65.135 did bar suits when the skier was injured by an inherent risk of skiing, but did not eliminate a ski area operator's liability under the comparative negligence doctrine if the ski area operator was also at fault. If the ski area operator is negligent in some regard, then the doctrine of comparative negligence applies and the injured skier may recover for injuries minus the fault attributed to the skier. Only if the skier is injured solely by an inherent risk of skiing would recovery be barred by AS 09.65.135. In short the court harmonized AS 09.17.060 and AS 09.65.135 by allowing a lawsuit to proceed if the ski area operator was a negligent cause of the skier's injury.

The most significant policy issue raised by this draft is the question of the type and scope of immunity to be granted to ski area operators. The scope of the immunity granted is largely dependent on the definition of "inherent danger and risk of skiing." This definition should be carefully reviewed. There is also the issue of whether a ski area operator loses immunity when the negligence of the operator contributes to the injury, as held by the Alaska Supreme Court in Hiibschman. That issue could be decided differently by the legislature, but this draft probably does not change the law as set out in Hiibschman. (See proposed AS 05.45.010 and 05.45.020(b); and AS 05.45.010 and 05.45.100 in the draft you provided.)

If you have further questions on these matters please contact me.

MFF:pl
93-034.plm

THE NEED FOR AND PROBABLE EFFECTS OF INHERENT RISKS OF SKIING LEGISLATION

House Bill 491 and Senate Bill 403

There are very few things which can be predicted with any degree of success in the litigation arena.[1] It is therefore difficult to predict with any degree of certainty the effect in an individual case of the adoption of House Bill 491 or Senate Bill 403, or if the Alaska Legislature adopted a statutory scheme similar to Colorado or New Hampshire.

Nevertheless, it is easy and appropriate to outline the basic differences between (1) the current statute, AS 09.65.135, as interpreted by the Alaska Supreme Court; (2) the statute as proposed in HB 491 and SB 403; and (3) the adoption of a comprehensive statute governing skiing responsibilities and duties, such as Colorado or New Hampshire.

I. The Need for Legislation Regarding the Inherent Risks of Skiing

Prior to 1978, it was generally assumed among ski area operators and the courts that skiers were responsible for their own injuries arising from the inherent risks of skiing. This doctrine was called "primary assumption of risk," and basically held that a ski area operator is not liable for injuries arising from the inherent risks of skiing. An operator owed his patron no duty to eliminate those risks, because they were part of the sport. Skiers assumed those dangers by their very participation in the sport. This doctrine was most eloquently set forth in *Wright v. Mt. Mansfield Lift, Inc.*, 96 F.Supp. 786, 790-91 (D.Vt. 1951). In that case, a skier claimed to have struck a stump (created by clearing the ski trail), and fallen, breaking her leg. The court held the ski area operator had no duty to protect against a danger so obvious in the sport of skiing:

> Skiing is a sport; a sport that entices thousands of people; a sport that requires an ability on the part of the skier to handle himself or herself under various circumstances of grade, boundary, mid-trail obstructions, corners and varied conditions of the snow. Secondly, it requires good judgment on the part of the skier and recognition of the existing circumstances and conditions. Only the skier knows his own ability to cope with a certain piece of trail. Snow, ranging from powder to ice, can be of infinite kinds. Breakable crust may be encountered where soft snow is expected. Roots and rocks may be hidden under a thin cover. A single thin stubble of cut brush can trip a skier in the middle of a turn. Sticky snow may follow a fast running surface without warning. Skiing conditions may change quickly. What was, a short time before, a perfect surface with a soft cover on all bumps may fairly rapidly become filled with ruts, worn

---

[1] The most certain prediction is that the lawyers on each side will more than likely reap greater benefits from the litigation than the clients.

spots and other manner of skier created hazards.

. . .

In this skiing case, there is no evidence of any dangers existing which reasonable prudence on the parts of the defendants would have foreseen and corrected. It isn't as though a tractor was parked on a ski trail around a corner or bend without warning to skiers coming down. It isn't as though on a trail that was open work was in progress of which the skier was unwarned. It isn't as though a telephone wire had fallen across the ski trail of which the defendant knew or ought to have known and the plaintiff did not know.

The trail at the point of the accident was smooth and covered with snow. There were no unexpected obstructions showing. The plaintiff, in hitting the snow-covered stump as she claims to have hit, was merely accepting a danger that inheres in the sport of skiing. To hold that the terrain of a ski trail down a mighty mountain, with fluctuation in weather and snow conditions that constantly change its appearance and slipperiness, should be kept level and smooth, free from holes or depressions, equally safe for the adult or the child, would be to demand the impossible. It cannot be that there is any duty imposed on the owner and operator of a ski slope that charges it with the knowledge of these mutations of nature and requires it to warn the public against such.

A short 27 years later, the Vermont Supreme Court turned the skiing community on its head with the holding in *Sunday v. Stratton Corp.*, 390 A.2d 398 (Vt. 1978). In that case, a skier claimed that he had fallen after his ski became entangled in a small bush or piece of brush near the side of a beginner's trail. The skier became a quadriplegic as a result of the incident. The court held that the ski area operator could be liable for such an incident, and affirmed a jury verdict in favor of the skier.

Within five years, over 20 states with commercial ski operations adopted one form of a statute imposing responsibility for injuries arising from the inherent risks of skiing on the skier. There are several reasons why such statutes are necessary and desirable, and why the legislature must use very specific language in expressing its intentions.

The first point is that ski area operators require certainty. It is very important that ski area operators know exactly those things for which they are responsible, and those things for which the skier is responsible. If area operators know what their duties are (provided they are not so onerous as to require more expenditures than can be recouped through revenues, i.e., ticket prices), and they know how to comply, skiing as a sport will be greatly enhanced. Insurance rates will go down for those who comply with the known requirements, especially after it is well-established that claims arising from inherent risk incidents can be resolved by summary motion. Cases like *Sunday v. Stratton*, which impose liability in unpredictable

circumstances, deprive operators and their insurers with the certainty necessary to develop an effective risk management program.

The second point is that courts resist change, especially when the legislature alters the common law as established by the court. It is imperative that the legislation show a clear intent to alter the common law with respect to the rights and duties of skiers and ski area operators. Section 1 of both bills does this, and is a critical component of the legislation. The best solution, of course, is for the legislature to adopt a comprehensive statute regulating the operation of ski areas, setting forth the specific duties of an operator to his patrons, and the specific responsibilities of ski areas. In addition to the reluctance with which courts greet changes in the laws they have "written," courts eagerly entertain the application of constitutional test to legislative acts which deviate from the common law. While most challenges to inherent risk statutes have been unsuccessful,[2] the Montana Supreme Court found the Montana act unconstitutional.[3]

The third point, and perhaps the most important, is that skiing is unlike any other commercial enterprise. Ski area operators offer skiers access to large areas of mountainous alpine terrain. This terrain contains all manner of variations in terrain, hills, gullies, ridges, holes, streams, forests, brush, grass, rocks, etc. Skiing takes place in the winter time, with all of the winter weather conditions. The patrons of a ski area engage in a highly athletic sport which requires good physical conditioning and quick reflexes. By the nature of the sport, the patrons slide on a steep, slippery surface at speeds which, even for the beginner or intermediate, easily exceed even the speed of the fastest runner. Unlike the operator of a skating rink or bowling alley or golf course, there is no physical way a ski area operator can modify, control, or even monitor each rock, tree, ridge, icy spot, or other single point condition so as to protect all patrons from injury. Yet a ski liability case is tried as if the area operator should focus all of his attentions and resources on the one tiny spot on the hill where the accident occurred.

Alyeska Resort has an enviable safety record when compared to other ski areas in the United States. Ski accident safety is traditionally measured in terms of the number of accidents

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[2] The following cases upheld inherent risk of skiing statutes as constitutional: *Pizza v. Wolf Creek Ski Development Corp.*, 711 P.2d 671 (Colo. 1985); *Grieb v. Alpine Valley Ski Area, Inc.*, 400 N.W.2d 653 (Mich.App. 1986); *Scmitz v. Cannonsburg Skiing Corporation*, 428 N.W.2d 742 (Mich.App. 1988); *Lewis v. Canaan Valley Resorts, Inc.*, 408 S.E. 2d 1128 (W.Va. 1991); *Northcutt v. Sun Valley Co.*, 787 P.2d 1159 (Idaho 1990); *Collins v. Schweitzer, Inc.*, -- F.Supp. —, 1991 WestLaw 196753 (D.Idaho 1991); *Glebink v. Fischer*, 709 F.Supp. 1012 (D.Colo. 1989); *Weinrauch v. Park City*, 635 F.Supp. 91 (D.Utah 1986).

[3] *Brewer v. Ski-Lift, Inc.*, 762 P.2d 226 (Mont. 1988). The Montana statute has since been amended to respond to the concerns expressed by the Montana Supreme Court. *See* Montana Code §§ 23-2-701 *et seq.*

incurred per thousand skier visits. A "skier visit" is one skier visiting the ski area on a single day. The number of accidents is the number of skiers who report injuries to the ski patrol. Over the last several years, the number of accidents at Alyeska has consistently remained well below the national average:

COMPARISON OF NUMBER OF SKI ACCIDENTS			
Year	Skier Visits	United States	Alyeska Resort
89-90	133,466	3.4	2.7
90-91	138,762	3.4	1.8
91-92 (as of 02/29/92)	132,280	3.3	1.1

Despite this positive safety record, Alyeska Resort spends a substantial amount of money each year defending claims made by injured patrons. The resort changed insurers effective December 1, 1989. Since that date, Alyeska Resort has paid over $100,000 in legal fees related to claims made by skiers, and currently has 6 open claims files. The net claim amounts and/or reserves for claims exceeds $200,000.

Why is a relatively safe ski resort stuck with very high legal fees and insurance premiums? Largely because Alyeska, like all Alaska ski areas, is without effective protection from claims arising from the inherent risks of skiing.

The fact is that despite the best efforts of any ski area operator, a very few skiers are going to get hurt while engaging in the sport. Some will sustain minor injuries, some will suffer permanent and/or serious injuries, and a very, very few will die. This is not because the skiers or the operators are bad people, or are foolish, or do not take care of themselves or the ski area. It is a result of a sport which combines high speed, mountainous steep terrain, varying snow and weather conditions, and rocks, trees, bushes, stumps, etc.

Currently, Alyeska is forced to consider any skier who suffers a substantial injury as a potential claimant. The rules are not clear, the chances of liability uncertain, and the amounts awarded potentially very large.

II. Current Status of Ski Law in the United States

Since there is no uniform law proposed by the American Law Institute, the statutes vary substantially. There are essentially three legal positions taken by the states within which skiing occurs. These are: (1) the common law as recently reinterpreted and established by the supreme courts in the various states; (2) statutes which tend to preserve the common law, but list the

inherent risks of skiing and limiting the liability of ski area operators; and (3) statutes which replace the common law with a specific list of duties for ski area operators and skiers.

A. Common Law

The first position is the common law duties established by the court: A landowner or possessor of land is required to act as a reasonable person in maintaining his property in a reasonably safe condition in view of all the circumstances including the likelihood of injury to others, the seriousness of the injury, and the burden on the respective parties of avoiding the risk. *Webb v. City and Borough of Sitka*, 561 P.2d 731, 733 (Alaska 1977). This makes sense when the size and nature of the parcel, when combined with the activities of the patrons in various weather conditions, allows the owner or possessor to generally monitor each area of his land. In the world of skiing, it imposes a theoretical desirable norm which is absolutely impractical in the real world. Each assertion of liability focuses on a mere snapshot of time and space, and totally ignores all of the other conditions of the land and patrons, and the efforts of the ski area operator to improve skier safety. Ski area operators need more certainty with respect to their duties than a jury trial from hind sight on every ski accident involving more than minor injuries.

B. List of Inherent Risks

The second position is the option selected by Alaska in 1990, and by a few other states, including Utah. This involves three parts. First, the legislature adopts a descriptive, non-comprehensive list of the inherent risks of skiing. Then, the legislature requires the ski area operator to post a notice informing skiers of the inherent risks of skiing and the limitation of liability. Finally, in exchange for correctly posting the notice, the ski area operator is relieved of liability for injuries arising from the inherent risks of skiing. The effectiveness of these statutes depends largely on their interpretation by the supreme court in the state of adoption. In both Alaska and Utah, the state supreme courts have restrictively interpreted these statutes. *Hilbschamn v. City of Valdez*, 821 P.2d 1354 (Alaska 1991); and *Clover v. Snowbird Ski Resort*, 808 P.2d 1037 (Utah 1991). Both courts held that this kind of statute merely codifies the common law, and does not prevent a patron from claiming the operator was negligent, even when the injury is caused by an inherent risk of the sport. The uncertainty created by this interpretation largely renders the statute meaningless. As the Utah Supreme Court stated, "While the general parameters of the act are clear, application of the statute to specific circumstances is less certain. ... The statute, therefore, contemplates that the determination of whether a risk is inherent be made on a case-by-case basis ..." 808 P.2d at 1044 and 1045.

