ALASKA LEGISLATURE COMMITTEE FILES 2001-2002 8672

10623 SENATE LABOR & COMMERCE

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and development purposes. Then, in 1973 the legislature enacted the Commercial Fisheries Limited Entry Act (AS 16.43).

This Act contained limitations and restrictions on permits that were designed to keep control of the permit in the hands of the holder and to not allow direct or indirect control by third parties, i.e., canneries, financial institutions, or speculative investors. Specifically, AS 16.43.150(g) stated:

> *An entry permit may not be:*
>
> > *(1) pledged, mortgaged, or encumbered in any way;*
> > *(2) transferred with any retained right of repossession or foreclosure; or*
> > *(3) attached, distrained, or sold on execution of judgment or under any other process or order of any court.*

In 1978, this statutory section was amended to allow the fishers to take advantage of the value of their permits to fund their operations or if they no longer wanted to participate in the fishery. With the passage of Chapter 83, SLA 1978, CFRLF was authorized to make and foreclose on limited entry permit purchase loans to Alaska residents. The aim of the State was to place more limited entry permits in the hands of Alaskans. CFRLF loans would still be consistent with the original intent of the Limited Entry Act as the State would be the holder of the foreclosed permit in the case of default on the loan by the fisher. This would ensure the permit would be sold to a qualified person under the Limited Entry Act requirements, allowing the State to maintain control over its fisheries resource management. In addition, if the sale of the foreclosed permit was financed by CFRLF, the purchaser would have to meet the residency requirements of the loan program.

The next year, the legislature passed an amendment to CFAB's statutes that gave the Bank the same authority to make limited entry permit loans as was given to CFRLF. The sectional analysis of the bill stated in part:

> *. . . This language parallels the existing law that allows the state division of loans to make limited entry permit loans. . . . The purpose of this section is to expand the bank's power to provide for limited entry permit loans to Alaskans. Since the Bank provides for loans only to resident Alaskans this additional capital source will be an advantage to Alaskans who want to get into the fishery in the future. At least one-third of Alaska's salmon fishermen are still nonresidents . . . . This expansion of loan authority to the Commercial Fishing and Agriculture Bank will provide another source of capital to Alaskans who want to move into the salmon fisheries in the state.*

Again, the limited entry permit loans made by CFAB were considered consistent with the intent of the Limited Entry Act. As CFAB was a creature of Alaska law, the procedures for foreclosure could be set by statute, thus protecting the State's right to control the transfer of

any foreclosed limited entry permit. Also, any purchaser of a foreclosed limited entry permit that obtained financing for the purchase from CFAB would have to meet its statutory residency requirement.

In 1995 there were 13,364 limited entry fishing permits held by fishers. Of those. 1,363 had liens against them by CFRLF and 383 by CFAB.

As previously mentioned, CFAB's statutes will lapse upon the full repurchase of its Class C stock from the State. This could create problems for Alaskan fishers and the State.

Problems in the elimination of CFAB's statutes

If payments for the repurchase of CFAB's Class C stock are made in accordance with the agreement with the Department of Revenue, CFAB's statutes will lapse in about May 1998. The Bank is to continue operations under its bylaws and the Alaska Cooperative Corporations Act (ACCA). Nonetheless. this elimination of CFAB's enabling statutes will give rise to several significant issues.

First, since CFAB's authority to make limited entry fishing permit loans is contained in AS 44.81, the elimination of that chapter will also delete such authority. Thus CFRLF would be the only capital source for financing the limited entry fishing permits for Alaska resident fishers.

This raises additional questions as to the legal status of CFAB's outstanding liens against permits at the time the statute is eliminated. These questions include concerns regarding any potential seizures of those permits by the federal Internal Revenue Service (IRS). Currently the State and the IRS are in a legal dispute over the applicability of AS 16.43 regarding tax liens and ultimate seizure and sale of permits by the IRS.

Secondly, the current statutory requirement for CFAB to make loans only to Alaska residents would be deleted with the elimination of AS 44.81. Under AS 44.81.210(a)(1) and (20), CFAB is authorized to make loans to Alaska residents and to companies owned by Alaska residents. Alaska Statute 44.81.210(a)(23) and AS 44.81.210(c) provide narrow exceptions for protection-of-collateral loans and shore-based Alaskan processors, respectively.

Thirdly, there are concerns as to whether CFAB could conduct its operations under AS 10.15. ACCA specifically excludes cooperatives organized for banking purposes.[9] However, ACCA does not define "banking." One possible definition can be found under the Alaska Banking Act (AS 06.05) which states:

(3) "banking" means performing activities that

[9]See AS 10.15.005.

> *(A) include, at a minimum, soliciting, receiving, or accepting money or its equivalent on deposit, whether the deposit is made subject to a check or is evidenced by a certificate of deposit, passbook, note, receipt, or other writing; in this subparagraph, "deposit" does not include a deposit made by an agent for a principal; and*
>
> *(B) may also include the negotiation for and discounting of promissory notes or other evidences of indebtedness, selling and buying money or its equivalent, lending money on personal or real property or other security, or performing other similar financial operations.* [Emphasis added.]

Although CFAB meets the criteria of section (B), it does not accept deposits, thus it may not be a "bank" under this definition. Regardless, the Alaska Banking Act is not controlling over the Alaska Cooperative Corporations Act. Thus, it is uncertain whether CFAB would qualify under ACCA.

In 1981 AS 44.81.010(a) was amended to make

> *. . . it clear that CFAB is not engaged in "banking" as contemplated by the Alaska Banking Code, as it seems clear that the Legislature intended that CFAB serve a different function than that of the commercial banks in the state. Regulation under the Alaska Banking Code would be inappropriate.*[10]

This amendment to AS 44.81.010(a) also added the sentence, *"[t]he bank is exempt from the provisions of the Alaska Banking Code (AS 06.05) in the exercise of powers granted by this chapter."* However, the legislature believed the exclusion of cooperatives organized for banking purposes under ACCA still needed to be addressed. The legislative summary of HB 413 stated the following:

> *The last paragraph of CFAB's originating legislation states that upon repurchase of the original Class C stock, the legislation lapses and CFAB is to operate totally under the cooperative statutes of the State. However, the first section of the cooperative statute prohibits a cooperative from engaging in banking or insurance. Therefore, once the current legislation ceases, CFAB could be construed as being an illegal operation under the strictest definition of banking.*

In order to address this problem with ACCA, the legislature amended AS 44.81.220 with the passage of FCCSHB 413 as follows:

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[10]A 1981 legislative document concerning House Bill 413, *Summary of a Bill Concerning the Alaska Commercial Fishing and Agriculture Bank and Relating to the Relationship of the Bank with the State.*

Notwithstanding the provisions AS 10.15.005,[11] upon the repurchase of all the nonvoting, preferred shares initially issued by the bank and purchased by agencies of the state, the provisions of this chapter lapse and the bank may proceed to operate solely as a private cooperative corporation under the terms of its bylaws and the provisions of AS 10.15.010 - 10.15.600 [ACCA provisions].

The concern regarding the elimination of AS 44.81 upon repurchase of CFAB's Class C stock is that these exemptions for CFAB from the Alaska Banking Code and ACCA will be deleted. Of course, the problem can be addressed by amending AS 44.81, as proposed in HB 284, by repealing AS 44.81.220. This would retain AS 44.81 upon repurchase of the CFAB's Class C stock from the State and not require CFAB to operate under ACCA. Another possible alternative would be for the legislature to allow AS 44.81 to lapse but amend the Alaska Banking Act to specifically exclude CFAB and to amend AS 10.15 to specifically include CFAB as a cooperative to be governed by ACCA. If this alternative is pursued by the legislature, any legal ramifications for CFAB should be considered in constructing the specific legislation due to the fact that it was originally incorporated under AS 44.81.

Finally, with the elimination of AS 44.81, CFAB would no longer be required to serve a specific public purpose that the legislature found appropriate to enhance the development of the aquatic and agriculture industries of the State.

In 1981, through FCCSHB 413, the legislature made it clear that CFAB was established to serve a public purpose by amending AS 44.81.010(a) to state that *"[t]he exercise by the bank of the powers conferred by this chapter is considered to be for a public purpose."* The summary of HB 413[12] included the following:

The Bill now before the Legislature as HB 413 is designed to make clear what many believe to be the intent of the original drafters of the legislation which created the Alaska Commercial Fishing and Agriculture Bank ("CFAB") i.e., that CFAB was intended to exist as a private, cooperative corporation while filling a crucial need of the State in making capital available to commercial fishermen and farmers, thereby assisting with the development of fishing and agriculture in the state.

In an effort to retain this public service charge, HB 284 was introduced last session to amend CFAB's statutes to have the State retain for perpetuity a $1 million investment in its Class C stock. However, based upon a request by CFAB's management and legal counsel the $1 million investment has been deleted and replaced with a more direct conveyance of public purpose. The proposed change to AS 44.81.010(a) reads as follows:

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[11]Alaska Statute 10.15.005 states that *"[A] cooperative may be organized under this chapter for any lawful purpose, except for the purpose of banking or insurance or the furnishing of electric or telephone services."*

[12]See previous footnote 10.

In the exercise of its powers under AS 44.81.215(7) the bank is acting under the express authority and reservat'ons of the state as the issuer of limited entry permits under AS 16.43.

The referenced section, AS 44.81.215(7), allows the Bank to ". . . *accept the pledge of a limited entry permit as security for a loan made under this chapter . . . .*"

As discussed earlier, CFAB was patterned after components of the Federal Farm Credit System, which were initially financed by the federal government. This initial financing was subsequently repaid and the components became fully owned and financed by their members/borrowers. However, with that repayment the Federal Farm Credit Act did not lapse; instead, it has remained to provide some congressional control over the public purpose of that system. This is similar to what is contemplated with CFAB in HB 284.

Retention of AS 44.81 may result in monetary benefits to the State

Retention of AS 44.81 would ensure CFAB would remain a source of capital for Alaska resident fishers, a financing mechanism for the purchase of limited entry permits, and an organization whose charge is to serve a public purpose in the development of the aquatic and agriculture industries of the State. In addition, we believe the Bank could be utilized to take over all or part of the functions of CFRLF through optimum use of its access to capital from the Federal Farm Credit System. See Recommendation No. 1 in the Findings and Recommendations section.

