ALASKA LEGISLATURE COMMITTEE FILES 1993-1994 8672
8159 HOUSE STATE AFFAIRS

424

OIL

SI 9. Propose a statutory or regulatory change to make marketing of heavy fuels (heavy bunker oil) more economically competitive by eliminating or reducing the taxes. Statutory reference AS 43.40.1 - May be possible to do by regulation.

Due to the excessive tax on heavy fuels if used instate ($2.10), heavy fuels have no instate sales/useage. In 1970-72, heavy bunker fuel was sold, to a small market, for use instate, by such firms as Sealand. In 1972, the present tax was placed on this fuel. All sales then ceased, and have remained non-existent since that date. Currently, there is the potential for a market of these fuels in Alaska, if the price of the fuel can be competetive with prices in Canada (current fuel source). The initial potential is for annual sales of $7,000,000, and employment for 7-10 Alaskans. Refineries instate do produce the heavy bunker fuel, and then it sell as an exported product.

MINING

SI 10. Change the valid timeframe of an Exploration and Reclamation permit from one year to five years (DNR). 11 AAC 97.300

Currently permits are only good for one year, and require considerable effort and expense in preparation. Exploration and reclamation themselves are likely to span several years. Requiring firms to file anew each year is an unnecessary additional expense both for the business enterprise and the State, which does not contribute to either the applicant or ADNR.

If ADNR is seeking updated information on changes, then alter the regulations to require notification of any changes when and if changes occur from those in the original approved permit.

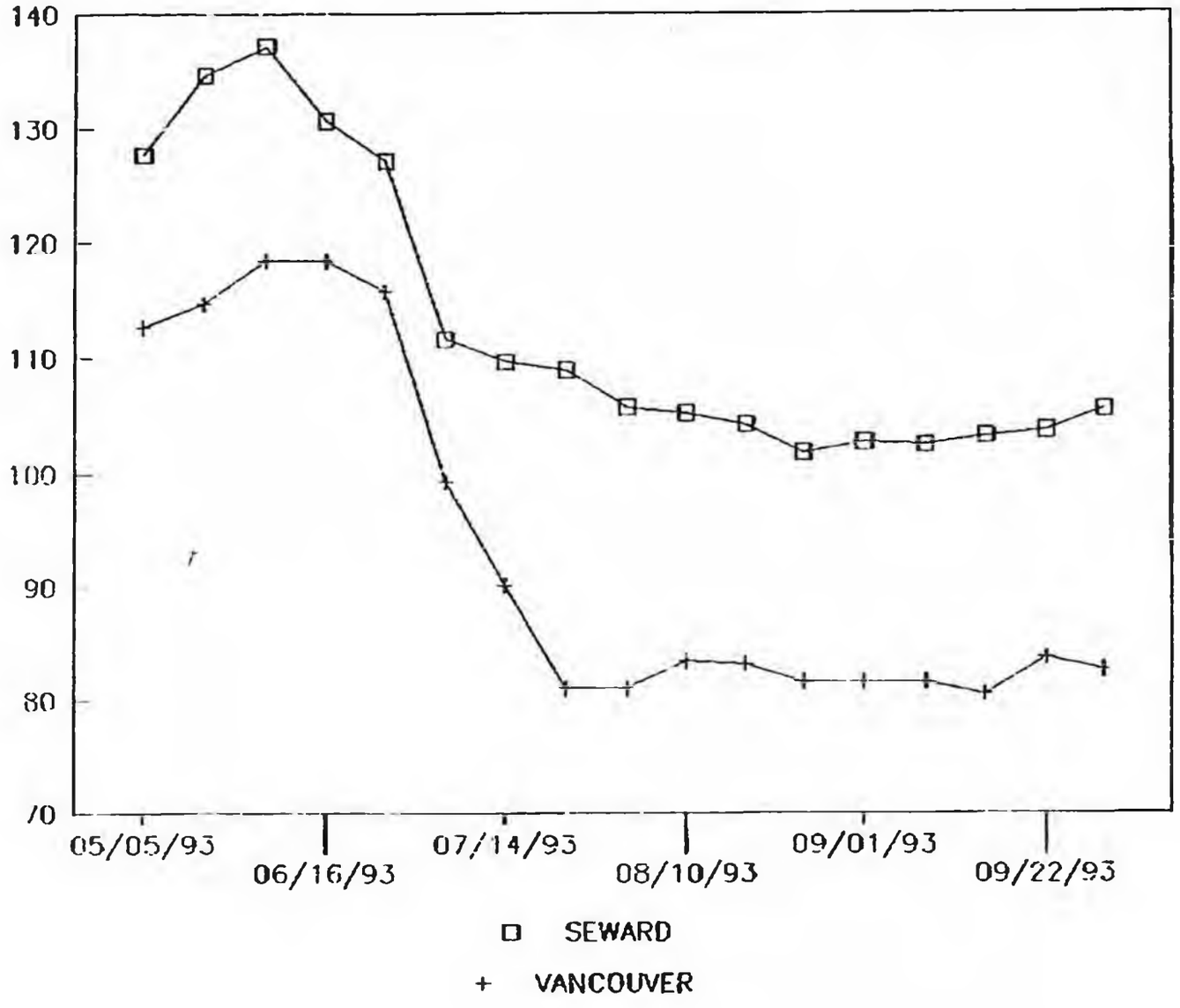
SI 11. Add a phrase to 18 AAC 80.020 so that it reads: "Toxic and Other Deleterious Organic and Inorganic Substances -Substances shall not exceed Alaska Drinking Water Standards (18 AAC 80) or EPA Quality Criteria for Water as applicable to substances *and use, i.e., if the water is not used as a public water system, 18 AAC 80.020 Source Protection is not the applicable use."*

This is recommended in order to get away from effective treated water at the source. As a result, "raw water" prior to treatment would not have to meet the same standards as water taken and treated for public consumption.

GRAPHS

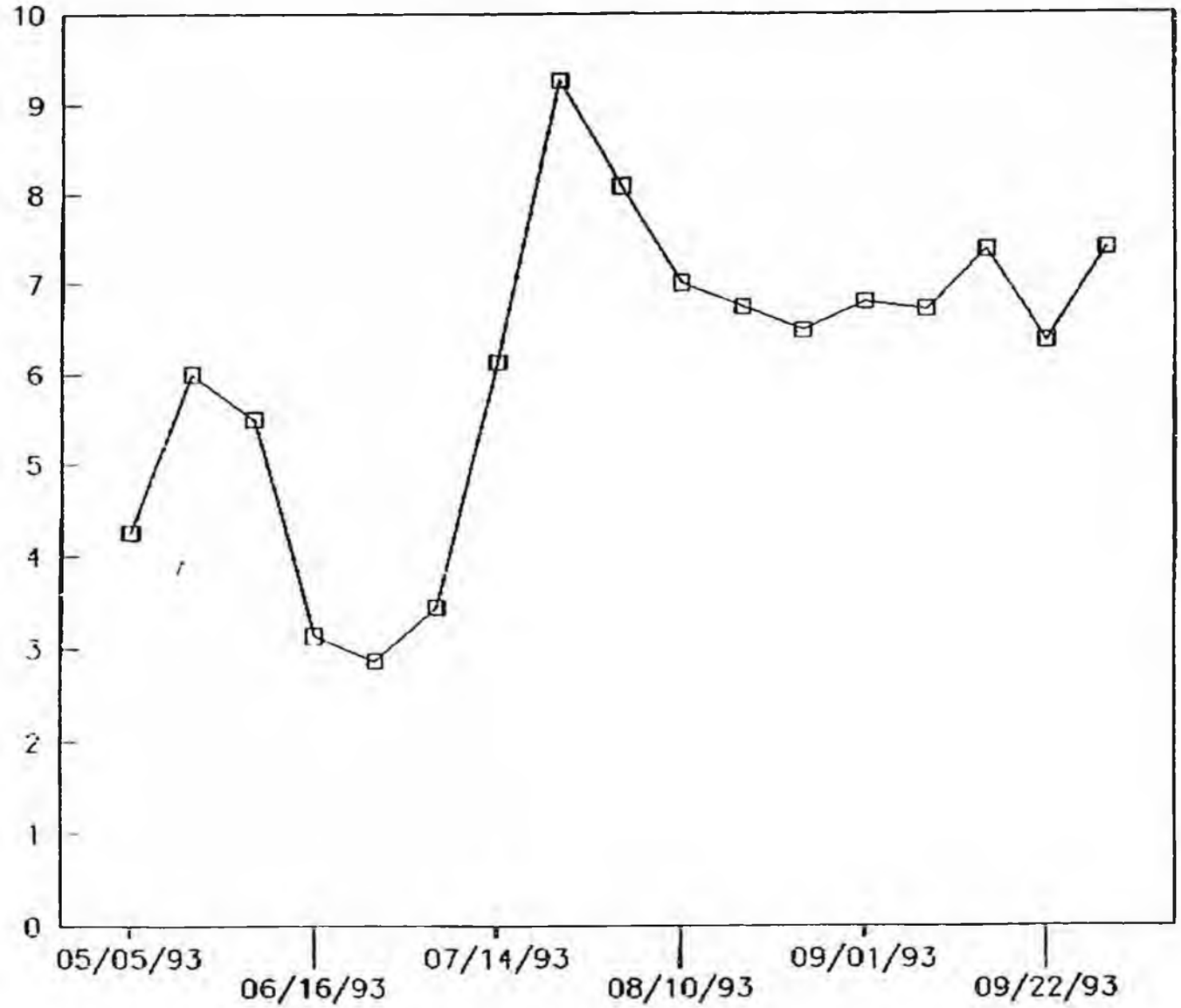
BUNKER PRICES IFO 380

SUMMER 1993 SEWARD VS CANADA



BUNKER PRICES

SEWARD OVER CANADA FOR 1993



Holland America Line
Westours Inc.

Mr. James S.BURNS
Petro Marine Services
3111 "C" Street Suite 500
Anchorage AK. 99503

To fax : (907) 561-6500

Seattle February 16 1994

Dear Mr. Burns

It was a pleasure meeting you Wednesday for what turned out to be a very interesting discussion. You informed me that you are currently working with others in the Marine Industry to have legislation introduced that would reduce the current tax on marine fuel in Alaska from 5 cents per gallon to 1 cent. If succesful, this would immediate reduce the price for Intermediate Bunker fuel with approximately $ 10.00 per Metric Ton and this would allow Seward and other Alaskan ports to offer shipowners an addtional or alternative bunkerchoice on the U.S. West Coast and British Columbia.
It is with this possibility in mind, that I express my appreciation and support for your continued efforts in this matter, which in my opinion will greatly benefit not only the Marine Industry but increasingly so, the people and the state of Alaska.

Very truly yours

Willem A. Koopman

Captain Willem A.KOOPMAN
Director Marine Operations WSC
HOLLAND-AMERICA LINE-WESTOURS Inc.

c.c. D.Grausz

LETTERS OF SUPPORT

Crown Cruise Line

February 18, 1994
L94057aa

VIA FAX: 907-561-6500

Petro Marine Services
Attn: James S. Burns
Anchorage, Alaska

Dear Mr. Burns:

We operate the MS CROWN DYNASTY whose summer itinerary has her sailing from Vancouver throughout Alaska.

While researching available bunkering ports, we understand the Alaska Marine Tax of five-cents per gallon is currently in effect. We understand Petro Marine Services is leading the way to have the tax reduced from 5 cents to 1 cent; we would like to lend our support to this effort and advise that such a reduction would play a key role in our decision to bunker in Alaska rather than relying solely on Vancouver as the primary bunker station.

Thank you for including our formal letter of support in this reduction effort's dossier.

Sincerely,

Captain Jorg Walczak
Director, Marine Operations

JW:aa

cc: P. Grant, Sr. VP Operations

REGENCY CRUISES

March 1, 1994

Mr. James S. Burns
PETRO MARINE SERVICES
3111 "C" Street
Suite 500
Anchorage, AK 99503

Dear Mr. Burns:

As I indicated during our meeting last month, Regency will deploy two vessels in Alaska during the summer of 94 and I am please to tell you we will add a third ship in 1995.

While at present, bunkering takes place in Vancouver every two weeks, we are very much interested in your proposal to bunker in Seward.

However we must tell you that in order to stay competitive with Vancouver's price, serious consideration must be given to reduce the current "motor fuel tax" to a more realistic figure.

To give you an indication of our bunkering needs, on an average the Regent Sea bunkers 450 M/T of IFO 180 and 150 M/T of MDO, the Regent Star 450 M/T of IFO 100 and 130 M/T of MDO every two weeks.

We look forward to doing business with you hopefully in the very near future.

Sincerely.
REGENCY CRUISES

Andrew K. Horton
Manager - Port Operations

AKH/GG

KENT DAWSON COMPANY

P.O. Box 20790
Juneau, Alaska 99802
Phone: (907) 463-2533
FAX: (907) 463-3922

March 16, 1994

The Honorable Al Vezey
Chair, House State Affairs
Committee
State Capitol
Juneau, Alaska 99801-1182

Dear Mr. Chairman:

On behalf of Princess Cruises and Princess Tours I have been asked to convey the following--quoting from a February 28, 1994, letter to Mr. Jim Burns of Petro Marine, and signed by Stephen A. Nielsen of Princess Cruises, which I have attached:

"Princess Cruises operates 6 cruise vessels in the Alaska cruise trade from June through September each year. Five of these vessels are based in Vancouver and one in San Francisco. Of the 5 Vancouver based vessels, 3 operate 7 day cruises across the Gulf of Alaska between Vancouver and Seward and 2 operate 7 day cruises round trip from Vancouver through the inside passage of Alaska. Alaska ports of call include Ketchikan, Juneau, Skagway, Sitka and Seward.

"We purchase the fuel oil for our ships based upon quality and price. Fuel oil purchased in Vancouver is essentially the same quality as that available in San Francisco, Seattle and Seward. The price differential, due to the Alaska state motor fuel tax is, however significant. The tax of $0.05 per gallon, which is approximately equal to $13.65 per ton, makes it prohibitive to purchase more that the minimum required in Seward to return to Vancouver. Our total requirements for the 1994 Alaska cruises season will be approximately 57,855 tons (15,680,000 gallons) for the 6 vessels. Of this amount we anticipate purchasing approximately 9,450 tons (2,561,000 gallons) in Seward.

"We strongly support the proposal to reduce the Alaska state motor fuel tax to $0.01 per gallon. This would make the cost of fuel oil in Alaska competitive with that in Vancouver. This would encourage greater purchase of fuel oil in Alaska."

In addition, I have been authorized to say that Princess will

purchase at least one third (1/3) of our fuel requirements for the ships calling at Seward if the price and quality are competitive with Vancouver, B.C. We can only say this for the Seward ships as Seward is the only Alaska port with bunkering facilities.

Sincerely,

V. Kent Dawson

Attachment

PRINCESS CRUISES

[illegible]
Santa Monica
Boulevard
Los Angeles
California
[illegible]
Corporate
[illegible]
Telex
[illegible]
Telefax
[illegible]

February 28, 1994
Ref: SAN/cjt #1612

Mr. Jim Burns
Petro Marine
3111 C Suite 500
Anchorage, Alaska 99503

Dear Jim,

Princess Cruises operates 6 cruise vessels in the Alaska cruise trade from June through September each year. Five of these vessels are based in Vancouver and one in San Francisco. Of the 5 Vancouver based vessels, 3 operate 7 day cruises across the Gulf of Alaska between Vancouver and Seward and 2 operate 7 day cruises round trip from Vancouver through the inside passage of Alaska. That San Francisco based vessel operates 10 day round trip cruises to the inside passage of Alaska. Alaska ports of call include Ketchikan, Juneau, Skagway, Sitka and Seward.

We purchase the fuel oil for our ships based upon quality and price. Fuel oil purchased in Vancouver is essentially the same quality as that available in San Francisco, Seattle and Seward. The price differential, due to the Alaska state motor fuel tax is, however significant. The tax of $0.05 per gallon, which is approximately equal to $13.65 per ton, makes it prohibitive to purchase more than the minimum required in Seward to return to Vancouver. Our total requirements for the 1994 Alaska cruises season will be approximately 57,855 tons (15,680,000 gallons) for the 6 vessels. Of this amount we anticipate purchasing approximately 9,450 tons (2,561,000 gallons) in Seward.