C. Substitution of Duties for Ski Area Operators and Skiers

The third position is the adoption of a comprehensive statute regulating the operation of ski areas, which is the position taken by Colorado and New Hampshire, among others. In its adoption of the statute, the legislature makes it clear that it is not merely codifying the common

law, but is comprehensively rewriting the law with respect to the operation of ski areas. First, the legislation sets forth with some particularity the duties of ski area operators to their skiing patrons, including generally very specific requirements regarding signs informing skiers of the relative difficulty of runs, and warning about the inherent risks. These statutes include regulation of the operation of tramways, much as Alaska has done in AS 05.20. The statutes also contain a list of prohibited activities by skiers who ride tramways. These statutes then set forth the duties of skiers with respect to their own safety and the safety of other skiers. Finally, the statutes generally state that so long as the operator fulfills his duties, or so long as a failure to fulfill a particular duty is not the cause of an injury, the ski area operator can not be held liable to the injured patron. These statutes provide the necessary certainty for ski area operators, thus encouraging the development and operation of ski areas. These statutes are also more likely to survive a constitutional challenge, because they impose specific duties on ski area operators in exchange for the limitation of liability. Colorado State: CRS §§ 33-44-101 to -114, interpreted in *Phillips v. Monarch Recreation Corp.*, 668 P.2d 982 (Colo.App. 1983), and *Pizza v. Wolf Creek Ski Development Corp.*, 711 P.2d 671 (Colo. 1985). New Hampshire Statute: NHS §§ 225-A:1 to A:26, interpreted in *Adie v. Temple Mountain Ski Area, Inc.*, 238 A.2d 738 (N.H. 1968), and *Berniger v. Meadow Green-Wildcat Corp.*, 945 F.2d 4 (1st Cir. 1991).

III. The Hiibschman Case, and the Legal Implications of the Decision on Incidents occurring at Alyeska Resort

The *Hiibschman* case arose at Salmonberry Ridge, a small ski area operated by the City of Valdez. Heather Hiibschman, 15 years old at the time, went skiing with friends at Salmonberry Ridge on March 13, 1986, the first year the area was open. Prior to going skiing, the group stopped by a liquor store and purchased beer, which they consumed during the day. Hiibschman watched several people jump over a bump on the hill estimated to be between two and four feet high. She waited in line to take her turn to go over the jump. When she went over the bump, she leaned backward and fell, resulting in paraplegia.

Based on the inherent risk of skiing statute, the Superior Court granted summary judgment to the City on all issues except the question of whether the City had complied with the signage requirement. The lower court held that Hiibschman had failed to ski within the limits of her ability. A jury later determined that the City had complied with the signage requirements.

The Supreme Court reversed the summary judgment, and sent the case back to the Superior Court for trial. There are several rulings in the *Hiibschman* decision which render the inherent risk of skiing statute largely ineffective. The following discussion illustrates a number of the problems created by the *Hiibschman* case, provides examples of recent incidents at Alyeska Resort which are affected by the rulings, and explains the application of the *Hiibschman* case, the proposed legislation and the more comprehensive ski statutes, to the example:

A. The statute preserved the common law duties of ski area operators. Thus, the ski area operator is required to act as a reasonable person in maintaining all skiing terrain under

his control in a "reasonably safe" condition.

Problem: Ski area operators are unlike any other business which invites patrons to enjoy land. Skiers seek an outdoor athletic experience in a winter alpine setting on very large tracts of land. Many skiers who get hurt were seeking higher physical challenges in steeper terrain, deeper snow, or using terrain variations to jump. Given the weather, slope, vegetation, etc., it is impossible for a ski area operator to keep the entire ski area "reasonably safe" under all conditions.

Example: Skier skied down Von Imhoff Trail at a high rate of speed, turn right off the main trail and attempted to jump from a small ridge. Skier fell before reaching the top of the ridge, struck some ice or rocks, and broke his back. Skier claims Alyeska liable because of negligent failure to provide sufficient snow cover or because the ski run was icy or because there were rocks where the skier fell.

1. Under the *Hlibschman* ruling, this case must go to a jury trial on whether Alyeska should have opened at all, whether there was sufficient warning of the off trail conditions, and whether Alyeska could have provided sufficient snow coverage or removed the rocks off the trail.

2. Under HB 491 and SB 403, this case probably would be resolved under summary judgment, provided the operator had posted the required warning signs. Section 1 makes clear the legislative intent to alter the common law, and the amendments in section 3 make it clear that whether the accident was caused by ice or rocks, it is the skier's responsibility. The statute and the required warning sign notify skiers of the dangers, and their responsibility.

3. Under Colorado or New Hampshire inherent risk statutes, the case certainly would be resolved under summary judgment, provided the operator had posted the required warning signs and fulfilled the other requirements under those statutes. Those statutes substitute an entire new set of responsibilities and obligations for area operators and skiers in the place of the general common law duty of landowners. These statutes recognize the unique nature of skiing.

B. An inherent risk is one which is obvious and necessary to it. A risk is not necessary if it could be eliminated or mitigated through the exercise of reasonable care. The listing of a risk in the statute makes the risk obvious, but does not make it necessary -- necessary risks are those which cannot reasonably be eliminated by the area operator.

Problem: The purpose of the statute was to require the skier to accept the risk of all inherent risks, not just those listed. It is irrelevant whether the risk is necessary, since the risk and the enjoyment factor often coincide. An example is a skier skiing down steep terrain on hardpack snow. Speed and descent are exhilarating, but also increase

the risk of injury. It does not matter whether the steep terrain or snow conditions are necessary, because the skier intended to encounter them.

Example: Skier fell while skiing on South Face, a steep run, after ski binding released. Skier slid down South Face, and tried to stop his descent by putting foot in snow. One foot caught in the snow, and he broke his femur. Skier claimed Alyeska liable because South Face was too icy to be opened that day. Skier's friend testified in deposition that they had skied the South Face the previous day, and at least once before that day without any problems. He also testified that they were expert skiers and had actively sought challenging runs.

1. Under the *Hiibschman* ruling, this case probably would have been tried before a jury. The court's ruling would have required a trial on the issue of whether Alyeska was negligent in opening the South Face that day, because the snow was "too hard" or "icy," and whether the snow conditions were a "necessary" part of the sport, thus an inherent risk.

2. Under HB 491 and SB 403, this case would be resolved under summary judgment, provided the operator had posted the required warning signs. Section 3 amends the list of inherent risks to clearly specify that all snow conditions are inherent risks, even as they change during the day or from day to day.

3. Under Colorado or New Hampshire inherent risk statutes, the case certainly would be resolved under summary judgment, provided the operator had posted the required warning signs and fulfilled the other requirements under those statutes.

C. Evidence of negligence, even where the injury resulted from an inherent risk, takes the case out of the protection afforded by the statute, and the case must be tried before a jury.

Problem: Only an incompetent plaintiff's attorney would be wholly unable to theorize an allegation of negligence and find an expert who will confirm the theory in virtually any skiing accident. The whole point of an inherent risk statute is that the burden of avoiding injury from such a risk is wholly on the skier. This single holding means that almost every case must go to a jury trial, because it is the rare negligence case that can be resolved by summary judgment. *Braham v. Fuller*, 728 P.2d 641, 646 (Alaska 1986); *Webb v. City and Borough of Sitka*, 561 P.2d 731, 735 (Alaska 1977).

Example: Skier skied down Sourdough Trail. His binding came loose, he lost a ski, and fell. Skier slid feet first to the edge of the main trail and struck a rock, breaking his back. Skier claims Alyeska liable because of negligent failure to provide sufficient snow cover, failure to remove the rock, and failure to mark the rock.

1. Under the *Hiibschman* ruling, this case would have been tried before a jury. The court's ruling requires a trial on the issue of whether the rock was in the main run or off the main trail, whether there was sufficient snow, and whether Alyeska should have removed the rock.

2. Under HB 491 and SB 403, this case might be resolved under summary judgment, provided the operator had posted the required warning signs. Section 3 amends the list of inherent risks to clearly specify collisions with natural objects, on or off the trail, are an inherent risk of the sport. There has been some earth work in the vicinity of the rock, however, and there is some question whether this fact would take the rock out of the status of "natural object."

3. Under Colorado or New Hampshire inherent risk statutes, the case certainly would be resolved under summary judgment, provided the operator had posted the required warning signs and fulfilled the other requirements under those statutes. Non-moving objects on the ski hill are the responsibility of the skier, whether on the main trails or off in the woods.

D. Artificial conditions are not inherent risks. Any alteration to natural conditions -- earth work to create a ski run, cutting a tree, grooming a ski slope -- removes those conditions from inherent risks of skiing within the list in the current statute.

Problem: This means that a ski area operator's efforts to improve safety by, for example, grading ski trails in the summer time increase the operator's risk of liability. This creates an incentive to leave dangerous -- but natural -- conditions in place. The legislature should encourage a ski operator to take steps to reduce naturally created hazards.

Example: A skier fell on the back of her skis on the Von Imhoff Trail, and slid through a transition onto Upper Sourdough, breaking her hip. Both runs were cut and graded out of the forest by Alyeska, and both provide substantially easier routes down the mountain than the natural conditions which existed before the work was performed. No claim has yet been made.

1. Under the *Hiibschman* ruling, any claim made would have to proceed to a jury trial. The slopes are artificial, and therefore, by Alaska Supreme Court definition, can not be considered an inherent risk of skiing. Any claim that asserted the injuries were a result of trail design, construction or maintenance would be impervious to a motion for summary judgment.

2. Under HB 491 and SB 403, this case would almost certainly be resolved under summary judgment, provided the operator had posted the required warning signs. Section 3 amends the list of inherent risks to clearly specify that variations in

terrain, whether natural or a result of slope design and terrain modification, are an inherent risk of the sport.

3. Under Colorado or New Hampshire inherent risk statutes, the case certainly would be resolved under summary judgment, provided the operator had posted the required warning signs and fulfilled the other requirements under those statutes. In particular, Colorado's statute specifically lists "variations or steepness in terrain, whether natural or a result of slope design, snowmaking or grooming operations, including but not limited to roads, catwalks, or other terrain modifications" are inherent risks of skiing. *See* Colorado Revised Statutes § 33-44-103(10).

E. Where warning signs must be placed and what they must say is an issue for the jury to resolve.

Problem: The best place to put the signs is where people who use the ski area are most likely to see them. The present statute, which requires "trail signs at prominent locations within a ski area" is open to vast interpretation, thus requiring a jury trial in every case on whether the signs were "trail signs" and whether they were placed in "prominent locations." Ski area operators need to know precisely what to post and where they have to post it.

Example: Skier (29-year old) was apparently skiing fast down the Waterfall and lost control, flying into the woods and striking two trees. Skier suffered severe multiple trauma. (The patrollers who attended his injuries were awarded the National Ski Patrol Purple Heart for a life-saving effort.) Skier's father has made repeated inquiries regarding the incident, but has not yet made a claim.

1. Under the *Hiibschman* ruling, this case would have been tried before a jury. Although it appears that the cause of the injuries was one or more inherent risks: trees, snow conditions or failure to ski within the limits of the skier's ability, the court's ruling requires a trial on the issue of whether Alyeska's signage was sufficient to comply with the warning sign requirements in the current inherent risk statute.

2. Under HB 491 and SB 403, this case would almost certainly be resolved under summary judgment, provided the operator had posted the required warning signs. Section 2 imposes firm and certain signage requirements both with respect to content and location. Alyeska can KNOW without a doubt what has to be done to comply, and can in fact comply. Section 3 amends the list of inherent risks to clearly specify collisions with natural objects, on or off the trail, are an inherent risk of the sport.

3. Under Colorado or New Hampshire inherent risk statutes, the case certainly would be resolved under summary judgment, provided the operator had posted the required warning signs and fulfilled the other requirements under those statutes. Non-moving objects on the ski hill are the responsibility of the skier, whether on the main trails or off in the woods.

IV. Conclusion

The need for legislation is apparent. In order for skiing to be available for Alaskan residents in any form and at reasonable ticket prices, the operators must know and be able to comply with the duties required by the state. This can best be effected by the adoption of an effective inherent risk statute.

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Ski Resort Negligence Liability

Hilbschman v. City of Valdez, 854 P.2d 1134 (Alaska 1991), involved issues of the interpretation of Alaska's Limitations on Claims Arising from Skiing Act (the "Act") A.S. 09.65.135, comparative negligence, and a protective order limiting the defendant's discovery and use of evidence regarding the plaintiff's prior DWI conviction and prior drinking experience. Hilbschman sued the City of Valdez for injuries incurred as she went over a ski bump/jump at a city ski hill.

The Act precludes recovery by skiers from a ski area operator for injuries resulting from an inherent risk of skiing which is defined in the statute as including, but not limited to, in part, variations or steepness in terrain, snow or ice conditions, and surface or subsurface conditions such as bare spots, forest growth and rock, and a skier's failure to ski within the limits of the skier's ability. The particular ski area in question is considered a beginner's hill, measuring 1,300 feet from top to bottom with a 208 foot vertical rise. Several bump/jumps could be found on the hill at the time of the accident. The trial court held that the plaintiff's injuries resulted from an inherent risk of skiing, but found that a genuine issue of material fact existed regarding whether the City complied with the statute's requirement of posting signs at prominent locations within the ski area listing the inherent risks of skiing and the limitation on liability of the ski area operator as provided by the Act.