Appropriate changes proposed for CFAB statutes

One of the objectives of the audit was to identify the new proposed general/lending powers included in HB 284 and to determine whether those type of activities are already available through other State or private organizations. Exhibit 4 identifies the proposed additional powers. As discussed below, we do not consider these new powers to constitute new or additional competition.

Exhibit 4

HB 284 Proposed Additions to CFAB's General/Lending Authority

AS 44.81.210 General Powers of the Bank

The bank may . . .
(6) engage in programs to support the efforts of resident fishers or farmers in order to enhance the further development, efficiency, stability, or profitability of commercial fishing or agriculture in the State. . . .
(14) establish wholly-owned or majority-owned subsidiary corporations or limited liability companies to:

- *acquire, hold, operate, maintain, or liquidate property received by the bank in a foreclosure action or other loan collection process, or*
- *provide services to resident fishers or farmers, or other persons, if the services are consistent with the corporate purposes and powers expressed in this chapter.*

(15) acquire equity or other ownership interest in a domestic corporation or limited liability company if the purpose of the acquisition is to enhance the further development, efficiency, stability, or profitability of commercial fishing or agriculture in the State.

AS 44.81.215 Lending Powers of the Bank

The bank may . . .
(8) make loans in participation with other lenders as provided in (1), (2), or (4) of this section, whether or not an obligor is a member of the bank.
(9) purchase or acquire participations in loans from other lenders if the participations conform to the provisions of (1), (2), or (4) of this section, whether or not an obligor is a member of the bank.

AS 44.81.236 Limitations on the Pledge of Permits

A loan may not be secured by the pledge of a limited entry permit unless the proceeds of the loan are used for . . .
(2) the purchase or lease of quota shares, individual fishing quotas, or another license, permit, or other grant of commercial fisheries harvesting entitlement that is issued and regulated under state or federal law. . . .
(5) the payment of obligations incurred in the support of a borrower and the persons who are dependent upon that borrower if the majority of the borrower's earned income is derived through commercial fishing under the borrower's permit.
(6) the enhancement of the productivity of diversification of the commercial fishing activities of a borrower, including education and technical training.
(7) the payment of taxes or other obligations whose status places the permit of a borrower in jeopardy of attachment, distraint, or sale on execution of judgment or under a process or order of a court.
(8) the purchase of the bank's stock or other equity instruments and loan costs.

CFAB is a potential participant in AIDEA or ASTF projects, not a competitor

Neither the management of the Alaska Industrial Development Export Authority (AIDEA) nor the Alaska Science and Technology Foundation (ASTF) believe there is a duplication of services between the statutory authority of their organizations and CFAB. Both organizations' management view CFAB as a potential participant in their projects relating to the development of the agriculture and commercial fishing industries in the State.

With respect to the additional general powers proposed under AS 44.81.210(6), both AIDEA and ASTF have similar authority to engage in programs that support fishers and farmers in their efforts to enhance the commercial fishing and agriculture industries in the State. However, AIDEA's authority is restricted to "participation" with government or private

industry in programs for technical assistance, loans, technology, transfer, or other programs related to the exportation of Alaska goods, services, or raw materials, while ASTF administers a grant program (rather than a loan program) for research projects that may be in the fisheries or agriculture industries. ASTF cannot not fund a project beyond the research stage; that is, it cannot fund operations or the development of markets.

The addition of AS 44.81.210(14) conveys authority similar to AS 44.88.080(14) that gives AIDEA the power to acquire, manage, and operate projects it considers necessary or appropriate to serve a public purpose. This would include projects that AIDEA acquires through foreclosure or other loan collection processes. CFAB's proposed statutory power would allow it to establish a wholly-owned or majority-owned subsidiary corporation or limited liability company to own and/or operate such acquired property. Unlike AIDEA, CFAB has member/owner interests to protect as well as the interests of CoBank as a capital lender. The use of subsidiary corporate or limited liability structures may provide some protection of these interests in CFAB's assets.

Neither AIDEA nor ASTF have the power to establish service corporations as proposed under AS 44.81.210(14). Nevertheless, revenue from a service corporation would provide some diversification of CFAB's revenue sources, which is desirable due to its lending activity being primarily concentrated in a single-resource based industry. The statutory change requires that the services provided be consistent with CFAB's statutory purposes and powers expressed in AS 44.81.

Alaska Statute 44.81.210(15) would provide CFAB with the power to acquire equity or other ownership interest in a domestic corporation or limited liability company. AIDEA has made a similar investment in a limited partnership referred to as the Polaris Fund. The purpose of the fund is to provide equity capital to young companies. The companies sought by the fund for investment are those with the potential to achieve profitable sales of $5 to $50 million within three to five years, in a distinctive product line. AIDEA's power to invest in the limited partnership is derived from its authority to invest the amounts held in its revolving fund.[13] The goal of both the proposed CFAB statutory change and AIDEA's investment in the Polaris Fund is to provide a source of venture capital to Alaskan enterprises. CFAB's authority would be limited to enterprises in the commercial fishing or agriculture industries in the State and limited to significantly lower dollar amounts.

There are in place certain controls over the type of activities that would result from the additional general powers proposed in HB 284. CFAB would have to obtain written approval

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[13]Alaska Statutes 44.88.060 states *". . . the authority has the powers and responsibilities established in AS 37.10.071 [Investment Powers and Duties] with respect to the investment of amounts held in the revolving fund."* According to an attorney general memorandum dated July 26, 1989, the discretion to concentrate or diversify investments under AS 37.10.071(b)(3) is *". . . the factor that makes the joint venture investment project feasible under existing law."*

from CoBank[14] to support or to acquire equity or other ownership interest in a domestic corporation or limited liability company and to engage in any new programs or activities. In addition, the agreement with CoBank would effectively limit the amount of capital available to invest[15] in such programs or entities. In addition, on an annual basis CoBank representatives perform a quality review of all or part of CFAB's loan portfolio, much like that performed by the DCED bank examiners. These controls would assist in ensuring that CFAB does not perform activities that may jeopardize its financial stability.

Proposed loan participation authority is standard industry practice

Under AS 44.88.155(c), AIDEA has the authority to purchase loans or purchase participations in loans for projects. The Farm Credit Act allows banks for cooperatives (BCs) to either purchase or acquire loan participations from other lenders, or make loans in participation with other lenders. These loans must be to entities engaged in similar activity as the BC's members but the loan obligors need not be members of the BC. The principle behind participations in loans with other entities is one of managing the risk of the transaction. This is a common practice in the financing industry.

The addition of sections (8) and (9) to AS 44.81.215 is consistent with AIDEA's statutes and the changes to the Farm Credit Act. It is somewhat more restrictive than the Farm Credit Act in that the loans associated with the participations must conform to the lending powers of CFAB's statutes.

Limitations on the Pledge of Permits

In accordance with AS 16.43.150(g), only CFAB and CFRLF may use limited entry permits as security for loans to commercial fishers. No other entities may make these loans.

The proposed additions to AS 44.81.236 relate to the use of the proceeds from a loan secured by a limited entry permit. The statutes governing CFRLF were recently amended to allow loan proceeds to be used for the purchase of quota shares for halibut and sablefish fisheries[16]

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[14]Per the National Bank for Cooperatives Line of Credit Agreement, dated April, 19, 1993, Section 15, *"[u]nless otherwise agreed to in writing by CoBank, while this agreement is in effect, whether or not any indebtedness is outstanding hereunder the Borrower [CFAB] will not: . . . (C) . . . acquire all or substantially all of the assets of any person or entity, or form or create any new subsidiary or affiliate, or commence operations under any other name, organization, or entity, including any joint venture. . . . (G) . . . Engage in any business activities or operations substantially different from or unrelated to the Borrower's [CFAB's] present business activities or operations."*

[15]Per the National Bank for Cooperatives Line of Credit Agreement, Section 13, *"[u]nless otherwise agreed to in writing by CoBank, while this agreement is in effect, whether or not any indebtedness is outstanding hereunder, the Borrower [CFAB] agrees to: . . . (I) . . . Maintain at all times a ratio of total assets to total equity . . . of not greater than 3.50 to 1.00. . . . (J) . . . Maintain at all times an excess of total assets over total liabilities . . . of not less than $20,000,000."*

[16]The federal government implemented a rights-based fisheries' management program for the halibut and sablefish fisheries. The 1995 fishing season was the first season in which the program was operational. The program is administered by the National Marine Fisheries Services.

and to satisfy past due federal tax obligations that may result in the execution upon and involuntary transfer of the individual commercial fisher's entry permits. Only one such CFRLF loan may be obtained during the individual's lifetime and is limited to $30,000.

We have concluded that duplication of lending services, including the additional authority provided in AS 44.81.236(2) and (7) above, exists between CFAB and the CFRLF. See Recommendation No. 1 in the Findings and Recommendations section.

Proposed changes do not alter CFAB's current competition with private financial institutions

The proposed changes to CFAB's lending powers do not constitute new or additional competition with the private financial institutions within the State. The factors in our determination are as follows:

- The legislature commissioned a study in the Fall of 1977 to study the problems and alternative solutions of financing the commercial fisheries industry in the State. The report entitled *Financing Alaska Commercial-Fisheries Businesses: Problems and Alternative Solutions*, dated October 14, 1977, confirmed that there was a need for improved access by the industry to sources of credit. It identified a number of options to address the need. One was to form a private cooperative development bank which would obtain its initial capitalization from the State and would leverage that capital base with funds provided through the Federal Farm Credit System. This would allow the State access to a source of capital generally available to the agriculture and commercial fishing industries in other states. This recommended option resulted in the legislature establishing CFAB.

  CFAB was a device to access the capital provided through the Federal Farm Credit System and that capital source is available to farmers, ranchers, and fishers in other states through cooperative banks or production credit associations. These cooperative banks or production credit associations do not appear to be considered undue competition with the private lending institutions in those states.

- In enacting the limited entry system, the legislature recognized that, for the purpose of conservation, the State needed to retain control of its fishery resources. In view of this, the legislative intent of the limited entry permit program was that an entry permit would not be the property of its holder but rather a use privilege which can be modified or revoked by the legislature without compensation.

