

ALASKA LEGISLATURE COMMITTEE FILES 1993-1994 8672

8412 SENATE LABOR & COMMERCE

1 legislative approval of the issuance of bonds by the Alaska Railroad Corporation, as required
2 by AS 42.40.285.

3 (b) The Alaska Railroad Corporation may loan the proceeds from the sale of revenue
4 bonds authorized by this section to a public or private entity that the Alaska Railroad
5 Corporation considers appropriate to acquire, construct, and operate the Northern Crossroads
6 Discovery Center. The Alaska Railroad Corporation may enter into agreements, including
7 leases, with a public or private entity that the Alaska Railroad Corporation considers
8 appropriate to provide for and secure payment of a loan made from the proceeds from the sale
9 of the revenue bonds.

10 (c) The issuance of revenue bonds authorized by this section is subject to
11 AS 42.40.600 - 42.40.700, except that, notwithstanding AS 42.40.630, the bonds are special
12 nonrecourse obligations of the Alaska Railroad Corporation payable only from the revenues
13 and assets of the public or private entity that owns and operates the Northern Crossroads
14 Discovery Center.

15 * Sec. 2. The Alaska Railroad Corporation shall conduct a study of the feasibility and
16 financial viability of the proposed Northern Crossroads Discovery Center for the Ship Creek
17 Landings Project, if a private party, including a potential developer or lessee of the Northern
18 Crossroads Discovery Center, enters into an agreement with the Alaska Railroad Corporation
19 to pay the cost of the study. The Alaska Railroad Corporation shall select the person to
20 conduct the study. Upon receipt of the completed study, the board of directors of the Alaska
21 Railroad Corporation shall determine whether the Northern Crossroads Discovery Center is
22 feasible and financially viable.

23 * Sec. 3. Before construction of the Northern Crossroads Discovery Center begins, the
24 Alaska Railroad Corporation shall require that the public or private entity authorized to design
25 and construct the Northern Crossroads Discovery Center post a payment and performance
26 bond in favor of the Alaska Railroad Corporation to assure completion of the Northern
27 Crossroads Discovery Center.

28 * Sec. 4. Each bond issued under sec. 1 of this Act shall contain on its face a statement
29 that

30 (1) the Alaska Railroad Corporation is not obligated to pay the bond or the
31 interest on the bond except from the revenue or assets pledged for the bond;

1 (2) neither the faith and credit nor the taxing power of the State of Alaska or
2 of a political subdivision of the state is pledged to the payment of the bond; and

3 (3) the issuance of the bonds does not create a legal or moral debt of the State
4 of Alaska and payment of the bond is not directly or indirectly dependent upon an
5 appropriation by the Alaska State Legislature.

6 * Sec. 5. This Act takes effect immediately under AS 01.10.070(c).

8-LS1761NK

Utermohle

3/1/94

CS FOR SENATE BILL NO. 338(L&C)**IN THE LEGISLATURE OF THE STATE OF ALASKA****EIGHTEENTH LEGISLATURE - SECOND SESSION****BY THE SENATE LABOR AND COMMERCE COMMITTEE****Offered:****Referred:****Sponsor(s): SENATE LABOR AND COMMERCE COMMITTEE BY REQUEST****A BILL****FOR AN ACT ENTITLED**

1 "An Act relating to the issuance of revenue bonds for acquisition and
2 construction of the Northern Crossroads Discovery Center for the Ship Creek
3 Landings Project; relating to a study of the feasibility and financial viability of
4 the Northern Crossroads Discovery Center; relating to construction of the
5 Northern Crossroads Discovery Center; and providing for an effective date."

6 **BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:**

7 * **Section 1.** (a) In furtherance of the state policy under sec. 1(a), ch. 153, SLA 1984 to
8 foster the long-term economic growth and development of the state, the Alaska Railroad
9 Corporation is authorized to issue revenue bonds in the principal amount of \$55,000,000 for
10 the construction and acquisition of the Northern Crossroads Discovery Center for the Ship
11 Creek Landings Project, if the board of directors of the Alaska Railroad Corporation
12 determines after completion of the study conducted under sec. 2 of this Act that the Northern
13 Crossroads Discovery Center is feasible and financially viable. This section constitutes

1 legislative approval of the issuance of bonds by the Alaska Railroad Corporation, as required
2 by AS 42.40.285.

3 (b) The Alaska Railroad Corporation may loan the proceeds from the sale of revenue
4 bonds authorized by this section to a public or private entity that the Alaska Railroad
5 Corporation considers appropriate to acquire, construct, and operate the Northern Crossroads
6 Discovery Center. The Alaska Railroad Corporation may enter into agreements, including
7 leases, with a public or private entity that the Alaska Railroad Corporation considers
8 approp. ate to provide for and secure payment of a loan made from the proceeds from the sale
9 of the revenue bonds.

10 (c) The issuance of revenue bonds authorized by this section is subject to
11 AS 42.40.600 - 42.40.700, except that, notwithstanding AS 42.40.630, the bonds are special
12 nonrecourse obligations of the Alaska Railroad Corporation payable only from the revenues
13 and assets of the public or private entity that owns and operates the Northern Crossroads
14 Discovery Center.

15 * Sec. 2. The Alaska Railroad Corporation shall conduct a study of the feasibility and
16 financial viability of the proposed Northern Crossroads Discovery Center for the Ship Creek
17 Landings Project. If a private party, including a potential developer or lessee of the Northern
18 Crossroads Discovery Center, enters into an agreement with the Alaska Railroad Corporation
19 to pay the cost of the study. The Alaska Railroad Corporation shall select the person to
20 conduct the study. Upon receipt of the completed study, the board of directors of the Alaska
21 Railroad Corporation shall determine whether the Northern Crossroads Discovery Center is
22 feasible and financially viable.

23 * Sec. 3. Before construction of the Northern Crossroads Discovery Center begins, the
24 Alaska Railroad Corporation shall require that the public or private entity authorized to design
25 and construct the Northern Crossroads Discovery Center post a payment and performance
26 bond in favor of the Alaska Railroad Corporation to assure completion of the Northern
27 Crossroads Discovery Center.

28 * Sec. 4. Each bond issued under sec. 1 of this Act shall contain on its face a statement
29 that

30 (1) the Alaska Railroad Corporation is not obligated to pay the bond or the
31 interest on the bond except from the revenue or assets pledged for the bond;

1 (2) neither the faith and credit nor the taxing power of the State of Alaska or
2 of a political subdivision of the state is pledged to the payment of the bond; and

3 (3) the issuance of the bonds does not create a legal or moral debt of the State
4 of Alaska and payment of the bond is not directly or indirectly dependent upon an
5 appropriation by the Alaska State Legislature.

6 * Sec. 5. This Act takes effect immediately under AS 01.10.070(c).

SB

340

DAVIS WRIGHT TREMAINE

LAW OFFICES

SUITE 1450 • 550 WEST 7TH AVENUE • ANCHORAGE, ALASKA 99501
(907) 257-5700

FROM: Parry 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

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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 AWA:

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 AWA 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(c). 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 AWA 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 AWA 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 AWA litigation and enforcement of AWA by the Commissioner. Restoration of the Commissioner's settlement authority (Subsection 3(e)) and authority for private AWA 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) 257-5500

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. 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?

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 McKeown vs. Kinney Shoe Corp., 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. 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?

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.

200972Vncms

LETTERS OF SUPPORT:

Alaska State Chamber of Commerce

ARC TECH SERVICES

Carlile Enterprises, Inc.

Carr Gottstein Foods Co.

Our Lady of Compassion

Sheraton Anchorage Hotel

Tesoro Alaska

Westmark Hotels

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



**Alaska State Chamber of Commerce
SENATE BILL NO. 340**

"Damages & Attorney Fees for Unpaid Wages"

On behalf of the Alaska State Chamber of Commerce, we wish to go on record in support of Senate Bill 340, 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 Senate Bill 340 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 Senate Bill 340 which would allow fairness to both employee and employer.

ARCTECH SERVICES

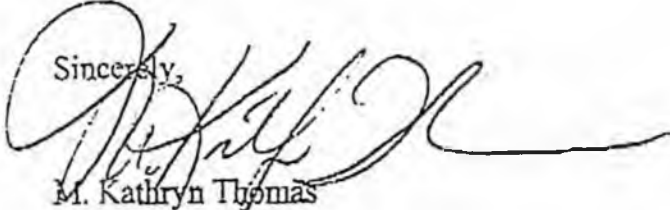
February 22, 1994

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

Carlisle

ENTERPRISES, INC.

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

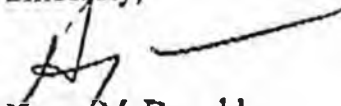
February 21, 1994

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

CARR COTTSTEIN

FOODS CO.