While the facts surrounding the accident were disputed, since the Court was reviewing a summary judgment ruling, the Court drew the inferences in the plaintiff's favor, as she was the party opposing summary judgment. The ski lift operator had testified that he thought the jump was dangerous. However, neither the ski lift operator nor the head of the ski patrol were aware of any other skier having ever been injured on the jump where the plaintiff's injury occurred. (The plaintiff landed on her tailbone after skiing off of the jump and was paralyzed from the waist down.) An expert in ski area design and planning thought it was inappropriate to have this jump or any jump on a beginner's hill, unless the jump were marked as appropriate only for more advanced skiers. The plaintiff, 15 years old at the time of the accident, estimated that she had consumed between one and a half and three beers before the accident. She also asserted that she had taken four ski runs between her last consumption of beer and the time of the accident and that she did not fall on any of those runs. An emergency medical technician who attended the plaintiff stated that the plaintiff's breath smelled of alcohol, but that she was not obviously intoxicated.

Following two motions for reconsideration of the trial court's ruling on the City's motion for summary judgment, the trial court submitted the issue of adequate signage to a jury, which returned a verdict in favor of the City.

The Supreme Court concluded that the statute in question was intended to bar recovery for those actions which on the skier could control and that were beyond the ski area operator's control. The Court concluded that the Act preserved the common law duty of reasonable care of ski area operators and that evidence of negligence on the part of a ski area operator makes the case out of the inherent risk of skiing context. The Court stated that the statute aids trial courts by listing those risks which are considered inherent in the sport of skiing: those risks which are obvious and necessary. The Court defined necessary dangers as those which cannot reasonably be eliminated by the area operator. The Court also observed that a risk not listed in the statute may still be an inherent risk of the sport if necessary and obvious, but this risk must be subjectively obvious to the skier, who must know of the risk's presence, understand its nature, and freely and voluntarily choose to encounter it.

Reviewing the evidence, the Court concluded that genuine issues of material fact existed as to whether the jump constituted an inherent risk of skiing. The Court noted that a jump is not specifically listed in the statute and its risk is not necessarily obvious or necessary. The plaintiff had testified that she did not think that the jump was hazardous in the way it was designed or constructed before she went off of it. The Court also noted testimony that the jump was not safe for beginner skiers and that the jump was not marked as being suitable only for expert skiers.

The Court held that the duty owed to a skier for a natural or an artificial condition is governed by the holding in *Webb v. City and Borough of Sitka*, 561 P.2d 731, 733 (Alaska 1977), which adopted the rule that a landowner must act as a reasonable person in maintaining his property in a reasonably safe condition in view of all of the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden on the respective parties of avoiding the risk. The Court observed that the origin of the danger (whether natural or artificial) is applicable to the rule announced in *Webb* as it affects the burden on the respective parties of avoiding the risk, and it is also relevant to the issue of the ski area operator's knowledge of the danger. However, the Court held, as a matter of law, an artificially created jump cannot be considered a variation or steepness in terrain or a surface condition, concluding that these categories relating to the inherent risk of skiing do not encompass artificially created conditions. Since the evidence was conflicting as to whether the jump was a natural variation in terrain or surface condition or an artificial structure, a jury question was presented as to whether a natural or artificial condition created the jump.

The Court also concluded that a jury question was presented with regard to the issue of whether the plaintiff was skiing beyond her ability. The Court ruled that, to bar an action, "skiing beyond one's ability" means the skier must subjectively know he or she is skiing beyond his or her ability, as an inherent risk of skiing must be necessary and subjectively obvious. However, once evidence of a ski area operator's negligence exists, the operator is free to argue that the skier voluntarily and unreasonably assumed a negligently created risk. The skier's negligence would then reduce recovery under the doctrine of comparative negligence. If an injury is caused by a combination of an inherent risk of skiing and the ski area operator's negligence, the doctrine of comparative fault will apply to determine the extent of the operator's negligence.

The Court next rejected the plaintiff's contention that the posted signs in the ski area were insufficient as a matter of law to comply with the statutory requirements. Although no "trail" signs were posted, the Court noted that the ski area consisted of one small open hill and that there were no real designated trails as such. The Court also noted evidence indicating that a number of signs were posted at the bottom of the hill, where they were likely to be seen by skiers, and affirmed the trial court's ruling that genuine issues of material fact existed as to whether the signage at the ski area complied with the statutory requirement.

The Court also affirmed the lower court's order prohibiting the City from discovering or using evidence relating to the plaintiff's prior driving while intoxicated conviction and prior drinking experience pursuant to Evidence Rule 402 and 403. The Court concluded that the evidence of prior drinking did have marginal relevance on the issue of the plaintiff's knowledge of the effect alcohol can have on one's judgment. The Court noted that the plaintiff admitted having knowledge about the effects of alcohol and that there was other evidence available to the City regarding the plaintiff's consumption of alcohol and impairment. The Court concluded that the potential for prejudice, that the jury might punish the plaintiff for her prior conduct, might outweigh the marginal relevance of the prior drinking evidence and concluded that the trial court did not abuse its discretion in precluding discovery into and use of this evidence. On the other hand, the Court ruled that evidence concerning the plaintiff's drinking on the day of the accident, as opposed to prior incidents of drinking, was relevant to the issue of comparative negligence.

To: Linda Diguere

Fr: Patti Rizer

I'll have more information for you later today. Thanks for your understanding.

Sand w ski resort bill

Heather HIIBSCHMAN, By and Through her guardian, Debra WELCH, and Debra Welch, Appellants and Cross-Appellees,

v.

CITY OF VALDEZ and Valdez Office Building, Inc., d/b/a Valdez Bottle Stop Liquor Store, Appellees and Cross-Appellants.

Nos. S-3678, S-3679.

Supreme Court of Alaska.

Dec. 6, 1991.

Skier who was injured while navigating jump-bump on ski hill brought action against city which owned and operated hill. The Superior Court, Third Judicial District, Douglas J. Serdahely and Rene J. Gonzalez, JJ., granted part of city's summary judgment motion and let part of case go to jury which found against skier. Skier appealed and city cross-appealed. The Supreme Court, Rabinowitz, C.J., held that: (1) genuine issue of material fact existed as to whether jump was inherent risk of skiing or negligently created artificial condition and whether Limitations on Claims Arising From Skiing Act thus barred action against city, precluding summary judgment; (2) genuine issue of material fact existed as to whether skier's injury was the result of failure to ski within her ability within meaning of Act, precluding summary judgment; and (3) claim is not barred under Act if injury was caused both by inherent risk and ski area operator's negligence but skier's negligence would reduce recovery under doctrine of comparative negligence.

Affirmed in part, reversed in part and remanded.

1. Judgment ⇐181(33)

Genuine issues of material fact existed as to whether jump-bump on city ski hill was inherent risk of skiing or negligently created artificial condition, precluding summary judgment in action brought by skier against city under Limitations on Claims Arising From Skiing Act to recover damages for injuries sustained when skier skied over jump-bump. AS 09.65.135.

2. Theaters and Shows ⇐6(19)

Assumption of the risk did not bar skier's claim under Limitations on Claims Arising From Skiing Act against city which owned and operated ski hill to recover for injuries sustained in navigating jump-bump on hill, even though city claimed that jump-bump was open and obvious and knowingly encountered. AS 09.65.135.

3. Theaters and Shows ⇐6(19)

A risk must be "necessary" to be inherent risk of skiing for purposes of Limitations on Claims Arising From Skiing Act which precludes skier from recovering for injury resulting from inherent risk of skiing. AS 09.65.135.

4. Theaters and Shows ⇐6(38)

Artificially created jump on ski hill was not, as a matter of law, "variations or steepness in terrain" or "surface conditions" for purposes of Limitations on Claims Arising From Skiing Act which precludes action against ski area operator for inherent risks of skiing which include variations or steepness in terrain and surface or subsurface conditions. AS 09.65.-135(a)(1)(B, D).

See publication Words and Phrases for other judicial constructions and definitions.

5. Theaters and Shows ⇐6(6)

Ski area operator protection from liability for artificial conditions provided by Limitations on Claims Arising From Skiing Act should be construed narrowly. AS 09.-65.135.

6. Judgment ⇐181(33)

Genuine issue of material fact existed as to whether skier was skiing beyond her ability when she went over jump-bump on ski hill, precluding summary judgment in action brought against city which owned and operated ski hill to recover damages for injuries sustained when skier navigated jump-bump. AS 09.65.135.

7. Theaters and Shows ⇐6(19)

For "skiing beyond one's ability" to bar an action under Limitations on Claims Arising From Skiing Act, skier must subjectively know he or she is skiing beyond his or her ability, as inherent risk of skiing must be necessary and subjectively obvious. AS 09.65.135.

See publication Words and Phrases for other judicial constructions and definitions.

8. Theaters and Shows ⇐6(19, 26)

As Limitations on Claims Arising From Skiing Act does not insulate ski area operator from liability for negligence, once evidence of negligence exists, case must go to jury; however, ski area operator is free to argue that skier voluntarily and unreasonably assumed negligently created risk and skier's negligence would then reduce recovery under doctrine of comparative negligence. AS 09.17.060, 09.65.135.

9. Statutes ⇐223.4

While Supreme Court generally gives preference to specific statute over more general one, it must harmonize two statutes if possible.

10. Judgment ⇐181(33)

Genuine issue of material fact existed as to whether requisite warning signs were posted at prominent locations in ski area, precluding summary judgment in skier's action against ski area operator for injury resulting while she was navigating jump-bump on hill. AS 09.65.135.

11. Evidence ⇐146

Trial court did not abuse its discretion in action brought by skier against ski hill operator to recover damages for injury sustained while navigating jump-bump on hill in prohibiting operator from discovering or using evidence relating to skier's prior driving while intoxicated conviction and prior drinking experience; potential for prejudice, that jury would punish skier who had been drinking before skiing, for her prior conduct, outweighed evidence's marginal relevance. Rules of Evid., Rules 402, 403.

12. Appeal and Error ⇐970(2)

Supreme Court reverses trial court's decision on admission of evidence only for abuse of discretion.

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Before RABINOWITZ, C.J., and BURKE, MATTHEWS, COMPTON, and MOORE, JJ.

OPINION

RABINOWITZ, Chief Justice.

INTRODUCTION

Heather Hiibschman sued the City of Valdez in tort for injuries incurred as she went over a ski bump-jump at a city ski hill. The superior court granted part of the City's summary judgment motion and let part of Hiibschman's case go to the jury, which found against her. She appeals and the City cross-appeals, both primarily questioning the interpretation of Alaska's 1980 Limitations on Claims Arising From Skiing Act ("Ski Act"), AS 09.65.135.[1]

1. **Limitations on claims arising from skiing.**

(a) A skier may not recover from a ski area operator for injury resulting from an inherent risk of skiing unless the injury occurred when the ski area operator was not providing the information required by (b) of this section.
(b) A ski area operator shall post trail signs at prominent locations within a ski area which shall include a list of the inherent risks of skiing and the limitation on liability of the ski area operator provided by this section.
(c) In this section

(1) "inherent risks of skiing" means the dangers or conditions which are an integral part of the sport of skiing, including, but not limited to,
(A) changing weather conditions;
(B) variations or steepness in terrain;
(C) snow or ice conditions;
(D) surface or subsurface conditions such as bare spots, forest growth, and rocks;
(E) collisions with lift towers, other structures, and their components unless the skier is on the lift;
(F) collisions with other skiers; and

STATEMENT OF FACTS

Salmonberry Ridge, the only downhill ski facility in Valdez, opened to the public in January 1986. It is considered a beginner's hill, measuring 1,300 feet from top to bottom with a 208 foot vertical rise. From the base of the hill, one can view almost the entire hill.

Several bump-jumps could be found on the hill at the time of Hiibschman's accident.[2] The jump at issue was located at the lower left side of the hill if one looked at the hill from its bottom. The jump was located on a relatively flat area of the hill, although there was a steeper area just uphill of the jump. The jump was estimated to be from two feet to four feet in height. It was the only jump in that area of the hill and was a "focal point" of the run on that side of the hill.

On March 13, 1986, Heather Hiibschman, a fifteen year old, went skiing at Salmonberry Ridge. Hiibschman was a beginner skier. She had gone downhill skiing approximately six to ten times prior to the accident, although she had also cross-country skied. Prior to March 13, Hiibschman had been skiing at Salmonberry every day of the week.

Hiibschman had never taken the jump in question. She said, "Most of the time I just didn't feel like I was ready ... I couldn't find anybody who would teach me, show me how to do it, and I wanted to be shown how to do it before I went and just tried it myself." The day of her accident, she decided to try the jump. Hiibschman watched at least four of her friends take the jump. While they were slightly more advanced than Hiibschman, she also observed people of her ability level go off the jump. Her friend Aaron Kelly specifically showed her how to ski the jump. He advised her, "stay down, stay forward." Hiibschman stated that she felt fairly familiar with the approach and the takeoff, gaining that familiarity from watching people as she skied beside them, looking at the jump, and reading ski magazines to learn what she was supposed to do.