  The legislature further recognized that the absence of a property right in a limited entry permit would not allow the holder the ability to obtain financing for its purchase or to use it as collateral to obtain financing for his/her commercial fishing operations. In order to provide a source of capital to the fishers, the legislature amended the Alaska Commercial Fisheries Entry Commission in 1978 (Ch. 83, SLA 1978) to allow the Commercial Fishing Revolving Loan Fund to take limited entry permits as

security for its loans to fishers. Then in 1981(Ch. 51, SLA 1981), similar legislation was passed which provided for CFAB to take limited entry permits as security for loans.

- Therefore, the proposed additions to AS 44.81.236 that relate to the use of proceeds from loans secured with limited entry permits do not constitute any new or additional competition with the private financial institutions. Private institutions can only make loans to commercial fishers or processors that are secured by assets other than limited entry permits.

CFAB was established because there was a need for improved access by the Alaska commercial fishing industry to sources of credit. Through the creation of CFAB the State had a mechanism to access the low cost funds of the Federal Farm Credit System. The proposed changes to HB 284 do not create any additional competition beyond that of the original intent of AS 44.81.

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SB

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ALASKA RAILROAD CORPORATION

Corporate Address: P.O. Box 107500, Anchorage, Alaska 99510
327 W. Ship Creek Avenue, Anchorage, Alaska 99501

Senate Bill 170
Senate Labor and Commerce Committee by request

Sponsor Statement

Senate Bill 170 serves a dual purpose. It provides Alaska Railroad Corporation (ARRC) employees minimum wage and overtime protection by clarifying that the ARRC is regulated by Alaska's Wage and Hour Act (AWHA). SB 170 also enables locomotive engineers, conductors and brakemen, represented by the United Transportation Union (UTU), to opt out of the Wage and Hour Act if ARRC management and UTU members mutually agree to do so in a collective bargaining agreement.

The ARRC is exempt from the Fair Labor Standards Act, the federal law governing minimum wage and overtime, by virtue of an exemption in that act for employees of rail carriers. If the ARRC is regulated by Alaska's Wage and Hour Act, then ARRC employees will enjoy the wage and hour protections available to virtually all other employees.

Clarifying ARRC's status under the AWHA not only protects ARRC employees, it provides clear guidance to ARRC management with regard to employee relations. It also protects the ARRC from liability for unintentional violations of employee rights.

The exemption for UTU members provided by SB 170 would not leave UTU members unprotected with regard to hours worked. Unlike most other Alaska Railroad employees, UTU members are protected by the federal Hours of Service Act (HOSA). This Act prevents excessive or unreasonable work hours by limiting the number of hours employees can work to 12 consecutive hours without a required rest period. (American Train Dispatcher's Association are also covered by the HOSA, as are a few Transportation Communication Union members.)

The UTU exemption is mutually beneficial to the ARRC's operation and the UTU members. It would allow ARRC management and UTU representatives to negotiate an agreement allowing UTU employees to be paid on a basis other than an hourly basis (for example, a salary basis or a day rate). This arrangement would enhance UTU member retirement benefits. In exchange, the ARRC would eventually be able to operate trains with a two-person crew, mirroring railroad industry standards and contributing positively to the ARRC's bottom line.

ALASKA RAILROAD CORPORATION

Corporate Address: P.O. Box 107500, Anchorage, Alaska 99510
327 W. Ship Creek Avenue, Anchorage, Alaska 99501

March 30, 2001

The Honorable Randy Phillips
Chair
Senate Labor and Commerce Committee
State Capitol, Room 103
Juneau, AK 99801-1182

Dear Senator Phillips:

On behalf of the Alaska Railroad Corporation and its employees, thank you for agreeing to support Senate Labor and Commerce Committee sponsorship of Senate Bill 170. We realize time is running very short until the end of session. With that in mind, we respectively request a hearing for SB 170 by the Labor and Commerce Committee as soon as your scheduling permits.

We look forward to working with you on this issue.

Sincerely,

Jerry Anderson
Acting President and CEO

ALASKA PUBLIC EMPLOYEES ASSOCIATION/AFT(AFL-CIO)

State Headquarters/Juneau Field Office
211 Fourth Street, Suite 306, Juneau, Alaska 99801
Telephone (907) 586-2334, (800) 478-9991, Fax 463-4980

March 30, 2001

Senator Randy Phillips
Alaska State Capitol, Room 103
Juneau, AK 99801-1182

Dear Senator Phillips:

I am writing to let you know that Alaska Public Employees Association/AFT supports the legislation being proposed by the Alaska Railroad and the United Transportation Union which will clarify that employees of the corporation are covered by Alaska's Wage and Hour Act and which will also allow the train and engine men on the Railroad, represented by the United Transportation Union to opt out of the Wage and Hour Act if the parties mutually agree to do so in a collective bargaining agreement. I understand that the UTU employees are negotiating to work as exempt salaried employees. I also understand that the UTU employees are subject to the federal Hours of Service Act so there is no danger of excessive or unreasonable work hours for the employees involved.

Thank you for your attention to this matter.

Sincerely,

Bruce Ludwig
Business Manager
Alaska Public Employees Association/AFT

cc:
United Transportation Union (fax 279-7118)
Ann Courtney, Alaska Railroad (fax 265-2443)
Charles A. Dunnagan (fax 563-7322)

Anchorage Field Office
1680 C Street, Suite 204, Anchorage, Alaska 99501
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Fairbanks Field Office
825 College Road, Fairbanks, Alaska 99701
Telephone (907) 456-5412, (800) 478-9993, Fax 456-7478

March 28, 2001

American Train Dispatchers Department/BLE
Alaska Railroad Corporation System
P.O. Box 671490
Chugiak, Alaska 99567

The Alaska Legislature,

The A.T.D.D /BLE supports the amendment to AS 42.40.710 proposed by the *United Transportation Union* Local 1626 and the Alaska Railroad Corporation that states in part UTU employees are exempt from the AWHA when mutually agreed to in a collective bargaining agreement.

K. H. Gibbons
General Chairman
American Train Dispatchers Department/BLE

Alaska Railroad Workers Local 183
A.F.G.E./AFL-CIO
P.O. BOX 100035
Anchorage, Alaska 99510-0035
Phone (907) 272-8316 Fax (907) 274-5244

To: Alaska Legislation

March 23, 2001

From: Ed Rivera
President ARW

Subject: U.T.U. Wage Proposal

Dear Legislators

I would like to state that the ARW has looked over the proposed changes to AS 42.40.710, and met with the UTU attorney to discuss this issue. After consideration I have found nothing that would impact any of my members or any negative issues associated with this proposal. The ARW therefor supports the change in the law as it is outlined by the UTU. Thank you for your support in this important piece of legislation.

Sincerely

Ed Rivera
President ARW

Michael L Weatherell
General Chairman

John T. Fleming
Vice Chairman

555 West Northern Lights #203
Anchorage, AK 99503

Jefferson "Lee" Davis
Vice Chairman

Darren M. Rupe
Secretary

Phone 907-279-7117 Fax 907-279-7118
Email utu1626@gci.net

united transportation union

Local 1626

General Committee of Adjustment GO-ARR

The Alaska Railroad Corporation

MEMORANDUM

TO: **Alaska Legislature**

FROM: **Mike Weatherell, General Chairman**
United Transportation Union
Alaska Railroad

DATE: **March 2, 2001**

RE: **Proposed Changes to AS 42.40.710.**

I am General Chairman of the United Transportation Union Local 1626. The UTU represents conductors, engineers, firemen, and brakemen on the Alaska Railroad. We fully support the proposed amendment to AS 42.40.710. which would clarify that the Alaska Railroad is subject to Alaska's Wage and Hour Act and which would also provide a conditional exemption that could apply to our bargaining unit under special circumstances.

Historically, train and enginemen have been paid by the mile. That changed after the Alaska Railroad was purchased by the state. For a variety of reasons, both the Railroad and our members would like to return to a compensation system similar to the one we had. In order to do so, we have to be exempt from Alaska's wage and hour law. To protect both parties, we have provided that the exemption only applies when the agreement is "mutual" and when the agreement is codified into a bona fide collective bargaining agreement. That way, neither party can force an agreement on the other. In the absence of an agreement, Alaska's Wage and Hour Act would apply as it does now. There is also no danger to the public safety. Our members are subject to the federal Hours of Service Act which already governs the number of hours our members can be on the road, rest periods between shifts, etc. This is a win-win proposal for all concerned and I hope you can join us in supporting its passage.

I have worked closely with the other employee groups on the Alaska Railroad. It is my belief and understanding that all represented employees support the passage of this amendment to AS 42.40. Again, we urge your assistance and support.

Date: 3/5/01

Mike Weatherell, General Chairman
United Transportation Union
Alaska Railroad

MEMORANDUM State of Alaska

TO: Hon. Lisa Rudd, Commissioner
Department of Administration

Hon. Richard Knapp, Commissioner
Department of Trans. & P.F.

DATE: December 21, 1984

FILE NO: 366-188-85

TELEPHONE NO: 465-3600

SUBJECT: Social security coverage of Alaska Railroad Corporation employees

FROM:

Norman C. Gorsuch
Attorney General

By: Virginia B. Ragle
Assistant Attorney General
Governmental Affairs-Juneau

Paul Roetman 3712

You have requested advice from this office concerning coverage under the federal Social Security Act, 42 U.S.C. § 401, et seq., of Alaska Railroad Corporation (corporation) employees after the date of transfer of the railroad to the state. It is our opinion that participation in that system may not continue after transfer, unless the corporation elects coverage under a voluntary agreement with the Social Security Administration (SSA), by modification of the state's agreement under AS 39.30.-010 -- 39.30.080.

Under 42 U.S.C. § 410(a)(7), employment with a state or political subdivision of a state does not constitute "employment" subject to social security coverage, unless an agreement extending coverage is entered into under 42 U.S.C. § 418. 42 U.S.C. § 418 allows the Secretary of Health and Human Services to enter into an agreement with a state for the purpose of extending social security coverage to employees of the state and to employees of political subdivisions of the state. Alaska entered into such an agreement in 1951, and that agreement remained in effect after Alaska became a state under Alaska Constitution article XV, section 2.