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

February 21, 1994

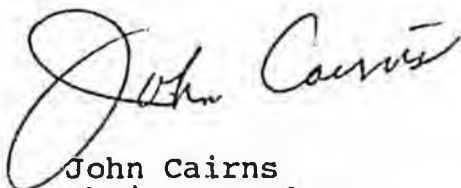
To All Members of The State House Labor and Commerce Committee

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 made "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
Chairman and CEO

OUR LADY OF COMPASSION CARE CENTER

4900 EAGLE STREET
ANCHORAGE ALASKA 99503-7446
PHONE: (907) 562-2281



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.

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Sincerely,

A handwritten signature in cursive script, appearing to read "Leissa A. Wright".

Leissa A. Wright, Director Human Resources



Sheraton Anchorage

H O T E L

February 17, 1994

Representative Bill Hudson, Chairman
House Labor and Commerce Committee
Room 101
State Capitol
Juneau, Alaska 99901-1182

Post-It™ brand fax transmittal memo 7871		# of pages 1
To: <i>Ch. Hudson, Bill Hudson</i>	From: <i>Forest J. Paulson</i>	
Co.	Co.	
Dept.	Phone #	
Fax # <i>465-6792</i>	Fax # <i>271-9142</i>	

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

Sheraton

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PHONE (907) 278-8701 FAX (907) 278-7711

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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

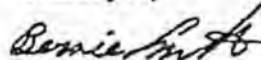
Dear Representative Hudson:

Tesoro Alaska Petroleum Company supports passage of HB 459. This bill will rectify an anomaly 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 out 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



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. Eldon Mulder
Rep. Brian Porter Rep. Bill Williams
Rep. Joe Sitton Rep. Jerry Mackie

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. 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, 752 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 AWA is based substantially on the FLSA. Indeed, the AWA 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.

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

March 9, 1994

SUBJECT: Sectional Summary of SB 340. (Liquidated damages and attorney fees for minimum wage and overtime compensation claims)

TO: Senator Tim Kelly, Chair
Senate Labor and Commerce Committee

FROM: Teresa B. Cramer *TBC*
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 bill Sec. 4(a),

— SECTIONAL —

Senator Tim Kelly
March 9, 1994
Page 2

this subsection (c) 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 bill Sec. 4(b), subsection (f) 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
94-193.glc

DIVISION OF LEGAL SERVICES

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FAX (907) 465-2029
Mail Stop 3101


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

MEMORANDUM

March 14, 1994

SUBJECT: Sectional Summary of CSHB 459(). (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 bill Sec. 4(a), subsection (e) applies to agreements entered into on or after the effective date of the Act.

Representative Eldon Mulder

March 14, 1994

Page 2

Subsection (f) permits an employee to waive the right to liquidated damages in a written settlement agreement with the employer. The settlement must meet standards listed in the subsection. Under bill Sec. 4(b), subsection (f) 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.

TC:pl

94-201.plm



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March 29, 1994

The Honorable Eldon Mulder
Alaska State Representative
State Capitol
Room 116
Juneau, Alaska 99801

Re: House Bill 459 / SB 340

Dear Representative Mulder:

I am writing to express my support for House Bill 459 and to make additional comments that may be of interest to you. The Article, at B4 of this mornings Anchorage Daily News provides the impetus for my comments.

I am a small business man in Alaska. Through various corporations, I own and operate Dimond Mini Storage, International Self Storage and International Moving and Storage. I have several employees and was recently sued by two former employees for overtime compensation. The cite for the appeal is in that matter is: Bobich v. Stewart, 843 P.2d 1232 (Alaska 1992). In this case, Mr. Kenneth Legacki was successful in receiving the following judgment:

Judgement for
Sharon Stewart: 21,731.00

Judgement for
Jimmie D. Stewart: 23,402.00

Liquidated damages
Sharon Stewart: 21,731.00

Liquidated damages
Jimmie Stewart: 23,402.00

The Honorable Eldon Mulder
Alaska State Representative

March 29, 1994

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Prejudgment Interest
Sharon Stewart: 5,619.98

Prejudgment Interest
Jimmie Stewart: 6,052.14

Attorney Fees 52,068.00

Costs: 4,479.79

Total Principal: 158,485.91

As I understand it, awards as large as the one listed above are quite common. I have paid this judgment in full, however, subsequent to the judgment, Mr. Legacki has taken on two additional clients, Patrick and Barbara Bliss. The Blisses replaced the Stewarts as managers of Dimond Mini Storage and Patrick Bliss testified in my behalf at the trial on the Stewart matter. However, after the Stewart trial, Mr. Legacki began to represent the Blisses in an overtime claim against my business interests. Mr. Legacki is using the "enterprise" theory to make all of my independent businesses liable to the Blisses, even though the Blisses worked for Dimond Mini Storage as managers of that facility.

At the first settlement conference, Mr. Legacki made the comment that if I gave him one of my storage facilities, valued at approximately \$1,000,000.00, he would convince the Blisses to settle. It is clear to me that the goal is to put me out of business, not to seek compensation for the employee.

During all of this time, I acted in a good faith belief that the Stewarts and the Blisses were managers (administrative) employees, exempt for overtime under the AWhA. After losing the Stewart matter, I began to pay the Blisses and all of my other employees overtime, which I believe is evidence of my good faith belief that they were administrative employees. I had the Blisses calculate their overtime from the day they began working for me and paid them all of their overtime they claimed on the time cards submitted. This fact notwithstanding, the Blisses have filed suit claiming that I did not pay them all of their overtime due.

The information about my paying the Blisses and acting in good faith has had no effect on the court and even though the Blisses have sued under FLSA and the AWhA, the court has recently made rulings in the Bliss matter that essentially hold that the good faith defense under FLSA is not available to me, because the AWhA

The Honorable Eldon Mulder
Alaska State Representative

March 29, 1994

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does not provide that defense. The court has also ruled that Statute of limitations provided in FLSA applies, even to the AWA claim. In other words, the court has said that if a provision of FLSA is more favorable to the employee, that provision will apply and if a provision of the AWA is more favorable, that provision will apply over FLSA. The employer, in Alaska, essentially has no defense to these cases and the law as it currently exists encourages frivolous claims being taken to trial since the employee risks nothing and the attorney makes a small fortune in fees.

I have made offers to settle the Bliss matter in the amount of \$90,000.00, which was rejected by Mr. Legacki. There is currently no trial date, and if I am again forced to pay a \$150,000.00 or \$200,000.00 judgment, I may be forced into the bankruptcy court and several individuals will lose their jobs as a result. I do not believe that systematic destruction of the Alaska economy was intended when enacting the AWA.

The AWA was enacted in 1959 and patterned after FLSA provisions in effect at that time. In 1947, Congress amended FLSA by passing the Portal to Portal Act. 29 U.S.C. § 251, et seq. When enacting the Portal to Portal Act, the U.S. Congress, made specific findings that large awards to employees and against employers was injurious to commerce and the development of commerce in the United States. Congress stated:

... the payment of such liabilities would bring about financial ruin of many employers and seriously impair the capital resources of many others, thereby resulting in the reduction of industrial operations, halting of expansion and development, curtailing employment, and the earning power of employees; the credit of many employers would be seriously impaired; there would be created both an extended and continuous uncertainty on the part of industry, both employer and employee, as to the financial condition of productive establishments and a gross inequality of competitive conditions between employers and between industry; employees would receive windfall payments including liquidated damages, of sums for activities performed by them without any expectation of reward beyond that included in their agreed rates of pay....

See 29 U.S.C. § 251 (1947).

Congress found that amendments to FLSA were necessary to provide for a strong national infrastructure, thereby enforcing the national public interest, general public welfare and the national

The Honorable Eldon Mulder
Alaska State Representative

March 29, 1994

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defense. 29 U.S.C. § 251. Small businesses were in fact being destroyed due to the large awards and mandatory liquidated damages. Though these findings were made in the 1947, Alaska did not adopt these amendments and has not made substantial amendments to the AWA since 1959.

Alaska is now on a course of encouraging development of its economic base. Small business will be the foundation to support Alaska's economic growth. The AWA stands in the way of this development, by providing employees and their attorneys with a means of destroying small business, thereby destroying the very foundation of Alaska's economic growth. The legislature has an opportunity to remedy this problem by passing HB 459, and I encourage passage of the Bill.

I also recommend that the legislature clarify the burden of proof required for an employer to prove that an employee was exempt from overtime compensation under the AWA. Mr. Legacki is now arguing in the Superior Court that I must prove that the Blisses were administrative employees and my burden is to prove all of the elements of the exemption, "beyond a reasonable doubt." Mr. Legacki relies on the recent Supreme Court opinion in Dayhoff v. Temsco Helicopters, 848 P.2d 1367 (Alaska 1993). According to Mr. Legacki, the Supreme Court changed the burden of proof from a "preponderance of the evidence," to "beyond a reasonable doubt." Dayhoff, 848 P.2d at 1371-1372. This burden should be clarified by the Alaska Legislature. The employer should not bear any heavier a burden than does the employee.