Hiibschman stood in line to take this jump. As she approached the jump, she concentrated on what she was doing. Hiibschman states that she snowplowed all the way to keep her speed as low as possible and that she was going slower than the skiers on the other side of the hill. As she approached the jump, she leaned forward. She also straightened out her skis so they would not cross when she hit the jump.[3] However, Hiibschman stated, the jump

> threw me way high, higher than I thought it would, and threw me back. And I was—still upside down in the air, and I was struggling to get forward, lean forward as hard as I could and I just didn't have enough time. My butt and the backs of my skis hit the ground at about the same time and then I rolled down the hill—slid actually.

Others confirmed that the jump "lofted you straight up into the air...." Hiibschman testified that when she landed, her skis "were almost perpendicular to the ground." She fell and landed on her tail bone, resulting in permanent paralysis from the waist down.

At the time Hiibschman jumped, a big pit existed at the base of the jump, where

(G) a skier's failure to ski within the limits of the skier's ability;
(2) "injury" means a personal injury or property damage or loss;
(3) "skier" means a person in a ski area engaged in the sport of skiing, sliding downhill on snow or ice on skis, a toboggan, a sled, a tube, a ski-bob, or other device for recreation in snow;
(4) "ski area" means all ski slopes, trails and other places under the control of a ski area operator and administered as a single enterprise in the state;
(5) "ski area operator" means the operator of a ski area.

2. While the City contends that this was more of a "bump" than a "jump," the term "jump" will be used. We draw the inferences in Hiibschman's favor, as she was the party opposing summary judgment. *Wilson v. Pollet*, 416 P.2d 381, 383–84 (Alaska 1966).

3. Others dispute Hiibschman's account. Some say that she was traveling quickly, approaching the jump at "full speed," becoming rigid as she neared the jump, and leaning too far back which caused her ski tips to go straight up. Again, we construe the facts in Hiibschman's favor at this stage.

people had been landing. The ski lift operator explained, "[A]t the end of the day you have this pit right here, this is an average distance where everybody's going to land, and they always fall and hit their butts on the snow and it just keeps digging it out and digging it out." Hiibschman never observed the landing area nor did anyone mention to her anything about it. The lift operator further explained, "as you landed it was kind of a flat surface, not too much incline so you had ... a hard landing ... because if you have an incline it tends to be more soft because you glide off it, but instead you kind of landed hard, boom, you know." Another lift attendant also said the jump was dangerous because the landing was too flat and a skier would get too much air time for the jump. About half the people taking the jump fell, some of whom were beginners.[4] Some skiers who fell also landed on their rear or back.

During testimony, when asked whether he thought the jump was dangerous, the ski lift operator answered, "Yes." He admitted that "I should have told them not to take the jump until they had learned how to ski better, because they kept getting behind on their skis...." [5] However, while the ski patrol would destroy jumps it considered unsafe or mark them as out of bounds, this jump was not so destroyed or marked. An expert in ski area design and planning thought it was inappropriate to have this jump, or any jump, on a beginner's hill unless the jump were marked as appropriate only for more advanced skiers.

One other key fact exists regarding the accident. Before skiing, Hiibschman and her friends stopped at the Valdez Bottle Stop Liquor Store. Hiibschman estimated that she had consumed between one and one-half and three beers before the accident. She believed that she was in control at all times while skiing and that the beers made no difference to her skiing performance. Hiibschman asserted that she had taken four runs between her last drink of beer and the time of the accident and she did not fall on any of those runs. She said she was clear headed as she started her descent towards the jump. An emergency medical technician who subsequently attended Hiibschman stated, "I could smell alcohol on her breath, but she was not obviously intoxicated."

On the day of Hiibschman's accident, there were at least five inherent risk of skiing signs posted at Salmonberry Ridge: one on the outside of the lift shack, one by the door to the warming hut, one inside the warming hut, and one on the inside of each bathroom door.[6] These signs were posted in places the Parks & Recreation Service thought were "the most prominent places on the ski hill."

4. The testimony varied widely on the success rate for navigating the jump. Some testimony indicated that hardly any of the skiers navigated it successfully and even intermediate skiers would fall. Yet, others said most skiers navigated this jump successfully.

5. The head of the ski patrol at the time of the accident stated, however, that to his knowledge, no other skier had ever been injured on that jump. The ski lift operator concurred.

6. The signs read as follows:

INHERENT RISKS OF SKIING

AS REQUIRED BY ALASKA STATE STATU[T]E SEC. 09.65.135, THIS NOTICE IS TO INFORM YOU OF THE INHERENT RISKS OF SKIING. INHERENT RISKS OF SKIING MEANS DANGEROUS CONDITIONS WHICH ARE AN INTEGRAL PART OF THE SPORT OF SKIING. THESE RISKS INCLUDE BUT ARE NOT LIMITED TO:

A. CHANGING WEATHER CONDITIONS;
B. VARIATIONS OR STEEPNESS IN TERRAIN;
C. SNOW OR ICE CONDITIONS;
D. SURFACE OR SUBSURFACE CONDITIONS SUCH AS BARE SPOTS, FOREST GROWTH, AND ROCKS;
E. COLLISIONS WITH LIFT TOWERS, OTHER STRUCTURES, AND THEIR COMPON[ ]ENTS UNLESS THE SKIER IS ON THE LIFT;
F. COLLISIONS WITH OTHER SKIERS;
G. A SKIER'S FAILURE TO SKI WITHIN THE LIMITS OF THE SKIERS ABILITY.

LIMITATION ON CLAIMS ARISING FROM SKIING

A SKIER MAY NOT RECOVER FROM A SKI AREA OPERATOR FOR INJURY RESULTING FROM AN INHERENT RISK OF SKIING.

Based on the Ski Act, the City moved for summary judgment, which the superior court granted in part and denied in part. The court held that Hiibschman's injuries resulted from "an inherent risk of skiing" which specifically included "variations or steepness in terrain," "surface ... conditions," and/or "a skier's failure to ski within the limits of the skier's ability." The superior court rejected Hiibschman's contention that the statute's categories violated equal protection. However, the superior court found that a genuine issue of material fact existed regarding whether the signs were posted "at prominent locations within [the] ski area...."

Hiibschman filed a motion for reconsideration. While the court concluded that artificial objects can qualify as an inherent risk of skiing within the statute, the court agreed with Hiibschman that negligent or defectively made or designed artificial conditions would not constitute an "inherent risk of skiing" and could be actionable in tort. However, the superior court stated that no competent evidence was presented to raise a genuine issue of material fact that the jump was negligently or defectively made or designed. The court also found it unnecessary to consider whether the slope was negligently maintained, instead treating the claim as one of negligent design.

Hiibschman then filed a second motion for reconsideration which the superior court granted in part, and denied in part. The court considered an expert affidavit stating that allowing a jump on a beginner hill was negligent and found that it raised a genuine issue of material fact as to whether the jump constituted an inherent risk of skiing. However, the court reaffirmed its prior conclusion that Hiibschman's attempt to ski over the jump was, as a matter of law, "a skier's failure to ski within the limits of the skier's ability." Thereafter the court submitted the issue of adequate signing to a jury. The jury returned a verdict in favor of the City on this issue. Hiibschman now appeals and the City cross-appeals.

PLEASE BE SAFETY CONSCIOUS AND HAVE A GOOD TIME.

I. DID THE JUMP CONSTITUTE AN INHERENT RISK OF SKIING OR A NEGLIGENTLY CREATED ARTIFICIAL CONDITION?

[1] The superior court found that a genuine issue of material fact existed as to whether the jump constituted an inherent risk of skiing, i.e. whether the jump was a non-negligently created or maintained variation in terrain. The City, in its cross-appeal, is asking the court to hold, as a matter of law, that the jump constituted an inherent risk of skiing.[7] The City contends that the jump was a "variation[ ] or steepness in terrain" or a "surface condition[ ]." The City also asserts that the jump was open and obvious and knowingly encountered, and argues that Hiibschman's alcohol consumption magnified any risk inherent in the jump. It claims the greater weight of authority would deem the jump an inherent risk of skiing.

Hiibschman maintains that the jump was an artificial condition created by a neglected stack of brush cut and stacked by the City. Alternatively, she submits that it may have been built by children with shovels borrowed from the City employees, and intentionally groomed by the employees. Her theory of negligence is that this jump was inappropriate for a beginners' hill, particularly as no warning of its danger was given.

We affirm the superior court's determination that a genuine issue of material fact existed as to whether the jump constituted an inherent risk of skiing.

A. *Evidence of Negligence*

First, we note that the statute does not eliminate a ski area operator's liability for negligence. The legislative history of the statute makes this clear. Industry proponents of the bill stated repeatedly that they

7. The superior court's grant of summary judgment is reviewed as to whether a genuine issue of material fact exists and whether the moving party is entitled to judgment on the law applicable to the established facts. *Sea Lion Corp. v. Air Logistics of Alaska, Inc.*, 787 P.2d 109, 116 (Alaska 1990). All legal questions are afforded *de novo* review. *See Walsh v. Emerick*, 611 P.2d 28, 30 (Alaska 1980).

did not wish to avoid any responsibilities that were rightfully theirs, but they wanted to reduce nuisance claims. The statute was intended to bar recovery for those actions which only the skier could control and that were beyond the ski area operator's control. That the legislature intended to "clarify" the law and not change it, and that it sought to limit recovery for "inherent risks," reinforces our conclusion that industry liability for negligence was maintained.[9]

Therefore, the Ski Act preserved the common law duties of ski area operators at the time of the act's passage. In *Webb v. City and Borough of Sitka*, we said,

> The rule that we adopt is this: A landowner ... must act as a reasonable person in maintaining his property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden on the respective parties of avoiding the risk.[9]

561 P.2d 731, 733 (Alaska 1977).

[2] Further, at the relevant time the law on assumption of risk had been clarified, restricting it as an affirmative defense, but leaving intact the concept in its "no duty" form. We explained,

> 'The concept of assumption of risk was developed from the common law action of a servant against his master. The master was held to be not negligent if he provided a reasonably safe place to work, and the servant was said to have assumed the inherent risks that remained. In this sense assumption of risk was not an affirmative defense, but rather was another way of saying the master was not negligent; for the servant had the burden of proving that his injury resulted from a risk other than one inherent in a place that was a reasonably safe place to work.

Leavitt v. Gillaspie, 443 P.2d 61, 67–8 (Alaska 1968). We continued,

> But where assumption of risk was a defense, the question was whether plaintiff had voluntarily entered into a situation involving obvious danger, with knowledge of the danger, and without regard to whether he had acted in such a situation as a reasonably prudent man would have acted....
>
> As a matter of policy we disapprove of a concept which could result in a situation where an accident victim, even though not contributorily at fault, could be barred from recovery because he knew or should have known of a negligently created risk. The just concept should be whether a reasonably prudent man in the exercise of due care would have incurred the risk despite that knowledge, and if so, whether he would have conducted himself in the manner in which the plaintiff acted in the light of all the circumstances, including the appreciated risk.

Id. Consequently, only the person who voluntarily and unreasonably assumed a negligently created risk was contributorily negligent and barred from recovery. *Hale v. O'Neill*, 492 P.2d 101, 103 (Alaska 1971); *Young v. State*, 491 P.2d 122, 125 (Alaska

8. The statement of legislative intent reads as follows:

> The legislature finds that the sport of skiing is practiced by a large number of residents of the state and attracts a large number of nonresidents, significantly contributing to the economy of the state. It further finds that insurance carriers are increasingly reluctant to provide liability insurance protection to ski area operators and that the premiums charged by insurance carriers have risen sharply in recent years due to confusion as to whether a skier assumes the risks inherent in the sport of skiing when he participates actively in the sport. It is the intent of the legislature in enacting this Act to clarify the law in relation to skiing injuries and the risks inherent in that sport and to provide that, as a matter of public policy, a person engaged in that sport may not recover from a ski area operator for injuries resulting from those inherent risks.
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> Ch. 80, § 1, SLA 1980.

9. When AS 09.65.135 was passed in 1980, ski area operators were also under a statutory duty to avoid liability for negligence. Former AS 05.20.012, enacted in 1967, read:

> Liability For Accidents In Skiing Areas. No owner or operator of ski equipment may be held liable for the negligence of persons other than employees who use designated skiing areas owned or controlled by him, *unless the owner or operator has negligently maintained the designated skiing areas* or has furnished or supplied defective equipment, the use of which is the proximate cause of any injury

1971); *Bachner v. Pearson*, 479 P.2d 319, 328–330 (Alaska 1970).[10]

[3] While we believe the statute codified this case law in the ski context, it also aids trial courts by listing those risks which are considered inherent in the sport: those risks which are obvious[11] and necessary[12] to it. Evidence of negligence on the part of the ski area operators, however, takes the case out of the inherent risk of skiing context.

In the case at bar, it is not clear that the condition was an inherent risk of skiing, given that a jump is not specifically listed in the statute and its risk is not necessarily obvious or necessary.[13] Hübschman stated she didn't think the jump was hazardous in the way it was designed or constructed before she went off of it. She said, "I didn't think it would be there if it was." She knew that the ski hill staff allowed the children to take the jump and therefore assumed it was safe for beginners.

Our review of the record persuades us that evidence of negligence also exists in the case at bar. For example, one witness stated that the jump should be torn down because "it wasn't fit, suitable ... because it was built to where you got too much air, and it was a flat landing." Hübschman's expert witness stated that there should not have been any jumps at all on a beginner's slope and that if the ski area were intended for more than beginner skiers, the jumps should have been clearly marked as being suitable only for expert skiers. Others also testified that the jump was not safe for beginner skiers. In fact, the ski area had rules prohibiting artificial jumps, unless authorized by ski area management. With all inferences drawn in Hübschman's favor, we conclude that genuine issues of material fact exist as to whether the jump was an inherent risk of skiing.