Under 42 U.S.C. § 418(c)(4) and the state's agreement with SSA, political subdivisions of the state not originally covered in the agreement may be included by modification of the agreement. "Political subdivision" is defined by AS 39.30.080(6) as including

> an instrumentality of the state or of a political subdivision, or of the state and a political subdivision, but only if the instrumentality is a juristic entity legally separate and distinct from the state or the political subdivision and only if its employees are not, by virtue of their relation to the juristic entity, employees of the state or the political subdivision;

> The railroad is established as
>
> a public corporation and is an instrumentality of the state within the Department of Commerce and Economic Development. The corporation has a legal existence independent of and separate from the state. The continued operation of the Alaska Railroad by the corporation as provided in this chapter is considered an essential government function of the state.

AS 42.40.010. Thus, the corporation meets the definition of a "political subdivision" of the state which is eligible for coverage by modification of the state's agreement and which is not covered absent such a modification.

We note that, under the 1983 Amendments to the Social Security Act, Pub. L. 98-21, employees who began their employment with the railroad on or after January 1, 1984 are in a class of employees of the United States who are required to contribute to the social security system. 42 U.S.C. § 410(a)(5). Once the railroad is transferred to the state, employes who transfer will no longer be employees of the United States. The state is not required to continue social security coverage for those employees, but, under section 607(a)(1) of the Alaska Railroad Transfer Act of 1982, 45 U.S.C. § 1206(a)(1), must continue contributions to the federal Civil Service Retirement and Disability Fund on behalf of those employees.

Please let us know if you would like further advice on this matter.

VER/pjg

cc: Stan McAlister
Assistant Railroad Coordinator
Dept of Transportation &
Public Facilities

MEMORANDUM State of Alaska

TO: Merwin Peters, Director
Office of Equal Employment Opportunity
Office of the Governor

DATE: November 6, 1986
FILE NO.: 663-86-0291
TELEPHONE NO.: 465-3600
SUBJECT: The meaning of "agency" under AS 44.19.449(1)

THRU:

FROM: Harold M. Brown
Attorney General

By: Susan D. Cox
Assistant Attorney General
Governmental Affairs-Juneau

You ask whether the Alaska Railroad Corporation, the University of Alaska, and other governmental entities are "agencies" of the executive branch under AS 44.19.449(1) so as to subject them to the provisions of AS 44.19.441 -- 44.19.449 and the authority of the office of equal employment opportunity (OEEO). Our short answer is they are. We present our reasoning below.

A.

After existing in the Department of Administration solely by administrative directive, OEEO was statutorily established in the Office of the Governor in 1985 under AS 44.19.441 -- 44.19.449 (the EEO Act). OEEO administers an "equal employment opportunity program for the executive branch of state government...." AS 44.19.442(a). The law provides that the governor shall "adopt annually an affirmative action plan for the executive branch of state government," AS 44.19.444, and that "[e]ach agency shall comply with the affirmative action plan." AS 44.19.445. Each agency is then required to "adopt an affirmative action program to implement the plan within the agency." Id. AS 44.19.449 provides the relevant definitions for the EEO Act, among them:

> (1) "agency" means a department, office, agency, public corporation, board, commission, authority, or other organizational unit of the executive branch;
>
> (2) "employment in the executive branch of state government" includes employment as a permanent, probationary, provisional, nonpermanent, or temporary employee in the classified, partially exempt, or exempt services in the executive branch of state government; ...

The question presented is whether the Alaska Railroad Corporation, the University of Alaska, and various quasi-public

entities are covered by the EEO Act. The definition of "agency" for purposes of the EEO Act is very broad and on its face appears to cover virtually every arm of the executive branch of state government. AS 44.19.449(1). Public corporations, boards, authorities, and any other "organizational unit of the executive branch" are included in its purview, with no stated exceptions.

B.

The legislature assumed control over the Alaska Railroad and established the Alaska Railroad Corporation (railroad) in 1984 as "a public corporation and ... an instrumentality of the state within the Department of Commerce and Economic Development." AS 42.40.010. At the same time, the legislature exempted railroad employees from provisions of Title 39, which covers public officers and employees of the state, and from several other provisions of state law. See AS 42.40.710 (amended by sec. 4, ch. 87, SLA 1986) and AS 42.40.920 (amended by sec. 41, ch. 106, SLA 1986).

Because the legislature set up the railroad as a "public corporation" in 1984 (AS 42.40.010) and, the next year, statutorily commanded public corporations and all other organizational units of the executive branch (without exception) to comply with the mandates of the EEO Act, we conclude that the railroad is subject to the EEO Act, AS 44.19.441 -- 44.19.449. See Horowitz v. Alaska Bar Ass'n, 609 P.2d 39 (Alaska 1980) ("If the meaning of a statute is plain it should be enforced as it reads without judicial modification or construction." 609 P.2d at 41, citing 2A C. Sands Sutherland Statutory Construction, § 45.02 at 4-5 (4th ed. 1973)).

We reach this conclusion despite the fact that the railroad has special status that distinguishes it from other executive branch agencies. We have previously opined that the railroad is a state entity, using various criteria outlined by the Alaska Supreme Court. See 1986 Inf. Op. Att'y Gen. (Apr. 25; 661-86-0528); Alaska Commercial Fishing & Agriculture Bank v. O/S Alaska Coast, 715 P.2d 707 (Alaska 1986). The court in CFAB noted several factors which buttress our conclusion that the railroad is an agency of the executive branch subject to the EEO Act. First, legislation creating the railroad locates it within the Department of Commerce and Economic Development. AS 42.40.010. See CFAB, 715 P.2d at 710. Second, the commerce commissioner is a railroad director, as is the commissioner of the Department of Transportation and Public Facilities, and the remaining railroad directors serve at the pleasure of the governor. Id. See AS 42.40.020 -- 42.40.030. Third, the railroad must

submit annual reports to the legislature and the governor. AS 42.40.260; CFAB, 715 P.2d at 710. Fourth, nothing in the railroad's or OEEO's statutes excludes the railroad from the EEO Act's provisions. Id. See also Alaska State Housing Authority v. Dixon, 496 P.2d 649 (Alaska 1972) (holding that ASHA, a public corporation, is an organizational unit of the executive branch). The fact that the railroad was set up to operate on a self-sustaining basis does not dictate an opposite conclusion; it is still a public corporation and an entity of the state until it is transferred to private ownership.

We acknowledge that the railroad's employees have been legislatively excluded from the Personnel Act that is applicable to other executive branch agencies, AS 42.40.710, but that fact does not alter our conclusion that the railroad is an "agency" of the executive branch under AS 44.19.449(1). There are other categories of personnel, e.g., exempt employees, who are not subject to the Personnel Act but who are still covered by the EEO Act's jurisdiction. See AS 39.25.110 -- 39.25.120, and AS 44.19.449(2). The legislature has directed that the EEO Act apply to any entity in the executive branch regardless of the status of its employees under the Personnel Act. AS 44.19.449(2). Furthermore, the EEO Act is part of Title 44, which covers the executive branch independently of the provisions of Title 39.

It is understandable that the railroad would object to being covered by the EEO Act, which is directed toward affirmative action and equal opportunity in employment, when its employees are not subject to other statutory personnel provisions applicable to state employees. However, we can conceive of policy reasons that support including the railroad within the purview of the EEO Act, even though it is excluded from Title 39. The goal of equal employment opportunity should apply equally to line agencies and quasi-independent agencies of state government alike. The legislature has created a central office in the executive branch to administer an equal employment opportunity program, assist state officials in carrying out their EEO responsibilities, investigate and resolve complaints of employment discrimination, and report to the governor and legislature on progress and problem areas in equal employment opportunity. We know of no policy reason justifying the exclusion of the railroad from any of these requirements. Furthermore, it appears that the legislature intended to avoid a piecemeal approach; establishment of a separate equal employment opportunity program by the railroad for its own employees would be inconsistent with the EEO Act's sweeping and complete coverage.

The railroad urges that an exemption from the EEO Act should be implied despite the law's plain language. The railroad contends that the legislature's failure to specifically exclude it from the EEO Act's definition of "agency" was an inadvertant omission, contrary to the legislature's intent. To respond to this, we must first present additional background information.

When the legislature created the Alaska Railroad Corporation in 1984, OEEO existed within the Department of Administration only through a series of administrative orders. In that context, we recognize it was unnecessary and would have made little sense for the legislature to exempt the railroad from OEEO jurisdiction. No language was included in the railroad's statutes with regard to equal employment opportunity obligations at all.

In December 1984 (after creation of the Alaska Railroad Corporation but before enactment of the EEO Act), we evaluated the railroad's equal employment opportunity responsibilities. 1984 Inf. Op. Att'y Gen. (Dec. 14; 663-81-0660). Besides concluding that the railroad must comply with the anti-discrimination laws in AS 18.80 enforced by the Alaska State Commission for Human Rights (applicable to both public and private employers), we found that the railroad had affirmative action obligations imposed by administrative order. Specifically, we advised that a court would likely consider the railroad an "appointing authority" of the executive branch subject to Administrative Order No. 59, an order requiring affirmative steps to implement equal employment opportunity, issued June 20, 1980, by Governor Hammond. Because the affirmative action order was "broadly written" and apparently intended "to apply as broadly as possible across the executive branch" (Inf. Op. Dec. 14, 1984, at 3), we counseled that the railroad should devise an EEO program to comply. ("For purposes of protecting civil rights, it is likely that a court would find that any public corporation is covered by the Orders." Inf. Op. Dec. 14, 1984, at 4.) Our memorandum did not address the role of OEEO (then a division in the Department of Administration) or Administrative Order No. 75, which announced Governor Sheffield's policy on equal employment opportunities and affirmative action in April 1983.

In the following year the legislature passed the EEO Act, making OEEO a creature of statute (in the Office of the Governor), clarifying its responsibilities, and removing all doubts about its jurisdiction. The railroad would have us imply an exception from the EEO Act's coverage because (1) the railroad had controlled its own equal employment opportunity program before OEEO was statutorily created, and (2) the legislature did not in-

tend to change the status quo with regard to the railroad when it passed the EEO Act. We find neither of these points persuasive.