We strongly support the proposal to reduce the Alaska state motor fuel tax to $0.01 per gallon. This would make the cost of fuel oil in Alaska competitive with that in Vancouver. This would encourage greater purchase of fuel oil in Alaska.

Very truly yours,

Stephen A. Nielsen

Sponsored by: Jones

CITY OF SEWARD, ALASKA
RESOLUTION NO. 94-030

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF SEWARD, ALASKA, SUPPORTING SB 327, ESTABLISHING A DIFFERENT TAX LEVY ON RESIDUAL FUEL OIL USED IN AND ON WATERCRAFT

WHEREAS, residual fuel oil currently produced by Tesoro Alaska north of Kenai is sold as an export product due to the excessive tax on heavy fuels; and

WHEREAS, there is the potential for a market of these fuels in Alaska if the price of the fuel can be competitive with prices in Canada; and

WHEREAS, ninety cruise ships will visit the Port of Seward during the summer of 1994; and

WHEREAS, these cruise ships are currently purchasing their fuel oil in Canada and have indicated a desire to purchase fuel in Alaska; and

WHEREAS, the initial potential is for annual sales of $7,000,000 and employment for seven to ten Alaskans;

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF SEWARD, ALASKA, that:

Section 1. The Seward City Council strongly urges the passage of SB 327, thereby reducing the tax on residual fuel oil used inand on watercraft of all descriptions to one cent per gallon.

Section 2. Copies of this resolutionshall be sent to Governor Walter J. Hickel, Senator Suzanne Little and Representative Gary Davis.

Section 3. This resolution shall takeffect immediately upon its adoption.

PASSED AND APPROVED by the City Council of the city of Seward, Alaska, this 14th day of March, 1994.

THE CITY OF SEWARD, ALASKA

Dave W. Crane

Dave W. Crane, Mayor

=B 327 IS Companion to HB 453 - Resolution of Support

DRAFT - RESOLUTION 94-01

A RESOLUTION OF THE GREATER KENAI CHAMBER OF COMMERCE BOARD OF DIRECTORS URGING PASSAGE OF HB453/SB327 RELATING TO BUNKER FUEL TAX

WHEREAS, there is a substantial demand for bunker fuel by the numerous cruise ships that call on Alaska ports and,

WHEREAS, the operators of these cruise ships purchase bunker fuel at the port where they purchase at the most favorable price and,

WHEREAS, the State of Alaska Marine Fuels Tax of $.05 per gallon prevents Alaska fuel suppliers from being competitive in the bunker fuel market with ports on the U.S. West Coast and British Columbia and,

WHEREAS, this proposed legislation is not expected to reduce State revenues, but rather, appears likely to generate increased revenues to the State due to expected increase in volume of bunker fuel sales at Alaska ports and,

WHEREAS, these increased sales of bunker fuel could potentially create as many as twelve(12) new seasonal jobs; generate a significant increase in business for the transportation support industries; generate additional local sales and property taxes; and further support the rapidly expanding tourism business on the Kenai Peninsula and,

WHEREAS, at this time, tourism is the fastest growing industry in the State of Alaska.

NOW, THEREFORE, BE IT RESOLVED BY THE GREATER KENAI CHAMBER OF COMMERCE BOARD OF DIRECTORS THAT WE RESPECTFULLY URGE PASSAGE OF HB453/SB327 BY THE ALASKA STATE LEGISLATURE.

PASSED BY THE GREATER KENAI CHAMBER OF COMMERCE BOARD OF DIRECTORS THIS _____DAY OF _____,1994.

_____
Valerie Edmundson, President
Kenai Chamber of Commerce
Board of Directors

ATTEST:_____
Laura R. Measles
Executive Director

3/4/94 Approved @ Kenai Chamber Board meeting.
Similar resolution going to Kenai City Council on 3/16/94

HB 459

HOUSE COMMITTEE REPORT

(7)

Date Referred: February 23, 1994 FURTHER REFERRALS: Judiciary

Date of Committee Action: 3-10-94

The STATE AFFAIRS Committee considered: HB 459

HOUSE BILL NO. 459 DAMAGES & ATTY FEES FOR UNPAID WAGES

"An Act relating to liquidated damages and attorney fees for minimum wage and overtime compensation claims."

RECOMMENDATIONS: [ ] the same title
be replaced with CS HB 459 (STA) [ ] a new title

[ ] have attached amendments(s)

[ ] do pass

[ ] do not pass

[✓] no recommendations

[ ] individual recommendations

[ ] additional referral to the _____ Committee

ADOPTS: _____ letter of Intent

ATTACHES NEW FISCAL NOTE(s): (Dept)

[ ] fiscal impact _____

[ ] zero fiscal note _____

APPROVES PREVIOUS: (Dept/Date)

[ ] fiscal note(s) _____

[✓] zero fiscal note(s) Law & Labor

SIGNING DO PASS	*DP*	*OTHER RECOMMENDATIONS*	*DNP*	*NR*	*AM*
Al Vezey	X	Jerry Saunders		✓	
Peter Trasti	X	Terry L. Stem		✓	
Audrey Allberg	✓	Bettye Davis		✓	

Al Vezey

CHAIRMAN'S SIGNATURE

FISCAL NOTE

STATE OF ALASKA
1994 LEGISLATIVE SESSION

BILL NO. HB 459

Revision Date: March 7, 1994
Title: "...liquidated damages and attorney fees for minimum wage and overtime compensation claims."
Sponsor: House Labor and Commerce Committee
Requestor: House State Affairs Committee

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

EXPENDITURES/REVENUES:

OPERATING	FY 95	FY 96	FY 97	FY 98	FY 99	FY 00
PERSONAL						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND &						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE						
FUNDING:						
1002 Federal						
1003 GF Match						
1004 GF						
1005 GF/Program						
1006 GF/MHTIA						
OTHER - IAR	-0-	-0-	-0-	-0-	-0-	-0-
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-
POSITIONS:						
FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

Estimate of current year (FY94) impact: -0-

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

Prepared by: Richard I. Pegues, Director
Phone: 465-3672
Division: Administrative Services Division
Date: March 7, 1994

Approved by Commissioner: Richard I. Pegues FOR Bruce M. Botelho, Attorney General
Agency: Department of Law
Date: March 7, 1994

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Rev 11/93

FISCAL NOTE

STATE OF ALASKA
1994 LEGISLATIVE SESSION

BILL NO. HB 459

ANALYSIS CONTINUATION:

This bill amends the Alaska Wage and Hour Act to provide in an action to recover unpaid minimum wages, unpaid overtime compensation, or liquidated damages, that if the employer shows to the satisfaction of the court that the act or omission giving rise to the action was made in good faith and that the employer had reasonable grounds for believing that the act or omission was not in violation of the state's minimum wage and overtime laws, the court may decline to award liquidated damages or may award an amount of liquidates damages less than the amount set out in AS 23.10.110(a).

The bill further provides that an employee is not entitled to liquidated damages if, as part of a written settlement agreement with the employer, the employee expressly waives the employee's right to receive liquidated damages. The bill also provides that the commissioner of labor may supervise the payment of unpaid minimum wages or unpaid overtime compensation owing to an employee. Payment in full in accordance with an agreement by an employee to settle a claim for unpaid minimum wages, unpaid overtime compensation, or liquidated damages would constitute a waiver of any right the employee may have under AS 23.10.110(a) to unpaid minimum wages, unpaid overtime compensation, or liquidated damages. Finally, the bill provides that, in addition to a judgment awarded to the prevailing party in a wage claim or overtime action, the court shall allow costs of the action and reasonable attorney fees to be determined according to court rule.

These provisions mark a departure from the way wage claims are handled in Alaska. First, current law provides that an employer who violates the state's minimum wage and overtime laws is liable for the unpaid wages and overtime, and the employer is liable for liquidated damages in an amount equal to the amount of unpaid minimum wages and unpaid overtime compensation. The bill has the effect of relieving employers who violate minimum wage and overtime laws from liquidated damages liability and, in the alternative, allowing employers and employees to compromise the amounts owed to employees.

Second, employees are allowed to assign unpaid wage claims to the commissioner of labor under existing AS 23.10.110(b), which permits the commissioner of labor to bring the claims on behalf of employees. In practice, however, substantial wage claims are brought by private counsel, and the commissioner of labor's intervention is usually reserved for small individual wage claims and for claims involving precedential value that have broad impact on the state's workforce. Consequently, the provision allowing costs and fees for prevailing parties, where current laws provide costs and fees only for prevailing plaintiffs, and the provision allowing for the compromise of claims, will probably result in far fewer claims being handled by the private bar. The bill appears to contemplate this result because it provides that payment in full of a written agreement between an employer and an employee to settle a claim constitutes a waiver of any right the employee may have to unpaid minimum wages, unpaid overtime compensation, or liquidated damages under AS 23.10.110(a). Under these latter circumstances, it is unlikely that an employee would be represented by legal counsel, although in most cases an employer would probably be represented. State oversight of settlement compromises is not included in the bill. Claims brought under Federal law require the oversight of the Secretary of Labor or the court to supervise any compromise of liquidated damages.

As a consequence, employees would have the options of accepting settlement offers, attempting to bring a claim in court through private counsel, pursuing a claim under federal wage and hour law, or assigning the claim to the commissioner of labor for state action. In this latter event, the Department of Law would present the claim on behalf of the commissioner. Because the majority of substantial wage claims are now handled by the private bar, we cannot determine what increase in our caseload might occur if the bill discourages the private bar from handling wage and hour claims. However, we expect that there will be pressure for the department to handle more claims. The Department of Law would seek to transfer any additional cost to the Department of Labor as a reimbursable expense.

217 Second Street, Suite 201
Juneau, Alaska 99801
(907) 586-2323
FAX (907) 463-5515

ALASKA STATE CHAMBER OF COMMERCE

Alaska State Chamber of Commerce
HOUSE BILL NO. 459

"Damages & Attorney Fees for Unpaid Wages"

On behalf of the Alaska State Chamber of Commerce, we wish to go on record in support of House Bill 459, which relates to liquidated damages and attorneys fees for minimum wage and overtime compensation claims.

As the law stands now currently, an employer who is in violation of the state's minimum wage or overtime compensation laws, is automatically liable for liquidated damages, regardless of the circumstances.

The goal of House Bill 459 is to change the state's standards regarding the awarding of liquidated damages to be in compliance with federal standards. This results in a more equitable situation for both parties, there is still protection for the employee, and flexibility is offered to the employer who makes a mistake in good faith, providing they meet the burden of proof.

In summary, the Alaska State Chamber of Commerce supports passage of House Bill 459 which would allow fairness to both employee and employer.

HOUSE COMMITTEE REPORT

(7)

Date Referred: February 9, 1994 FURTHER REFERRALS: State Affairs
Judiciary

Date of Committee Action: 2/22/94

The LABOR AND COMMERCE Committee considered: HB 459

HOUSE BILL NO. 459 DAMAGES & ATTY FEES FOR UNPAID WAGES

"An Act relating to liquidated damages and attorney fees for minimum wage and overtime compensation claims."

RECOMMENDATIONS: [ ] the same title
be replaced with _____ [ ] a new title

[ ] have attached amendments(s)
[ ] do pass
[ ] do not pass
[ ] no recommendations
[X] 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) _____

[X] zero fiscal note LABOR [ ] zero fiscal note(s) _____

SIGNING DO PASS	DP	OTHER RECOMMENDATIONS	DNP	NR	AM
Brian D. Porter	✓	J. Sutton		✓	
[illegible] +S	✓	W.K. Williams		✓	
[illegible]	✓	[illegible]		✓	
		Bill Hudson		✓	

Bill Hudson
CHAIRMAN'S SIGNATURE

KENNETH W. LEGACKI, P.C.
ATTORNEY AT LAW
425 "G" STREET, SUITE 760
ANCHORAGE, ALASKA 99501
(907) 258-2422 • FAX 278-4848

MEMORANDUM

TO : MEMBERS OF THE HOUSE STATE AFFAIRS COMMITTEE

FROM : KENNETH W. LEGACKI, ESQ.

DATE : MARCH 9, 1994

RE : HOUSE BILL NO. 459 - A BILL TO CHANGE THE ALASKA WAGE AND HOUR ACT

You as a legislature must ask how does this Bill:

(1) protect the health and well-being of Alaskan employees;

(2) protect complying, scrupulous, and honest employers;

(3) relieve unemployment;

(4) induce work sharing or create jobs.

My name is Ken Legacki and I am an attorney in Anchorage who primarily represents employees in wage and hour lawsuits. My practice has expanded in this area within the last few years, because of the dramatic increase in wage and hour complaints employees have against employers. For example, I represented the employees in a relatively recent Alaska Supreme Court case which defined the remedies for employees when employers violate the Wage and Hour Act. See Bobich v. Stewart, 843 P.2d 1232 (Alaska 1992).

It has been my experience that we need to keep the Alaska Wage and Hour Act as it presently stands. The changes to the Act that have been proposed by this Bill run contrary to the purpose and policy of the Wage and Hour Act. It is imperative that employees and complying employers be well-protected from unscrupulous and overreaching employers, and that honest employers not be penalized for obeying the law.

Our Wage and Hour Act is no accident. When Alaska became a state in 1959, the requirements of the federal Act were well-known, yet employers refused to comply with its mandates. Outside

employers, believing they could exploit Alaska workers, refused to comply with the federal mandates. The compelling policy reasons for the Act authorizing mandatory liquidated damages have not changed since Alaska became a state. It is needed now more than before.

Alaska law is based on the federal wage and hour Act. McGinnis v. Stevens, 543 F.2d 1221 (Alaska 1975). To interpret our Act, we must look to federal law. However, when state remedies are more favorable to employees, those state remedies should apply Webster v. Bechtel, Inc., 621 P.2d 890 (Alaska 1980). The employment relationship is a local concern. Webster v. Bechtel, id. at 898.

The legislature must remember the purpose and policy of the Wage and Hour Act, and must ask itself how the changes to this Bill will facilitate that purpose and policy.

PROTECT HONEST AND COMPLYING EMPLOYERS

One of the purposes of the Wage and Hour Act is to protect honest, complying employers from unfair competition. An employer who does not properly pay overtime obtains an economic advantage by capitalizing on employee compensation unlawfully withheld. Hodgson v. Wheaton Glass Co., 446 F.2d 527, 533 (3rd Cir. 1971); Martin v. Tango's Restaurant, 969 F.2d 1319, 1324 (1st Cir. 1992); Hansen v. United States, 340 F.2d 142 (8th Cir. 1965).

If an employer avoids paying employees earned overtime, all good, honest employers who obey the law pay the price and commerce suffers. One of the purposes of liquidated damages is to protect complying employers who follow the Act's mandates.

THIS BILL ENCOURAGES EMPLOYERS TO CIRCUMVENT THE WAGE AND HOUR ACT

This proposed Bill is against the public policy because it will encourage employers to attempt to circumvent the law and to avoid paying employees all the overtime that is due to them. As the United States Supreme Court stated in Brooklyn Savings Bank v. O'Neil, 324 U.S. 697 (1945), the nonpayment of overtime nullifies the purpose of the wage and hour Act. The purpose of the Act is to create employment, protect the health and well-being of employees, and protect complying employers. See Janes v. Otis Engineering Corp., 757 P.2d 50, 53 (Alaska 1989). How does this Bill help increase employment? It doesn't. This Bill gives employers an incentive not to comply with the Act because it now becomes a "gamble" or a "calculated risk" for the employer not to ensure it is complying with the Wage and Hour Act. If the employer does get caught, the penalty won't be that great. It will be a business

decision not to pay overtime. The employer can "gamble" in not getting caught.

PRIVATE SETTLEMENT

Either the Department of Labor or the court system must oversee and make sure that there is no overreaching by an employer in the settlement process. As the federal courts have stated, when an employee brings a lawsuit for wage and hour violations, he does not bring it for himself, but for every working person in the state. As was stated in Greenberg v. Arsenal Bldg. Corp., 50 F. Supp. 700, 702 (S.D.N.Y. 1943), an employee enforces a public and not a private right. The legislature has to stand up for nonunion labor in embodying the Act in order to increase substandard pay, discourage overtime work, relieve unemployment and induce work sharing. Greenberg v. Arsenal Bldg. Corp., 50 F. Sup. 700 (S.D.N.Y. 1943), citing Overnight Motor Transp., Inc. v. Missel, 316 U.S. 572, 577-578. As the Overnight Motor Transp. case states, the parties cannot by private agreement circumvent the public policy expressed in the Act. The provision in HB 459 that allows "private settlements" encourages employers to "gamble or take a calculated business risk" not to get caught. And if they do get caught, they will try to "buy out" of the claim cheaply, thereby punishing those employers who follow the law.