B. *Artificial versus Natural Conditions*

Hübschman makes much of this distinction in her brief; the City, however, contends it is irrelevant to the legal question of whether the jump was a "variation[ ] or steepness in terrain," or a "surface ... condition[ ]." The City maintains the origin of the jump is irrelevant, as it is an inherent risk of skiing even if it was an artificial condition.

An artificial item can produce an inherent risk of skiing. The statute covers, for example, collisions with lift towers. AS 09.65.135(c)(1)(E). Other artificial items may also produce inherent risks assuming they are not negligently designed or maintained or assuming the risk is obvious and necessary (e.g. moguls on an expert trail).[14]

sustained by a person while engaged in skiing activities within the designated skiing areas. [§ 2 Ch. 25 SLA 1967] (Emphasis added).

10. Given the law of assumption of risk codified by the statute, we reject the City's argument that assumption of risk bars Hübschman's claim on the basis that the jump was open and obvious and knowingly encountered. Similarly, the City cites cases indicating that the assumption of risk doctrine codified by statute "renders the reasonableness of the skier's ... behavior irrelevant." *E.g., Schmitz v. Cannonsburg Skiing Corp.*, 170 Mich.App. 692, 428 N.W.2d 742, 744 (1988). We reject this interpretation.

11. The frequent notice provided by trail signs makes the risk obvious.

12. A risk must be "necessary" to be an inherent risk of the sport.

> The question of whether a risk is necessary relates to the issue of the operator's duty; .... If a given danger could be eliminated or mitigated through the exercise of reasonable care, it is not a necessary danger. Necessary dangers, therefore, must be those which cannot *reasonably* be eliminated by the area operator.

Assumption of Risk After Sunday v. Stratton Corp.: The Vermont Sports Injury Liability Statute and Injured Skiers, 3 Vermont L.Rev. 129, 141–2 (1978) (emphasis in original).

13. A risk not listed in the statute may still be an inherent risk of the sport if necessary and obvious. The risk must be subjectively obvious to the skier. The plaintiff must know of the risk's presence, understand its nature, and freely and voluntarily choose to encounter it. W. Keeton, *Prosser & Keeton on Torts*, § 68, at 486–87 (5th ed. 1984).

14. If, as the City contends, moguls originate from "terrain variations, skier patterns, and snow and ice conditions," then they are not artificial conditions intentionally put on the run comparable to the jump.

See Rowett v. Kelly Canyon Ski Hill, Inc., 102 Idaho 708, 639 P.2d 6, 7 (1981) (no negligence by ski area operator when night skier injured by skiing into traffic control device which was adequately illuminated and discernible at a distance); *see also Smith v. Seven Springs Farm, Inc.*, 716 F.2d 1002, 1009 (3rd Cir.1983) (advanced intermediate skier voluntarily assumed the risk when he skied down a trail marked most difficult, aware of an icy headwall lined by an unprotected telephone-like pole).

Therefore, we hold that the duty owed to a skier for a natural or an artificial condition is governed by *Webb*, 561 P.2d 731 (faulty sidewalk) and *Moloso v. State*, 644 P.2d 205 (Alaska 1982) (rock slide during state highway project). Primarily, the origin of the danger figures into the *Webb* calculus, as it affects the burden on the respective parties of avoiding the risk. It is also relevant to the issue of the ski resort's knowledge of the danger.

[4, 5] We also hold, however, that an artificially created jump can not be, as matter of law, "variations or steepness in terrain" or "surface ... conditions." AS 09.65.135(a)(1)(B) or (D). While the statute does not differentiate explicitly between a ski operator's responsibility for artificial versus natural conditions, the items it lists, as well as the intent to retain liability for negligence, indicate that ski area operator protection from liability for artificial conditions should be construed narrowly. The legislative history explained, "The intent of this legislation is to clarify the law concerning the *natural, inescapable* risks that are a part of the sport of skiing and to specify that a ski area operator is not liable for injuries resulting from these inherent risks." (Emphasis added).

We find particularly compelling the testimony provided by the National Ski Patrol System, Inc. during the bill's consideration:

> We agree with the concept of S.B. No. 470 which addresses the risks inherent in the sport of skiing. Ski area operators in the state definitely need protection from unjustified liability insurance claims associated with the *natural* risks of the sport. At the same time, we are concerned that skiers must also be adequately protected against any form of negligence caused by ski area operators. We believe with a few modifications, the proposed statute can achieve equitable protection for both ski area operators and the using public.
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> Suggested revisions to sec. 09.10.320 *definitions* are:
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> ....
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> 2. (D). Eliminate the word "stumps". These are probably man induced obstacles that should be either eliminated, reduced, or marked as hazards by the ski area operator.

(Emphasis added). The recommendation to eliminate the word "stumps" was adopted, indicating that altering natural conditions (e.g. cutting a tree) removes them from the category of inherent risks which are explicitly listed by the statute. Our conclusion is reinforced by the presence of the word "stumps" in the Utah ski statute, upon which the Alaska statute is modeled. UCA § 78–27–52(1). Similarly, the National Ski Patrol System, Inc. recommended the following, which was not adopted:

> 1. (C) Expand on snow or ice conditions to clarify that variations may occur because of weather factors and/or hill grooming.
>
> For instance, standard grooming practices could cause variable snow surface conditions which skiers should accept as normal inherent risks on a managed ski run. Negligent grooming practices could cause unsafe conditions, such as leaving dangerous berms or cutbanks on groomed runs. Ski area operators should not be absolved from such negligence.

That the statute did not include snow variations from hill grooming as an inherent risk also reinforces the importance of this dichotomy.

Case law from other jurisdictions also emphasizes the importance of "natural conditions."

> What the challenged statute does is to recognize that there are certain risks in-

herent in the sport of skiing that neither the skier nor the ski area operator can reasonably control. Indeed, the risk and often-rugged *natural* setting provides both the greatest attractions of skiing as well as the greatest elements of danger. *Natural conditions*, such as vegetation, snow cover and weather conditions, make trail conditions highly variable and difficult to manage.

Kelleher v. Big Sky of Montana, 642 F.Supp. 1128, 1130 (D.Mont.1986) (emphasis added). Other cases identifying the "inherent risks of skiing" often speak generally of items such as "grade, boundary, mid-trail obstructions, corners and varied conditions of the snow." *Wright v. Mt. Mansfield Lift, Inc.*, 96 F.Supp. 786, 790 (D.Vt. 1951). This includes things such as roots, rocks, brush, ruts, and worn spots. *Id.* In *Leopold v. Okemo Mountain Inc.*, the court spoke of the "apparent and necessary danger" inhering in "trees, rocks and adverse terrain which border every trail." 420 F.Supp. 781, 787 n. 2 (D.Vt.1976).

Here, conflicting evidence exists as to whether this jump was artificially made or naturally part of the terrain. This presents a factual question for jury resolution. The ski lift operator believed the jump was artificial because after it was removed, no dirt, alders or rocks were left. He saw just leveled snow, "nice clean snow." Nor was there newly moved brush around to indicate that it was formed by brush. Also, he had observed the hill prior to the snowfall and others had told him that the jump was an artificial structure. Some operators called the jump "Chet's jump," allegedly after the individual who built it. One witness testified that he saw Chet and another person build these jumps. Supposedly, each day, the employees would throw more snow on the jump to keep it built up, and would groom it or pack snow on it to change its characteristics. Testimony was presented that children made and groomed the jumps with the shovels given to them by employees at the hill. Yet, there was also evidence that it was not a jump, but rather a bump that was used as a jump. The person who removed the jump said it was created by alder.

It remains for the jury to determine whether the jump is a natural variation in terrain or surface condition. Thus, we conclude that the superior court's denial of summary judgment in this respect was correct.

II. WAS HIIBSCHMAN'S INJURY A RESULT OF A FAILURE TO SKI WITHIN HER ABILITY WITHIN THE MEANING OF AS 09.65.135(c)(1)(G)?

[6] The superior court concluded as a matter of law that at the time of the accident Hiibschman was skiing beyond her ability, within the meaning of AS 09.65.135(c)(1)(G). Hiibschman argues that the trial court's reasoning produces absurd results, assumes the legislature intended to change tort liability, and is contrary to public policy. The City emphasizes that Hiibschman knew from personal observation what the jump entailed and knowingly assumed the risk. It argues that Hiibschman's alcohol consumption magnified any risk inherent in the jump.

The ski area operator is not liable for injuries resulting from inherent risks listed by the statute, including skiing beyond one's ability. A trial court should grant summary judgment only if no genuine issue of material fact exists. *Sea Lion Corp. v. Air Logistics of Alaska, Inc.*, 787 P.2d at 116 (Alaska 1990). Here, a disputed issue of fact exists as to whether Hiibschman was skiing beyond her ability. We hold that the trial court erred in not submitting this issue to the jury.

[7] For "skiing beyond one's ability" to bar an action, the skier must subjectively know he or she is skiing beyond his or her ability, as an inherent risk of skiing must be necessary and subjectively obvious. On knowledge of risk, Prosser states,

> [H]e must not only know of the facts which create the danger, but he must comprehend and appreciate the nature of the danger itself.... *The standard to be applied is, in theory at least, a subjective one*, geared to the particular plaintiff and his situation, rather than

that of the reasonable man of ordinary prudence who appears in contributory negligence. If because of age or lack of information or experience, he does not comprehend the risk involved in a known situation, he will not be taken to consent to assume it. His failure to exercise ordinary care to discover the danger is not properly a matter of assumption of risk but of the defense of contributory negligence.

At the same time ... the plaintiff will not be heard to say that he did not comprehend a risk which must have been quite clear and obvious to him.

Keeton, *supra*, at 487–88 (footnotes omitted and emphasis added); *see also Rutter v. Northeastern Beaver County School Dist.*, 496 Pa. 590, 437 A.2d 1198, 1204 (1981).

Viewing the evidence most favorably to Hiibschman, we find that skiing this jump was within her ability level. The jump was located on a beginners' slope. The ski lift operator described Salmonberry Ridge as "very beginner, very slow. There is no difficulty to the run." Hiibschman had taken some down-hill ski lessons before, and had evaluated how to take this jump. Hiibschman watched beginners taking the jump, some mastering it. Others who mastered it, like Aaron Kelly, had fallen the first three times he jumped it. She did not notice anything dangerous about the way the jump was designed or constructed. Although Hiibschman was drinking, she said it did not affect her that day. Moreover, evidence was presented that teenagers and beginner skiers are not as able to accurately assess a degree of risk presented by a dangerous condition. Because contrary evidence was presented,[15] a contested issue of material fact exists. The question of whether Hiibschman was skiing beyond her ability should have gone to the jury.

III. IS A CLAIM BARRED IF THE INJURY WAS CAUSED BOTH BY AN INHERENT RISK AND THE SKI AREA OPERATOR'S NEGLIGENCE?

[8] As the statute does not insulate a ski area operator from liability for negligence, once evidence of negligence exists, the case must go to the jury. However, the ski area operator is free to argue that the skier voluntarily and unreasonably assumed a negligently created risk.[16] The skier's negligence would then reduce recovery under the doctrine of comparative negligence.

[9] In 1986, six years after the most recent inherent risk of skiing statute was passed (Ch. 80, SLA 1980), our legislature enacted a comparative negligence statute.[17] While we generally give preference to a specific statute over a more general one, *City of Cordova v. Medicaid Rate Comm'n.*, 789 P.2d 346, 352 (Alaska 1990), we must harmonize the two statutes if possible. *State, Dept. of Highways v. Green*, 586 P.2d 595, 602 (Alaska 1978).

Ordinarily, an unambiguous statute is enforced as written without judicial construction or modification; however, this rule is not controlling when a seemingly unambiguous statute must be considered in conjunction with another act. *Hafling v. Inlandboatmen's Union*, 585 P.2d 870, 872 (Alaska 1978). In that case, we will examine the legislative history and adopt a reasonable construction which realizes legislative intent, avoids conflict or inconsistency, and gives effect to every provision of both acts. *Id.* at 873, 875, 877.

Lake v. Construction Mach., Inc., 787 P.2d 1027, 1030 (Alaska 1990).

15. For example, Hiibschman's mother told Chet Simmons that the accident was Hiibschman's own fault, that she was intoxicated and skiing out of control. As to this statement, Hiibschman's mother later submitted an affidavit denying she had said it.

16. Skiing beyond one's ability, AS 09.65.135(c)(1)(G), would constitute an unreasonable assumption of a negligently created risk.

17. Alaska Statute 09.17.060 reads as follows:

Effect of contributory fault. In an action based on fault seeking to recover damages for injury or death to a person or harm to property, contributory fault chargeable to the claimant diminishes proportionately the amount awarded as compensatory damages for the injury attributable to the claimant's contributory fault, but does not bar recovery.