The plain language of the EEO Act purports to cover all entities of the executive branch, of which the railroad is one. When the EEO Act was passed the year after the railroad corporation was set up, defining covered agencies very broadly, no language was inserted to exempt the railroad from coverage. Moreover, the legislature did not exclude the railroad from the EEO Act when enacting other amendments to the railroad's statutes (AS 42.40) in 1986, the year after OEEO was put in statute. Cf. sec. 41, ch. 106, SLA 1986; sec. 4, ch. 87, SLA 1986. Without language expressly excluding the railroad from the expansive definition of a covered "agency" in AS 44.19.449(1) or in the railroad's own statutes, we believe it is subject to the EEO Act's jurisdiction.

"It is an accepted rule of statutory construction that to include specific terms presumptively excludes those which are not enumerated." Burrell v. Burrell, 696 P.2d 157, 165 (Alaska 1984); 2A N. Singer, Sutherland Statutory Construction § 47.23 (4th ed. 1984). In the Alaska Railroad Corporation Act, the legislature stated that, "[u]nless specifically provided otherwise, the following laws do not apply to the operation of the corporation ...," and then proceeded to list 11 statutory exceptions. AS 42.40.920(b) (emphasis added). In 1986, the legislature increased the number of exceptions in AS 42.40.920(b) to 12. Sec. 41, ch. 106, SLA 1986. See also sec. 4, ch. 87, SLA 1986, AS 42.40.720, 42.40.900(c) and (d). An earlier supreme court decision counsels against arguing that the railroad enjoys an implied exclusion from the EEO Act. In State Dept. of Revenue v. Alaska Pulp America, Inc., 674 P.2d 268 (Alaska 1983), a taxpayer group attempted to argue that, even though Alaska statutes specifically exempted certain types of businesses from taxation and their group was not listed, it should be entitled to an exemption. The court, applying Sutherland's § 47.23 referenced above, held that because the group's exemption was not listed in the statute along with the other exemptions the group was precluded from inferring an exemption. Id. at 275. See also Territory of Alaska v. Journal Printing Co., 135 F. Supp. 169, 171 (D. Alaska 1955) ("It is a fundamental principle of statutory construction that the enumeration of certain things in the statute implies the exclusion of all other things."). Thus, in this situation, the legislature is considered to have purposefully not exempted the railroad from the EEO Act because it failed to exclude them on the two occasions it had the opportunity to do so.

Until legislation is passed exempting the railroad from the EEO Act, it should be treated as an "agency" of the executive branch for purposes of AS 44.19.441 -- 44.19.449. In the absence of evidence contrary to the plain meaning of the statute, AS 44.-19.449(1), we must conclude that the definition of "agency" does unambiguously include the Alaska Railroad Corporation. 1/ See University of Alaska v. Geistauts, 666 P.2d 424, 428 n.5 (Alaska 1983).

C.

You also ask whether the EEO Act's coverage extends to other quasi-independent entities that are created as part of the executive branch. To the extent that we have previously defined an entity as a state agency, 2/ it should be considered subject to the EEO Act unless specifically exempted. Thus, the Alaska State Housing Authority, Alaska Housing Finance Corporation, Alaska Resources Corporation, Alaska Permanent Fund Corporation, Alaska Industrial Development Authority, Alaska Gas Pipeline Financing Authority, Alaska Municipal Bond Bank Authority, and Alaska Power Authority are agencies of the executive branch and therefore subject to the EEO Act. (We further note that "agency" in AS 44.19.449(1) specifically includes public corporations, boards, and authorities, bolstering our conclusion on this point.)

D.

The Alaska Supreme Court has decided on several occasions that the University of Alaska (university) is a state agency, but these decisions turn on each case's particular facts and statutes. Although the court has not been presented with the question of whether the university is an agency, or organizational unit, of the executive branch under the terms of the EEO Act, the rationale previously used by the court is helpful to the matter at hand. See University of Alaska v. Gerstauts, 666 P.2d 424 (Alaska 1983); Carter v. APEA, 663 P.2d 916 (Alaska 1983); Uni-

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1/ In reaching this conclusion, we have not overlooked the provisions of AS 42.40.930. That statute states that the provisions of AS 42.40 will prevail in situations where any part of AS 42.40 conflicts with another state law. Because there is nothing in AS 42.40 that conflicts with the EEO Act, AS 42.40.930 is inapposite.

2/ 1986 Inf. Op. Att'y Gen. (Apr. 29; 661-86-0218); 1982 Inf. Op. Att'y Gen. (Dec. 2; 663-83-0269); 1982 Inf. Op. Att'y Gen. (Oct. 26; 663-83-0235); 1982 Inf. Op. Att'y Gen. (June 1; 663-82-0326); 1981 Inf. Op. Att'y Gen. (May 13; 663-81-0664); see 1982 Inf. Op. Att'y Gen. (June 8; 663-82A-0220).

versity of Alaska v. National Aircraft Leasing, Ltd., 536 P.2d 121 (Alaska 1975).

At the outset, it should be emphasized that the university's Board of Regents is given independent constitutional power to govern the policies of the institution. Alaska Const. art. VII, § 3. The supreme court has noted that the university "enjoys a considerable degree of statutory independence." National Aircraft, 536 P.2d at 123. However, the court recognizes that the autonomy and independence of the university are not boundless. See also 1985 Inf. Op. Att'y Gen. (Mar. 21; 663-85-0150); 1976 Inf. Op. Att'y Gen. (May 7; Lorensen).

In National Aircraft, the university argued that it was not subject to AS 09.50.290, which stated that contract, quasi-contract, and tort actions against the state must be tried by the court without a jury. The court found that, because "of the unique character of the University as a constitutional corporation, we are persuaded that it is an instrumentality of the sovereign which enjoys in some limited respects a status which is co-equal rather than subordinate to that of the executive or the legislative arms of government." National Aircraft, 536 P.2d at 128 (footnote omitted). The court observed that, despite the fact that the university enjoys a considerable degree of independence, "the University is also subject to some executive and legislative control.... In this light, the University must be regarded as uniquely an instrumentality of the state itself .... We reach this conclusion ... from the degree of control over the affairs of the University which is exercised by the executive and legislative branches of our government, and from the financial dependence the University has upon the state." Id. at 123-125.

Subsequent supreme court decisions, following the reasoning of National Aircraft, have held that the university is subject to state laws on public meetings, Geistauts, 666 P.2d 424; disclosure of public records, Carter, 663 P.2d 916; land disposal, State of Alaska v. University of Alaska, 624 P.2d 804 (Alaska 1981); and pay discrimination, Brown v. Wood, 575 P.2d 760 (Alaska 1978). We conclude that, if given the opportunity, the court would most likely find that the university should be treated as a unit of the executive branch under AS 44.19.449(1).

As with the railroad, the legislature has not explicitly exempted the university from the provisions of AS 44.19.441 -- 44.19.449. Had the legislature meant to exclude the university from the executive branch's EEO program, it could have done so expressly. See generally Brown, 575 P.2d at 767. The courts are unwilling to read a specific exclusion into a provision "when the

legislature has not seen fit to do so." Id. Also, because the EEO statute's purpose is remedial, it may be interpreted liberally to effectuate its purposes. State for Use of Smith v. Tyonek Timber, Inc., 680 P.2d 1148, 1157 (Alaska 1984); 2A N. Singer, Sutherland Statutory Construction § 58.06 (4th ed. 1984).

Finally, the EEO Act defines "employment in the executive branch of state government" to include employees "in the classified, partially exempt, or exempt services in the executive branch of state government...." The state's Personnel Act includes "officers and employees of the University of Alaska" in the exempt service. AS 39.25.110(5). Thus, the legislature must have intended exempt employees of the university to be considered as employees of the executive branch of state government. As such, we conclude they are subject to the provisions of the EEO Act.

SDC/pjg

cc: Larry Wood, Esq.
Legal Counsel
Alaska Railroad Corporation

William Kauffman, Esq.
University Legal Counsel
University of Alaska

WESTERN ALASKA BUILDING & CONSTRUCTION TRADES COUNCIL, Jerry Smart, Larry Libbey, Richard Guittierez, Willie Sallison, and Linda Machia, and State of Alaska, Department of Labor, Appellants,

v.

INN-VESTMENT ASSOCIATES OF ALASKA and A & A Construction and Development, Inc., Appellees.

Nos. S-5887, S-5968.

Supreme Court of Alaska.

Jan. 12, 1996.

Rehearing Denied Feb. 15, 1996.

Development contractor and partnership involved in construction of new hotel sought declaratory relief from Attorney General's ruling that project constituted "public construction" subject to provisions of Little Davis-Bacon Act. The Superior Court, Third Judicial District, Anchorage, J. Justin Ripley, J., held that project was not subject to Act. Appeal was taken. The Supreme Court, Compton, J., held that project was subject to Act.

Reversed and remanded.

Matthews, J., filed dissenting opinion in which Moore, C.J., joined.

1. Appeal and Error ⇐893(1)

Supreme Court employs de novo review to question of law raised by summary judgment motion.

2. Labor Relations ⇐1101.1

Little Davis-Bacon Act is remedial act for benefit of construction workers, and thus should be liberally construed to effectuate its beneficent purpose. AS 36.05.010, 36.95.010.

3. Labor Relations ⇐1132, 1268

Factors to be considered in determining whether project constitutes "public construction," subject to provisions of Little Davis-Bacon Act, include: (1) nature of contract, i.e., whether contract was for provision of funds or construction itself, (2) whether structure will be used for public purpose, (3) whether state will control structure after construction, (4) whether state will continue to fund project after construction, and (5) relative portion of project financing that state supplied; none of these factors is to be considered individually but instead are to be weighed in total to determine whether there is significant state involvement in project. AS 36.05.010, 36.95.010.

4. Labor Relations ⇐1132, 1268

Notwithstanding that Alaska Railroad Corporation's (ARRC) portion of total financing for hotel construction project built in partnership with private investors was small, project was "public construction" subject to provisions of Little Davis-Bacon Act, where ARRC undertook significant liability that was of benefit to partnership in obtaining construction loan for millions of dollars, ARRC's involvement was due not only to investment incentive, but also due to its desire to augment its passenger business and further development of region, and ARRC would continue to participate in financial future of project including ability to veto significant nonroutine partnership transactions. AS 36.05.010, 36.95.010.