Finally, the legislature should clarify the application of the Statute of Limitations applicable to claims filed under the AWA. The federal courts have ruled that a cause of action for unpaid wages accrues on each and every date that an employee is paid, and for which he claims he was not paid the wages to which he alleges he was entitled. Johnson v. Allied Stores Corp., 679 P.2d 640, 644-45 (Idaho 1984); Mitchell v. Lancaster Milk Co., 185 F.Supp. 66 (D.C. Pa. 1960). Federal courts have consistently held that a separate cause of action for unpaid overtime compensation accrues at each regular payday, immediately following the work period during which services were rendered and for which overtime compensation is claimed. Shandelman v. Schuman, 92 F.Supp. 334, 335 (D.C. Pa. 1950).

Mr. Legacki has successfully argued in the Bliss matter that the Statute of Limitations period does not begin to run until the employee terminates his employment and all wages then become due and owing. This means that an employee can work for an employer for 10 years and sue the day after he quits for all of the overtime not paid for the previous 10 years.

The Honorable Eldon Mulder
Alaska State Representative

March 29, 1994

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The employee would effectively put the employer out of business and, in essence, collect a retirement fund in the process.

I do not want amendments to stall progress on HB 459, but I ask that you consider introducing another Bill amending the Statute of Limitations proscribed in AS 23.10.130 and clarifying when the limitations period for unpaid wages begins to run. The limitations period should not be tolled during the full term of one's employment.

I also ask that you consider passing another statute in the same, supplemental Bill that clarifies the burden of proof as to the employer's defenses, such as good faith and administrative or other exemptions.

Thank you for sponsoring this legislation and for considering my comments.

Sincerely;

A handwritten signature in cursive script that reads "Matt Bobich".

Matthew Bobich

MB/lks

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: March 29, 1994

RE: CSHB 459, Wage and Hour Reform Legislation,
Section 2 (Attorney Fees)

Plaintiff trial attorneys object to Section 2 of CSHB 459 and assert that the attorneys' fee rule embodied in AS 23.10.110(c) should not be changed. Are they right? Why not leave the attorneys' fees rule as it is?

AS 23.10.110(c) presently allows only the plaintiff to recover attorneys' fees in a wage & hour act lawsuit. The rule is one sided; the employer always pays. If the plaintiff wins the lawsuit, the employer must pay the attorneys' fees incurred by the plaintiff, and the employer must pay his own attorneys' fees. The employer pays twice. If the plaintiff loses, the employer still has to pay his own attorneys' fees. The employer gets no reimbursement for having successfully defended against the plaintiff's claims.

Plaintiffs trial attorneys obviously like this rule. There is never any "downside" to them or their client in suing the employer. They have everything to gain from taking their cases to trial, and next to nothing at risk from turning down reasonable settlement offers.

Section 2 amends AS 23.10.110(c) by providing that the prevailing party recovers costs and attorneys fees from the losing party as determined by court rule. That means Alaska Civil Rule 82, a copy of which is attached hereto. There are several good reasons for adopting this amendment:

1. Civil Rule 82 is the universally accepted standard for recovery of attorneys' fees in civil litigation in Alaska. Ninety percent of more of civil cases are decided under this rule. Judges and attorneys are familiar with the rule. The rule recognizes that the prevailing party should recover at least partial attorneys' fees for having been put to the trouble of successfully suing or successfully defending.

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2. Civil Rule 82 is fair. It treats plaintiffs and defendants exactly alike. Neither side is favored. It assures the prevailing party will recover attorneys' fees.

3. Civil Rule 82 encourages reasonable settlements. Defendants with weak defenses are encouraged to settle because if they don't, they will be ordered to pay at least part of the plaintiff's fees. Likewise, plaintiffs with weak or frivolous cases are encouraged to settle because they could end up paying part of the defendant's fees. The rule works both ways.

4. Civil Rule 82 is flexible. Neither party can safely engage in vexatious litigation because Civil Rule 82 gives the court the power to award enhanced fees and even full attorneys' fees. For example, if an employer protracts wage & hour litigation by raising spurious defenses, by abusing the discovery rules or by otherwise acting unreasonably in the face of a meritorious plaintiff's wage & hour act claim, the court has considerable leeway for increasing the plaintiff's fees recovery. See Civil Rule 82(b)(3).

Section 2 of CS HB 459 should be enacted into law because it insures that both parties will play by the same rules. That is imminently fair.

Attachment: Alaska Civil Rule 82

ALASKA RULES OF COURT

Rule 82. Attorney's Fees.

(a) **Allowance to Prevailing Party.** Except as otherwise provided by law or agreed to by the parties, the prevailing party in a civil case shall be awarded attorney's fees calculated under this rule.

(b) **Amount of Award.**

(1) The court shall adhere to the following schedule in fixing the award of attorney's fees to a party recovering a money judgment in a case:

	Judgment and, if awarded, Prejudgment Interest	Contested With	Contested Without Trial	Non- Contested
First	\$ 25,000	20%	18%	10%
Next	\$ 75,000	10%	8%	3%
Next	\$400,000	10%	6%	2%
Over	\$500,000	10%	2%	1%

(2) In cases in which the prevailing party recovers no money judgment, the court shall award the prevailing party in a case which goes to trial 30 percent of the prevailing party's actual attorney's fees which were necessarily incurred, and shall award the prevailing party in a case resolved without trial 20 percent of its actual attorney's fees which were necessarily incurred. The actual fees shall include fees for legal work customarily performed by an attorney but which was delegated to and performed by an investigator, paralegal or law clerk.

(3) The court may vary an attorney's fee award calculated under subparagraph (b)(1) or (2) of this rule if, upon consideration of the factors listed below, the court determines a variation is warranted:

- (A) the complexity of the litigation;
- (B) the length of trial;
- (C) the reasonableness of the attorneys' hourly rates and the number of hours expended;
- (D) the reasonableness of the number of attorneys used;
- (E) the attorneys' efforts to minimize fees;

(F) the reasonableness of the claims and defenses pursued by each side;

(G) vexatious or bad faith conduct;

(H) the relationship between the amount of work performed and the significance of the matters at stake;

(I) the extent to which a given fee award may be so onerous to the non-prevailing party that it would deter similarly situated litigants from the voluntary use of the courts;

(J) the extent to which the fees incurred by the prevailing party suggest that they had been influenced by considerations apart from the case at bar, such as a desire to discourage claims by others against the prevailing party or its insurer; and

(K) other equitable factors deemed relevant.

If the court varies an award, the court shall explain the reasons for the variation.

(c) **Motions for Attorney's Fees.** A motion is required for an award of attorney's fees under this rule. The motion must be filed within 10 days after the date shown in the clerk's certificate of distribution on the judgment as defined by Civil Rule 58.1. Failure to move for attorney's fees within 10 days or such additional time as the court may allow, shall be construed as a waiver of the party's right to recover attorney's fees. A motion for attorney's fees in a default case exceeding \$50,000 must specify actual fees.

(d) **Determination of Award.** Attorney's fees upon entry of judgment by default may be determined by the clerk. In all other matters the court shall determine attorney's fees.

(e) **Effect of Rule.** The allowance of attorney's fees by the court in conformance with this rule shall not be construed as fixing the fees between attorney and client.

(Adopted by SCO 5 October 9, 1959; amended by SCO 497 effective January 18, 1982; by SCO 712 effective September 15, 1986; by SCO 921 effective January 15, 1989; by SCO 1006 effective January 15, 1990; by SCO 1066 effective July 15, 1991; repealed and reenacted by SCO 1118 effective July 15, 1993)

April 4, 1994

Re: SB 340

Senator Tim Kelly, Chair
Senate Labor and Commerce Committee
State Capitol Building
Juneau, Alaska 99801-1182

Dear Senator Kelly:

We are Jim and Sharon Stewart, husband and wife. We were the winning party in Bobich v. Stewart. We understand SB 340, if passed, will change key provisions of the Alaska Wage and Hour Act. Those specific sections are what allowed us to sue Mr. Bobich in the first place, and also allowed us to get back some of what we had been cheated out of. Therefore, it is our hope that you will kill this bill in the interests of your non-union constituents.

We worked at the Dimond Mini Storage for Mr. Bobich. We took the job for \$1500 per month between the two of us. However, Mr. Bobich had also promised, as part of our "compensation package": finder's fees for customer referrals to Mover's World (also a Bobich enterprise), cash bonuses for high occupancy at the storage facility, and an apartment to be constructed inside the storage compound.