As such, we must interpret the Ski Act so as not to nullify the comparative negligence statute. The reason for this was explained in *Rini v. Oaklawn Jockey Club*, 861 F.2d 502, 508 (8th Cir.1988):

> "[W]here assumption of risk coincides with contributory negligence, application of the doctrine operates to frustrate the very result that the comparative negligence statute was designed to achieve." *Rutter v. Northeastern Beaver County School District*, 437 A.2d at 1210 n. 6 (plurality). Dean Prosser also noted that the retention of this form of assumption of risk after legislative adoption of comparative negligence
>
> > [i]n all probability ... defeats the basic intention of the statute, since it continues an absolute bar in the case of one important, and very common, type of negligent conduct on the part of the plaintiff. It can scarcely be supposed in reason that the legislature has intended to allow a partial recovery to the plaintiff who has been so negligent as not to discover his [or her] peril at all, and deny it to one who has at least exercised proper care in that respect, but has made a mistake of judgment in proceeding to encounter the danger after it is known.
>
> W. Prosser, Prosser on Torts § 68, at 457 (4th ed. 1971) (footnote omitted).

We note that this approach has been adopted by Oregon. *Jessup v. Mt. Bachelor, Inc.*, 101 Or.App. 670, 792 P.2d 1232, 1233 *rev. denied* 310 Or. 475, 799 P.2d 646 (1990). The Oregon Court of Appeals held that while recovery is barred for an injury caused solely by an inherent risk of skiing, comparative fault applies when the injury is caused by a combination of an inherent risk of skiing and the ski area operator's negligence. *Id.*

The City disagrees with this approach, placing emphasis on a Utah statute similar to Alaska's Ski Act. The City cites *From Wright to Sunday and Beyond: Is the Law Keeping Up With the Skiers?* 4 Utah L.Rev. 885, 893–97 (1985):

> By extending immunity to ski resorts when an "inherent risk" causes the injury, the Utah legislature has pre-empted the comparative negligence statute for those risks. Thus, where an injury results from a hazard categorized as an "inherent risk," the skier injured in Utah is contributorily negligent per se, despite the comparative negligence statute.

Two critical facts, however, differentiate Utah's statute from the Alaska Ski Act. First, the Alaska statute omits language contained in the Utah statute: "[n]otwithstanding anything in Sections 78–27–37 through 78–27–43 [78–27–38 is the specific provision adopting comparative negligence] to the contrary, no skier may make any claim against, or recover from, any ski area operator for injury resulting from any of the inherent risks of skiing." Utah Code Ann. 78–27–53 (1953). Second, Alaska's comparative negligence statute was passed *after* the Ski Act, whereas in Utah it was passed before the ski statute. The statutory enactment of comparative negligence in Alaska after the inherent risk of skiing statute, without acknowledging the Ski Act, indicates a legislative intent to allow principles of comparative negligence into the ski context. *Cf. In re Tapp*, 16 B.R. 315 (Bankr.Alaska 1981).

Moreover, because Alaska had comparative negligence as a matter of case law as early as 1975, *e.g. Kaatz v. State*, 540 P.2d 1037, 1049 (Alaska 1975), the Ski Act's failure to specifically eliminate comparative negligence in the ski context, as Utah did, indicates that the legislature did not intend to exclude comparative negligence analysis. Our conclusion is reinforced by the statute's legislative history, which indicates that the statute was not intended to eliminate ski area operator's liability for negligence.

On remand, questions of whether Hibschman's actions were reasonable, including the relevance of her drinking and her knowledge of the risk of taking the jump, will be relevant to the issue of comparative negligence.

IV. WERE THE POSTED SIGNS INSUFFICIENT AS A MATTER OF LAW TO SATISFY AS 09.65.135?

[10] The superior court found that a genuine issue of material fact existed as to

whether the signs were posted at prominent locations in the ski area. Hiibschman contends that the posted signs were insufficient as a matter of law, for they were not "trail signs" nor were they posted at "prominent locations" as required by statute.

We find Hiibschman's arguments without merit. The superior court left for the jury the general issue of the adequacy of notice and signing. The issues of "the size, content, number, location, and prominence of the signs" were all tried by the jury, and the evidence in the record supports the verdict. Steven Weber, who was the Director of the Parks and Recreation Department in Valdez at the relevant time, explained that he had posted the signs so that "the average skier—or the skier participating in the activity could stop and read the sign." It was typed in bold letters with some underlining. While there were no inherent risk of skiing signs on the hill itself, Weber stated:

> [W]e felt ... the best place to do that was at the bottom of the hill where most of the activity took place, where ... the skiers had to initially go by to get to the ski lift. Posting signs throughout the hill ... didn't really meet that requirement in my eyes. I felt that the intent or the spirit of this statute here was to inform the skiers, and I felt the best way to inform them was prior to skiing and not after skiing. And, skiers would traditionally normally use the restroom prior to skiing, use the warm-up hut prior to skiing to put their boots on and then ... by the nature of the way they travelled to the ski lift ... we had a couple of signs posted there they would have to go by in order to get to the ski lift and actually load on the lift.

Although no "trail" signs were posted, Salmonberry Ridge is just one small open hill; there are no real, designated trails as such. After skiers get off of the lift, they have the option of going to the right or going to the left, skiing each respective side of the hill. While others, including Hiibschman, said that they saw no signs, the jury found that such signs were posted. John Wiland, the mountain manager when Salmonberry Ridge opened, testified that signs were posted in each of the outhouses, going into the warming hut, on the lift shack, and at the top of the lift shack. Theresa Day was skiing on the day of Hiibschman's injury and recalls seeing signs posted in the outhouse and in the ski tow area. Aaron Kelly, who also was skiing with Hiibschman, saw the signs posted on the inside of the outhouse and on the front of the warming hut. Therefore, we affirm the superior court's ruling that genuine issues of material fact existed as to whether requisite signs were posted at prominent locations in the ski area.[18]

V. DID THE SUPERIOR COURT ABUSE ITS DISCRETION IN GRANTING THE PROTECTIVE ORDER RELATING TO HIIBSCHMAN'S PRIOR DWI CONVICTION AND/OR PRIOR DRINKING EXPERIENCE?

[11] The superior court prohibited the City from discovering or using evidence relating to Hiibschman's prior Driving While Intoxicated (DWI) conviction and prior drinking experience pursuant to Evidence Rule 402[19] and 403.[20]

[12] We reverse a trial court's decision on the admission of evidence only for an

18. Our resolution of the merits of this issue makes it unnecessary to discuss the City's argument that the issue is improperly before the court.

19. Evidence rule 402 states,

> All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States or of this state, by enactments of the Alaska Legislature, by these rules, or by other rules adopted by the Alaska Supreme Court. Evidence which is not relevant is not admissible.

20. Evidence Rule 403 states,

> Although relevant, evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

abuse of discretion. *Adkinson v. State*, 611 P.2d 528, 532 (Alaska), *cert. denied* 449 U.S. 876, 101 S.Ct. 219, 66 L.Ed.2d 97 (1980). The City believes that such an abuse occurred; it argues that the probative value of the evidence far exceeds its prejudicial effect. The City intends to use the evidence to establish that Hiibschman and her mother knew of the adverse effects the alcohol had on Hiibschman's functioning. The City claims the evidence shows Hiibschman's lack of judgment on the day of the accident, as well as her mother's own negligence in permitting Hiibschman to drink alcohol. It also shows Hiibschman's tolerance level for alcohol.[21]

We hold that the superior court did not abuse its discretion in issuing the protective order. While the City argues that the court's citation to Rules 402 and 403 indicates that the court found "the evidence relevant under 402, but nonetheless excluded it under Rule 403....", the sparse reference by the superior court does not conclusively support the City's interpretation. The court also may have found the evidence irrelevant under Evidence Rule 402.

We conclude that the evidence does have marginal relevance. Hiibschman admits knowledge about the effects of alcohol. She has taken Freshman Health in school where she learned about the amount of alcohol that impairs one's judgment. While Hiibschman claims she did not drink enough to impair her judgment, the excluded evidence is only slightly relevant to this point. In *Dyer v. State*, the court of appeals said that evidence used to impeach a witness by showing that he was an alcoholic at the time of the incident about which he was testifying "was only tangentially probative of how much alcohol he actually drank that particular night." 666 P.2d 438, 451 (Alaska App.1983). Moreover, other evidence exists which suggests Hiibschman's consumption and impairment. The availability of alternative evidence goes to the probativeness of the evidence in dispute. Finally, this information is not relevant to the comparative negligence of Hiibschman's mother, for she did not give Hiibschman alcohol on the day in question.

The cases cited by the City are unhelpful. This type of relevance question, requiring the balancing of prejudice and probativeness, is a fact specific inquiry. The potential prejudice, that the jury would punish Hiibschman for her prior conduct, may outweigh the evidence's marginal relevance. The superior court did not abuse its discretion.[22]

CONCLUSION

We AFFIRM in part, and REVERSE in part, and REMAND the case for a new trial.

Ronald MUSGROVE, Appellant,

v.

Loita MUSGROVE, Appellee.

No. S–3968.

Supreme Court of Alaska.

Dec. 6, 1991.

Former wife brought action against former husband to recover arrearage in

21. Hiibschman was arrested in December 1985 for DWI. She entered a plea of no contest, receiving a sentence of a $250 fine, 72 hours in jail, and alcohol screening. She claimed that the experience made her very careful about drinking. The incident involved drinking some of her grandfather's beer and putting her mother's truck into a ditch. She alleges the truck ended up in the ditch not because of her alcohol consumption, but because the street had about four inches of glare ice on it. When she touched the brakes to stop at the stop sign, the truck slid into the ditch. She recognizes that her judgment was impaired.

22. As to the other issues on appeal, we need not address them. The City concedes that expert testimony is not essential if the matter is remanded. As to Hiibschman's argument that AS 09.65.135 violates equal protection under the Alaska Constitution, our construction of AS 09.65.135 makes resolution of this issue unnecessary.

Department of Commerce & Economic Development / POSITION PAPER

HB 41: **"An Act relating to civil liability for skiing accidents, operation of ski areas, and duties of ski area operators and skiers; and providing for an effective date."**

HB 41 sets duties of ski operators and skiers. The bill removes the liability of ski operators for injuries resulting from an inherent danger and risk of skiing. The department has no position on SB 44.

C E Beard for
Paul Fuhs, Acting Commissioner

Date: 1-22-93

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Senate & Labor Commerce Committee

Letters of Support for SB 44 - Civil Liability for Skiing Accidents

Anchorage Convention & Visitors Bureau
Alaska Visitors Association
Anchorage Economic Development Corporation
United Brotherhood of Carpenters and Joiners of America
Local Union No. 1281
Alaska Hotel & Motel Association
Days Inn
Westmark Hotels

Westmark
HOTELS
ALASKA/YUKON

January 19, 1993

Senator Tim Kelly
Alaska State Legislature
Juneau, AK 99801

Dear Senator Kelly:

Please accept this letter as Westmark Hotels support of Bill SB 44 pertaining to civil liability for skiing accidents.

This bill will increase the economic development of tourism in our state during the Winter months and bring our state skiers liability laws on equal footing with those laws in other Western States.

Sincerely,

William J. Dugdale
General Manager
WESTMARK ANCHORAGE HOTEL

4

Alaska Ski Areas Association

7015 ABBOTT ROAD
ANCHORAGE, ALASKA 99516
(907) 346-1446

Alaska State Senate
Senate Labor & Commerce
Juneau, Alaska
Attention: Tim Kelly, Chair

1-20-93

Dear Mr Kelly:

I was at Tuesdays public hearing but did not get a chance to testify so I am writing in support of SB 44. I am the Chairman of the Alaska Ski Areas Association and also the General Manager of Hilltop Ski Area here in Anchorage.

There are 13 downhill ski areas in Alaska: Cleary Summit, Ski Land, Ravenwood and Birch Hill all near Fairbanks. Black Rapids near Delta Junction. Hilltop, Hillberg, Arctic Valley and Alpenglow in Anchorage. Alyeska Resort in Girdwood. The Coast Guard Hill in Kodiak. Mt. Eyak in Cordova, and Eaglecrest near Juneau. In addition there are numerous organizations that prepare and operate Nordic trails: Chena Hot Springs Resort, Hatchers Pass Lodge and Anchorage Nordic Ski Club just to name a few.

There are many inherent risks in any sport. Skiing is no exception. Ski area operators sell access to a winter alpine or nordic environment not to a perfectly groomed danger free slope. This environment includes all manner of risks: weather, slopes, forest growth, snow conditions as well as some man made obstacles. All skiers should recognize that ski area operators and track setters can not modify even a small portion of this environment. There is no way to make skiing absolutely "safe". Individual skiers must bear some of the responsibility for their participation in the sport.

Since 1980 Alaska has had a statute relieving ski area operators of liability for injuries or property damage which arise from the inherent risks of skiing. The purpose of this statute was to recognize that a ski area operator could not eliminate these risks, and to ensure that a ski areas could obtain insurance and continue to provide skiers the opportunity to enjoy their favorite winter outdoor recreation. An effective law will continue to be important in providing the legal climate necessary to further development of winter tourism facilities in Alaska.

In December of 1991 the Alaska Supreme Court interpreted the statute as not preventing suits by injured skiers. Claiming an operator had failed to make the slopes "safe" for patrons. This ruling defeats the purpose of the statute and leaves operators and skiers in substantial danger that Alaska ski areas will not be able to obtain insurance at reasonable rates. Assuming that a ski area can still operate, ticket prices will have to increase substantially in order to cover the increased insurance premiums.