James A. Gasper and William K. Jermain, Jermain, Dunnagan & Owens, Anchorage, for Appellants Western Alaska Building & Construction Trades Council, Jerry Smart, Larry Libbey, Richard Guittierez, Willie Sallison and Linda Machia.

Robert A. Royce, Assistant Attorney General, Anchorage, and Bruce M. Botelho, Attorney General, Juneau, for Appellant State of Alaska, Department of Labor.

Robert K. Stewart, Jr., Davis Wright Tremaine, Anchorage, for Appellees Inn-Vestment Associates of Alaska and A & A Construction and Development, Inc.

Before: MOORE, C.J., and RABINOWITZ, MATTHEWS, COMPTON and EASTAUGH, JJ.

OPINION

COMPTON, Justice.

I. *INTRODUCTION*

The Alaska Railroad Corporation (ARRC) entered into a general partnership with private investors, Inn-Vestment Associates of Alaska (IAA). The purpose of IAA was to finance, construct, and maintain the Comfort Inn (Inn) on ARRC land in the Ship Creek area of Anchorage. IAA contracted with A & A Construction and Development, Inc. (A & A) for construction of the Inn.

The primary question presented in this case is whether ARRC's involvement in IAA implicated the provisions of Alaska's Little Davis-Bacon Act, AS 36.05, which requires that workers on public construction projects receive at least the current prevailing wage. AS 36.05.010. Both the Alaska Department of Labor (DOL) and the State Attorney General indicated that the project was subject to Alaska's Little Davis-Bacon Act, and thus workers should be compensated in accordance with the statutorily mandated prevailing wage. In response, IAA and A & A sought declaratory relief in the superior court, asking that the project be deemed outside the purview of the statute. IAA, A & A, and the State each moved for summary judgment. After permitting the Western Alaska Building and Trades Council (Trades Council) to intervene, the superior court entered summary judgment in favor of IAA and A & A.[1] DOL and Trades Council appeal. We reverse.

II. *FACTS AND PROCEEDINGS*

In August 1991 ARRC received a 40% equity share in IAA, in exchange for contributing the land upon which to build the Inn. This partnership was formed for the purpose of financing, constructing, and maintaining the Inn. The remaining 60% of the partnership was owned by four groups of husband/wife investors who had previously participated together in other hotel development projects. ARRC is the largest individual shareholder.[2]

Initially ARRC had desired merely to lease its land to the investors and achieve a return based upon the market lease-value of the land. However, the investors urged ARRC to join them, become an equity partner, and execute all IAA loan obligations as a co-obligor. The investors' stated rationale for this arrangement, which they had utilized numerous times before, was to encourage cooperation between the landowner and the other investors. ARRC agreed to the arrangement, believing that it could realize a greater return on its land if it participated in development of the land. By virtue of owning a forty percent partnership interest, ARRC is the only partner whose approval *must* be obtained for significant partnership decisions; such matters require a sixty-one percent majority approval vote.[3] However, day-to-day operational authority is vested in IAA's managing partner and a management company [4] that has been hired to operate the Inn.

ARRC undertook substantial obligations as a result of its partnership interest in IAA. ARRC leased the land, valued at $845,000, to IAA for $1.00 annually for a term of 35 years. A renewal term of an additional 35 years is available at IAA's option. If ARRC divests itself of its partnership interest at any time, the lease reverts to market lease rates. In addition to contributing use of the land, ARRC and the other investors executed as co-borrowers and separate obligors a $3.9 million construction loan agreement. This is an obligation on which ARRC and the other investors are individually 100% liable.

ARRC does not "use, occupy, or directly control any part of the ... Inn project." Instead, in announcing its participation in the project, ARRC enumerated three purposes for its involvement: (1) augmenting its passenger business, (2) creating a source of real estate income and (3) supporting its redevelopment of the Ship Creek area. Additional-

1. IAA and A & A filed a single appellees' brief in this court. Therefore, references to the appellees' arguments will be addressed as those of IAA, but represent A & A's also.

2. The four husband/wife investment teams owned 23%, 12%, 18% and 7%, respectively, of IAA.

3. IAA maintains that all partners enjoy the ability to veto fundamental partnership decisions. However, IAA's citation to the record does not confirm this assertion.

4. The husband/wife investor groups that comprise the 60% of IAA not owned by ARRC also own the management company.

ly, ARRC noted that it had a history of investing in hotels, and planned similar future investments since such enterprises benefit and support ARRC's passenger business.

IAA contracted with A & A[5] for construction of the Inn. The total costs of improvements to the land eventually amounted to approximately $3.8 million, including architectural, engineering, and general contractor fees.

In April 1992 the Attorney General issued an opinion, and DOL stated, that the project constituted "public construction" that was subject to the provisions of Alaska's Little Davis–Bacon Act. IAA and A & A responded by seeking declaratory relief in the superior court and a ruling that the Act did not apply to the project.[6] Motions for summary judgment were filed. Before the court ruled on the motions, the Trades Council and several of its individual members were permitted to intervene. The superior court granted IAA and A & A's motion, holding that the Act did not apply. The court, however, provided no corresponding analysis, findings of fact, or conclusions of law. Additionally, the court awarded attorney's fees to IAA and A & A in the amount of fifty percent of their actual fees, stating that the actual fees were reasonable and, that while efforts were "not 'labor intensive' in the sense of extensive discovery, motion practice or trial," the lawyers had conducted extensive analysis of novel and complex issues. DOL and the Trades Council appeal both the superior court's holding and its award of attorney's fees.

III. *DISCUSSION*

A. *Standard of Review*

[1] The issue in this case is whether the work performed in constructing the Inn constituted "public construction" subject to Alaska's Little Davis–Bacon Act's wage protection provisions. AS 36.05.010, 36.95.010. We are reviewing the superior court's summary judgment holding that the Act does not apply. In *City and Borough of Sitka v. Construction and General Laborers Local 942*, 644 P.2d 227 (Alaska 1982), we addressed the identical issue on appeal from a summary judgment holding. *Id.* at 230. We apply the same standard of review that was appropriate in *Sitka*: "We employ de novo review to the question of law raised by the summary judgment motion." *Id.* at 230 n. 7 (citing *Armco Steel Corp. v. Isaacson Structural Steel Co.*, 611 P.2d 507, 516 n. 22 (Alaska 1980)).

B. *Statutory Provisions*

[2] The dispute centers on the language of AS 36.05.010 and AS 36.95.010. Alaska Statute 36.05.010 provides:

> A contractor or subcontractor who performs work on *public construction* in the state, as defined by AS 36.95.010, shall pay not less than the current prevailing rate of wages for work of a similar nature in the region in which the work is done. The current prevailing rate of wages for each pay period is that contained in the latest determination of prevailing rate of wages issued by the Department of Labor before the end of the pay period.

AS 36.05.010 (emphasis added). It is the phrase "public construction" and whether it encompasses the Inn project, that is the basis for the dispute between the parties. Alaska Statute 36.95.010(3), which provides definitions applicable to AS 36.05.010, supplies some assistance in interpreting the phrase:

> "[P]ublic construction" or "public works" means the on-site field surveying, erection, rehabilitation, alteration, extension or repair, including painting or redecorating of buildings, highways, or other improvements to real property under *contract for the state*, a political subdivision of the state,[7] or a regional school board.

AS 36.95.010 (emphasis added). Because this legislation "is a remedial act for the benefit of construction workers, [it] is therefore liberally construed to effectuate its beneficent purpose." *Drivers, Salesmen, Warehousemen, Milk Processors, Cannery, Dairy Employees and Helpers, Local Union No. 695 v. NLRB*, 361 F.2d 547, 553 n. 23 (D.C.Cir.1966).[8]

C. *Case Law*

This court has interpreted the applicable statutory language in two prior cases: *City and Borough of Sitka v. Construction and General Laborers Local 942*, 644 P.2d 227 (Alaska 1982), and *Alaska State Federation of Labor v. State, Department of Labor*, 713 P.2d 1208 (Alaska 1986).

1. *City and Borough of Sitka v. Construction and General Laborers Local 942*

In *Sitka*, we concluded that a timber harvesting contract, which was a necessary precursor to a dam construction project, fell within the ambit of Alaska's Little Davis–Bacon Act. We held that the legislation applied even though the timber agreement was separate from the dam construction contract. Clearing the land was an integral, preliminary part of dam construction. *Sitka*, 644 P.2d at 232. If the severance of the two contracts were permitted to defeat the application of the Act, this would have "impermissibly enable[d] a public agency to profit at the expense of workers engaged in activities instrumental to a public construction project." *Id.* at 233.

2. *Alaska State Federation of Labor v. State, Department of Labor*

[3] Our decision in *Federation* provides more specific guidance. The State Department of Community and Regional Affairs granted $1 million to the Central Council of Tlingit and Haida Indian Tribes of Alaska for the construction of a community hall. The question presented was whether the transfer of funds via the grant invoked the provisions of AS 36.05.010. *Federation*, 713 P.2d at 1210. As in the instant case, interpretation of AS 36.95.010(3)'s language, "under contract for the state," was the central issue in the dispute. *See id.* at 1210. In analyzing the situation in *Federation*, we considered all circumstances surrounding the transaction, rather than focusing on one factor as determinative. In utilizing this approach, we stated: "The Act clearly envisions contracts between the state or a political subdivision, and a contractor for the construction of a specified public project." *Id.* The contract involved a grant, *i.e.* the provision of funds and not construction itself. *Id.* While the structure would be used for a public purpose, the fact that the State would not retain control over or continue to fund the hall after construction belied the existence of a construction contract for the State. *Id.* Furthermore, the State supplied funds that constituted only twenty-five percent of the construction costs. *Id.* at 1211. In holding that this project fell outside the provisions of the Act, we explained:

> [T]he state never owned or controlled, nor intended to control or own the [structure]. The project was not public construction. The Act defines public construction as construction 'under contract for the state.' *This requires significant state involvement.* The evidence, however, shows that the project was intended primarily for private purposes and private control. State involvement was indirect—funding through a grant—and relatively small—only about twenty-five percent of the total cost.