Other than the substandard wage, we received none of the other "compensations" - we didn't even get overtime pay as required by law. Although we asked him many times about when we could expect some of the items, he continually changed his story. He conveniently forgot items, "disagreed" with our recollection of how full Dimond had to be before we got the occupancy bonus, blamed it on his accountant, etc. The truth was apparent early on - he had no intention of paying us more than \$750 per month each for 80+ hours of work per week.

In addition, as time went on, he heaped more and more duties on us. We were expected to do piecework at other properties owned by Alaskan Real Estate, Bobich's company. This included maintenance and janitorial at several residential properties, *all without additional compensation*. We were even expected to pay for contractors and materials out of our own pockets, and we usually had to persistently badger Bobich for reimbursement.

Why didn't we just quit? My wife and I are in our fifties and we were in the middle of a depressed economy. It takes some doing to support a family on \$1500 per month - try doing it on nothing. We didn't dare quit until we already had other job offers. It took two years of slaving under Bobich and his partners before that would happen.

We initially had no intention of suing anyone. People like us just don't win lawsuits against people like Bobich. But our son insisted that we could sue him and win back at least a part of what he had promised us. It took a lot of talking before he convinced us to find an attorney, Ken Legacki, who was willing to help us. Two years and a lot of heartache later, we won. If SB 340 had been law at the time, we not only wouldn't have won, we wouldn't have tried.

SB 340 would require losing employees to pay for their employer's lawyers. If we knew that we would have to pay Bobich's high-powered gaggle of lawyers if we lost, we would never have considered filing suit. I don't think that is how the system is supposed to work. It's there to protect people like us from people like Bobich. The Act as it stands now eases exploited employees' fears and offers them a chance at equal justice, something they wouldn't have otherwise. If those exploited employees faced bankruptcy if they lost, there would likely be no more wage and hour suits in Alaska.

SB 340 would also preclude a lawsuit if a "private settlement" is reached with the employer. In the early stages of our lawsuit, Bobich offered to settle for \$5000, a fraction of what he owed us. We almost accepted it, because we didn't think we could win anyway. If SB 340 becomes law, that "settlement" would have been legal and enforceable.

Exploiting labor is criminal, isn't it? If someone burglarizes your home, and they pay you back at ten cents on the dollar, wasn't a crime still committed? As far as we are concerned, settlement offers like Bobich's \$5000 are tantamount to hush money, and that shouldn't be legal. Under the Act as it reads now, it isn't. The employer can try to buy you off with peanuts, but you still aren't waiving your ability to seek justice. SB 340 would allow unscrupulous employers to threaten their way into minuscule settlements without fear of retribution. The right to sue for redress is a basic right - you shouldn't be able to waive it under intimidation.

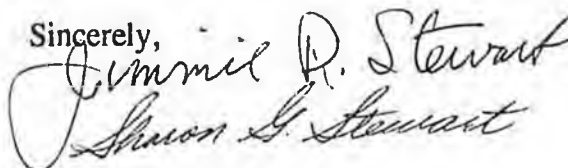
Finally, SB 340 would exempt employers from paying liquidated damages if the Court finds that they "acted in good faith" - that is, they convince the judge that they didn't know they were breaking the law. So the question of whether the employee gets his due or not depends on how good an actor the employer is. As an employer, shouldn't you have to know the laws governing your employees, what their rights are, and how you can work and pay them? We have always thought that ignorance is no excuse where the law is concerned. Employers, of all people, should not be excused from knowing the labor laws.

Senator Tim Kelly, Chair
Senate Labor and Commerce Committee

April 4, 1994
Page 3

In conclusion, we believe the Bobiches of this state are why the Alaska Wage and Hour Act exists. It's there for average working people who have no union or other protection from unscrupulous, slave-driving, scofflaw employers. For the reasons stated above, we strongly urge this committee to kill SB 340. Thank you for your time.

Sincerely,

Handwritten signatures of Jim D. Stewart and Sharon G. Stewart. The signature of Jim D. Stewart is written in a cursive style, and the signature of Sharon G. Stewart is written in a similar cursive style below it.

Jim D. Stewart
Sharon G. Stewart
P.O. Box 210050
Anchorage, Alaska 99521-0050

JDS/js

cc: Kenneth W. Legacki, Esq.
425 "G" Street, Suite 760
Anchorage, Alaska 99501

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 Shoe ruling, an employee with a claim for underpaid overtime or minimum wages had a 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 AWHHA 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.

FISCAL NOTE

STATE OF ALASKA
1994 LEGISLATIVE SESSION

BILL NO : SB 340

Revision Date: _____
 Title: "Damages and Atty Fees for
 Unpaid Wages"
 Sponsor: Senate Labor & Commerce
 Requestor: Senate Labor & Commerce

Department Affected: Labor
 ERU: 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/MF-TIA						
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 *[Signature]* Phone: 465-6003
 Division: Labor Standards & Safety Date: 3/7/94
 Approved by Commissioner: Charles W. Mahler *[Signature]*
 Agency: Department of Labor Date: 3/7/94

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- FISCAL NOTE -

A M E N D M E N T

OFFERED IN THE SENATE
TO: CSSB 340(L&C)

BY SENATOR KELLY

Page 1, line 1, after "to":

Insert "settlement and payment of claims for minimum wage and overtime compensation claims and to liquidated damages and attorney fees for"

SB

341

**ALASKA NATIVE
TOURISM COUNCIL**
Sharing Alaska's Rich Native Cultures

MEMORANDUM

TO: Honorable Walter J. Hickel
Paul Fuhs, Commissioner of Commerce
and Economic Development
Mary Pignalberi, Director, Alaska Division of Tourism
Members, Alaska House of Representatives
Members, Alaska Senate

FROM: Ann Campbell, Executive Director *Ann*
Alaska Native Tourism Council

RE: Resolution in Support of the Alaska Tourism Marketing Council

DATE: March 9, 1994

Attached to this memorandum, you will find a resolution passed by the Alaska Native Tourism Council at its March meeting, which states unanimous support for the Alaska Tourism Marketing Council (ATMC). This resolution illustrates our support for full refunding of the ATMC's FY 95 budget as well as for its reauthorization.

As you head into final budget considerations for the FY 95 year, please understand that the ATMC program significantly benefits many small businesses throughout Alaska, including rural tourism entrepreneurs. The ATMC, through its domestic marketing efforts, helps stimulate the Alaska economy, creates jobs in rural Alaska and produces a good income for many in rural Alaska.

Through the cooperative marketing program managed by the ATMC, the Alaska Native Tourism Council membership can effectively market Native cultural attractions to millions of potential visitors every year. Our research shows that 50 percent of those people who received information from our members, and who visited Alaska, did visit rural/cultural tour products.

Our membership of 10 community-owned tourism businesses representing the width and breadth of Alaska, is asking each of you to support our industry through your support of the Alaska Tourism Marketing Council's \$7.2 million budget and its longevity.

1527 "C" STREET, SUITE 304 • ANCHORAGE, ALASKA 99501
PHONE: 907-274-5400 • FAX: 907-263-9971

**RESOLUTION OF
SUPPORT**

**ALASKA NATIVE
TOURISM COUNCIL**
Sharing Alaska's Rich Native Cultures

RESOLUTION

Whereas the Alaska tourism industry is strong and growing with over a million visitors arriving each year;

Whereas the strength of Alaska tourism is based upon a successful cooperative marketing program;

Whereas the Alaska Native Tourism Council is a body representing a wide spectrum of Native-owned and operated tourism projects across the state;

Whereas Alaska Native Tourism Council depends on the efforts of the Alaska Tourism Marketing Council (ATMC), whose cooperative marketing program is regarded as one of the most effective in the nation;

Whereas mailing lists from the ATMC program produce outstanding conversions of visitors to Native tourism products;

Whereas many organizations like the Alaska Native Tourism Council couldn't afford to develop mailing lists as productive as the ATMC's leads;

Whereas the continued success of the Alaska Native Tourism Council is dependent upon the continuation of the ATMC;

Whereas the combined efforts of the ATMC and the Alaska Native Tourism Council have produced additional income and jobs for rural Alaskans;

Now therefore be it resolved that the Alaska Native Tourism Council supports a continuation of the authorization of ATMC;

Be it further resolved that the Alaska Native Tourism Council strongly supports full funding for the ATMC program which is so essential for rural tourism success.

This resolution was passed unanimously by the Alaska Native Tourism Council on March 1, 1994.