As a result of that Supreme Court decision the City of Valdez can no longer offer it's residents the recreation of downhill skiing. If this legislation does not pass perhaps other ski areas around the state will fall under the load of escalating premiums and frivolous law suits.

There is a segment of the community that believes that this legislation is proceeding only to protect a multinational corporation (Seibu) from liability. Most of the ski areas within the state are very small and most are products of the communities that they are located in. This legislation will affect all of them not just one of them and in most cases if insurance premiums rise as a result of poor legislative protection it will become cost prohibitive to operate. The ski areas are not trying to hide from their responsibilities to provide safety for the skiing public because we recognize that if we fail to do that soon we will be out of business.

Alaska has a lot to be proud of. Last year an Alaskan skier by the name of Hilary Lindh came home from the Olympics with a Silver Medal. I we fail to support this legislation where will the Hilary Lindh's of the future get a chance to practice and excel in this sport?

I urge you to please support this legislation!!

Sincerely,

Steven P. Remme

Steven P. Remme
ASAA Chairman

Alaska Hotel & Motel Association
PO BOX 104900 • ANCHORAGE, ALASKA 99510 • (907) 344-3778

January 18, 1993

Senator Tim Kelly
State Capitol
Room 101
Juneau, AK 99801-1182

Dear Senator Kelly:

As President of the Alaska Hotel Motel Association, I would like to clarify our position as being POSITIVE in regards to Senate Bill #44 pertaining to civil liability for skiing accidents.

This bill will definitely increase economic development in tourism in our State because it will put our skier liability laws on equal footing with the laws in other Western ski areas in the United States. We will then be able to compete with these States and Canada. Even our own hotel, the Anchorage Hilton, of which I am the General Manager, will benefit because guests will come to ski Alyeska and possibly stay at our property, or any one of the other properties in the downtown area, on their way to or from Alyeska.

On behalf of all our membership, we firmly believe this bill should definitely be passed as quickly as possible to assist Alyeska.

Thank you for your assistance.

Sincerely,

Ralph C. Nogal

RCN/eh

Post-it™ brand fax transmittal memo 7671 | # of pages ▸ 1
From Ralph Nogal

Alaska Hotel & Motel Association
PO BOX 104900 • ANCHORAGE, ALASKA 99510 • (907) 344-4778

January 19, 1993

Subject: SB-44, Civil Liability for Skiing Accidents

The Alaska Hotel and Motel Association supports SB-44 as written. The Alaska Hotel and Motel Association believes that many individual sports, including skiing, have inherent dangers which vary depending upon the individual participants judgement and skills. It would be impossible for a ski area operator to fully guarantee the total safety of every individual skier in every circumstance because of the natural varying inherent dangers of the sport.

The Alaska Hotel and Motel Association believes that ski area operators in the State of Alaska should be permitted to compete fairly with other ski areas throughout the USA and the world. To handicap Alaskan ski area operators through unfair or unnecessary legislation, will only serve to reduce the number of skiers who choose to ski in Alaska. This would certainly have a negative effect on the many supporting businesses of the ski industry, such as hotels and lodges, restaurants, transportation etc...

Max J. Lowe

Max J. Lowe, CHA
Past Chairman
Alaska Hotel and Motel Association

sp

UNITED BROTHERHOOD OF
Carpenters and Joiners of America
LOCAL UNION NO. 1281
407 DENALI
PHONE 276-3533
ANCHORAGE, ALASKA 99501
FAX: 276-7962

January 18, 1993

Dear Alaska Legislator:

This is a statement of support for SB 44, as submitted by Sen. Kelly

If Alaska is to grow and prosper in the clean, ecologically sound and renewable area of Tourism this bill should be supported.

The bill would put Alaska on even footing with the rest of the western United States. That, coupled with our natural beauty and long winters, should give Alaska a leg up for future economic development.

The only people that I can imagine not supporting SB 44 would be those people not willing to take responsibility for their own actions or lawyers looking for a little action.

Sincerely,

Phillip A. Thingstad

Phillip A. Thingstad
Business Manager
Carpenters Local 1281

PAT/we

ANCHORAGE
ECONOMIC
DEVELOPMENT
CORPORATION

Honorable Tim Kelly
111 Capitol
PO Box V
Juneau, AK 99811

Dear Senator Kelly:

The Anchorage Economic Development Corp. (AEDC) supports SB44, Civil Liability for Skiing Accidents.

As you know, the AEDC's mission is to stimulate economic development. One industry we focus on because of it's tremendous potential is tourism. We have fully supported Seibu Alaska's Alyeska Resort expansion and support development of the Glacier/Winner Creek areas as well.

Alaska's ski resort success will depend on how effectively we compete with other developable areas in the northwest United States and Canada. Passing SB44 is critical to Alaska's winter tourism because it will put Alaska on equal footing with its competitors on the issue of skier liability.

Because this bill will so greatly benefit an industry still in its infancy in Alaska, and will only harm a small sector of the economy (trial lawyers) in Alaska, the AEDC fully supports passing SB44.

Sincerely,

Scott E. Hawkins
President

550 West 7th Avenue • Suite 1130 • Anchorage, AK 99501 • Telephone (907) 258-3700 • FAX (907) 258-6646

**Anchorage!
Convention & Visitors
Bureau**

*Our Community's Way
of Attracting and
Serving Visitors*

1600 A Street, Suite 200
Anchorage, AK 99501-5162
(907) 276-1118
Fax: (907) 278-5559

#93-01

Resolution in Support of Ski Safety and
Inherent Risks of Skiing Legislation

Whereas, skiing in Alaska has inherent risks caused by terrain, weather, equipment and individual skiers, and

Whereas, financially sound ski areas are a significant part of Alaska's winter tourism industry and resident recreation, and

Whereas, the steady growth of winter tourism provides jobs for residents and revenue to the state, and

Whereas, the rising cost of insurance and increasing threat of lawsuits as a result of not recognizing the sport's inherent risk could force the price of skiing to grow so much that the majority of Alaskans and visitors could not afford the sport, threatening the continued operation of many ski areas, and

Whereas, this issue has been recognized by other states, primarily in the western United States, where skiing is an important part of their winter tourism industry, through the enactment of appropriate liability laws, and

Whereas, if the inherent risk of skiing is not recognized and controlled in the state of Alaska, the state will remain non competitive in its efforts to attract winter visitors who would utilize established ski resorts and winter recreational areas,

Now Therefore Be It Resolved, that the Anchorage Convention and Visitors Bureau Board of Directors, on behalf of its more than 900 members, unanimously supports the passage of Senate Bill 45 and House Bill 41.

Adopted by the Anchorage Convention & Visitors Bureau
Board of Directors March 26, 1992

Larry G. Anderson
Chairman
Anchorage Convention & Visitors Bureau

ALASKA VISITORS ASSOCIATION

501 West Northern Lights, Suite 201 • Anchorage, Alaska 99503
Tel: (907) 276-6663 • Fax: (907) 258-4036

#92-03

RESOLUTION IN SUPPORT OF INHERENT RISKS OF SKIING LEGISLATION

WHEREAS, the sport of skiing is practiced by a large number of Alaskans and attracts visitors to the state who provide significant contributions to the state economy through the construction and operation of skiing facilities, and

WHEREAS, skiing is a critical element of efforts to increase fall/winter/spring visitation, and

WHEREAS, skiing is an exhilarating sport, the enjoyment of which includes several components: exercise, enjoyment of the outdoors, physical and mental challenges, and the excitement of taking risk, and

WHEREAS, skiing is conducted in an environment that includes natural variations of terrain, weather, and snow conditions and necessary man-made amenities created and maintained by ski area operators, and

WHEREAS, the sport of skiing is accompanied by inherent risks of accident and injury, and

WHEREAS, the Alaska Legislature in 1980 recognized these inherent risks and the individual skiers responsibility to assume them by enacting AS 09.65.135, "Limitations on Claims Arising From Skiing," and

WHEREAS, the Alaska Supreme Court, in Hübschman vs. City of Valdez et al, rendered an opinion that undermines the intent and effectiveness of the act, and

WHEREAS, the cost of insurance and defense from suits involving the inherent risks of skiing are certain to rise dramatically as a result of the ruling, causing increases in ticket prices and threatening the continued operation of some areas, and

WHEREAS, legislation has been introduced to clarify provisions of the act and restore its effectiveness,

NOW THEREFORE BE IT RESOLVED, that the Alaska Visitors Association Board of Directors, on behalf of the membership and tourism industry part represents, endorses adoption of revision to AS 09.65.135, "Limitations Claims Arising From Skiing," and will join public and private organiz seeking passage of Senate Bill 403 and House Bill 491.

Adopted by the Alaska Visitors Association
Board of Directors
February 21, 1992
Juneau, Alaska

Post-it™
To
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Alaska Action Trust
P.O. Box 102323 • Anchorage, Alaska 99510
Office: 540 "L" Street, Suite 206 • Anchorage, AK 99501
(907) 258-4040 • FAX (907) 276-7185

FAX TRANSMITTAL

TO: Representative Hudson, Chair of House Labor & Commerce
Representative Green, Vice-Chair of House Labor & Commerce
Representative Mulder
Representative Porter
Representative Williams
Representative Sitton
Representative Mackie

FROM: Dennis Mestas

DATE: January 22, 1993

RE: HB 41

****

On behalf of the Academy of Trial Lawyers, I have been asked to express our strong opposition to HB 41. HB 41 would grant immunity for negligent maintenance, construction and design activities that would virtually insulate the ski area from any liability for the operation of the ski area operations.

The state law Seibu wishes to repeal and revise vis a via HB 41 was largely the result of one lawsuit which was filed against Seibu. In that case, a 16 year old boy was skiing on the newly opened night skiing area at Alyeska when he skied over an unmarked, unsigned, unlighted 15 foot drop-off that was in a shadowed area in the middle of the night skiing course. The shadows that obscured the drop-off were a result of Seibu placing the largest group of lights on the course immediately behind a grove of trees. As the case developed, it appeared that Seibu failed to advise the lighting engineers of the trees' existence (according to the lighting engineer) and Seibu somehow failed to notice the trees when it was placing the lights behind them. This is somewhat difficult to do when each light must be separately aimed with a sighting mechanism on it. Further, neither Seibu nor the lighting engineer noticed the trees and the shadow after the system was built and the area was open. This young boy was paralyzed for life from the waist down when he went off the drop-off and landed on a flat "cat track" - a road.

The drop-off was created by a road cut made by a dozer as it cut through the ridge comprising the ski area between lifts 1 and

4. Seibu left a near 90 degree cut-bank in the middle of the ski area instead of shaving off its upper edge to make a "roll." An expert, who was a former National Ski Areas Association president and extremely revered figure in the national ski industry, testified that the situation was "murderous and totally unacceptable." He further indicated it was far beyond the role (pale) of normal industry standards and was an easily, cheaply remedied situation.

I take the time to briefly set forth some of these facts as you should note that a provision of the proposed bill includes among the "inherent risks of skiing" variation or steepness in terrain "man-made structures, and their components ... including roads and catwalks or other terrain modifications". Thus, Seibu and other ski areas seek to be immunized for design and construction activities which are clearly avoidable, controllable and their responsibility and which are clearly not "unavoidable, natural consequences of the sport of skiing." According to the ski experts in the above case against Alyeska (Schlaak v. Seibu) such design and construction activities involving roads, lights, signs and trail marking are an integral part of the safety considerations that have to be kept in mind in making slopes safe for skiers during the design, construction and maintenance process.

It should be kept in mind that skiing is not much different than driving a car. The same human reactions and human frailties relating to vision, reaction time and attention are present. Thousands and thousands of people are travelling these "ski roads including many, many children." They deserve the same sort of consideration regarding a safe traffic design including elimination of hazards when reasonably possible as well as appropriate signs and warnings of hazards. Virtual cliffs constructed in the middle of a ski run because of improper road cutting certainly do not qualify for the rubric of "inherent hazards of skiing." Nor do other hidden hazards known to the ski area which the skier does not and cannot know of, such as snow making equipment.

Further, in this regard, I believe it is appropriate to refer to the recent Supreme Court decision which Seibu and others are apparently so desperate to make an end run around. The case is Hilbschman v. City of Valdez, et al. One of the thrusts of that opinion was that the present statute codified the common law that ski areas were not liable for injuries caused by the inherent risks of skiing. As the Supreme Court noted, it is only in this situation where the injuries or deaths are caused solely by such inherent risks that the lack of liability is apparent. Such risks are the natural and unavoidable risks -- the risks that cannot be controlled.

Perhaps even more importantly, the Supreme Court noted that the legislature in passing "tort reform" indicated a very strong statutory policy was present (as you will no doubt recall) to the

effect that each party should only bear its own risk, i.e. the "tort reform" statutes.

Thus, we now have several and not joint liability. While at one point "tort reformers" wanted every party to be responsible for its own fault, now Seibu and others seek to avoid any responsibility which runs directly against the clear intent of legislature in passing "tort reform" and mandating complete several liability. Thus, the Supreme Court noted that it would not be consistent to allow ski areas to escape liability while promoting the concept of true several liability. Here, the ski areas, of course, do not object to several liability, they just do not want to be among the "several."