In essence, the private settlement provision violates the federal provisions of the Act and may be void. See Webster v. Bechtel, Inc., id. at 902.

ATTORNEY FEES ISSUE

Federal law requires that an employee who successfully brings suit have his attorney fees paid by the noncomplying employer. Bonnette v. California Health & Welfare, 704 F.2d 1465 (9th Cir. 1983). The purpose of this provision is because the employee is enforcing "a public right" and not a private one. Greenberg v. Arsenal Bldg. Corp., 50 F. Supp. 700 (S.D.N.Y. 1943). The attorney representing the employee is acting as a private attorney general protecting not only the party to the lawsuit, but also employers who comply with the law, to ensure that those employers who don't comply are prosecuted. If there is no incentive to prosecute, the law will not be followed. Under the proposed modifications to the Act, the employer would gain a benefit if it didn't have to pay attorney fees because it would not be cost effective to prosecute an action for an employee and complying employers.

The attorney fees provision in this Bill is in conflict with federal law and may be void. Webster, id. at 900.

COST SAVINGS TO THE STATE TREASURY

"Privatization" of the prosecution of wage and hour claims saves the state money. The state would not have to hire more Department of Labor investigators or attorneys to prosecute these cases.

CONCLUSION

The provisions in this Bill are contrary to well-established federal and state law. It is not in the best interests of Alaska workers, honest men and women who are seeking help from their legislators to improve their conditions in life, to have this law changed to their detriment. Ironically, bills are now being introduced into the House and Senate to force people previously on public assistance to go to work. However, this Bill would strip the protections needed by these people. The people who most need this law are the people who least understand the law: the lower, hourly wage employees who lack the sophistication to understand exactly what the law means and how the law protects them. It is because history has proven there are unscrupulous employers that past legislatures have placed a high burden upon employers to make sure that they follow the law and pay their employees appropriately.

Westmark
HOTELS
ALASKA/YUKON

February 16, 1994

Representative Bill Hudson, Chairman
House Labor and Commerce Committee
Room 101
State Capitol
Juneau, AK 99801-1182

Dear Chairman Hudson:

We strongly support the passage of HB 459. This legislation reforms Alaska's wage and hour statute by again allowing for negotiated settlements and allowing the State Department of Labor (DOL) and the Alaska Courts the flexibility to mitigate what are now mandatory liquidated damages, provided the employer can prove his or her error was made in "good faith."

The current law, as interpreted by the Alaska Supreme Court in its "Kenny Shoe" decision, strips the DOL of its previous flexibility with regard to settlements and liquidated damages, voids private settlements and creates a "double or nothing" situation whereby the employers most likely end up paying double whatever the claim is regardless of the circumstances.

The Bill will not make it easy for employers to avoid paying overtime claims or liquidated damages. It will simply provide (in cases where employers can demonstrate they made "honest mistakes") the Department or the Courts may take this into consideration when deciding whether and how much liquidated damages are awarded. The Fair Labor Standards Act, upon which the Alaska statute is based, provides the flexibility in federal law that HB 459 seeks to allow in state law. The states of California, Oregon, and Washington already have very similar provisions on their books. Alaska employers should not be placed under a more burdensome standard than the thousands of businesses in those states.

Please give HB 459 your support and move it out of the Labor and Commerce Committee as soon as possible. We look forward to working with you to accomplish the goals of this important legislation.

Sincerely,

WESTMARK HOTELS, INC.

Al Parrish
President

tkw
cc: Rep. Joe Green
Rep. Brian Porter
Rep. Joe Sitton
Rep. Eldon Mulder
Rep. Bill Williams
Rep. Jerry Mackie

Westmark Corporate Office 880 H Street, Suite 101, Anchorage, Alaska 99501-3400
(907) 272-9403, Facsimile: (907) 258-0560

WESTMARK HOTELS 2-16-94

ARCTECH SERVICES

February 22, 1994

Representative Eldon Mulder
State Capitol, Rm. #116
Juneau, Alaska 99801-1182

Dear Representative Mulder,

I urge you to support House Bill 459. Passage of this legislation will allow the Department of Labor to settle wage and hour claims and allowing for a more fair and equitable settlement for the parties involved.

Sincerely,

M. Kathryn Thomas

ARCTECH SVC. 2-22-94

P.O. BOX 3005 • KENAI, ALASKA 99611 • MI 20 KENAI SPUR HWY

Carlile

ENTERPRISES, INC.
900 Aurora Avenue • Fairbanks, Alaska 99701 • (907) 451-7155

February 21, 1994

Rep. Eldon Mulder
Fax: 465-3518

Dear Eldon:

I wanted to let you know that I strongly support the passage of HB 459. We need the flexibility regarding liquidated damages that this bill allows. The present mandatory liquidated damages can actually hold up the resolution of claims, especially when an "error" has been made in good faith. Again I urge you to support passage of this bill. Thanks.

Sincerely,

Harry McDonald
President

HM/jd

CARLILE 2-21-94

CARR GOTTSTEIN
FOODS CO.
6411 A Street Anchorage, Alaska 99518
Ph: (907) 561-1944

February 21, 1994

To All Members of The State House Labor and Commerce Committee

Reps: Bill Hudson (Chairman)
Joe Green (Vice Chairman)
Eldon Mulder
Brian Porter
Bill Williams
Joe Sitton
Jerry Mackie

We wanted to let you know we wholeheartedly support the passage of HB 459. This legislation brings much needed reform to Alaska's wage and hour statute by once again allowing for negotiated settlements and allowing the State Department of Labor (DOL) and the Alaska Courts the flexibility to mitigate what are now mandatory liquidated damages provided the employer can prove his or her error was made in "good faith". The current law, as interpreted by the Alaska Supreme Court in its "Kinney Shoe" decision, strips the DOL of its previous flexibility with regard to settlements and liquidated damages, voids private settlements, and creates a "double or nothing" situation whereby the only options open to the employer are 1. paying the costs of an outright victory in court, or 2. paying double whatever the claim is regardless of the circumstances.

The bill will not make it easy for employers to avoid paying overtime claims or liquidated damages. It will simply provide that in cases where employers can demonstrate they have make "honest mistakes" the Department or the Court may take this into consideration when deciding whether and how much liquidated damages are awarded. The Fair Labor Standards Act, upon which the Alaska Statute is based, provides the flexibility in federal law that HB 459 seeks to allow in state law. In addition, the states of California, Oregon, and Washington already have very similar provisions on their books. We can think of no reason Alaska employers should be placed under a more burdensome standard than the thousands of businesses on the rest of the Pacific Coast.

Please give HB 459 your support and move it out of the Labor and Commerce Committee as soon as possible. We look forward to working with you to achieve final passage of this critically important legislation.

John Cairns

John Cairns
Chairman and CEO

TESORO ALASKA

February 17, 1994

Representative Bill Hudson, Chairman
House Labor and Commerce Committee
Capitol Building
Juneau, Alaska

Subject: Statement of Support for House Bill 459

Dear Representative Hudson:

Tesoro Alaska Petroleum Company supports passage of HB 459. This bill will rectify an anomoly that currently exists between state law and the Fair Labor Standards Act. Current Alaska Wage and Hour law provides for mandatory liquidated damages when employers are found to have erred under state law, irrespective of the circumstances.

The proposed bill will not eliminate liquidated damages from future awards made under state Wage and Hour law. If passed, the new law would restore flexibility for the trier of facts when an employer has proven that its error was made in "good faith." A similar approach is used in the Federal Wage and Hour laws, as well as the comparable laws of California, Oregon, and Washington.

If you have any questions or, if we can be of assistance, please contact me. We hope HB 459 will be moved our of Committee soon and believe it's final passage will benefit the State.

Thank you,

Bernie Smith

cc: Representative Joe Green, (Vice Chairman)
Representative Eldon Mulder
Representative Brian Porter
Representative Bill Williams
Representative Joe Sitton
Representative Jerry Mackie

Tesoro Alaska Petroleum Company, P.O. Box 1[illegible]272, Anchorage, Alaska 99519-6272 (907) 561-5521 FAX (907) 561-5047

TESORO ALASKA 2-17-94

Sheraton Anchorage
HOTEL

February 17, 1994

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

To (Alaska) Bill Hudson	From Forest J. Paulson
Co.	Co.
Dept.	Phone #
Fax # 465-6190	Fax # 279-9142

Representative Bill Hudson, Chairman
House Labor and Commerce Committee
Room 101
State Capitol
Juneau, Alaska 99801-1182

Dear Chairman Hudson:

We, here at the Sheraton Anchorage Hotel, strongly support the passage of HB 459 along with many others. We think it's important that you know of our feelings.

This legislation brings much needed reform to Alaska's wage an hour statute by once again allowing for negotiated settlements and allowing the State Department of Labor (DOL) and the Alaska Courts the flexibility to mitigate what are now mandatory liquidated damages, provided the employer can prove his or her error was made in "good faith".

The current law, as interpreted by the Alaska Supreme Court in its "Kenny Shoe" decision, strips the DOL of its previous flexibility with regard to settlements and liquidated damages, voids private settlements and creates a "double or nothing" situation whereby the only options open to the employer are 1) paying the costs of an outright victory in court or 2) paying double whatever the claim is regardless of the circumstances.

The Bill will not make it easy for employers to avoid paying overtime claims or liquidated damages. It will simply provide (in cases where employers can demonstrate they made "honest mistakes") the Department or the Courts may take this into consideration when deciding whether and how much liquidated damages are awarded. The Fair Labor Standards Act, upon which the Alaska statute is based, provides the flexibility in federal law that HB 459 seeks to allow in state law. In addition, the states of California, Oregon, and Washington already have very similar provisions on their books. We can think of no reason Alaska employers should be placed under a more burdensome standard than the thousands of businesses on the rest of the Pacific Coast.

We are hoping that you will support HB 459, along with the Sheraton Anchorage Hotel, and look forward to working with you on this very important matter.

Sincerely,

Sheraton Anchorage Hotel

Forest J. Paulson
General Manager

FJP/mjd

ITT Sheraton
401 EAST 6TH AVENUE, ANCHORAGE, AK 99501
PHONE (907) 276 8700 FAX (907) 276 7569

Sheraton ANC 2-17-94

Sponsor Statement
HB 459

OVERVIEW

This legislation addresses the awarding of punitive damages in claims of underpaid overtime compensation or statutory minimum wages under the Alaska Wage and Hour Act (AWHA). State statute imposes the payment of unpaid minimum wages or overtime compensation to an employee by an employer who has violated provisions of the AWHA. In addition to this, the employer may be liable for mandatory liquidated damages of an equal amount (AS 23.10.110(a)).

The Alaska Supreme Court in McKeown v. Kinney Shoe Corp., 820 P.2d 1068 (Alaska 1991), ruled that liquidated damages are **mandatory** and that any individual settlements out of court that did not include liquidated damages were invalid.

Prior to the Kinney [illegible] ng, an employee with a claim for underpaid overtime or minimum wag[illegible] few options for redress. One, they could file complaint with the Alaska Dept. of Labor, who was able to negotiate a settlement. Two, the employer could attempt to reach a private settlement with the employer in question. In either of these cases, a settlement could be reached for an amount below full liquidated damages. Finally, if a settlement could not be reached in the above options, the case could be taken to court, where liquidated damages would be awarded in full if the case was found for the plaintiff.

As the law stands currently, an employer who is in violation of the state's minimum wage or overtime compensation laws is automatically liable for liquidated damages, regardless of the circumstances. Though this is intended as a deterrent to the employer in these instances, it creates an imbalance in certain situations. Under the current law, an employer who makes an "honest mistake" is punished as severely as an employer who knowingly violates the law. In these situations, the employer either takes his case to court, facing the possibility of paying full liquidated damages plus court costs or settling out of court for the claim plus full liquidated damages.

The Federal Labor Standards Act, upon which the AWHA is based, contains identical language to AS 23.10.110(a), but also contains the following language:

> . . . if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing his act or omission was not in violation of the Fair Labor Standards Act, . . . the court may in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in [29 U.S. Code § 216].

29 U.S. Code § 260

This additional language in the FLSA creates some flexibility for employers when an honest mistake is made. The discretion is left to the courts to decide to award partial or no liquidated damages where the employer shows it acted in good faith and it had a reasonable basis for believing it was not violating the law.

The goal of HB 459 is to change the state standards regarding the awarding of liquidated damages to be congruent with the federal standards. This results in a more equitable situation for both parties; protection is still provided to the employee and flexibility is afforded to the employer who makes a mistake in good faith, providing they meet the burden of proof.

CARR GOTTSTEIN FOODS CO.

6411 A Street Anchorage, Alaska 99518
Ph: (907) 561-1944

February 21, 1994

To All Members of The State House Labor and Commerce Committee

Reps: Bill Hudson (Chairman)
Joe Green (Vice Chairman)
Eldon Mulder
Brian Porter
Bill Williams
Joe Sitton
Jerry Mackie

We wanted to let you know we wholeheartedly support the passage of HB 459. This legislation brings much needed reform to Alaska's wage and hour statute by once again allowing for negotiated settlements and allowing the State Department of Labor (DOL) and the Alaska Courts the flexibility to mitigate what are now mandatory liquidated damages provided the employer can prove his or her error was made in "good faith". The current law, as interpreted by the Alaska Supreme Court in its "Kinney Shoe" decision, strips the DOL of its previous flexibility with regard to settlements and liquidated damages, voids private settlements, and creates a "double or nothing" situation whereby the only options open to the employer are 1. paying the costs of an outright victory in court, or 2. paying double whatever the claim is regardless of the circumstances.

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Please give HB 459 your support and move it out of the Labor and Commerce Committee as soon as possible. We look forward to working with you to achieve final passage of this critically important legislation.

John Cairns
Chairman and CEO

TESORO ALASKA

February 17, 1994

Representative Bill Hudson, Chairman
House Labor and Commerce Committee
Capitol Building
Juneau, Alaska

Subject: Statement of Support for House Bill 459

Dear Representative Hudson:

Tesoro Alaska Petroleum Company supports passage of HB 459. This bill will rectify an anomoly that currently exists between state law and the Fair Labor Standards Act. Current Alaska Wage and Hour law provides for mandatory liquidated damages when employers are found to have erred under state law, irrespective of the circumstances.

The proposed bill will not eliminate liquidated damages from future awards made under state Wage and Hour law. If passed, the new law would restore flexibility for the trier of facts when an employer has proven that its error was made in "good faith." A similar approach is used in the Federal Wage and Hour laws, as well as the comparable laws of California, Oregon, and Washington.

If you have any questions or, if we can be of assistance, please contact me. We hope HB 459 will be moved our of Committee soon and believe it's final passage will benefit the State.

Thank you,

Bernie Smith

cc: Representative Joe Green, (Vice Chairman)
Representative Eldon Mulder
Representative Brian Porter
Representative Bill Williams
Representative Joe Sitton
Representative Jerry Mackie

Tesoro Alaska Petroleum Company, P.O. Box 196272, Anchorage, Alaska 99519-6272 (907) 561-5321 FAX (907) 561-5047

Carlile

ENTERPRISES, INC.
900 Aurora Avenue • Fairbanks, Alaska 99701 • (907) 451-7155

February 21, 1994

Rep. Eldon Mulder
Fax: 465-3518

Dear Eldon:

I wanted to let you know that I strongly support the passage of HB 459. We need the flexibility regarding liquidated damages that this bill allows. The present mandatory liquidated damages can actually hold up the resolution of claims, especially when an "error" has been made in good faith. Again I urge you to support passage of this bill. Thanks.

Sincerely,

Harry McDonald
President

HM/jd

Sheraton Anchorage
HOTEL

February 17, 1994

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To Chairman Bill Hudson	From Forest J. Paulson
Co.	Co.
Dept.	Phone #
Fax # 465-4390	Fax # 274-9442

Representative Bill Hudson, Chairman
House Labor and Commerce Committee
Room 101
State Capitol
Juneau, Alaska 99801-1182

Dear Chairman Hudson:

We, here at the Sheraton Anchorage Hotel, strongly support the passage of HB 459 along with many others. We think it's important that you know of our feelings.