REPORT CONCLUSIONS

Currently AS 44.66.010 has ATMC scheduled for termination on June 30, 1993 and provides ATMC with a year in which to conclude its affairs. We recommend that the legislature consider legislation that extends ATMC's termination date to June 30, 1997 with the provision that current state general funds supporting their budget be gradually replaced by program receipts generated from revenues derived from the tourism industry (see Recommendation No. 1). Given the future prospect of declining state oil revenues and the continuing growth and maturity of the tourism industry, it is our opinion that state participation in funding the domestic tourism market should be gradually replaced with self-assessed taxes, fees, and/or contributions. This could take the form of enacting legislation to replace state general fund money with an assessment tax on the tourism industry, similar to that paid by commercial seafood processors, to fund the operations of the Alaska Seafood Market Institute. This recommendation is consistent with the Administration's desire to encourage privatization of ATMC. The Division of Tourism (DOT) should closely monitor the effect this action has, if any, on immature or undeveloped tourism markets and adjust the DOT program accordingly.

— STATE AUDITOR'S
RECOMMENDATIONS —

FINDINGS AND RECOMMENDATIONS

Of the following three recommendations, note that the third is directed solely at the Department of Commerce and Economic Development (DCED), Division of Tourism (DOT). Its inclusion in this report is due to our discovery of a material internal control weakness in DOT's disbursement procedures.

Recommendation No. 1

The legislature should consider legislation that extends the Alaska Tourism Marketing Council's (ATMC's) termination date to June 30, 1997 with the provision that current state general funds supporting its budget be gradually replaced with program receipts from tourism industry contributions or assessments within that four year period.

During Governor Hickel's Organizational Efficiency Task Force review, the operations of DCED as well as other state agencies were examined. In their summary report dated July 1992, the task force felt that state funds should be targeted to assisting the creation of new ventures rather than subsidizing the costs of maturing businesses. Consequently they felt that the efforts to privatize the activities of the ATMC should continue.

Currently the industry is required by statute to contribute at least 15% of the costs of ATMC. AVA has indicated a willingness to increase their contribution to the program. In a December 1991 letter to the commissioner of DCED they state:

We understand and are committed to the desire of the administration to reduce the contribution from the general fund for generic marketing in an effort to replace that source over a five (5) year period with resources of private and state support in collaboration with the Alaska Visitors Association (AVA). The AVA supports in principal the concept that generic marketing should be supported in part by private sector contribution and by new funding sources, rather than solely by the state general fund . . .

AVA has stated that they will increase their contribution to the marketing program. However, in an AVA project entitled *Destination: Alaska, Strategies for the Visitor Industry*, draft recommendations (among many others) were made that the visitor industry should be taxed and increased state general funds should be allocated to ATMC and DOT. It is our understanding that this report is currently being revised, thus these recommendations may be subject to change.

We recommend that current state general funds be gradually replaced by tourism industry generated funds. DCED should coordinate with the industry in determining the options available by which the industry can generate these funds. These funds may be increased industry contributions, industry assessments, tourism-related taxes or a combination of these.

As the goal of replacing state general funds with program receipts from the tourism industry is effectuated, the relationship between DCED and the industry as it is currently legislated may need re-evaluated.

Recommendation No. 2

The legislature should consider legislation to incorporate ATMC's staff within the Division of Tourism.

Currently, Alaska Statutes 44.33.710 provides that the ATMC board of directors may employ and determine the salary of the staff of ATMC. Staff is limited by the statutes to an executive director and no more than two employees. The statutes further provide that if there is no executive director, the staff of the council is to be supervised by the director of DOT.

Presently there is duplication of duties between DOT and ATMC staff. The director of DOT is statutorily responsible for ATMC's procurement activities. AS 44.33.120(b)(3) states, "*The Alaska division of tourism shall . . . review and approve the procurement documents and procedures of the tourism marketing council to ensure compliance with applicable laws and regulations . . .*" Additionally, AS 44.33.705 (11)(d) provides that "*a contract or grant entered into by the council is not effective until signed by the director [of the Division of Tourism].*" DOT staff are therefore responsible for monitoring ATMC's contracts, payments, and procurement. However, ATMC staff duties also include preparing budgets, administering contracts, and handling procurement.

Incorporating ATMC's staff within the Division of Tourism would eliminate these duplicate duties and provide for more efficient operations.

Recommendation No. 3

The Department of Commerce and Economic Development (DCED), Division of Tourism (DOT) should comply with the state budgetary process, state procurement code, and generally acceptable accounting principles and immediately cease the practice of diverting funds to non-state agencies. DCED should work with the Department of Administration in resolving this issue and make recovery to the State as may be considered necessary.

DOT directed a State of Alaska subcontractor to pay the Alaska Highway Rendezvous '92 Society \$6,500 that should have been credited to the State of Alaska. This check accompanied a letter dated November 5, 1992 from DOT that stated:

. . . the revised "Wings Over the North" production was never approved nor budgeted for by the Division of Tourism. Rather, you proceeded on a verbal commitment made in a telephone conversation with Lt. Governor Coghill, which he does not recall having made and which we have tried unsuccessfully to document.

The letter further stated that

. . . due to Alaska procurement laws which require some form of competitive solicitation in order to enter into contracts, we do not have a contractual arrangement. . . . Therefore, our only approach lies in redirecting funds. . . . A good example is the enclosed check from a printer who owed the division a credit and which we are now directing to you.

It is inconceivable to us that state employees would believe diverting monies due the State is an appropriate and legal action. The practice circumvents the state accounting system and certification process. At a minimum, circumvention of this process results in the state accounting records not accurately reflecting the financial transactions of the State. Processing transactions outside the state accounting system create an environment conducive to fraudulent transactions. Since the check/credit noted above related to FY 92 expenditures, it is possible that this diversion of funds also violates provisions regarding the expenditure of state funds as outlined in Section 13, Article IX of the Alaska Constitution.

In addition to the preceding check, according to DOT personnel, at least another \$700 in state funds have been diverted in a similar manner.

Internal controls should ensure that state resources are safeguarded against waste, loss, and misuse; that state resources are used consistent with laws, regulations, and policies; and reliable data is obtained, maintained, and fairly disclosed in reports. Management is responsible for implementing and maintaining adequate internal control systems and should institute timely action to correct identified internal control system weaknesses.

DCED should work with the Department of Administration to determine the appropriate corrective action to remedy the above matter.

Alaska Tourism Marketing Council

Organization

The Alaska Tourism Marketing Council was created by the Alaska Legislature in 1988 as a joint venture between the State of Alaska and the visitor industry. This truly unique melding of public and private expertise and funding is challenged with keeping Alaska a top contender in the highly competitive, worldwide tourism marketplace.

The ATMC is a public corporation mutually managed through a contract between the Alaska Department of Commerce and Economic Development and the Alaska Visitors Association.

The 21-member council is comprised of 10 directors appointed by the Governor, 10 directors appointed by AVA, and the Director of the Alaska Division of Tourism as an automatic appointment. The council works through a strong committee structure with each director serving on at least one of the following committees: fall/winter/spring promotion; collateral; public relations; research; advertising and planning.

The primary objective of the ATMC is to encourage expansion and growth of the state's visitor industry. It is also charged with ensuring the economic benefits derived from the industry remain in Alaska and that a maximum number of Alaska residents are employed in industry businesses. The council promotes cooperation between state and private sectors in developing visitor marketing campaigns and visitor industry facilities, both in the public and private domain, to ensure the visitor experience is, and continues to be, positive.

Funding

The council's operating budget is determined by a yearly appropriation from the State Legislature, plus funds from the private industry. The industry is responsible for no less than a 15% cash matching contribution, and must also share a portion of production costs for the Official State Vacation Planner. The sale of vacation planner advertisements, direct mailing labels and stock film footage to industry businesses is administered by the Alaska Visitors Association to generate the private sector's matching contribution.

Cooperative Marketing Program

The ATMC achieves its promotional objectives through an integrated marketing program directed at domestic and Canadian markets with the greatest potential for producing new and repeat visitors. Components of the program developed by the ATMC include:

- * The Official State Vacation Planner distributed to more than 500,000 potential visitors;
- * Domestic and Canadian magazine advertising, targeting adventure and outdoor travelers;
- * National television image advertising;
- * National public relations efforts;
- * Direct mail advertising campaigns;
- * Special Alaska newspaper sections in major U.S. markets;
- * Winter campaign promoting "off-season" travel to Alaska.

Through extensive market research, analysis of conversion rates and visitor spending habits, the cooperative marketing effort has resulted in award-winning marketing campaigns and unprecedented growth in Alaska's visitor industry.

Benefits of Cooperative Marketing

As a comprehensive travel guide created and designed specifically for people who have already indicated a strong interest in an Alaska vacation, the Vacation Planner represents an extraordinarily affordable and effective vehicle for all tourism-related businesses.

For the nominal cost of a narrative advertisement, businesses can reach hundreds of thousands of potential customers through distribution of the planner via direct mail, at trade shows and travel events, and to 50,000 travel

agents around the nation. Moreover, display advertising in the planner offers unparalleled exposure for Alaska tourism businesses.