Finally, we believe HB 41 is brought before the legislature because of not only the recent Hiibschman decision but also because of a recent death that occurred at Seibu's resort at Alyeska. On December 8, 1991, Bart Rizer, a 12 year old boy, died of hypothermia on an open slope in the bowl at Alyeska. Approximately four feet of snow had fallen in the 48 hours before his death and the bowl had not previously been open for skiing and had not been groomed. December 8, 1991, was a Sunday. On Saturday, skiing had been allowed on the ridge from the roundhouse down where a packed base was present. On Sunday, in the late afternoon, Seibu opened the bowl for skiing even though the bowl had not been adequately signed or roped off so as to warn skiers of extremely dangerous and indeed life threatening snow conditions that were present in some areas. Further, there was not even sufficient grooming done to allow the ski patrol to visually inspect and gain access to all parts of the bowl to check for downed skiers when the final sweep of the hill was made after the bowl was closed at 3:30 p.m. Many skiers had to be literally dug out of the snow as it was "bottomless powder" up to skiers' chests when off their skis.

While making a run through the bowl shortly before it closed, Mr. Rizer fell while proceeding down a short steep slope known as "Horror Hill" which is virtually in the middle of the bowl and is not obscured by trees. Unknown to Bart was the fact that extremely deep, treacherous snow was on Horror Hill. The snow was so deep that when he fell head first into it he was buried upside down up to his knees and was unable to extricate himself. When the final sweep was made a very short time later, Mr. Rizer was not found and he died of hypothermia after being abandoned on the mountain.

Apparently, he was in a very small hollow where he could not be seen from the only packed area down through the bowl. Seibu had packed one narrow track up through the bowl and therefore, this portion of Horror Hill could not be visualized from immediately below it as it could be when the whole area is packed because the snow was five or six feet deep and the ski patrol would have found it extremely difficult to walk through this deep snow across the bottom of the hill scrutinizing it for downed skiers. Similarly,

because of the deep snow, a walk across the top of the hill could not be made without extreme difficulty. Apparently, one ski patrolman may have skied down a small portion of Horror Hill, but did not see Bart due to the snow condition and his location. There is no way that a proper sweep could have been made of this area given the extreme snow and the limited number of ski patrollers. Thus, for no good reason, a very bright and promising young man is dead.

You will note that a portion of the proposed bill is focused on grooming operations. Further, a portion of it is also focused at every possible snow condition. If this bill is passed as written, it would even insulate Alyeska from foreseeable avalanches that could kill hundreds of people because "snow on the ground is constantly changing". This is truly outrageous.

Seibu is required by the U.S. Forest Service to have a snow safety plan. This plan is prepared by the U.S. Forest Service in concurrence with Seibu. One of the stated objectives of their plan is as follows:

> One of the prime objectives in winter sports administration is to prevent accidents related to ski lifts, tows, avalanche and terrain hazards.

One of Seibu's stated and agreed to duties is as follows:

> Taking reasonable care to identify and mitigate hazards on primary ski slopes.

Thus, the Forest Service is directly involved in monitoring and requiring safe operation of Seibu's ski area at Alyeska. Most of the ski area is on Forest Service land and is governed by Forest Service Management regulations. All aspects of ski safety are addressed in this plan. These include signs far beyond those included in the present statute including cautionary signs, daily trail and snow condition signs, area map with trail locations, avalanche signs, and trail markers. There are many other provisions of the ski plan that are focused at safety.

The question is this, if Seibu and other ski areas on public Forest Service land are already required to try to achieve maximum public safety, why are they now trying to escape responsibility for what they are required to do? Why should Seibu be insulated for negligent use of our land? The clear import of Forest Service regulation and the Forest Service mandated safety plan is to maximize public safety, not eliminate it. HB 41 will cause further erosion of safety procedures at Alyeska and other ski areas rather than enhancing the stated Forest Service goal of maximum safety for recreational users of federal land.

15140 Mesa Place
Anchorage, AK 99516
January 25, 1993

Rep. Bill Hudson
Alaska State Legislature
State Capitol
Juneau, Ak 99801-1182

VIA FACSIMILE 465-6740

Dear Rep. Hudson:

I wish to express my concern with HB 41 and specifically the language in the bill that would relieve ski resort operators of any liability. Even though ski operators can not change the terrain, I expect them to mitigate hazards dealing with the environment including avalanches, mechanical safety of the lifts, and daily changes in the weather that might cause unsafe skiing conditions. You might assume that ski operators all have a snow safety plan in place, but I know some do not, or they do not follow their plans; therefore there must be a way to ensure that the customer is assured of the safest conditions possible.

If you traveled to a new, unfamiliar ski area, don't you think it would be reasonable to expect the professionals of the area to be constantly evaluating the changing weather and snow conditions, including avalanche dangers? Do you think you should be responsible for those decisions? What do you think Alaskan tourists would expect from our ski operators?

Do not be mislead by the ski resort operators who say that the price of lift tickets will go up if they are aren't given immunity from liability; a similarly passed law in Colorado did not result in lower tickets or insurance.

If you believe that giving ski operators immunity from liability is a good thing, would you also agree that air taxi operators should be relieved of liability from accidents resulting from all weather hazards. One reason we have FAA rules is to help mitigate changing weather conditions--passengers can't be expected to do that, and neither can all taxi operators be expected to operate in the safest possible manner unless there are rules with severe consequences for failure to comply.

And so must there also be ramifications for ski operators who might not always act responsibly. They should not be immune, and in fact, many ski operators use public lands for their operations and so are required to operate under detailed management plans. Why then are they asking to be released from such responsibilities on our public lands? And do you intend to vote to release them from immunity?

Sincerely,

Dianne Holmes
345-1514

January 25, 1993

To: **Reps. Hudson, Green, Mulder, Porter, Williams, Sitton, Mackie**
FR: Patti Rizer, 5530 Rabbit Creek Road, Anchorage, 345-1743
RE: HB 41

We already have an inherent risk of skiing statute in Alaska. Twenty-four other states have very similar legislation. HB 41 greatly expands the inherent risk of skiing definition and places all the responsibility on the skier. HB 41 is special-interest legislation designed to give carte blanche immunity to a specific industry.

Why should Alaskans grant this special-interest legislation on behalf of the ski industry? Would we exempt the airline industry for their negligence? For example, if Alaska Airlines said, "As along as we have fuel in the tanks, we are immune from any other negligence" and a plane crashes, would we want to grant them this type of immunity? This is just what this bill says...as long as ski area operators put up certain warnings, they cannot be held liable. All risks rest with the skier.

This bill says that if the skiing industry places signs and does a few other minimal tasks, they are responsible for nothing. P. 2 No. 8 and 9 say ski area operators are financially and physically incapable of controlling conditions. Seibu Corporation is required by the U.S. Forest Service to have a Snow Safety Plan. This plan is prepared by the U. S. Forest Service in concurrence with Seibu. One of the stated objectives of their plan is as follows:

> One of the prime objectives in winter sports is to prevent accidents related to ski lifts, tows, avalanche and terrain hazards.

One of Seibu's stated to and agreed to duties is as follows:

> Taking reasonable care to identify and mitigate hazards on primary ski slopes.

This legislation will allow ski area operators to evade these agreed-to objectives and duties and will in no way promote safety.

Skiers don't expect "croquet lawns" as stated on P. 2 No. 9. Skiers expect a **reasonably safe environment** for skiing and **accountability** on the ski area operator's part.

P. 3 No. 12 says "it is impractical to expect the operator to eliminate or mitigate these hazards"—mitigating hazards is part of the ski area operator's responsibilities.

P. 3 No. 4 wants to exclude a comparative negligence or comparative fault analysis—no industry enjoys this immunity. Will this law set a precedence for other industries to ask for an exclusion of comparative negligence? Whom are we protecting?

Paying $30 a day for a lift ticket helps cover insurance. The ski industry says prices will go up without this legislation. Colorado passed a similar bill two years ago. The immunity now enjoyed by ski operators did not result in lower insurance rates (they were already going down) nor did the immunity (which supposedly translated into savings) result in lower lift tickets.

Colorado's bill places the greatest responsibility on the skier of any other state's ski bill. How can we reward Alaska ski area operators with such a bill when Alaska ski resorts don't compare at all to Colorado's runs, employees (especially pro patrol staff), high-tech equipment, and other amenities? Who will oversee the Alaska ski indust and make sure they are providing a reasonably safe environment? In addition, if there is an accident, con ers should always be able to ask who is at fault. When we asked the U.S. Forestry Service in Alask if they investigated our son's death at Mt. Alyeska, they told us, "No one asked us to."

I feel there may be too much of a risk if we take this bill paragraph by paragraph. It is much better to kill the whole bill. Even a comparative negligence clause won't be of any help to consumers because this bill is so broad and encompassing of what the inherent risks of skiing are; i.e. "risks of skiing rests only with the skier."

Ski areas are capable of insuring through ticket sales. If the skier is at fault, the industry doesn't have to pay. That is the way the statute is now. This law goes way beyond inherent risks.

Plaza Inn Hotels, Inc. d/b/a Days Inn - Anchorage
321 East Fifth Avenue
Anchorage, Alaska 99501-2654
(907) 276-7226
Fax (907) 278-6041

January 18, 1992

Senator Tim Kelly
Capitol Building
Juneau, AK 99801

Dear Senator Kelly:

RE: SB44

Unfortunately due to prior commitments I will be unable to attend the hearing on the Skier liability law. In lieu of not attending I would like to advise you of my concerns on this law.

As an avid skier and frequent user of the ski trails not only at Alyeska, but Alpenglow and Hilltop, I recommend that Alaska's skier liability law be brought into conformance with laws in other western states. Alaska can not afford to have laws more restrictive than it's competition. The potential for a world class resort, and the further development that it could bring, must be addressed at all levels. This development could be the start of winter tourism to rival other western states and Canada. Please Let's do what we can to remove any barricades to future development.

Thank You.

Dennis J. Lavey
Managing Partner

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Juneau, Alaska 99801-2105

JAN 20 1993

MEMORANDUM January 20, 1993

SUBJECT: Civil liability for skiing accidents (HB 41)

TO: Representative Gail Phillips
Attn: Sandy

FROM: Michael F. Ford
Legislative Counsel

This memo is in response to your request for an explanation of the effects of the attached draft. In general, the draft revises the existing law regarding the liability of a ski area operator to an injured skier. By clarifying the duties of ski area operators and skiers, and by expanding the definition of "inherent danger and risk of skiing" the draft is intended to provide greater protection against lawsuits for ski area operators.

In 1975, the Alaska Supreme Court adopted a doctrine called the doctrine of comparative negligence. Kaatz v. State, 540 P.2d 1037, 1049 (Alaska 1975). This doctrine actually evolved over a long period in which courts struggled to determine how to balance the negligence of the party being sued with the negligence of the party bringing the lawsuit. Instead of denying any recovery to a person who was partially at fault, the court adopted a policy under which any recovery would be reduced by the negligence of the person bringing the lawsuit. In short, the negligence of each party is compared, and any recovery is reduced by the percentage of fault that is attributed to the party who was injured.

In 1980, the legislature enacted AS 09.65.135, a statute that barred claims by injured skiers, if the claim arose from "an inherent risk of skiing" unless the ski area operator failed to post required warning signs. This statute appeared to remove these type of cases from the usual comparative negligence system adopted by the Alaska Supreme Court. Instead, in these cases if a skier was injured due to an inherent risk of skiing the skier was barred from any recovery as opposed to simply reducing the recovery by the negligence of the skier.

In 1986 the legislature codified the comparative negligence doctrine, as AS 09.17.060. In doing this the legislature did not preclude application of comparative negligence to the immunity granted under AS 09.65.135.

This was the situation when the Alaska Supreme Court decided Hiibschman v. City of Valdez, 821 P.2d 1354 (Alaska 1991). In this case an injured skier brought suit against a ski area operator. The ski area operator asserted the immunity of AS 09.65.135 and argued that the skier's injuries were as a result of an inherent risk of skiing. The court held that AS 09.65.135 did bar suits when the skier was injured by an inherent risk of skiing, but did not eliminate a ski area operator's liability under the comparative negligence doctrine if the ski area operator was also at fault. If the ski area operator is negligent in some regard, then the doctrine of comparative negligence applies and the injured skier may recover for injuries minus the fault attributed to the skier. Only if the skier is injured solely by an inherent risk of skiing would recovery be barred by AS 09.65.135. In short the court harmonized AS 09.17.060 and AS 09.65.135 by allowing a lawsuit to proceed if the ski area operator was a negligent cause of the skier's injury.

The most significant policy issue raised by this draft is the question of the type and scope of immunity to be granted to ski area operators. The scope of the immunity granted is largely dependent on the definition of "inherent danger and risk of skiing." This definition should be carefully reviewed. There is also the issue of whether a ski area operator loses immunity when the negligence of the operator contributes to the injury, as held by the Alaska Supreme Court in Hiibschman. That issue could be decided differently by the legislature, but this draft probably does not change the law as set out in Hiibschman. (See proposed AS 05.45.010 and 05.45.020(b); and AS 05.45.010 and 05.45.100 in the draft you provided.)

If you have further questions on these matters please contact me.

MFF:pl
93-034.plm