This legislation brings much needed reform to Alaska's wage an hour statute by once again allowing for negotiated settlements and allowing the State Department of Labor (DOL) and the Alaska Courts the flexibility to mitigate what are now mandatory liquidated damages, provided the employer can prove his or her error was made in "good faith".

The current law, as interpreted by the Alaska Supreme Court in its "Kenny Shoe" decision, strips the DOL of its previous flexibility with regard to settlements and liquidated damages, voids private settlements and creates a "double or nothing" situation whereby the only options open to the employer are 1) paying the costs of an outright victory in court or 2) paying double whatever the claim is regardless of the circumstances.

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We are hoping that you will support HB 459, along with the Sheraton Anchorage Hotel, and look forward to working with you on this very important matter.

Sincerely,

Sheraton Anchorage Hotel

Forest J. Paulson
General Manager

FJP/mjd

Westmark
HOTELS
ALASKA/YUKON

February 16, 1994

Representative Bill Hudson, Chairman
House Labor and Commerce Committee
Room 101
State Capitol
Juneau, AK 99801-1182

Dear Chairman Hudson:

We strongly support the passage of HB 459. This legislation reforms Alaska's wage and hour statute by again allowing for negotiated settlements and allowing the State Department of Labor (DOL) and the Alaska Courts the flexibility to mitigate what are now mandatory liquidated damages, provided the employer can prove his or her error was made in "good faith."

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Please give HB 459 your support and move it out of the Labor and Commerce Committee as soon as possible. We look forward to working with you to accomplish the goals of this important legislation.

Sincerely,

WESTMARK HOTELS, INC.

Al Parrish
President

tkw
cc: Rep. Joe Green Rep. Eldon Mulder
Rep. Brian Porter Rep. Bill Williams
Rep. Joe Sitton Rep. Jerry Mackie

Westmark Corporate Office 880 H Street, Suite 101, Anchorage, Alaska 99501-3400
(907) 272-9403, Facsimile: (907) 258-0560

OUR LADY OF COMPASSION CARE CENTER
4300 CALLE STREET
ANCHORAGE ALASKA 99503-7440
PHONE (907) 561-2411

SISTERS OF PROVIDENCE
SERVING IN THE WEST SINCE 1856

February 16, 1994

Members of The State House Labor and Commerce Committee:
Reps. Bill Hudson, Chairman
Joe Green, vice Chairman
Eldon Mulder
Brian Porter
Bill Williams
Joe Sitton
Jerry Mackie

I wanted to let you know that Our Lady of Compassion Care Center wholeheartedly supports the passage of HB 459. This legislation brings much needed reform to Alaska's wage and hour statute by once again allowing for negotiated settlements and allowing the State Department of Labor (DOL) and the Alaska Courts the flexibility to mitigate what are now mandatory liquidated damages provided the employer can prove his or her error was made in "good faith". The current law, as interpreted by the Alaska Supreme Court in its "Kenny Shoe" decision, strips the DOL of its previous flexibility with regard to settlements and liquidated damages, voids private settlements, and creates a "double or nothing" situation whereby the only options open to the employer are:

1. paying the costs of an outright victory in court, or
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Sincerely,

Melissa A. Wright, Director Human Resources
cc: C. J. Zane

DIVISION OF LEGAL SERVICES

LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

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

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

MEMORANDUM February 18, 1994

SUBJECT: Sectional Summary of HB 459. (Liquidated damages and attorney fees for minimum wage and overtime compensation claims)

TO: Representative Eldon Mulder

FROM: Teresa B. Cramer
Legislative Counsel

You have requested a sectional summary of the above-described bill. As a preliminary matter, note that a sectional summary of a bill should not be considered an authoritative interpretation of the bill and the bill itself is the best statement of its contents.

Section 1 applies the exceptions enacted in section 3 of the bill to the general rule established in the statute that employers who violate the overtime wage or minimum wage requirements are liable for liquidated damages in the amount of the unpaid minimum wage or overtime compensation.

Sec. 2 permits the court to award attorney fees to the prevailing party, as determined by court rule, rather than only providing for attorney fees for a prevailing plaintiff.

Sec. 3 adds new provisions to permit the court to decline to award liquidated damages or to award an amount less than the amount required under AS 23.10.-110(a), which is amended by sec. 1 of this bill. The court may do so if the employer shows to the satisfaction of the court that the employer acted in good faith and that the employer had reasonable grounds for believing that it was not violating the minimum wage or overtime requirements. This waiver does not apply to an action brought by the Commissioner of Labor.

Under subsection (e), the commissioner is permitted to supervise the payment of unpaid minimum wage or overtime claims including settlements. Under Sec. 4(a), this subsection applies to agreements entered into on or after the effective date of the Act.

Subsection (f) permits an employee to waive the right to liquidated damages in a written settlement agreement with the employer. Under Sec. 4(b), this applies to written agreements entered into on or after the effective date of the Act.

Sec. 4 addresses how to apply the provisions of the Act. As noted in the discussion above, Sec. 4(a) and (b) apply the settlement provisions to agreements entered into on or after the date the Act takes effect. Under Sec. 4(c), to the extent constitutionally permitted, the rest of the Act applies to actions in which a final judgement has not been entered on the date the Act takes effect.

TBC:gc
94-137.glc

DAVIS WRIGHT TREMAINE
LAW OFFICES
SUITE 1450 · 550 WEST 7TH AVENUE · ANCHORAGE, ALASKA 99501
(907) 257-5300

MEMORANDUM

TO: Alaskan Employers

FROM: Parry Grover

DATE: February 9, 1994

RE: Analysis of Proposed House Bill Relating to Liquidated Damages and Attorney's Fees for Minimum Wage and Overtime Compensation Claims

Several questions have been raised regarding the impact of the proposed House Bill. This Memorandum responds to those questions:

1. <u>If the Bill is Enacted Into Law, Won't That Make It More Difficult For Employees and Former Employees With Small Claims to Recover the Wages Due Them</u>?

No. The majority of small minimum wage and overtime claims are collected by the Alaska Department of Labor, Wage and Hour Administration. Section 3(e) of the Bill simply restores to the Commissioner discretion to settle those claims with or without liquidated damages. The Commissioner had that discretion prior to <u>McKeown vs. Kinney Shoe Corp.</u>, 280 P.2d 1068 (Alaska 1991). The Commissioner is under no obligation to waive or reduce liquidated damages when collecting such claims on behalf of present or former employees. The Commissioner may accept assignment of claims up to $5,000. A.S. 23.05.230(c).

2. <u>If Section 3(d) is Enacted Into Law, Won't It Become It Easy For Employers to Avoid Payment of Overtime Compensation and Liquidated Damages</u>?

No. The liquidated damages penalty built into A.S. 23.10.110(a) will remain the law of Alaska. Any employer who fails to pay minimum wages or overtime compensation when due will be required to make those payments and, in most cases, liquidated damages, court costs and attorneys' fees too. Only those employers who prove to the satisfaction of the court that they acted reasonably and in the good faith belief the minimum wage or overtime compensation was not due will be eligible to avoid an assessment of liquidated damages. Even then, the court will have

discretion to award partial or full liquidated damages, as the circumstances warrant.

Section 3(d) of the Bill is limited to private claims filed in court, i.e., not those enforced by the Commissioner. The experience of my office in defending cases of this type is that the typical plaintiff is a salaried, mid-level manager or supervisor. Typical overtime claims run into the tens of thousands of dollars. Minimum wage cases are rare in Alaska.

The decision of the Alaska Supreme Court in Bobich v. Stewart, 843 P.2d 1232 (Alaska 1992), is typical of private overtime pay litigation in Alaska today. In that case, the employees, Mr. and Mrs. Stewart, managed the Dimond Mini-Storage facility in Anchorage. The owners paid them on a salaried basis and treated them as exempt employees. The Stewarts convinced a jury they were not exempt employees and were entitled to overtime compensation. The jury awarded the Stewarts some $45,133 in overtime pay for a two-year period, which the court doubled as mandatory liquidated damages pursuant to A.S. 23.10.110(a). The court awarded another $11,672 in prejudgment interest and almost full attorney's fees totaling $52,068. The Stewarts' total recovery exceeded $154,000, which the Supreme Court affirmed on appeal.

Faced with the potential of such losses, we believe reasonable employers will continue to have very strong incentives to abide by the Alaska Wage and Hour Act and to enter into reasonable settlements, where they are permitted to do so.

3. Why is this a problem now? Isn't It Enough To Give The Commissioner Discretion to Settle Wage Claims?

Section 3(e) of the Bill will restore the Commissioner to the authority he had prior to Kinney Shoe to settle wage claims. Section 3(e) is not sufficient by itself, however, because the Commissioner has jurisdiction only to enforce claims up to $5,000. Many larger claims are litigated by the parties in the courts without the Commissioner's involvement. Section 3(e) of the Bill does not address those claims.

The Bill also is necessary because of the recent upswing in Wage and Hour Act litigation in Alaska. If my firm's experience is typical -- and I believe it is -- we presently see more large Wage and Hour Act cases filed each year than we used to see in the entire mid-1980s. These cases have come into vogue with the plaintiff's bar because of potentially large recoveries, mandatory liquidated damages, and the availability of virtually full attorney's fees and court costs. The Kinney Shoe decision exacerbated this situation by declaring private settlements "void."

It seems anomalous for Alaska law to permit employees to enter into private settlements of wrongful discharge and employment discrimination cases, but not Wage and Hour Act cases. The Bill will have the salutary effect of allowing private settlements. And only those employers who can prove to the satisfaction of the court they acted reasonably and in good faith will have any hope of avoiding an assessment of full liquidated damages.

4. How Does Alaska's Liquidated Damages Statute, A.S. 23.10.110(a), Compare With the Laws of Other States?

I have discussed the liquidated damages provision in the Alaska Wage and Hour Act with knowledgeable attorneys and labor relations consultants in several other states. The strong consensus is that Alaska's liquidated damages provision is more stringent than similar statutes in other states.

By way of illustration, each of the other West Coast states has liquidated damages laws more like the Bill than Alaska's present liquidated damages law. Liquidated damages are not mandatory in every case, as they are in Alaska, in these states:

Washington. Washington law allows employees to recover liquidated damages where the employer violates its overtime compensation act "willfully and within intent to deprive the employee of any part of his wages." See RCW 49.52.050(1) & (2). The Supreme Court of Washington has interpreted the willful requirement to mean that nonpayment must be:

> the result of knowing and intentional action and not the result of a bona fide dispute as to the obligation of payment.

Chelan County Deputy Sheriffs' Assn vs. City of Airway Heights, 109 Wn.2d 282, 300, 745 P.2d 1 (1987).

Oregon. In Oregon, an employee may recover liquidated damages for non-payment of overtime compensation as provided under the federal Fair Labor Standards Act (FLSA). A former employee may recover the greater of one month's pay as liquidated damages or the liquidated damages recoverable under the FLSA. ORS 652.150. In either case, the federal good faith and reasonable basis defense is available to the employer as is proposed in section 3(d) of the Bill.

California. California law also permits recovery of liquidated damages in wage and hour act cases. However, Section 1194.2(b) of the California Labor Code is virtually identical to section 3(d) of the Bill. It provides that California courts may

refuse to award liquidated damages or award any amount up to full liquidated damages

> if the employer demonstrates that the act or omission giving rise to the action was in good faith and that the employer had reasonable grounds for believing that the act or omission was not in violation of any provision of the Labor Code.

In short, Alaska presently treats its employers more harshly than its West Coast sister states by making liquidated damages mandatory in every case, regardless of the circumstances. The Bill is a corrective measure which will bring Alaska into the mainstream on the issue of liquidated damages without undermining the strong incentives employers have for compliance with the Alaska Wage and Hour Act.

20397/7[illegible]

SUMMARY ANALYSIS HB 459

This proposed legislation will work a significant change in the wage and hour laws of Alaska. There are four areas of potential impact that should be addressed. They are as follows:

A. Private settlements of wage and hour disputes would be permissible, overruling the Supreme Court's decision in McKeown v. Kinney Shoe Corporation,

B. Liquidated damages would no longer be mandatory in wage and hour cases,

C. Automatic liquidated damages for the commissioner, and

D. The potential effect of the legislation on current litigation.

These issues will be addressed separately.

A. Private settlements of wage and hour disputes would be permissible, overruling the Supreme Court's decision in McKeown v. Kinney Shoe Corporation, 820 P.2d 1068.

It has long been the rule under the federal Fair Labor Standards Act that an employer cannot settle disputes with its employees over wage and hour violations without court or Department of Labor approval. This requirement is imposed because of the very great potential for abuse of the employer's strong bargaining position on this issue with its employees. This is exactly what happened in the Kinney case cited above, where the employer, facing a potential overtime exposure to many of its employees past and present, made individual settlement offers that represented only pennies on the dollar of what the employer's real overtime liability was likely to be. All of the employees who still worked for the company signed the agreement rather than risk the ire of their employer. The employer's offer, of course, put the employees in a very awkward position, as they could not very well assert their rights under the law and still be comfortable about keeping their jobs. Other employees, getting a very brief and biased description of the issue from the employer, and seeing the promise of immediate cash, simply took the employer's offer without a fair opportunity to educate themselves on what the employer actually owed them. When they later learned what they had given up, they discovered that they had made a very one-sided deal.

It was over-reaching of this nature that led to the Supreme Court's decision in the Kinney case, and this remains the law under the Federal Act. The Kinney protection is a very valuable one to

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HB 459 should be revised as follows:

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HB 459 §3(f) should be deleted, as it subverts entirely the protection against overreaching by the employer against the employee. It would be an easy matter for any employer to willfully violate overtime and minimum wage requirements of the law and simply settle those claims with the employees on terms very favorable to the employer if this protection is not retained. This is certainly the most dangerous flaw in HB 459.

B. Liquidated damages would no longer be mandatory in wage and hour cases.

Under current Alaska law, companies who violate Alaska's Wage and Hour Act must pay unpaid wages and an equal amount in liquidated damages. There is no provision in the law as it now stands that allows for any exceptions to the mandatory imposition of liquidated damages. Thus, an employer who makes every effort to comply with the law may still find itself facing a liquidated damages penalty. There is some natural concern for imposing the penalty on an employer who does its best to comply with the law. However, these cases are a very small minority. The more typical scenario involves a large company doing business outside the State of Alaska who decides to enter the market within the state and simply imposes on its Alaska employees the standard corporate method for payment of wages and overtime. These businesses don't bother to check the Alaska Statutes to determine their potential application and simply proceed in the face of Alaska law.

Because most wage and hour violations go unnoticed, the Outside business enjoys an extreme competitive advantage over Alaska businesses who know the law and comply with it. Weakening the law by weakening the liquidated damages provision will substantially diminish the incentives for these out-of-state businesses to comply with Alaska law. This would not be a desirable result and would only further exacerbate the competitive advantage out-of-state companies enjoy who continue to operate in violation of current state law.

All of this, of course, does not address the real problem, which is the business that is aware of the law and takes steps to comply, only to find that a judge somewhere disagrees and imposes the liquidated damages penalty. As currently proposed, HB 459 would allow the employer to escape liquidated damages if it demonstrates that their action was in good faith and based on reasonable grounds. This language will be the inevitable source of further litigation, introducing another element of uncertainty and another point of controversy into wage and hour cases.

Some proponents of HB 459 argue that Alaska is "out of step" with other states in the way they handle liquidated damages questions. Because liquidated damages are not mandatory in some jurisdictions, so the argument goes, they should not be in Alaska.

Mandatory liquidated damages in Alaska are no accident. This state has a long history of protecting its working men and women from abusive employment practices. A stiff penalty for those who violate wage and hour laws with impunity will do more to ensure compliance than an army of state compliance officers. It is a cost-effective way to ensure that employers follow the law. Workers in Alaska, with its many remote work sites, are especially vulnerable to employment practices that demand long hours at low pay. An employer is much more likely to ask too much of its workers in this state than anywhere else. This is a particular problem in Alaska because so many of the employers are based

Outside, having no interest in the state except profits and no stake in the community. It is the working people in the state, who stay here and raise their families here, who deserve the protection current law offers. Any weakening of the law will only work to the advantage of Outside interests and to the prejudice of Alaska residents.