In addition to offering advertisement, the Cooperative Marketing Program gives industry businesses the option to develop their own customized direct mail marketing campaign through the sale of labels. Using a list generated from requests for the Vacation Planner, this program is capable of sorting names and addresses of more than 450,000 potential visitors based on a variety of demographic data. The labels program offers virtually all industry businesses a highly cost effective promotional avenue to reach an extremely targeted market base.

Alaska Division of Tourism

The Alaska Division of Tourism is a division of the Department of Commerce and Economic Development. The DOT Director serves as an automatic appointment to the Alaska Tourism Marketing Council, and has a standing seat on the Alaska Visitors Association's Board of Advisors.

The DOT maintains a variety of promotional projects and programs that compliment the efforts of ATMC and AVA to serve the visitor and encourage business development.

Tourism Marketing

On the international scene, the DOT promotes Alaska, focusing primarily in Japan and the German-speaking countries of Europe. With tourism offices in both Japan and Germany, this promotion includes consumer advertising, travel trade show exhibits, travel writers/tour wholesaler familiarization tours, and production of foreign language collateral.

On the domestic front, the DOT engages in activities, both independent of and in cooperation with the ATMC, to promote Alaska in the Lower 48. Among those activities is an extensive visitor research program used by the division, ATMC, community organizations and private business to guide marketing efforts. In addition, the division directly mails destination information to travel agencies nationwide, and responds to over 131,000 telephone and mail requests for information from potential visitors.

Visitor Services

The DOT participates with state and federal agencies in operating Alaska Public Land Information Centers in Anchorage and Fairbanks, and fully funds and operates the Tok Visitors Center as an APLIC. The DOT also prints and distributes informational brochures and maps for Alaska trip planning.

Business Development and Assistance

The DOT provides technical assistance to communities developing visitor attractions and private businesses initiating or expanding their product. As part of that effort, the division is spearheading development of the AlaskaHost customer service training program offered to tourism businesses statewide. In addition, the division's Alaska Film Office promotes Alaska as a motion picture and television production location.

Product Analysis

DOT participates in feasibility analysis and design of new in-state visitor attractions, and works cooperatively to promote creation of new direct passenger air routes from overseas.

COOPERATIVE MARKETING

The Alaska Cooperative Marketing Program

The Cooperative Marketing Program is a unique joint venture between the state and private industry to bring visitors to Alaska. The Alaska Visitors Association, representing private industry, contracts with the State of Alaska to jointly manage the Alaska Tourism Marketing Council which executes the marketing program.

AVA

The Alaska Visitors Association is a statewide, non-profit trade association representing more than 700 Alaska businesses. With a charter of promoting travel to and within Alaska, the association provides a unified voice for the visitor industry, lobbies the legislature to encourage funding and support of tourism issues and provides a matching contribution to state tourism funds. This match is generated by ad and mailing label revenues from the Official Alaska State Vacation Planner. The association has four primary goals for the coming year:

- Increase the number of visitors to Alaska
- Increase the state funding for tourism promotion
- Educate the visitor industry on important tourism issues
- Encourage and support AVA member businesses

ATMC

The Alaska Tourism Marketing Council is a public corporation jointly managed by AVA and the Alaska State Department of Commerce and Economic Development. It is charged with development and execution of Alaska's domestic and Canadian marketing program. ATMC promotes Alaska as a world-class visitor destination through marketing, advertising and public relations. A yearly appropriation from the legislature and a 15 percent matching contribution from the AVA gives the council its operating capital. The 21-member council is comprised of 10 governor-appointed members, 10 AVA-appointed members and the Director of the Division of Tourism.

DOT

The goal of the state Division of Tourism is to foster the growth of tourism in Alaska. The division follows up on more than 50,000 separate requests for information and represents Alaska at consumer and trade shows throughout the nation. The DOT is responsible for developing international markets, developing research data, providing assistance to tourism businesses and overseeing grant programs. The division also promotes Alaska as a filming location to the movie industry.

ATMC



AVA

DOT

Cooperative Marketing Components

Alaska's Cooperative Marketing Program is a national program promoting Alaska as a visitor destination. The components of the program, which are developed by the ATMC, include:

- The Vacation Planner, sent to more than 700,000 potential visitors
- Domestic & Canadian magazine advertising, targeting adventure/outdoor travelers
- National television image advertising
- National public relations effort
- Direct mail advertising campaign
- Special "Alaska" newspaper sections in major U.S. markets
- Fall/Winter/Spring campaign promoting "off-season" Alaska

PUBLIC ATTITUDES

The Alaska Visitors Association (AVA) contracted with Cracium & Associates to conduct a statewide public opinion survey on tourism. The main purpose of the survey was to understand Alaskan residents' experiences and perceptions of the role the tourism industry plays in diversifying the State's economy.

The statewide public opinion survey on tourism was conducted with several objectives in mind:

- gather data on Alaskan views of the tourism industry;
- identify the current image and perception of tourism specifically, and in relationship to other industries (i.e. mining, fishing, timber, oil and government);
- explore attitudes regarding the future economic impact of tourism; and
- track public opinion so that policy makers and businesses can better monitor the growth and development of tourism in the State of Alaska.

Key Findings

If State revenue from oil declines, four out of five Alaska residents, 79.6% of Alaskans surveyed, believe tourism and fishing will be critical for a healthy state economy.

When attention is turned to their local area, seven out of ten Alaskans feel tourism is essential to the local economy. This was especially true for Anchorage, Kenai, Kodiak, Fairbanks, and southeast Alaska. Demographically, more women saw tourism as important to the economy of the area than did men (81% to 63%, respectively). By the same token, a respondent's age and length of residence in Alaska had no bearing on their opinions about the importance of tourism to the local economy.

Half of the respondents either worked or knew someone who worked in a tourism-related industry.

In a series of questions designed to assess underlying values and beliefs about tourism and its effect on the quality of life in Alaska, the public response to arguments for and against tourism revealed a resounding positive experience toward tourism, both economically and personally.

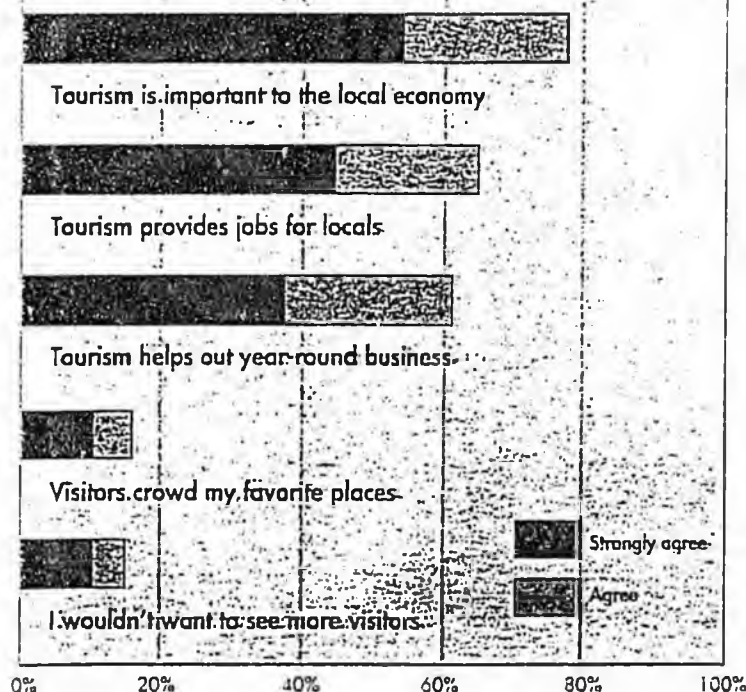
More than three quarters (78%) AGREE with the statement, "Tourism is important to my local economy." When residents were queried about the potential encroachment of tourists, 74% DISAGREE that "I wouldn't want to see any more visitors in my area than there are now." Clearly two-thirds (66%) held strong beliefs that tourists, in fact, provided jobs for locals and helped out year-round local businesses (62%).

A comparison of a similar lifestyle question from a 1989 study on tourism found 24% of Anchorage residents AGREEING with the statement "Tourists crowd all the good places in Anchorage in the summer." In the current study, only 15% of Anchorage residents AGREE that "visitors make it difficult for me to go to my favorite places."

Finally, the study looked at the public sentiment regarding State spending on advertising and promotion. Nearly one-third thought the State should SPEND MORE, (a rare statement of support at a time of increasing cuts in government spending) no doubt to fulfill their hopes of tourism dollars replacing declining oil revenues.

A Survey of Public Attitudes Toward Tourism in Alaska

Conducted by Cracium & Associates July 1991



VISITOR INDUSTRY IMPACT

The visitor business is Alaska's #1 growth industry.