Id. at 1211 (emphasis added). Thus, *Federation* yields a list of factors for us to consider

5. A & A is owned by a husband and wife team who are also partners in IAA.

6. In their briefs, the parties did not specify, or provide a citation to the record for, the incremental wage costs that IAA would have incurred if it had complied with the Act. During oral argument, the Trades Council's attorney maintained that in an affidavit that ARRC had submitted to the superior court, the incremental cost of compliance was estimated at $500,000 to $600,000.

7. Alaska Statute 36.95.010(6) additionally provides that " 'state or political subdivision of the state' means any state department, state agency, state university, borough, city, village, school district or other state subdivision."

8. "The fundamental purpose of [Alaska's] Little Davis–Bacon is to assure that employees engaged in public construction receive at least the prevailing wage," the same purpose as under the federal legislation. *City and Borough of Sitka v. Construction and Gen. Laborers Local 942*, 644 P.2d 227, 232 & n. 11 (Alaska 1982). This court has held that because the Federal Davis–Bacon Act is the model for Alaska's legislation, federal precedent is persuasive in the absence of decisions from Alaska's courts. *Id.* at 231.

in determining whether the Inn project constitutes "public construction": (1) the nature of the contract (whether the contract was for the provision of funds or for the construction itself); (2) whether the structure will be used for a public purpose; (3) whether the State will control the structure after construction; (4) whether the State will continue to fund the project after construction; and (5) the relative portion of project financing that the State supplied.[9] Implicit in *Federation* is the notion that these facets of State involvement are not intended to be considered individually. Rather, they are to be weighed in total to determine whether there is "significant state involvement" in the project.[10] *See id.*

3. *Analysis of factors implicating "significant state involvement" in the construction project*

a. *Nature of the contract*

This factor is less germane to the instant case than it was in *Federation*. In that case, the State was providing funds in the form of a grant. 713 P.2d at 1209. Here, there is a construction contract in which ARRC is a participant through its involvement with IAA.

Nevertheless, IAA argues that the existence of a contract between a State entity and a contractor is the "single most important factor" in determining if a project is "public construction." IAA attempts to disguise State involvement in the building contract. IAA argues that it was the partnership that made the agreement, and that ARRC was not a party to the contract.

IAA's characterization is accurate, but ARRC has the ability to significantly influence the actions of IAA. ARRC could have vetoed the construction contract, via the provision of the partnership agreement that requires a sixty-one percent majority approval of major decisions such as construction and financing of the project. Its participation in securing the funds, and the security it provided to the lenders, may be viewed as a significant factor in obtaining the loan. Additionally, ARRC's involvement in the project resulted in substantial liability for ARRC. Each of these considerations indicates "significant state involvement." Permitting IAA to avoid application of the Act based upon the State's role being masked behind the partnership veil would defeat the "fundamental purpose" of the Little Davis-Bacon legislation: "to assure that employees engaged in public construction receive at least the prevailing wage." *City and Borough of Sitka v. Construction and Gen. Laborers Local 942*, 644 P.2d 227, 232 (Alaska 1982). Furthermore, such a result would encourage similar arrangements in the future, arrangements that could be designed to circumvent the Act's application. This would permit the situation this court warned against in *Sitka* and "impermissibly enable[ ] a public agency to profit at the expense of workers engaged in activities instrumental to a public construction project." *Id.* at 233.

b. *Public purpose of the project*

The day after deciding to participate as a partner in IAA and its development of the Inn project, ARRC's President and CEO issued the following statement to the Railroad's employees:

> I have some interesting news for you today: the Alaska Railroad Corporation plans on getting back into the hotel business.... The long-term benefits of this project are what make it most attractive: we augment our passenger business, create a source of real estate income and support our redevelopment of the Ship Creek area. We have a long history of owning hotels such as those that operated at Curry and at Healy. We foresee other hotels being built upon ARRC property, especially near Denali Park or at Fairbanks. I believe hotels are natural enterprises in which the Railroad should invest because they can benefit and support our passenger business. We're convinced we'll be able to provide better customer service and attract more customers by having convenient, affordable accommodations to market with rail trips.

As DOL asserts, this statement indicates that a public corporation was pursuing the Inn opportunity not only because it was a beneficial financial investment, but also because it would enhance the passenger portion of this public corporation's business. Additionally, ARRC's participation in the "hotel business" was an activity that was ongoing.

IAA's position is that this view "confuse[s] the concept of public benefit with those of public purpose and use," as the Inn is a private facility that is not open to public use. In support of this assertion, IAA, while recognizing the benefits of increased employment and downtown development, cites four cases for the proposition that "incidental" public benefits can be distinguished from public purposes. *See Daniels v. City of Fort Smith*, 268 Ark. 157, 594 S.W.2d 238, 240–41 (1980); *Zickuhr v. Bowling*, 97 Ill.App.3d 534, 53 Ill.Dec. 65, 69, 423 N.E.2d 257, 261 (1981); *Gregory v. City of Lewisport*, 369 S.W.2d 133, 135 (Ky.1963); *Erie County Indus. Dev. v. Roberts*, 26 Wage & Hour Cases (BNA) 627, 632, 94 A.D.2d 532, 540–41, 465 N.Y.S.2d 301, 306–07 (1983), *aff'd*, 63 N.Y.2d 810, 482 N.Y.S.2d 267, 472 N.E.2d 43 (1984). The cases that IAA cites for the "incidental" public benefits rationale all involved government-sponsored bond financing. Therefore, these courts, just as this court in *Federation*, were reviewing situations where the government was merely involved in the financing of a project. Three of these courts specifically mentioned that the governmental entity would retain little control of the project in the long term. *Daniels*, 594 S.W.2d at 240; *Zickuhr*, 53 Ill.Dec. at 69, 423 N.E.2d at 261; *Erie County*, 26 Wage & Hour Cases (BNA) at 631, ——, 94 A.D.2d at 538–40, 465 N.Y.S.2d at 305–06.[11] These situations are distinguishable from the instant case, since ARRC will continue to share in the financial future and management of the Inn.[12] Therefore, these cases are not persuasive.

Furthermore, IAA does not fully address DOL's argument that the motivation for ARRC's involvement is the enhancement of its passenger business, and not merely an investment opportunity. Trades Council cites *Harris v. City of Cincinnati*, 79 Ohio App.3d 163, 607 N.E.2d 15 (1992), for, among other things, that court's recognition that where government involvement in a project is significantly motivated by enhancement of the downtown community (e.g., reconstructing/rehabilitating the slum, improving the area's appearance, attracting businesses and consumers to the downtown), this is a factor in favor of finding that the construction is subject to prevailing-wage laws. *Id.* 607 N.E.2d at 20. Similarly, ARRC was attracted to the Inn project because of its effect on the Ship Creek area re-development project. While IAA's brief does address *Harris*, it does not respond persuasively to Trades Council's reliance on the case. Rather, IAA distinguishes *Harris*, based on the presence of some differing facts and a varying statutory scheme. While these distinguishing fac-

9. This list of factors is not comprehensive. Situations may demand consideration of additional factors. Furthermore, these illustrative factors need not necessarily be given equal weight. We recognize that the two factors relied on by the dissent (nature of ownership of building or work, and nature of use of the building or work) will often be particularly important or even dispositive in many, but not all, cases.

10. Cases from other jurisdictions are of only limited assistance in resolving this dispute. Varying combinations of aspects of state involvement and differing statutory schemes mean that no one case is likely to be persuasive. *See Penfield Mechanical Contractors v. Roberts*, 119 Misc.2d 105, 462 N.Y.S.2d 393, 395 n. 1 (N.Y.Sup.Ct.1983) ("Authority from other jurisdictions is of limited value due to differing statutory schemes.") *aff'd*, 98 A.D.2d 992, 470 N.Y.S.2d 1021 (1983) *aff'd*, 63 N.Y.2d 784, 481 N.Y.S.2d 72, 470 N.E.2d 870 (1984).

11. The dissent relies on *National Railroad Passenger Corp. v. Hartnett*, 30 Wage & Hour Cases 977, 169 A.D.2d 127, 572 N.Y.S.2d 386 (BNA) (1991). Like the cases cited by IAA, the *National Railroad* court also found it important that future financial loss risk, physical destruction, and operational profits all resided with private interests and not the State. *Id.* at 979, 169 A.D.2d at 130–32, 572 N.Y.S.2d at 388–89. "These are the factors that have repeatedly been held sufficient to preclude any determination that a given project constitutes a public works...." *Id.* In the instant case, these factors are not present, as ARRC shares in these aspects of the operation via its partnership interest.

12. This factor is especially persuasive. Where a State entity shares in operational profits and losses as a result of its participation in a project, this weighs heavily in deeming a project "public construction"; the benefits or costs of such participation will accrue to the State.

tors do exist, they do not nullify *Harris'* implications regarding ARRC's motivation for participating in the project, which in large measure is derived from ARRC's desire to participate in the hotel industry, as compared to other projects, as a complement to its passenger business. This factor weighs in favor of finding that ARRC's participation was in furtherance of a public purpose.

c. *State control of the structure after completion*

As discussed, by virtue of its forty percent share of IAA, ARRC enjoys the ability to veto any major partnership decisions. In minimizing the importance of this factor, IAA cites *National Railroad Passenger Corp. v. Hartnett*, 30 Wage & Hour Cases 977 (BNA), 169 A.D.2d 127, 572 N.Y.S.2d 386 (1991), for the proposition that the ability to veto certain project decisions is insufficient to constitute the requisite public control. Again, however, this was only one factor in that court's analysis, and it is important to recognize that the veto authority there had a much more limited scope than in the instant case. *See id.* at 979, 169 A.D.2d at 130–32, 572 N.Y.S.2d at 388–89. Furthermore, the court also noted that it was the private corporation that bore the risk of project loss in the future. *Id.* In the case of IAA, it is ARRC that will absorb its proportionate share of any Inn deficit.