A better approach would be to develop a simple mechanism to protect employers who make an honest effort to comply with the law from liquidated damages. A better solution than that proposed in HB 459 is suggested by the way the Department of Labor currently handles some pay plans. Under AS 23.10.060(15), employers can implement flexible work hour plans if certified by the Department. A similar certification procedure could easily be adopted for employers allowing them to apply to the Department for a written determination of the appropriateness of what the employer proposes. If the commissioner agrees that the employer's action is legal, certification is given. The certification then gives the employer an absolute defense to liquidated damages, if a judge at some point in the future disagrees with the certification given by the Department. Otherwise, the employer acts at its own risk in ignoring the statutory requirements for minimum wages and overtime compensation. Therefore, Section 3 of HB 459 should be rewritten to state as follows:

> AS 23.10.110 is amended by adding a new subsection to read:
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The virtue of this proposed language is that it removes all uncertainty and doubt over whether liquidated damages may be awarded. If the employer has an honest question about whether the employee is entitled to minimum wage or overtime, this can be addressed by the Department on a case-by-case basis and the employer can proceed without fear of having a liquidated damages penalty applied against it.

Such a mechanism would have the advantage of avoiding further costly legal battles between the employer and the employee over whether the employer's conduct was in "good faith" and based upon "reasonable grounds". Those phrases are broad enough and vague enough to create only further legal uncertainties for the parties.

As a practical matter, there are only very few cases where this is a serious concern, as the more common practice is that out-of-state employers simply adopt the pay practice they think is

appropriate and act in accordance therewith. It is a very rare case where the employer takes the time to determine what Alaska law requires, and then acts in accordance with it. The real problem with HB 459 is that it is overbroad, undermining the employee's protections in all cases simply because there have been a few reported instances where the employer has tried to comply with the law but still had to pay liquidated damages.

C. Automatic liquidated damages for the commissioner.

HB 459 would require that employers whose wage and hour violations are prosecuted by the commissioner remain subject to mandatory liquidated damages, apparently on the theory that the commissioner needs more "clout" when dealing with recalcitrant employers. On the other hand, HB 459 would make liquidated damages discretionary for private actions. This raises obvious constitutional problems with equal protection. If all persons are to be treated the same under the law, their remedy should not be different if they pursue their claim through the commissioner or in an independent action. Free access to the courts for redress of wrongs is a fundamental principle that would be inhibited through the creation of such a two-tier structure.

The preference HB 459 gives the commissioner would probably not survive a court challenge and the commissioner would also be deprived of the leverage of mandatory liquidated damages.

As noted above, HB 459 would make liquidated damages discretionary in many instances. The commissioner seeks to except the state from this statutory change. There is no apparent reason why the commissioner should be treated any differently than other litigants. The problems of an employer who seeks to comply with the law are no different when he faces a legal challenge from the commissioner or a private party. Both circumstances should be handled the same.

D. The potential effect of the legislation on current litigation.

HB 459 in its present form has gone through several versions. An early version proposed that it would apply only to work performed after the effective date of the legislation. Now it is designed to reach any litigation or agreements that have not yet been concluded as of the effective date of the Act. This is certain to generate a lot of controversy over the legality of applying laws retroactively to work already performed. There is no legitimate justification for taking this position, except perhaps to bail out employers who are attempting to save through legislation what they are likely to lose in pending litigation. It is simply poor policy to resolve court battles through legislation. Making any enactment that is finally adopted by the legislature applicable only to work performed after that date will not alter

the expectations of the parties, which they are entitled to rely upon at the time they perform services under Alaska's wage and hour law. This legislation should be revised to apply only to work performed after its effective date, avoiding another constitutional challenge to Alaska's wage and hour laws.

nation ignores this distinction between attorney's fees and compensation, in effect creating a new definition of "compensation." Such a construction effectively renders meaningless the statute's distinction between "compensation" and attorney's fees, in violation of the rule that a "statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Libby v. City of Dillingham*, 612 P.2d 33, 43 (Alaska 1980) (Rabinowitz, J., concurring), citing 2A Sands, *Sutherland Statutory Construction*, § 46.06, at 63 (4th ed. 1973).

The purpose of AS 23.30.155(j) is to prevent a claimant from retaining funds he is not entitled to, while providing a reimbursement mechanism which softens the financial burden on claimants who have been overpaid. This framework is inapplicable to cases involving an employer's payment of attorney's fees to the employee's attorney during the pendency of a workers' compensation appeal which is ultimately resolved in favor of the employer. The Act's generous legal rate schedule was designed to account for the contingent nature of recovery in workers' compensation cases.[1] The majority's desire to compensate Croft for his efforts in this case is thus misplaced; Croft is overcompensated for the workers' compensation cases which he wins.

If the legislature *had* intended to provide a statutory mechanism for repaying the overpayment of attorney's fees, I am puzzled why it would have chosen the gradual repayment mechanism provided by AS 23.30.155(j). Unlike the injured claimants whom the repayment mechanism is designed to protect, attorneys are not often in such dire financial circumstances that policy dictates gradual repayment of overpayments.

Instead of deviating from the mandates of the Act's language and purpose, I would hold that the overpayments received by an attorney in a workers' compensation case are not "compensation" within the meaning of the Act, and therefore that AS 23.30.155(j) does not limit the recovery by an employer or insurance carrier of overpaid attorney's fees. If this law is to be changed, I believe it is the province of the legislature to do so.

1. *Wien Air Alaska v. Arant*, 592 P.2d 352, 366 (Alaska 1979) ("high awards for successful claims may be necessary for an adequate overall rate of compensation, when counsel's work on unsuccessful claims is considered").

Joseph McKFOWN, Kevin Anderson, Terrance Smith and Robert Boyer, Petitioners,

v.

KINNEY SHOE CORPORATION, d/b/a Kinney Shoes, Footlocker and Lady Footlocker, Respondents.

No. S-4024.

Supreme Court of Alaska.

Nov. 15, 1991.

In class action suit for liquidated damages under State Wage and Hour Act, review was sought of order of the Superior Court, Third Judicial District, Anchorage, Brian C. Shortell, J., refusing to declare employer's private settlement agreements with putative class members void. The Supreme Court, Burke, J., held that: (1) private settlements were void on grounds of public policy, and (2) employees who received settlement payments did not have to tender them back before joining class action.

Order vacated.

1. Labor Relations ⇐1298

Employer's private settlement of claims for unpaid overtime and liquidated damages under State Wage and Hour Act was injurious to interests of public and

thus void on grounds of public policy. AS 23.10.050 et seq.

2. Labor Relations ⇐1298

Employer's private settlement of claims for unpaid overtime and liquidated damages under Fair Labor Standards Act would be void. Fair Labor Standards Act of 1938, §§ 1–19, 29 U.S.C.A. §§ 201–219.

3. Labor Relations ⇐1298

Employees who received payments from employer in purported settlement of claims for liquidated damages under State Wage and Hour Act did not have to tender back those payments before they could join class action; settlements had been found void ab initio as violative of public policy and were not merely being rescinded. AS 23.10.050 et seq.

4. Contracts ⇐258

Rescission is equitable remedy that abrogates, annuls, or unmakes contract entered into through mistake, fraud, or duress.

5. Contracts ⇐98

Void agreement never attains legal effect as contract.

David E. Grashin, David Grashin & Assoc., Anchorage, John E. Casperson, Faulkner, Banfield, Doogan & Holmes, Seattle, for petitioners.

William F. Mede, Scott J. Nordstrand, Owens & Turner, Anchorage, for respondents.

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

OPINION

BURKE, Justice.

This case requires us to decide whether an employer and an employee may privately settle claims for liquidated damages arising under the Alaska Wage and Hour Act. We conclude that they may not.

I

Four individual plaintiffs brought class action wage and hour claims against Kinney Shoe Corporation. The claims were brought on behalf of six classes of past and present Kinney employees. All of the claims alleged violations of the Alaska Wage and Hour Act (AWHA), AS 23.10.050–.150; four of the classes represented were past and present employees to whom Kinney allegedly had not paid overtime wages required by the AWHA.

On March 1, 1990, the superior court set oral argument on class certification for April 25, 1990. On April 4, 1990, Kinney sent individual settlement offers to putative class members. The offers proposed monetary settlements tailored to compensate each recipient for his or her specific unpaid wages. In return, Kinney demanded waiver of "any rights [the recipient] might have against Kinney ... for all of the claims which were or could have been asserted in the class action lawsuit." Kinney made clear in its settlement offers that the class action lawsuit sought "recovery of, among other things, unpaid overtime, bonuses and certain deductions from paychecks." Some of the solicited employees or ex-employees chose to accept Kinney's offer.

One day before oral argument on certification, petitioners moved to have the superior court declare void the private settlements that some putative class members had entered into with Kinney. The superior court decided to review the private settlement issue in detail before ruling on class certification. Further briefing and oral argument followed. Finally, on June 18, 1990, the superior court both certified the classes and denied petitioners' motion to declare void Kinney's private settlement agreements with putative class members. This court subsequently granted plaintiffs' petition for review on the question whether the superior court erred by not declaring the settlement agreements void.

II

[1] The class action lawsuit underlying the present appellate review involves a va-

riety of statutory claims. Kinney's settlement offers attempted to encompass all of those asserted claims. Consequently, petitioners initially asserted multiple challenges to the validity of the settlements. Both parties, however, focus here upon a single question. We likewise limit the scope of our review to the same narrow issue: whether an employer's private settlement of a claim for unpaid overtime and liquidated damages under the AWHA is injurious to interests of the public and, therefore, void on the grounds of public policy. 14 S. Williston, *A Treatise on the Law of Contracts* § 1629, at 8 (W. Jeager, 3d ed. 1972).

The stated policy behind the AWHA is to protect "the health, efficiency, and general well-being of workers." AS 23.10.050(2). To that end, an employer who fails to pay overtime as required by AS 23.10.060 faces several possible civil and criminal penalties.[1] The civil penalty most pertinent to this case is the provision in the AWHA for liquidated damages in the amount of actual unpaid overtime and "an additional equal amount." AS 23.10.110(a). "Such damages in the act are a type of punitive damages, not, as in other contexts, a substitute for compensatory damages." *Gore v. Schlumberger Ltd.*, 703 P.2d 1165, 1166 (Alaska 1985).

As our opinion in *Gore* indicated, the liquidated damages provision of AWHA is intended to further the policy behind the AWHA by punishing the violating employer. *See id.* Accordingly, when an employer violation is established, "liquidated damages ... must be granted as a matter of law." *Alaska Int'l Indus., Inc. v. Musarra*, 602 P.2d 1240, 1249 (Alaska 1979); *see also* AS 23.10.110(a) (a violating employer "*is liable*" for liquidated damages) (emphasis added). One inherent characteristic of this punitive scheme, of course, is that an employer's violation often must be established by private action. If the employer entices the private actor—the unpaid employee—to settle a legitimate claim, a violating employer may then escape without an adjudication of liability and without punitive sanction. An interpretation of the AWHA that would permit such escape countermands the very purpose of the liquidated damages provision. If the liquidated damages available under the AWHA were meant mainly to compensate the wronged employee, one might reasonably argue that compromise or settlement by the wronged employee might be appropriate. Because the liquidated damages are not compensatory, an employee's capacity to compromise or settle for a lesser amount should be extremely restricted. *Accord* 3 N. Singer, *Sutherland Statutory Construction* § 59.05 (C. Sands 4th ed. 1978) (punitive laws pertaining to public health and safety must be given "substantial effect"—especially "where penalties are recoverable in civil actions prosecuted by private individuals").

[2] We note that further support for prohibiting employee settlement of AWHA claims without judicial approval appears in the federal courts' interpretation of the Fair Labor Standards Act (FLSA).[2] The

1. As we previously have explained:

> The [AWHA] prescribes with comprehensive specificity the remedies available for its violation. An employee may recover his unpaid minimum wages or unpaid overtime compensation, and an identical sum as liquidated damages. Reasonable attorney's fees are afforded. The Commissioner of Labor may obtain injunctive relief and criminal penalties may be imposed of not less than $100 nor more than $2,000, or imprisonment for not less than ten nor more than ninety days, or both. The comprehensiveness of this remedial system implies that the legislature did not intend to allow further unenumerated remedies.

Gore v. Schlumberger Ltd., 703 P.2d 1165, 1165–66 (Alaska 1985) (footnotes omitted).

2. We have recognized that the AWHA is based on the Federal Labor Standards Act of 1938 (codified as amended at 29 U.S.C. §§ 201–219 (1988)). *E.g., Webster v. Bechtel, Inc.*, 621 P.2d 890, 895 (Alaska 1980). The two Acts are not identical, however. *See id.* (AWHA imposes on employers a *higher* standard of overtime pay than does federal law). And, of course, federal court interpretations of the FLSA are not binding on Alaska court interpretations of the AWHA. *See Dresser Indus., Inc. v. Alaska Dep't of Labor*, 633 P.2d 998, 1002 (Alaska 1981), *cert. denied*, 455 U.S. 1019, 102 S.Ct. 1716, 72 L.Ed.2d 137 (1982). However, we have found the federal court interpretations of the FLSA helpful in interpreting consistent aspects of the AWHA. *See, e.g., Gore*, 703 P.2d at 1166.

traditional federal rule prohibits compromise or release of liquidated damages liability under the FLSA on the theory that such agreements "will tend to nullify the deterrent effect which Congress plainly intended [the liquidated damages provision] should have." *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 710, 65 S.Ct. 895, 903, 89 L.Ed. 1296 (1945). "To allow contracts for waiver of liquidated damages approximates situations where courts have uniformly held that contracts tending to encourage violation of laws are void as contrary to public policy." *Id.* Having reviewed recent federal precedent on this point, we believe that under federal law the settlements in the present case would be void, for much the same reason that we find them void under Alaska law. *See generally Lynn's Food Stores, Inc. v. United States*, 679 F.2d 1350, 1352–54 (11th Cir. 1982).[3]

In sum, permitting private settlement of liquidated damages claims under the AWHA is contrary to the strong policy behind the AWHA and its liquidated damages provisions. We thus conclude that the superior court erred by not declaring void the settlements in this case, insofar as the settlements purported to compromise AWHA claims for unpaid overtime.

III

[3] Finally, Kinney argues that if the settlements in this case are found to be void, then the employees who have received settlement payments from Kinney must tender back those payments before they may join the class action lawsuit here. Kinney's argument principally relies upon our decision in *Thorstenson v. Arco Alaska, Inc.*, 780 P.2d 371, 375 (Alaska 1989). There we wrote that "[t]ender of the benefits received under an agreement is ordinarily a prerequisite to an action at law for rescission of the agreement." *Id.*

Petitioners' argue in response that *Thorstenson* does not control here. Petitioners' note that they moved the superior court not for rescission of the settlement agreements, but for an order declaring the agreements void *ab initio* as violative of public policy. Thus, according to petitioners, the tender-back requirement recognized in *Thorstenson* has no application on these facts. We agree with petitioners.

[4, 5] An action to have an agreement declared void as violative of a statute or of public policy is an entirely different action than one for rescission. Rescission is an equitable remedy that abrogates, annuls, or unmakes a contract entered into through mistake, fraud, or duress. *Dreiling v. Home State Life Ins. Co.*, 213 Kan. 137, 515 P.2d 757, 767–68 (1973). A void agreement, on the other hand, never attains legal effect as a contract. 1 A. Corbin, *Corbin on Contracts* § 7 (1963); *see also Currington v. Johnson*, 685 P.2d 73, 78 (Alaska 1984). As a result, the tender-back requirement that may arise as a prerequisite to an action for rescission has no relevance in an action to declare an agreement void. Thus, assuming they are otherwise qualified, the potential class members who entered into settlement agreements with Kinney now may join the class action lawsuit without first tendering back any settlement money received.[4]

The superior court order denying petitioners' motion to declare void Kinney's settlement agreements with potential class members is VACATED. The superior court is instructed to enter an order declaring all settlements in this case void, insofar as they purport to compromise claims for unpaid overtime under the Alaska Wage and Hour Act.

3. We recognize that the FLSA permits nonprivate settlements, supervised by the Secretary of Labor or the district court. *See* 29 U.S.C. § 216 (1988); *see also Lynn's Food Stores*, 679 F.2d at 1353–54. We have discovered no federal decisions, however, that have adopted any exceptions to the prohibition against private settlements of an FLSA claim. *See, e.g., Lynn's Food Stores*, 679 F.2d at 1353 n. 9.

4. Of course, Kinney may offset damages ultimately awarded to particular employees by any amount that it has already paid to those employees in its attempt to settle their claims.