Specifically, the visitor industry:

- ☞ Has the highest percentage of Alaska resident hire of all basic industry sectors, with an 84% local Alaska hire rate;
- ☞ Is the second largest private sector employer in Alaska, surpassed only by the seafood industry. The industry employs 18,800 during the peak season and 13,500 people year-round;
- ☞ Affects the employment of more than 52,000 other people in the transportation, retail or service sectors. And, it would most likely account for another 8,000 primary jobs if travel by Alaskans within Alaska had been calculated;
- ☞ Employs the most people in Southcentral (7,256 jobs with a peak season total of 9,573). Southeast accounts for the second highest employment (2,598 with a peak season total of 3,949) and the Interior/Far North employment ranks third (2,038 jobs with 2,975 during peak season);
- ☞ Generates \$244 million in annual payroll (based on 1990 employment data);
- ☞ Generates \$1.1 billion in revenues and spends an estimated \$590 million on inventory, advertising, marketing and labor. An additional \$260 million is paid out in taxes and other business-related expenses;
- ☞ Spends the most in Southcentral (\$168 million in 1990), second highest amount in Southeast (\$56 million), third highest in Interior/Far North (\$52 million) and 59 million in Southwest Alaska; and,
- ☞ Invests heavily in Alaska. Investments in Alaska are estimated to be \$448 million in property and operating equipment. The industry investment in Alaska is expected to top half a billion dollars within the next few years.

Tourism brings \$1.1 billion in revenues to Alaska.

Between 1989 and 1990, visitor businesses generated \$1.1 billion in revenues. Of this, approximately \$822 million represented business spending, with the remaining \$260 million going for taxes, payment to capital, and profits to business owners.

The total investment in Alaska's visitor industry is estimated at \$448 million, not including an estimated \$2 billion or more in cruiseship investments.

Tourism is a statewide industry.

In all of Alaska's regional economies, the tourism industry is a leading industry in the private sector. In the Southcentral and Interior/North regions, it ranks second, and in Southeast it ranks third. It is a growing factor in the Southwest and Arctic Alaska economies.

As the fastest growing industry in Alaska, tourism's future promise is a long range economic force offering year-round employment to thousands of residents.

Total Revenues to the State of Alaska from the Visitor Industry

As the following table illustrates, a total of over \$30 million attributable to the visitor industry flows into the state's general fund each year. The Alaska Marine Highway System, Department of Fish and Game, and corporate income taxes are the largest sources.

In addition, the Alaska Railroad and International Airport System also receive a significant amount of revenue attributable to the visitor industry. Although these are state operations, their finances are largely independent, and their revenues do not flow into the state general fund. Both of these revenue sources are included under "revenues to other state entities" in the adjoining table. Together, they received close to \$21 million in revenues attributable to the visitor industry.

The figures included in this table represent a *minimum* level of revenues to the state from the visitor industry. There are certainly additional sources of revenue to the state from the visitor industry that could not be quantified here (for example, rental car registration fees).

Despite these limitations, the data presented captures the most significant visitor industry sources of revenue to the state. The figures presented are based on hard data gathered from a variety of sources. Where necessary, conservative estimates were made. The result is a defensible, detailed estimate of the contribution of the visitor industry to state general fund revenues.

Revenues to the General Fund

Non-resident Visitor Spending

State Parks, FY91	
<i>Camping Permits, Historical Guided Tours, Other</i>	\$ 273,000
Department of Fish and Game, CY91	
<i>Non-resident and Alien Tags and Permits</i>	\$ 7,607,000
Alaska Marine Highway System, AVSP89-90	
<i>Non-resident Spending on Ferry Transportation</i>	\$ 14,900,000
Gasoline Taxes Paid by Visitors, AVSP89-90	\$ 517,000
State and University Museums, FY91	
<i>Non-resident Visitor Admission Fees</i>	\$ 240,000

Taxes and Fees from Visitor Industry Businesses

Department of Motor Vehicles Fees, Cy90	
<i>Tour Bus Vehicle Registration Fees</i>	\$ 43,000
Corporate Income Tax, FY91	\$ 4,169,000
Business License Fees, FY91	\$ 125,000
Aviation Fuel Taxes, FY90	\$ 2,000,000
Tour Bus Fuel Tax, CY91	\$ 41,000

Agencies Promoting the Visitor Industry

Alaska Division of Tourism, FY91	
<i>Program Receipts and ATMC</i>	\$ 1,269,000

Subtotal: Revenues to the General Fund **\$ 31,184,000**

Revenues to Other State Entities

Alaska Railroad, CY91	
<i>Pull Revenues, Specials and</i>	
<i>Estimated Non-resident ticket Receipts</i>	\$ 7,400,000
Alaska International Airport System, FY91	\$ 13,385,000

Subtotal: Revenues to Other State Entities **\$ 20,785,000**

Grand Total **\$ 51,969,000**

* (Direct Revenues to the State of Alaska from the Visitor Industry, McDowell Group, May 1992)

Audit Report



**DEPARTMENT OF COMMERCE AND
ECONOMIC DEVELOPMENT
ALASKA TOURISM MARKETING
COUNCIL**

January 25, 1993



Audit Control Number:

08-1399-93

Division of Legislative Audit

P.O. Box 113300, Juneau, Alaska 99811-3300

ALASKA STATE LEGISLATURE

LEGISLATIVE BUDGET AND AUDIT COMMITTEE

Division of Legislative Audit



P. O. Box 113300
Juneau, AK 99811-3300
(907) 465-3830
FAX (907) 465-2347

January 25, 1993

Members of the Legislative Budget
and Audit Committee:

In accordance with the provisions of Title 24 of the Alaska Statutes, the attached report is submitted for your review.

DEPARTMENT OF COMMERCE AND ECONOMIC DEVELOPMENT ALASKA TOURISM MARKETING COUNCIL

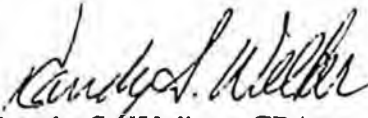
January 25, 1993

Audit Control Number

08-1399-93

The audit reports on whether the Alaska Tourism Marketing Council (ATMC) should continue its existence. Currently AS 44.66.010 has ATMC scheduled for termination on June 30, 1993 and provides ATMC with a year in which to conclude its affairs. We recommend that the legislature consider legislation that extends ATMC's termination date to June 30, 1997 with the provision that current state general funds used to fund ATMC be gradually replaced by program receipts derived from tourism industry generated revenues within that four year period.

The audit was conducted in accordance with government auditing standards. Fieldwork procedures utilized in the course of developing the findings and discussion presented in this report are discussed in the Objectives, Scope, and Methodology section of this report.


Randy S. Welker, CPA
Legislative Auditor

CORRECTION

**THIS DOCUMENT
HAS BEEN REPHOTOGRAPHED
TO ASSURE LEGIBILITY**

Audit Report

**DEPARTMENT OF COMMERCE AND
ECONOMIC DEVELOPMENT
ALASKA TOURISM MARKETING
COUNCIL**

January 25, 1993



Audit Control Number:

08-1399-93

Division of Legislative Audit

P.O. Box 113300, Juneau, Alaska 99811-3300

LEGISLATIVE BUDGET AND AUDIT COMMITTEE

DIVISION OF LEGISLATIVE AUDIT

The Legislative Budget and Audit Committee is a permanent interim committee of the Alaska Legislature. The committee is made up of five senators and five representatives, with one alternate from each legislative chamber. The chairmanship of the committee alternates between the two chambers every legislature.

The committee is responsible for providing the legislature with audits of state government agencies. The programs and activities of state government now cost more than \$5 billion a year. As legislators and administrators try increasingly to allocate state revenues effectively and make government work more efficiently, they need information to evaluate the work of governmental agencies. The audit work performed by the Division of Legislative Audit helps provide that information.

As a guide to all their work, the Division of Legislative Audit complies with generally accepted auditing standards established by the American Institute of Certified Public Accountants and with government auditing standards established by the U.S. General Accounting Office.

Audits are performed at the direction of the Legislative Budget and Audit Committee. Individual legislators or committees can submit requests for audits of specific programs or agencies to the committee for consideration. Copies of all completed audits are available from the Division of Legislative Audit's offices in either Anchorage or Juneau.

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ALASKA STATE LEGISLATURE

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Division of Legislative Audit



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January 25, 1993

Members of the Legislative Budget
and Audit Committee:

In accordance with the provisions of Title 24 of the Alaska Statutes, the attached report is submitted for your review.

DEPARTMENT OF COMMERCE AND ECONOMIC DEVELOPMENT ALASKA TOURISM MARKETING COUNCIL

January 25, 1993

Audit Control Number

08-1399-93

The audit reports on whether the Alaska Tourism Marketing Council (ATMC) should continue its existence. Currently AS 44.66.010 has ATMC scheduled for termination on June 30, 1993 and provides ATMC with a year in which to conclude its affairs. We recommend that the legislature consider legislation that extends ATMC's termination date to June 30, 1997 with the provision that current state general funds used to fund ATMC be gradually replaced by program receipts derived from tourism industry generated revenues within that four year period.