SUMMARY ANALYSIS HB 459

This proposed legislation will work a significant change in the wage and hour laws of Alaska. There are four areas of potential impact that should be addressed. They are as follows:

A. Private settlements of wage and hour disputes would be permissible, overruling the Supreme Court's decision in McKeown v. Kinney Shoe Corporation,

B. Liquidated damages would no longer be mandatory in wage and hour cases,

C. Automatic liquidated damages for the commissioner, and

D. The potential effect of the legislation on current litigation.

These issues will be addressed separately.

A. Private settlements of wage and hour disputes would be permissible, overruling the Supreme Court's decision in McKeown v. Kinney Shoe Corporation, 820 P.2d 1068.

It has long been the rule under the federal Fair Labor Standards Act that an employer cannot settle disputes with its employees over wage and hour violations without court or Department of Labor approval. This requirement is imposed because of the very great potential for abuse of the employer's strong bargaining position on this issue with its employees. This is exactly what happened in the Kinney case cited above, where the employer, facing a potential overtime exposure to many of its employees past and present, made individual settlement offers that represented only pennies on the dollar of what the employer's real overtime liability was likely to be. All of the employees who still worked for the company signed the agreement rather than risk the ire of their employer. The employer's offer, of course, put the employees in a very awkward position, as they could not very well assert their rights under the law and still be comfortable about keeping their jobs. Other employees, getting a very brief and biased description of the issue from the employer, and seeing the promise of immediate cash, simply took the employer's offer without a fair opportunity to educate themselves on what the employer actually owed them. When they later learned what they had given up, they discovered that they had made a very one-sided deal.

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employees who find themselves confronted with an employer who wishes to settle its overtime or minimum wage exposure for a pittance. An employee is in a very difficult position when faced with such an offer, and the Kinney case represents the best response to such undue pressure. As the law now stands, settlements must be reviewed for fairness before approval, making sure the worker is not being taken advantage of. This policy already appears in AS 23.05.180(b), which prohibits an employer from using its leverage to settle wage disputes on terms that are unfavorable to the employee.

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Outside, having no interest in the state except profits and no stake in the community. It is the working people in the state, who stay here and raise their families here, who deserve the protection current law offers. Any weakening of the law will only work to the advantage of Outside interests and to the prejudice of Alaska residents.

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AS 23.10.110 is amended by adding a new subsection to read:

(d) in an action under (a) of this section to recover unpaid minimum wages, unpaid overtime compensation, or liquidated damages, if the employee and the employer have signed a written agreement and the Department has issued a certificate approving the agreement as not in violation of AS 23.10.050-23.150, the employer is not subject to an award of liquidated damages under (a) of this section.

The virtue of this proposed language is that it removes all uncertainty and doubt over whether liquidated damages may be awarded. If the employer has an honest question about whether the employee is entitled to minimum wage or overtime, this can be addressed by the Department on a case-by-case basis and the employer can proceed without fear of having a liquidated damages penalty applied against it.

Such a mechanism would have the advantage of avoiding further costly legal battles between the employer and the employee over whether the employer's conduct was in "good faith" and based upon "reasonable grounds". Those phrases are broad enough and vague enough to create only further legal uncertainties for the parties.

As a practical matter, there are only very few cases where this is a serious concern, as the more common practice is that out-of-state employers simply adopt the pay practice they think is

appropriate and act in accordance therewith. It is a very rare case where the employer takes the time to determine what Alaska law requires, and then acts in accordance with it. The real problem with HB 459 is that it is overbroad, undermining the employee's protections in all cases simply because there have been a few reported instances where the employer has tried to comply with the law but still had to pay liquidated damages.

C. Automatic liquidated damages for the commissioner.

HB 459 would require that employers whose wage and hour violations are prosecuted by the commissioner remain subject to mandatory liquidated damages, apparently on the theory that the commissioner needs more "clout" when dealing with recalcitrant employers. On the other hand, HB 459 would make liquidated damages discretionary for private actions. This raises obvious constitutional problems with equal protection. If all persons are to be treated the same under the law, their remedy should not be different if they pursue their claim through the commissioner or in an independent action. Free access to the courts for redress of wrongs is a fundamental principle that would be inhibited through the creation of such a two-tier structure.

The preference HB 459 gives the commissioner would probably not survive a court challenge and the commissioner would also be deprived of the leverage of mandatory liquidated damages.

As noted above, HB 459 would make liquidated damages discretionary in many instances. The commissioner seeks to except the state from this statutory change. There is no apparent reason why the commissioner should be treated any differently than other litigants. The problems of an employer who seeks to comply with the law are no different when he faces a legal challenge from the commissioner or a private party. Both circumstances should be handled the same.

D. The potential effect of the legislation on current litigation.

HB 459 in its present form has gone through several versions. An early version proposed that it would apply only to work performed after the effective date of the legislation. Now it is designed to reach any litigation or agreements that have not yet been concluded as of the effective date of the Act. This is certain to generate a lot of controversy over the legality of applying laws retroactively to work already performed. There is no legitimate justification for taking this position, except perhaps to bail out employers who are attempting to save through legislation what they are likely to lose in pending litigation. It is simply poor policy to resolve court battles through legislation. Making any enactment that is finally adopted by the legislature applicable only to work performed after that date will not alter

the expectations of the parties, which they are entitled to rely upon at the time they perform services under Alaska's wage and hour law. This legislation should be revised to apply only to work performed after its effective date, avoiding another constitutional challenge to Alaska's wage and hour laws.

FISCAL NOTE

No. 1

STATE OF ALASKA
1994 LEGISLATIVE SESSION

BILL NO :

Bill Version: HB 459
(H) Publish Date: 2/23/94

Revision Date:
Title: Damages and attorney fees for unpaid wages
Sponsor: House Labor & Commerce
Requestor: House Labor & Commerce

Department Affected: Labor
BRU: Labor Standards & Safety
Component: Wage & Hour

COMPONENT SERIAL NO. 345

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 95	FY 96	FY 97	FY 98	FY 99	FY 00
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 (FY94) impact: $ None

ANALYSIS: (Attach a separate page if necessary)

Prepared by: Donald G. Study, CSP, Director
Phone : 465-6003
Division: Labor Standards & Safety
Date : 2/22/94

Approved by Commissioner: Charles W. Mahler
Agency: Department of Labor
Date: 2/22/94

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DEPT. OF LABOR F.N.

DIVISION OF LEGAL SERVICES

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Juneau, Alaska 99801-2105

MEMORANDUM February 18, 1994

SUBJECT: Sectional Summary of HB 459. (Liquidated damages and attorney fees for minimum wage and overtime compensation claims)

TO: Representative Eldon Mulder

FROM: Teresa B. Cramer
Legislative Counsel

You have requested a sectional summary of the above-described bill. As a preliminary matter, note that a sectional summary of a bill should not be considered an authoritative interpretation of the bill and the bill itself is the best statement of its contents.

Section 1 applies the exceptions enacted in section 3 of the bill to the general rule established in the statute that employers who violate the overtime wage or minimum wage requirements are liable for liquidated damages in the amount of the unpaid minimum wage or overtime compensation.

Sec. 2 permits the court to award attorney fees to the prevailing party, as determined by court rule, rather than only providing for attorney fees for a prevailing plaintiff.

Sec. 3 adds new provisions to permit the court to decline to award liquidated damages or to award an amount less than the amount required under AS 23.10.-110(a), which is amended by sec. 1 of this bill. The court may do so if the employer shows to the satisfaction of the court that the employer acted in good faith and that the employer had reasonable grounds for believing that it was not violating the minimum wage or overtime requirements. This waiver does not apply to an action brought by the Commissioner of Labor.

Under subsection (e), the commissioner is permitted to supervise the payment of unpaid minimum wage or overtime claims including settlements. Under Sec. 4(a), this subsection applies to agreements entered into on or after the effective date of the Act.

SECTIONAL SUMMARY

Subsection (f) permits an employee to waive the right to liquidated damages in a written settlement agreement with the employer. Under Sec. 4(b), this applies to written agreements entered into on or after the effective date of the Act.

Sec. 4 addresses how to apply the provisions of the Act. As noted in the discussion above, Sec. 4(a) and (b) apply the settlement provisions to agreements entered into on or after the date the Act takes effect. Under Sec. 4(c), to the extent constitutionally permitted, the rest of the Act applies to actions in which a final judgement has not been entered on the date the Act takes effect.

TBC:gc
94-137.glc

BILL NO: House Bill No. 459 **DATE:** February 21, 1994

TITLE: Damages And Atty Fees For Unpaid Wages **CONTACT:** Arbe Williams
465-2700

House Bill No. 459 would substantially alter the punitive penalties that currently exist for violations of the Alaska Wage and Hour Act. Section 3 would provide for a "good faith" exception to penalties except where actions are brought by the Commissioner of Labor. In addition, the commissioner and private parties would be authorized to negotiate a settlement that excludes part or all of the liquidated damages. Section 4 would apply the amendments to the Act to cases currently in litigation in the courts.

The interest to address liquidated damages is the result of a recent Alaska Supreme Court case involving Kinney Shoes wherein the Court found that individual settlement agreements that did not include liquidated damages were void. This has resulted, for all parties to such disputes, including the Department of Labor, in the mandatory inclusion of liquidated damages in any settlements reached. Prior to the Kinney Shoes decision parties could, and did, waive some or all liquidated damages if convinced that it was appropriate and in the best interest of the settlement. If a claim could not be settled administratively and court action was required, liquidated damages were automatically awarded if the case came to trial and the plaintiff prevailed.

The liquidated damage penalty created in AS 23.10.110 has been determined by the courts to be a punitive penalty designed to deter employers from violating the minimum wage and overtime obligations imposed by state law. This bill would eliminate automatic liquidated damages. The bill attempts to provide an exception for those cases brought by the Department of Labor but the department is advised that the courts would not look at those cases differently. A "good faith" effort does not require that the employer act to inform oneself of the law. Without an effective and guaranteed deterrent, employers will chance getting caught in violation of the laws because the odds would be good that the worst that will happen is that they will be forced to pay the wages they were liable to pay in the first place.

Before the Kinney decision, the department, and private parties, had the ability to negotiate settlements that included some portion of the liquidated damages using the certainty that a court would award 100% liquidated damages as leverage for settlement. Thus, settlement did not rely on an overburdened court system for relief in each and every case. Less than 1% of the department's claims ended up in court and fewer actually came to trial. In addition, there were no complaints with the process until the Kinney Shoe case removed the parties' ability to settle for less than 100% of damages.

The Department of Labor supports encouraging the settlement of wage claims outside the court system and would propose to amend House Bill No. 459 to define "good faith" to include affirmative action taken by the employer to comply with state law. This amendment would

POSITION PAPER/Department of Labor

POSITION PAPER

encourage compliance with the Alaska Wage and Hour Act, would provide an incentive to settle wage claims, and would reduce the burden on the courts to enforce the state's laws.

In addition, the Department would propose that the inclusion of Section 4 be reconsidered. This section affects those claimants whose cases are currently before the courts but have not been decided; those employees would be treated differently than those who filed during the same period but whose cases have been decided. All employees should be assured that they are provided equal protection under the law.

APPROVED:

Charles W. Mahlen, Commissioner

DATE: 2/22/94

POSITION PAPER/Department of Labor

DAVIS WRIGHT TREMAINE

Law Offices

Suite 1450 · 550 West 7th Avenue · Anchorage, Alaska 99501
(907) 257-5300

FROM: Barry Grover, Davis Wright Tremaine

DATE: February 2, 1994

RE: Analysis of proposed House Bill relating to liquidated damages and attorney fees for minimum wage and overtime compensation claims

This bill corrects two serious shortcomings with respect to the liquidated damages provision of the Alaska Wage & Hour Act (AWHA), AS 23.10.110(a):

1. It restores to the Commissioner of the Alaska Department of Labor the authority to settle minimum wage and overtime claims without assessing liquidated damages, and it authorizes settlements outside court; and

2. It grants the courts discretion in private AWHA litigation to award partial or no liquidated damages if the employer proves he acted in good faith and reasonably.

Neither action has been legally permissible since the Alaska Supreme Court's decision in McKeown v. Kinney Shoe Corp., 820 P.2d 1068 (Alaska 1991).

The policy underlying AWHA is to require employers who fail to pay their employees minimum wages or overtime compensation the unpaid minimum wages or overtime compensation which are due, and an equal amount as liquidated damages. This policy is drawn from the federal Fair Labor Standards Act (FLSA) which contains similar liquidated damages provisions.

Unlike the FLSA, however, AS 23.10.110(a) has been interpreted by the Alaska Supreme Court as mandating payment of liquidated damages in every case, regardless of whether the employer acted reasonably and in good faith. The FLSA allows the court to waive liquidated damages in whole or in part if the employer makes that showing. Moreover, prior to Kinney Shoe, the Commissioner felt he had authority in appropriate cases to settle claims without requiring payment of liquidated damages. Since that decision, the Commissioner has been required to recover liquidated damages in every case.

This bill does not remove the liquidated damages provision in AWHA. Rather, it restores the Commissioner's pre-Kinney Shoe settlement authority, and it grants the courts power to waive

2-2-94 DAVIS WRIGHT TREMAINE (DWT)

liquidated damages in cases where federal law allows that discretion.

The following analysis of Sections 3 and 4 of the bill summarizes how this bill corrects AWHA:

Subsection 3(d). This provision incorporates the FLSA standard under which a court may decline to award liquidated damages where the employer proves it acted reasonably and in good faith. See 29 U.S. Code § 260. Subsection (d) applies only to private AWHA litigation. It does not affect the Commissioner's enforcement and settlement powers.

For example, an employer might incorrectly believe an employee is exempt from overtime compensation because of advice from the Department of Labor given under a good faith misunderstanding of certain facts. After trial, the court would require the employer to pay the overtime compensation, but could decide to award partial or no liquidated damages depending on circumstances of the case. It will be the employer's burden to persuade the court not to award liquidated damages.

Subsection 3(e). This provision was requested by the Commissioner. It likewise is drawn from the FLSA, 29 U.S.Code § 216, and is intended to restore the Commissioner's pre-Kinney Shoe authority to settle AWHA cases without requiring payment of liquidated damages. If the Commissioner finds it necessary to sue the employer in court and prevails at trial, an award of full liquidated damages is required under AS 23.10.110(a). Employers thus will have a powerful inducement to accept reasonable settlement proposals advanced by the Commissioner.

Subsection 3(f). This provision allows AWHA settlements made outside of court which expressly waive liquidated damages to be respected judicially. The Kinney Shoe court held that private settlements are void. The court's decision has had the effect, albeit perhaps unintended, of increasing resort to litigation. There is language in the decision which strongly suggests that only those settlements approved by a court are valid. It is poor public policy to encourage litigation and to discourage private settlements of claims.

Section 4. This effective date provision distinguishes between private AWHA litigation and enforcement of AWHA by the Commissioner. Restoration of the Commissioner's settlement authority (Subsection 3(e)) and authority for private AWHA settlements (Subsection 3(f)) are tied to the effective date of the Act. The good faith and reasonable grounds defense to liquidated damages will become available in pending private court proceedings which have not gone to final judgment prior to the effective date of the Act, and to future actions.

DAVIS WRIGHT TREMAINE
LAW OFFICES
SUITE 1450 · 550 WEST 7TH AVENUE · ANCHORAGE, ALASKA 99501
(907) 257-5300

MEMORANDUM

TO: Alaskan Employers

FROM: Parry Grover

DATE: February 18, 1994

RE: Analysis of House Bill 459's "Good Faith and Reasonable Grounds" Exception to Liquidated Damages

Questions have been raised regarding what employers must prove to avoid assessment of mandatory liquidated damages under the "good faith and reasonable grounds" exception incorporated in Section 3(d) of H.B. 459.

The questions can be answered by reference to existing federal regulations adopted under the Fair Labor Standards Act (FLSA) and the Portal-to-Portal Act, and federal court decisions which have ruled upon the availability of that defense in a wide variety of fact situations.

1. If H.B. 459 is Enacted into Law, Will an Employer Be Able to Prove it Acted Reasonably and in Good Faith by Showing the Employer Was Ignorant of the Requirements of the Alaska Wage & Hour Act?

No. Ignorance of the law is no defense. Federal court decisions have held that ignorance of the requirements of the FLSA, the Portal-to-Portal Act and the Equal Pay Act does not constitute good faith or reasonable grounds. See Marshall v. Brunner, 668 F.2d 748 (3rd Cir. 1982); Crenshaw v. Quarles Drilling Corp., 798 F.2d 1345 (10th Cir. 1986). For example, the federal appellate court in Barcellona v. Tiffany English Pub. Inc., 597 F.2d 464, 469 (5th Cir. 1979), held:

> [G]ood faith requires some duty to investigate potential liability under the FLSA. . . . Even inexperienced businessmen cannot claim good faith when they blindly operate a business without making any investigation as to their responsibilities under the labor laws. Apathetic ignorance is never the basis of a reasonable belief.

2-18-94
D.W.T. MEMO

2. What Must an Employer Prove to Avoid Assessment of Liquidated Damages Under the Good Faith and Reasonable Grounds Exception?

Reported federal decisions show clearly that the good faith and reasonable grounds exception is not easy to satisfy. The employer has the burden of proving both that it acted in good faith (a subjective standard), and that it had reasonable grounds for believing its actions were in compliance with the law (an objective standard). If the employer fails to prove either element, the exception to mandatory liquidated damages is not available. Mireles v. Frio Foods, Inc., 899 F.2d 1407 (5th Cir. 1990); Majchrzak v. Chrysler Credit Corp., 537 F. Supp. 33 (D. Mich. 1981).

Federal regulations incorporate these dual requirements. 29 CFR § 790.22(b) restates both standards and explains:

> If these [two] conditions are met by the employer against whom suit is brought, the court is permitted, but not required, in its sound discretion to reduce or eliminate the liquidated damages which would otherwise be required in any judgment against the employer. . . . If, however, the employer does not show to the satisfaction of the court that he has met the two conditions . . ., the court is given no discretion by the statute, and it continues to be the duty of the court to award liquidated damages.

At a minimum, the dual standards require the employer to prove the honest intention to ascertain and follow the dictates of the Act. Hultgren v. County of Lancaster, Nebraska, 913 F.2d 498 (8th Cir. 1990). Thus good faith can be shown where the employer seeks out publications and opinion letters in an effort to determine whether its pay practice is lawful, Hultgren, 753 F. Supp. 809; or where it seeks the written opinion of the Department of Labor, Clay v. City of Winona, 753 F. Supp. 624.

But even if the employer has an honest, good faith belief that it acted in compliance with the law, the liquidated damages exemption will be denied the employer if its actions appear unreasonable to the court. For example, if the employer obtains the opinion of the Department of Labor, but then fails to follow the Department's recommendations, liquidated damages will be assessed. SEIU Local 102 v. County of San Diego, 784 F. Supp. 1503 (S.D. Cal. 1992). Or where the employer ignores disclaimers in Department of Labor guidelines, the exception will be denied. Renfro v. City of Emporia, Kansas, 732 F. Supp. 1116 (D. Kan. 1990).

In short, the employer must show he attempted to determine what the law requires and then took the additional, critical step of attempting to comply with the law in a reasonable manner.

3. Should Alaska Attempt to Define the "Good Faith" and "Reasonable Grounds" Standards in the Statute?

No, that is not necessary and might very well confuse rather than clarify. Section 3(d) incorporates the same "good faith" and "reasonable grounds" standards used throughout similar federal laws such as the FLSA, the Portal-to-Portal Act, and the Equal Pay Act. The federal regulations and court decisions provide an ample body of precedents regarding the proper interpretation of these terms in many different fact situations. See 29 U.S.C.A. § 260 and annotated court decisions reported therein.

The AWHA is based substantially on the FLSA. Indeed, the AWHA encourages the Alaska Commissioner of Labor to adopt "regulations and interpretations that are made by the administrator of the Wage and Hour Division of the federal Department of Labor . . .." AS 23.10.095. The Commissioner and Alaska courts should look to those federal regulations and decisions for guidance.

Perhaps most importantly, were Alaska to attempt to statutorily define these standards and do so in words any different than those used in the federal regulations, that almost certainly would lead to increased litigation. Attorneys would argue the Legislature must have intended different standards to apply in Alaska. It is no accident that Civil Rule 82 (regarding prevailing party attorneys' fees), which is unique to Alaska, is the single most often litigated court rule in this state.

There is no sound policy reason for Alaska to attempt to redefine terms which have been in use for many years in virtually identical federal administrative and court proceedings, and whose meanings are well understood.

OUR LADY OF COMPASSION CARE CENTER
4900 EAGLE STREET
ANCHORAGE, ALASKA 99503-7446
PHONE: (907) 562-2281

SISTERS OF PROVIDENCE
SERVING IN THE WEST SINCE 1856

February 16, 1994

Members of The State House Labor and Commerce Committee:
Reps. Bill Hudson, Chairman
Joe Green, vice Chairman
Eldon Mulder
Brian Porter
Bill Williams
Joe Sitton
Jerry Mackie

I wanted to let you know that Our Lady of Compassion Care Center wholeheartedly supports the passage of **HB 459**. This legislation brings much needed reform to Alaska's wage and hour statute by once again allowing for negotiated settlements and allowing the State Department of Labor (DOL) and the Alaska Courts the flexibility to mitigate what are now mandatory liquidated damages provided the employer can prove his or her error was made in "good faith". The current law, as interpreted by the Alaska Supreme Court in its "Kenny Shoe" decision, strips the DOL of its previous flexibility with regard to settlements and liquidated damages, voids private settlements, and creates a "double or nothing" situation whereby the only options open to the employer are:

1. paying the costs of an outright victory in court, or
2. paying double whatever the claim is regardless of the circumstances.

The bill will not make it easy for employers to avoid paying overtime claims or liquidated damages. It will simply provide that in cases where employers can demonstrate they have made "honest mistakes" the Department or the Courts may take this into consideration when deciding whether and how much liquidated damages are awarded. The Fair Labor Standards Act, upon which the Alaska statute is based, provides the flexibility in federal law that **HB 459** seeks to allow in state law. In addition, the states of California, Oregon, and Washington already have very similar provision on their books. I can think of no reason Alaska employers should be placed under a more burdensome standard than the thousands of businesses on the rest of the Pacific Coast. Please give **HB 459** your support and move it out of the Labor and Commerce Committee as soon as possible. I look forward to working you to achieve final passage of this critically important legislation.

Sincerely,

Leissa A. Wright, Director Human Resources

HB 474

WALTER J. HICKEL, GOVERNOR

DEPT. OF NATURAL RESOURCES

DIVISION OF OIL AND GAS

P.O. BOX 107034
ANCHORAGE, ALASKA 99510-7034
PHONE: (907) 762-2553

(907)762-2547

April 21, 1994

The Honorable Al Vezey
Alaska State Legislature
Room 102
State Capitol
Juneau, Alaska 99801-1182

Dear Representative Vezey:

As you will recall, HB 474 was introduced earlier this session following a series of adverse court decisions concerning oil and gas lease sales and offshore prospecting permits. A summary of the lawsuits which led to the drafting of HB 474/SB 308 is enclosed. The decisions in those lawsuits confirmed the need to amend the Title 38 Best Interest Finding provisions and the Title 46 Alaska Coastal Management Program requirements. In response, these bills were drafted to clarify the legislature's intent regarding the procedures to be followed in preparing for resources disposals, as well as permitting projects in Alaska's Coastal Zone. It is critical that the legislature act this session to ensure the state's continued ability to conduct its oil and gas leasing and other disposal programs.

Earlier today, the Senate passed its amended counterpart of HB 474, CSSB 308 (Fin). It is my understanding that CSSB 308 (Fin) is being referred to the House Resources Committee where hearings are expected to be held next week. With limited time remaining in the session, I wanted to be sure that you are aware of the recent amendments to this legislation, and how these amendments have broadened public acceptance and support for this bill.

To that end, I have enclosed several documents which address the specific amendments made to SB 308 between the time the bill moved into the Senate Finance Committee and its passage by the Senate. These documents include April 9 and 12, 1994 memoranda from me to Senator Pearce describing amendments which had been made as of those respective dates. In addition, I have enclosed the three-page amendment which subsequently was offered by Senator Pearce and adopted by the Senate just prior to the bill's passage. An accompanying document provides a short description of the basis for each provision of Senator Pearce's amendment on a page and line number basis.

I have also enclosed letters of support from Mr. Jon Isaacs and Ms. Nancy Wainwright, both of whom are independent consultants to certain of the Coastal Districts, as well as from Ms. Linda Freed of the Kodiak Island Borough. Also enclosed is a copy of Resolution #94-046 from the Matanuska-Susitna Borough, reversing its earlier Resolution #94-032 and supporting passage of CSSB 308 (Fin), as amended on the floor by Senator Pearce. It is important to note that both Mr. Isaacs and Ms. Wainwright submitted their letters of support on behalf of themselves, and not as representatives of the district.

I hope that your review of these materials confirms that in the intervening weeks since you last saw this legislation, it has undergone many substantive amendments in response to concerns raised by the public, the Coastal Districts and affected municipalities, among others. As with any legislation of this scope, however, it is virtually impossible to accommodate every amendment suggested. Nevertheless, I feel that all the parties have made a good faith effort to assure that reasonable compromises are represented in the bill which now comes to the House. I believe CSSB 308 responds to public concerns, while at the same time maintaining the protections which are necessary to assure continuation of these vital state programs. I urge you and your colleagues to support passage of this very important legislation.

I look forward to the opportunity to answer any questions which you or your staff may have or to discuss the legislation and its background in greater detail if you desire.

Sincerely,

James E. Eason
Director

Enclosures

STATE OF ALASKA

WALTER J. HICKEL, GOVERNOR

DEPT. OF NATURAL RESOURCES

DIVISION OF OIL AND GAS

PO BOX 107034
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PHONE: (907) 762-2553

TO: Senator Drew Pearce
Senator Steve Frank

DATE: March 28, 1994

FILE NO.:

PHONE: 762-2553

FROM: Barbara Fullmer
Kyle Parker

SUBJECT: SB308 - Litigation Summary

Rescurces Disposal Litigation Summary

BACKGROUND

Under current law, the Department of Natural Resources ("DNR") may not dispose of state land, resources, or property, or interests in them, unless the Commissioner first determines that such action will serve the best interests of the state and issues a written finding to that effect. Except in the context of oil and gas lease sale best interest findings, however, the legislature has not directed specific requirements for a best interest findings analysis. Rather, the generally applicable best interest finding provision simply states, in pertinent part:

> Upon a written finding that the interests of the state will be best served, the director may, with the consent of the commissioner, approve contracts for the sale, lease, or other disposal of available land, resources, property or interests in them, and, in addition to the conditions and limitations imposed by law, may impose additional conditions or limitations in the contracts as the director determines, with the consent of the commissioner, will serve the best interests of the state. . . . [T]he director shall make available to the public a written finding that sets out the facts and applicable law upon which the determination that the sale, lease, or other disposal will best serve the interests of the state was based.

AS 38.05.035(e). The legislature has chosen not to define the scope of DNR's best interests analysis or even to suggest specific things that should be included in the written finding. The current statute merely requires that DNR "set out the facts and applicable law" which form the basis for its best interests determination. The legislature, therefore, apparently intended to leave the details concerning the proper

scope of the written finding and the review upon which it is based to the expertise and discretion of DNR.

The Alaska Supreme Court, however, has not been content to let DNR define the scope of its best interests finding or coastal consistency determination in light of the uses to be authorized by the proposed disposal of land or resources. Instead, beginning in 1990 with its first decision on Oil and Gas Lease Sale 50 (Camden Bay), the Supreme Court has repeatedly reversed superior court decisions upholding DNR's best interest findings and coastal consistency determinations, particularly when DNR deliberately limited the scope of the finding challenged in accordance with limits on the uses directly authorized by the disposal. In short, the Court disapproves of DNR deferring consideration of remote, speculative impacts that possibly could result if the uses authorized pursuant to a best interest finding and coastal consistency determination lead to future development -- none of which could happen without further review and authorization.

The following chronologies of the administrative appeals to DNR, the appeals to the superior courts and the Supreme Court, and the subsequent remands, graphically illustrate both the scope and complexity of this litigation.

OIL AND GAS LEASE SALE 50 (CAMDEN BAY)

In the Trustees for Alaska v. State ("Camden Bay I") decision, issued on March 16, 1990, the Supreme Court ruled on the six issues raised by Trustees in their points on appeal:

1) The Court rejected Trustees' claim that they had been denied a fair opportunity to comment on the issues concerning offshore development, holding that the preliminary best interest finding gave sufficient notice that offshore facilities were contemplated.

2) The Court rejected Trustees' argument that DNR's best interest finding, in general, did not sufficiently explain the basis for its decision that the sale was in the best interest of the state.

3) The Court rejected Trustees' claim that DNR did not adequately address the cumulative effects of its leasing decision.

4) The Court agreed with Trustees' claim that DNR did not adequately consider the methods and risks of oil transportation from Camden Bay if ANWR remains unavailable for onshore support facilities

5) The Court rejected Trustees' argument that leasing Camden Bay was unreasonable because oil production and transportation would not be economically feasible without onshore support facilities in ANWR, holding that "this court need not inquire into the feasibility of future development."

6) The Court agreed with Trustees' assertion that AS 44.19.145(a)(11) required the office of Management and Budget ("OMB"), rather than DNR, to render the conclusive consistency determination under the Alaska Coastal Management Program ("ACMP").

The Court remanded the Sale 50 final best interest finding stating that DNR omitted "any discussion" of the facilities necessary to transport oil from the Sale 50 area if ANWR's status remains unchanged.

The state petitioned the Court for rehearing of its Sale 50 decision asserting that the Court overlooked the fact that DNR did discussed transportation issues, including specific potential alternatives and their risks and benefits, in the final finding to the extent feasible at the lease sale stage. DNR argued that, given the uncertain nature of the quantity, quality, and location of oil deposits, and of the nature of the technology used to produce any deposits discovered, detailed hypothetical studies of alternative development scenarios at the lease sale stage are "unfair and unwise," "speculative," and "a gross misallocation of resources." See Tribal Village of Akutan v. Hodel, 869 F.2d 1185, 1192 (9th Cir. 1989); Park County Resource Council V. United States, 817 F.2d 609, 624 (10th Cir.1987); County of Suffolk v. Secretary of Interior, 562 F.2d 1368, 1378 (2d Cir.1977) cert.denied, 434 U.S. 1064 (1978); Village of False Pass v. Watt, 565 F.Supp. 1123, 1134 (D.Alaska 1984), aff'd, 733 F.2d 605 (9th Cir. 1984).

The Court never acted on the state's petition for rehearing. DNR, therefore, issued a supplemental best interest finding in September 1990 to comply with the Court remand. The Court's ruling in Sale 50, however, also led to the enactment of new legislation intended to clarify the Title 38 best interest finding requirement for oil and gas lease sales. See AS 38.05.035 (g).

Two weeks after the Camden Bay I decision was issued, then-Governor Cowper requested that the Alaska Legislature enact legislation addressing the Court's decision. Two bills were introduced at the Governor's request. SB 539 provided for ratification of the Camden Bay lease sale. SB 540 amended AS 44.19.145(a) to make clear that DNR and the other resource agencies have the authority to render conclusive consistency determinations if a project involves only the permits of that agency.[1] The Governor also requested that amendments be introduced to HB 128 to

---

[1] Although the Senate overwhelmingly passed SB 539 to ratify the Camden Bay lease sale, the House Resources Committee did not move the bill to the floor for a vote before the legislature adjourned. The legislature did, however, enact SB 540, which clarified that DNR was the proper agency to render the conclusive consistency determination for oil and gas lease sales. The

identify the subjects that DNR must discuss in its best interest finding for oil and gas lease sales. The Governor explained the purpose of the proposed legislation as follows:

> The proposed amendments to SCS CSHB 128 (RES) respond to the court's holding that the best interest finding for Oil and Gas Lease Sale 50 (Camden Bay), required by AS 38.05.035(e), failed to consider the environmental safety of transportation facilities should the Arctic National Wildlife Refuge (ANWR) remain unavailable for shore-based support facility siting under federal law. The decision overlooks the fact that the best-interest finding did address transportation to the extent feasible at the time of the lease sale, incorporating suggestions from, among others, the Department of Environmental Conservation (DEC) and the Department of Fish and Game (ADF&G).

1990 Senate Jour. 3132 (emphasis added). The Governor further explained that the proposed legislation was intended to clarify that in preparing its best interest finding, "DNR need not speculate concerning the location and size of discoveries, the economic feasibility of ultimate development, future environmental or other laws that may apply at the time of any future development, or other such factors that cannot be reasonably foreseen at the time of leasing."