The audit was conducted in accordance with government auditing standards. Fieldwork procedures utilized in the course of developing the findings and discussion presented in this report are discussed in the Objectives, Scope, and Methodology section of this report.



Randy S. Welker, CPA
Legislative Auditor

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OBJECTIVES, SCOPE, AND METHODOLOGY

In accordance with the intent of Titles 24 and 44 of the Alaska Statutes (sunset legislation), we have reviewed the activities of the Alaska Tourism Marketing Council (ATMC) to determine if it should continue in existence.

As required by legislative intent, this report shall be considered during the legislative oversight function in determining whether the Alaska Tourism Marketing Council should be reestablished. The law currently specifies that ATMC will terminate on June 30, 1993.

During the course of our examination, we reviewed and evaluated the following:

1. Applicable statutes and regulations.
2. Interviews with Division of Tourism and ATMC personnel.
3. Minutes of Alaska Tourism Marketing Council meetings.
4. Contents of the director of the Division of Tourism's correspondence files.
5. Interviews with ATMC board members.
6. Interviews with representatives of local and regional tourism associations.
7. Interviews with other states' tourism office personnel.
8. Office of the Ombudsman closed case file.
9. Other documents as deemed pertinent.

ORGANIZATION AND FUNCTION

The Alaska Visitors Association (AVA) is the statewide visitor industry group with which the Department of Commerce and Economic Development (DCED) contracts for joint management of Alaska's domestic tourism marketing program. AVA was established in the 1950s. In 1976, AVA approached the State with the idea of combining funds from the State with funds and marketing talent contributed by private companies for use in building Alaska's tourism program. A sub-group was created within AVA entitled the Alaska Visitors Association Marketing Council.

The Division of Tourism's (DOT's) informal financial arrangement with the AVA was questioned by the Department of Law in 1987. As a result, the idea of cooperative marketing Alaska with industry became formalized in statute in 1988.

The Alaska Tourism Marketing Council (ATMC) was established on July 1, 1988 as an instrumentality of the State in DCED. It is a quasi-state corporation that has a legal existence independent of and separate from the State.

ATMC's statutory responsibilities include the following:

1. To conduct a tourism marketing program which promotes the State as a tourist destination.
2. To prepare and implement marketing plans for the promotion of Alaska tourism including necessary research.
3. To provide advice, at the request of the director of DOT, on tourism programs of the division.

ATMC is governed by a 21 member board (see inset at right) with 10 members appointed by the governor and 10 members appointed by the Alaska Visitors Association (AVA). The remaining member is the director of DOT who is the presiding officer. Statutes require that

. . . a board member shall (A) be substantially involved in a visitor or recreation industry business; (B) have training in a field such as marketing; (C) be an officer or a senior staff member of a local government or nonprofit enterprise established to promote the visitor industry; or (D) have business or government experience that would materially enhance the member's ability to contribute to the planning, execution, or evaluation of a visitor industry promotional marketing campaign . . .

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the promotion of tourism to and within the state and which has a statewide membership comprised of representatives of all major sectors of the visitor industry . . ."

DCED's Division of Administrative Services and DOT provide assistance to ATMC in the areas of accounting, procurement, personnel, and budgeting. The DOT director is statutorily responsible for overseeing all ATMC procurement documents and procedures of ATMC to ensure compliance with applicable laws and regulations. DOT is also charged with conducting research to evaluate the effectiveness of ATMC's marketing programs.

Currently, a Division of Tourism study by the McDowell Group entitled *Alaska's Visitor Industry: An Economic Profile* dated July, 1991 indicates that the Alaska Visitor Industry businesses spent an estimated \$822 million on such items as inventory for resale, advertising/marketing, and labor in 1990. While the accuracy of these numbers have not been confirmed, they are an indication of the size of the industry.

CORRECTION

**THIS DOCUMENT
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According to the Department of Law, board member appointees do not need to meet all four characteristics noted above. Instead, due to the language of the statute, only one of the four characteristics must be met by board members. Seven of the ten ATMC board members appointed by AVA are those companies and/or individuals who have financially contributed the most to AVA. That determination is based upon the dollar amount of advertising space and mailing labels purchased by the company and/or individual as well as those amounts contributed directly to AVA by those companies and/or individuals.

The ATMC bylaws outline their standing committees. These committees change as deemed appropriate by ATMC. The current committees are: the planning committee, the advertising committee, the collateral committee, the public relations committee, the research committee, and the fall/winter/spring committee. The planning committee oversees and coordinates other committees' activities with the overall ATMC marketing plan goals and objectives. The planning committee consists of all other committee chairs and ATMC's presiding officer. ATMC members are required to sit on at least one committee but are limited to membership on two committees with the exception of the presiding officer. Other individuals may sit on a committee with approval by the ATMC.

A periodical called the vacation planner is produced yearly by ATMC. The vacation planner includes editorial information about Alaska by region and advertising by businesses and organizations. AVA sells the advertising space to interested businesses and organizations to raise the required industry contribution and their share of the planner's production costs.

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Alaska Statutes limit ATMC staff to an executive director and no more than two other employees. The executive director of ATMC is selected by the council members as provided for in statute.

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The DCED commissioner has statutory authority on how to manage ATMC. Alaska Statute 44.33.705 delineates the commissioner's options regarding management of the council. The commissioner may contract with a qualified trade association to jointly manage the council if that association will contribute at least 15 percent of the expenses of the council. If the commissioner chooses not to contract with a qualified trade association, a three person board of directors manages the council. Those three persons are the director of DOT, the commissioner of DCED, and the commissioner of another executive department designated by the governor.

Since the inception of ATMC, the commissioner has contracted with a qualified trade association for joint management of the council. Alaska Statute 44.33.735 has defined a qualified trade association as "*a private, nonprofit organization whose primary purpose is*

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REPORT CONCLUSIONS

Currently AS 44.66.010 has ATMC scheduled for termination on June 30, 1993 and provides ATMC with a year in which to conclude its affairs. We recommend that the legislature consider legislation that extends ATMC's termination date to June 30, 1997 with the provision that current state general funds supporting their budget be gradually replaced by program receipts generated from revenues derived from the tourism industry (see Recommendation No. 1). Given the future prospect of declining state oil revenues and the continuing growth and maturity of the tourism industry, it is our opinion that state participation in funding the domestic tourism market should be gradually replaced with self-assessed taxes, fees, and/or contributions. This could take the form of enacting legislation to replace state general fund money with an assessment tax on the tourism industry, similar to that paid by commercial seafood processors, to fund the operations of the Alaska Seafood Market Institute. This recommendation is consistent with the Administration's desire to encourage privatization of ATMC. The Division of Tourism (DOT) should closely monitor the effect this action has, if any, on immature or undeveloped tourism markets and adjust the DOT program accordingly.

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FINDINGS AND RECOMMENDATIONS

Of the following three recommendations, note that the third is directed solely at the Department of Commerce and Economic Development (DCED), Division of Tourism (DOT). Its inclusion in this report is due to our discovery of a material internal control weakness in DOT's disbursement procedures.

Recommendation No. 1

The legislature should consider legislation that extends the Alaska Tourism Marketing Council's (ATMC's) termination date to June 30, 1997 with the provision that current state general funds supporting its budget be gradually replaced with program receipts from tourism industry contributions or assessments within that four year period.

During Governor Hickel's Organizational Efficiency Task Force review, the operations of DCED as well as other state agencies were examined. In their summary report dated July 1992, the task force felt that state funds should be targeted to assisting the creation of new ventures rather than subsidizing the costs of maturing businesses. Consequently they felt that the efforts to privatize the activities of the ATMC should continue.

Currently the industry is required by statute to contribute at least 15% of the costs of ATMC. AVA has indicated a willingness to increase their contribution to the program. In a December 1991 letter to the commissioner of DCED they state:

We understand and are committed to the desire of the administration to reduce the contribution from the general fund for generic marketing in an effort to replace that source over a five (5) year period with resources of private and state support in collaboration with the Alaska Visitors Association (AVA). The AVA supports in principal the concept that generic marketing should be supported in part by private sector contribution and by new funding sources, rather than solely by the state general fund . . .

AVA has stated that they will increase their contribution to the marketing program. However, in an AVA project entitled *Destination: Alaska, Strategies for the Visitor Industry*, draft recommendations (among many others) were made that the visitor industry should be taxed and increased state general funds should be allocated to ATMC and DOT. It is our understanding that this report is currently being revised, thus these recommendations may be subject to change.

We recommend that current state general funds be gradually replaced by tourism industry generated funds. DCED should coordinate with the industry in determining the options available by which the industry can generate these funds. These funds may be increased industry contributions, industry assessments, tourism-related taxes or a combination of these.