The legislature enacted SCS CSHB 128 (FIN) which in its final form added a new subsection (g) to AS 38.05.035. The new subsection provides a complete list of what must be considered and discussed in a written best interest finding for an oil and gas lease sale. The director's duty to consider and discuss facts is limited to "facts that are known to the director at the time of preparation of the finding and that are material to the [matters listed in the statute] or to issues that were raised during the period allowed for receipt of public comment." Governor Cowper signed this bill into law on June 14, 1990.

In May 1991, Trustees initiated their second appeal of Sale 50 on issues regarding the Alaska Coastal Management Program ("ACMP"). After briefing and oral argument, the Supreme Court, in its second opinion in the Sale 50 litigation ("Camden Bay II"), remanded DNR's coastal consistency determination for additional findings. This second remand was based, in part, on an erroneous predicate: that DNR's determination of geophysically hazardous areas was limited to "a summary statement that the entire Sale 50 area is a 'known geophysical hazard.'" In its Opinion, however, the Court understated DNR's efforts to identify geophysical hazards, and the extensive

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legislature removed the inconsistency between the regulations and the statute by amending the statute retroactively. The Governor signed this bill into law on May 11, 1990.

Sale 50 administrative record established that DNR advanced more than a "summary statement" that the entire sale area is a known geophysical hazard.

In its Sale 50 finding, under the heading "Potential Geological and Geophysical Hazards in Camden Bay, " DNR noted:

> Geophysical surveys conducted in the Camden Bay region (Grantz et al, 1982) have delineated several potential hazards to oil and gas exploration and production which may be of greater significance to the Sale 50 area than other sale areas on the North Slope. Recent uplift on the Beaufort Sea shelf north of Camden Bay and the occurrence of numerous faults and shallow earthquakes indicate that this area may be an active tectonic zone. The magnitude of earthquakes recorded in the Sale 50 vicinity range from less than 1.0 to 5.3 on the Richter Scale. In addition, documented slump features indicate that sediments are susceptible to liquefaction and tectonically triggered sliding or slumping in the deeper waters. The instability of poorly consolidated sediments on the Beaufort Sea shelf may present a potential hazard to pipelines, platforms, and artificial islands.[2]

In its assessment of geological and geophysical hazards in the Sale 50 finding, DNR specifically cites to a detailed survey of geophysical hazards in the Camden Bay area: "Map cross sections and chart showing late Quaternary faults, folds, and earthquake epicenters on the Alaskan Beaufort Shelf: USGS Miscellaneous Investigations Series, Map I-1182-C, scale 1:500,000," Grantz, A. and others. 1982.[3] In fact, at the time of

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[2] In its Opinion, the Court quotes from the federal environmental impact statement ("EIS") prepared for OCS Sale 97 (in the Beaufort Sea adjacent to the Sale 50 tracts) and states that: "The federal statement deals with faults and earthquakes in the Camden Bay area in much greater detail than the State's decisional document." However, a comparison of the statement in the Sale 50 finding, quoted in the text above, with that quoted favorably by the Court, shows that the Sale 50 statement is at least as detailed, if not more, than the federal statement. The federal statement on faults and earthquakes in the OCS Sale 97 EIS states in full: "Earthquakes indicate active movement along the faults in the Camden Bay area and tend to occur along the axes of anticlines and synclines. They are part of the central Alaska Seismic system. Most of the earthquakes recorded since 1968 range in magnitude from 3.0 to 4.0."

[3] The U.S. Fish and Wildlife Service referred this survey to DNR in its comments on proposed Sale 50. DNR specifically relied on the Grantz survey ("Grantz et al., 1982") in its analysis of geophysical hazards. DNR also compiled and considered additional

its final finding for Sale 50, DNR incorporated by reference the only publicly available maps and cross-sections of known geophysical hazards.

In Camden Bay II, the Court remanded the finding to DNR "to identify and report on known and substantially possible areas of geophysical hazards within Sale 50." When preparing the best interest finding and coastal consistency determination, however, DNR "conduct[ed] a survey of available sources" and "report[ed] the results." Specifically, DNR identified known geophysical hazards based on the only survey of the Camden Bay area then available, the Grantz survey. In addition to addressing and identifying known hazards, DNR imposed stipulations and terms of sale to mitigate the currently unknown but potentially discoverable geophysical hazards that subsequently may be determined to exist at specific exploratory or development sites. It took this step to ensure the sale's compliance with 6 AAC 80.050. Unless the Court wished DNR to go beyond the express language of the regulation -- and in its Opinion, the Court specifically "excludes a requirement to conduct field studies" for geophysical hazards -- there was nothing more to be done at the lease sale stage.

In the Camden Bay II decision, the Court also misinterpreted the geophysical hazards standard (6 AAC 80.050) of the ACMP. Under the geophysical hazards standard (6 AAC 80.050) of the ACMP, state agencies must "identify known geophysical hazard areas and areas of high development potential in which there is a substantial possibility that geophysical hazards may occur." In its Opinion, the Court interprets this to mean that DNR must "identify known or substantially possible hazard areas." This is not what the regulation requires. There is a subtle, but crucial difference in the language of the regulation which the Court overlooked.

The regulation clearly requires identification of only two types of areas: (1) those with known geophysical hazards, and (2) those having high development potential in which there is a substantial possibility that geophysical hazards may occur. As discussed above, DNR identified those areas of known geophysical hazards in the sale area. However, the second type of area, areas of high development potential, obviously cannot be identified at the leasing stage because the exploration necessary to define the location of any oil deposits has not taken place. Therefore, DNR requires surveys and site specific mitigation for geophysical hazards when -- but not before -- specific activities are proposed at specific sites.

The Court rejected DNR's reasonable approach to identifying and mitigating geophysical hazards, and it did not defer to agency expertise as courts generally do in decisions involving complicated technical matters. In the same decision, however, the Court deferred to DNR's expertise and acknowledged that DNR utilized the preferred

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information regarding geophysical hazards generally, and seismicity in particular, in the Sale 50 area.

approach when addressing transportation concerns: "Until exploration is proposed and, in all likelihood, until and unless a commercially exploitable discovery is made, there will be no occasion for siting, designing or constructing transportation and utility routes." The same logic the Court used in upholding DNR's approach to addressing transportation issues under the ACMP, applies to DNR's handling of geophysical hazards because development potential is unknown until after exploration has taken place.

Finally, in its Camden Bay II decision, the Court overlooked extensive evidence that DNR's consistency determination complied with the historic, pre-historic and archeological standard (6 AAC 80.150) of the ACMP. Under 6 AAC 80.150: "Districts and appropriate state agencies shall identify areas of the coast which are important to the study, understanding, or illustration of national, state, or local history or prehistory." In its Opinion, the Court interprets the regulation to require, "the identification of known archeological sites at the initial sale stage." Identification of known cultural resource sites requires, according to the Court, "literature surveys and personal contact with individuals who may have knowledge concerning such sites."[4]

The Court's conclusion that "DNR did not attempt to identify archeological sites within the sale area," was wholly mistaken. In its consistency determination, DNR surveyed the known data, set out the results, and stated its conclusions. Specifically, DNR found that:

> It is not likely that any cultural resources sites would be identified within the proposed sale area since it is offshore. However, no cultural resource surveys have been conducted in the area, and the discovery of sites, especially in nearshore areas, should not be ruled out.

This conclusion was based directly on comments submitted by Judith E. Bittner, Chief, State of Alaska Office of History and Archeology:

> The offshore aspects of the proposed sale offer little impact to cultural resources of the north slope. There are currently no known cultural resource sites with the submerged lands identified in Sale 50, and the potential for encountering such sites would be low due to ice scouring. Be that as it may, appropriate stipulations should be applied to the leases for the protection of any as yet unknown cultural resources in the sale area.

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[4] In its Opinion, the Court specifically rejects the need to conduct field surveys and exploration in an effort to identify unknown sites.

Furthermore, contrary to the Court's conclusions, DNR did not leave to its lessees the discretion to determine how and when identification of cultural sites would occur. Rather, in compliance with Ms. Bittner's suggestions, DNR noted the potential for discovery of sites in the nearshore areas, and established lease terms and stipulations in recognition that future oil and gas related activity may result in the identification of currently unknown resource sites.

Specifically, stipulation 1 to the Sale 50 leases requires the lessee to report the discovery of any site, structure, or object of historical or archeological significance and to make every reasonable effort to preserve and protect the site until DNR issues directions regarding its protection. Additionally, at the permitting stage, lease term 3 requires consistency with the ACMP, and term 22 requires that the lessee complete an archeological survey before exploration and development activities are undertaken.[5] Each of these points was brought to the Court's attention in the state's request for reconsideration of its decision. Although the Court took that opportunity to correct the factual errors in its original decision, it declined to reverse its decision.

OIL AND GAS LEASE SALE 55 (DEMARCATION POINT)

In its Sale 55 Opinion, issued in December 1993, the Supreme Court determined that DNR failed to consider what the Court viewed to be a "salient" factor -- the possible effects of the lease sale on the Porcupine Caribou Herd and the subsistence use of that herd by the residents of the City of Kaktovik. In so doing, however, the Court failed to defer to agency expertise and simply substituted its judgment for that of DNR in determining what is a "salient" factor for purposes of a best interests finding in support of a decision to lease. To compound its error, the Court disregarded the fact that the Sale 55 administrative record supports DNR's decision that offshore activities in the Sale 55 area would not foreseeably have an adverse impact on the caribou herd located onshore.

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[5] Because unrestricted availability to information concerning the nature and location of any archeological resource increases the threat of site destruction, access to such information is closed to the general public by the Alaska Office of History and Archeology. Authority for this policy is contained in AS 9.25.120 and 16 U.S.C. 470hh. Therefore, even if there were information on known sites offshore in the sale area, DNR is required to withhold specific information regarding those sites until the plan of operations stage when the director of the Division of Oil and Gas and Division of Parks and Outdoor Recreation can work with the lessee to develop site specific mitigation measures.

Subsection (g) of AS 38.05.035 currently provides a complete list of what DNR must consider and discuss in a best interests finding for an oil and gas lease sale. The statute requires that DNR consider the effects of an oil and gas lease sale on fish and wildlife species and the subsistence uses of those species in the sale area. However, it does not require DNR to extend its consideration to potential effects on species located outside the sale area. As the Porcupine Caribou Herd clearly is not found in the sale area, a marine environment, DNR did not violate the statute. Ruling otherwise, however, the Supreme Court created an undefined zone around the sale area which DNR must somehow, without guidance or restriction, delineate and evaluate. Extension of this logic makes it virtually impossible for DNR to assure that it has considered all the species in all the areas that may be alleged to be material.

GOODNEWS BAY OFFSHORE PROSPECTING PERMIT DISPOSAL

In the Goodnews Bay offshore prospecting permit case, decided in January of 1994, the Supreme Court again redefined the scope of DNR's best interest analysis. The Court rejected DNR's decision to defer consideration of the possible effects that might result from future mining if workable mineral deposits were found, even though the kind and number of mining operations that might result and whether mining would indeed take place were matters of speculation, and, more important, DNR's subsequent approval of mining leases (and of mining plans of operation) would have been required before mining actually could have taken place. Though the superior court had upheld DNR's best interest finding, the Supreme Court disregarded these uncertainties and the retained authority of DNR, concluding that DNR should have fully analyzed the potential impacts of mining in the region at the prospecting permit stage.

The Supreme Court remanded the Goodnews Bay finding to DNR with instructions to prepare a best interest finding which takes a "hard look" at the effects of mining, including the cumulative regional effects, that might eventually result from the limited exploration to be authorized by the offshore prospecting permits. In response to DNR's argument that its best interest analysis had been as complete as possible at the prospecting permit stage where no development was authorized or even contemplated, the Court suggested that DNR should have emulated the federal practice of conducting environmental impact studies in which a range of possible scenarios are considered.

OIL AND GAS LEASE SALES 57 AND 75A

DNR's legislatively mandated administrative proceedings provide a constructive forum where issues regarding lease sales are fleshed out and addressed.

This process is involved, costly and time-consuming. The current system, however, is subject to abuse which unnecessarily delays administrative decisions and obstructs the administrative decision making process. The Sales 57 and 75A appeals are examples of this abuse. Abuse which cost the state significant amounts of money for staff time and resources at DNR and the Department of Law. More important than these direct costs incurred as a result of such abuse, are the indirect costs of chilling participation in the state's leasing program by signaling that Alaska is more vulnerable to litigation over leasing than other areas.

Oil and Gas Lease Sale 57 (North Slope Foothills)

DNR's administrative review for Sale 57 began on June 4, 1986, when it issued the first general call for comments on the proposed lease sale. A second call for comments was issued on August 21, 1986, requesting consideration of two proposed leasing schedules involving five proposed lease sales, including Sale 57. Two more calls for comments were issued for Sale 57 on August 14, 1987 (general call for comments), and on March 13, 1989 (request for specific comments on fish and wildlife populations, human uses of those resources, and the potential effects of the sale on those resources and uses).

On June 27, 1990, DNR was forced to defer the date for several lease sales, including Sale 57, because of budget reductions in fiscal year 1990. As a result of the re-scheduling of Sale 57, DNR started the public comment process over again, issuing a general call for comments on September 17, 1990. On May 26, 1992, DNR issued another call for comments (requesting socioeconomic and environmental information and comments). Later, the public was encouraged to comment yet again following the issuance of the preliminary finding on March 23, 1993. Oral testimony on the proposed lease sale also was taken at a public hearing held April 19, 1993, in the community of Anaktuvuk Pass.

DNR's adherence to the administrative process required by law provided ample opportunity for public participation and comment during the Sale 57 administrative proceedings. Only once, however, did Trustees for Alaska and Alaska Center for the Environment ("Trustees"), appellants in the case filed with the superior court, avail themselves of those opportunities. And then, Trustees only submitted one short paragraph of general comments on the sale.

Trustees' one paragraph of general comments was submitted in response to DNR's August 21, 1986 call for comments on two proposed leasing schedules involving five proposed lease sales, one of which was Sale 57. The one paragraph addressing Sale 57 in Trustees' September 2, 1986 submission, contains a general criticism of DNR for failing to mention the proximity of the proposed sale to the Gates of the Arctic National Park and Preserve in the initial public notice. Trustees also

stated that there are questions about the transportation of oil and possible socioeconomic effects in the village of Anaktuvuk Pass associated with the sale.[6] Aside from these broad conclusory statements, Trustees did not explain their concerns. Nor did Trustees submit further comments, scientific data, specific criticisms or testimony.

In fact, during the lengthy administrative review process that followed Trustees' September 2, 1986 generalized and brief criticism of the initial public notice, Trustees never submitted additional comments on Sale 57. Trustees never responded to the four additional calls for comment. Trustees failed to participate in the public hearing held in Anaktuvuk Pass. And Trustees did not submit comments on DNR's preliminary best interest finding -- the document that "describes the proposed sale area and presents the department's review of the areas resources," and which formed the basis for DNR's final best interest finding.

Submission of one paragraph of generalized comments at the very start of a seven year administrative review does not constitute sufficient participation in an administrative proceeding for the purpose of standing to appeal. In the present case, beyond a general criticism of DNR's alleged failure to mention in the public notice the proximity of the proposed sale to the Gates of the Arctic National Park and Preserve, Trustees did not raise any specific concerns regarding Sale 57. Throughout the seven year administrative review, when DNR was actively soliciting public comments (and when criticism would have been constructive), Trustees failed to sufficiently participate. Only after time and resources were spent in conducting a critical review of Sale 57, did Trustees decide to voice their concerns through the appeals process in the courts.

Oil and Gas Lease Sale 75A (Colville River Exempt)

The Alaska Supreme Court has held that under the state's Administrative Procedure Act, an appellant must meet three requirements in order to have standing to challenge an administrative agency decision. First, the appellant must have a direct interest in the proceedings. Second, the appellant must be factually aggrieved (suffered an actual injury) by the agency decision. And, third, the appellant must have participated at the agency level. In their appeal of Oil and Gas Lease Sale 75A, Trustees for Alaska and Alaska Center for the Environment ("Trustees") failed at least two of the three requirements established by the Court. Trustees were not factually

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[6] Noticeably absent from that one submission are any concerns regarding riparian areas or archeological resources, or any specific comments regarding impacts of the sale on the Gates of the Arctic National Park and Preserve, which are the issues Trustees subsequently brought on appeal to the superior court.