Additionally, ARRC can terminate the lease on one year's notice at any time during the renewal term (i.e., after the first thirty-five years of the lease). Even though this would mean compensating IAA for the fair market value of improvements, this ability still represents a further degree of control for ARRC in the continuing operations of the Inn. If a private individual enjoyed this position in such a venture, his or her involvement would be considered "significant." ARRC should receive a similar evaluation. This is the case even though authority for day-to-day operations is vested in a management company and the general partner. Considering ARRC's posture in the partnership and the power ARRC wields, other IAA partners simply cannot ignore its desires.

d. *State funding after construction*

The State would be obligated to provide funds on a continuing basis only if the Inn ran a deficit, or the debts and obligations of the partnership required further contributions from partners.[13] Therefore, analysis of this factor militates against finding "significant state involvement," as it does not appear that ARRC would have continuing obligations. However, the existence of some ARRC responsibility for partnership losses and obligations makes this factor less persuasive.

e. *Relative portion of financing supplied by the State*

This factor weighs in favor of IAA's position. IAA argues that even assuming that ARRC essentially provided the fair market value of the land in exchange for its partnership share, this contribution constitutes no more than 18.3%[14] of the total project costs, an assertion that DOL and Trades Council do not refute. This is significantly less than the twenty-five percent of project costs—and, expressed in other terms, also less than the $1 million—that this court deemed "relatively small" in *Federation*. 713 P.2d at 1211. In this case, most of the funds needed for construction are being obtained from a commercial lender. However, ARRC's participation in the lending process as a co-obligor with 100% liability for the loan amount, a fact that IAA concedes, cannot be overlooked. This pledge was undoubtedly a benefit to IAA in obtaining the loan. Furthermore, it is again important to remember the context of *Federation*: a grant contract, with indirect State funding, and no State obligation to retain control or fund the project upon completion. The percentage of State funding factor alone is not determinative. It is the total mixture of circumstances which must be reviewed in determining if there is "significant state involvement."

13. In fact, ARRC already provided $485,000, pursuant to a capital call, to fund interim construction costs before the approval of the construction loan. These funds were to be returned once the construction loan closed.

14. $845,000 fair market value of land ÷ ($3,764,732 construction costs + $845,000) = 18.3%.

IV. *CONCLUSION*

[4] The totality of circumstances indicates that the State's role provides the significant involvement that this court has deemed necessary in order to conclude that a project is "public construction" subject to Alaska's Little Davis–Bacon Act. *See id.* at 1211. ARRC was a party to a construction contract via its significant participation in IAA. ARRC undertook a significant liability that was of benefit to IAA in obtaining a construction loan for millions of dollars. ARRC's involvement in the project was due not only to an investment incentive, but also due to ARRC's desire to augment its passenger business and further the development of the Ship Creek area. Additionally, ARRC has pursued investment in hotels in a continuing course of action. Consistent with this role, ARRC will continue to participate in the financial future of the Inn. In view of its ability to veto significant, non-routine partnership transactions, ARRC wields substantial power in the functioning of IAA. Even though ARRC's portion of the total project financing was small, the other enumerated considerations indicate that State involvement in the Inn project was "significant." Therefore, the provisions of Alaska's Little Davis–Bacon Act that mandate payment of prevailing wages apply. This fulfills the legislation's fundamental purpose: "to assure that employees engaged in public construction receive at least the prevailing wage." *City and Borough of Sitka v. Construction and Gen. Laborers Local 942*, 644 P.2d 227, 232 (Alaska 1982).

The judgment of the superior court is REVERSED and the case REMANDED to the superior court with directions to enter summary judgment in favor of the appellants.[15]

MATTHEWS, Justice, with whom MOORE, Chief Justice, joins, dissenting.

I.

While I do not mean to minimize the difficulty of devising a test to determine whether the Little Davis–Bacon Act applies to a construction project, I am concerned that the five-factor approach adopted in today's opinion gives very little guidance as to how future cases should be decided. Persons involved in a project in which the state will or may participate will encounter serious difficulties in attempting to predict whether the Act will apply to their project. The approach may deter building projects in which the state participates alongside private business by making these projects too expensive. The five-factor approach may also engender unnecessary litigation.

In my view, focusing on two factors, the nature of ownership of the building or work and the nature of use of the building or work, is all that is needed for a proper decision in most cases. Only when these two factors point in opposite directions do other factors have to be considered. Further, I think that requiring consideration of five unweighted factors in all cases tends to make it difficult to distinguish hard cases from easy cases. Finally, I am concerned that the opinion sets up deciding whether there is "significant state involvement" as the goal of the five-factor approach, whereas the statutory goal of any analysis should be to determine whether a project constitutes "public construction," or a "public work[ ]." *See* AS 36.05, AS 36.95.010(3).

II.

The result of today's opinion is not compelled by our prior case law. The multiple factor approach used in the opinion is purportedly derived from our decision in *Alaska State Federation of Labor v. State, Department of Labor*, 713 P.2d 1208 (Alaska 1986). However, *Federation* does not prescribe a multi-factor test. It does discuss factors similar to the factors used in today's opinion. But it does not say which of those factors are important and which are not, and it does not state that a totality of the circumstances test should determine whether the Act applies. Rather, it merely rejects a series of argu-

15. Because of our disposition of this case, the award of attorney's fees is vacated and this matter remanded for an appropriate award of attorney's fee to the appellants.

ments that were made in favor of applying the Act in that case which correspond to the factors used in today's opinion. *Id.* at 1210–11.

III.

In my view, focusing on the reason that the Act does not apply to all construction projects helps in making an informed choice as to the types of projects to which the Act should apply.

Alaska's Little Davis–Bacon Act is based on the federal Davis–Bacon Act, which was passed in 1931. In *Universities Research Ass'n v. Coutu*, 450 U.S. 754, 773–74, 101 S.Ct. 1451, 1462–63, 67 L.Ed.2d 662 (1981), the United States Supreme Court explained that the purpose of the Davis–Bacon Act was to prevent contractors from lowering wage rates in local labor markets by importing cheap labor. The Court stated,

> The Act was "designed to protect local wage standards by preventing contractors from basing their bids on wages lower than those prevailing in the area." Passage of the Act was spurred by the economic conditions of the early 1930's, which gave rise to an oversupply of labor and increased the importance of federal building programs, since private construction was limited. In the words of Representative Bacon, the Act was intended to combat the practice of "certain itinerant, irresponsible contractors, with itinerant, cheap, bootleg labor, [who] have been going around throughout the country 'picking' off a contract here and a contract there."

Id. at 773, 101 S.Ct. at 1463 (citations omitted). The Court did not explain who the "cheap, bootleg labor" were, where they came from, or why Congress felt that it was fair to benefit local labor at the expense of the "cheap, bootleg labor." The history of the Act indicates that the cheap laborers were mainly Southern Black workers who were used by contractors in the North to work on federal projects.[1] For this reason and others, the Davis–Bacon Act has been criticized as harming minorities and being motivated by racism. *See* John P. Gould & George Bittlingmayer, *The Economics of the Davis–Bacon Act: An Analysis of Prevailing Wage Laws* 8–9, 62–63 (1980); Kenneth M. Roberts, *Labor Law—The Davis Bacon Act, Another Setback for Labor: Building & Construction Trades' Department v. Donovan*, 10 J.Corp.L. 277, 279 (1984).

Merely because the federal Davis–Bacon Act may have roots in protectionism and prejudice does not mean that its Alaska counterpart was enacted for similarly questionable motives. Knowledge of this history does, however, counsel against an easy assumption that this is legislation whose beneficent public purpose is so apparent that it is necessarily entitled to a broad construction.

Our case law states that "[t]he fundamental purpose of Little Davis–Bacon is to assure that employees engaged in public construction receive at least the prevailing wage." *City & Borough of Sitka v. Construction & Gen. Laborers Local 942*, 644 P.2d 227, 232 (Alaska 1982). This statement of purpose does not without further analysis help to determine whether a particular project should be treated as public construction under the Act. Figuring out whether the Act should apply in this case requires discovering what special characteristics public construction has that justify a prevailing wage law covering workers in public construction but not workers in private construction.

As the facts of this case illustrate, the prevailing wage required by Little Davis–Bacon is higher than that which will be paid by at least some cost-conscious owners and contractors. The purpose of the Act is thus to establish a wage floor which increases the income of workers in public construction. It is a "minimum wage law designed for the benefit of construction workers." *United States v. Binghamton Constr. Co.*, 347 U.S. 171, 178, 74 S.Ct. 438, 442, 98 L.Ed. 594 (1954), *quoted in Fowler v. City of Anchorage*, 583 P.2d 817, 822 n. 9 (Alaska 1978). With regard to this purpose, the natural question is why the Act does not apply to all construction, public and private. The likely answer is that attempting to apply the Act to private construction would discourage some private construction, which, in turn, would hurt the construction workers whom the Act is intended to benefit. Presumably, this is not a problem with public construction, because the level of public construction is determined by the needs of the public and by political considerations, and is not dependent on the profit motive.

This suggests that projects built with a for-profit motive, especially those that are in competition with projects which are purely private in every sense, should not be included within the statutory term "public construction."

1. During Congressional debate of the bill that became the Davis–Bacon Act, one Congressman stated:

> Reference has been made to a contractor from Alabama who went to New York with bootleg labor. That is a fact. That contractor has cheap colored labor that he transports, and he puts them in cabins, and it is labor of that sort that is in competition with white labor throughout the country.

John P. Gould & George Bittlingmayer, *The Economics of the Davis–Bacon Act: An Analysis of Prevailing Wage Laws* 8 (1980).

IV.

A review of the published opinions of the Alaska Attorney General reveals some of the enormously diverse circumstances in which questions concerning the application of the Act arise. I give only a few examples here and indicate the conclusion of the Attorney General:

March 14, 1991

Does the Act apply to a contract awarded by the state for the clean-up of contaminated dirt on private land?

No. The clean-up was not associated with an identifiable public construction project and the property was not intended for public use.

1991 Informal Op.Att'y Gen. 201.

April 18, 1986

Does the Act apply to weatherization contracts paid for by the state for improving "low-income homes"?

No. The property improved is privately owned and not publicly used. (This opinion reversed an opinion of December 30, 1985, which concluded that the Act probably did apply to weatherization contracts because the state and political subdivisions were the contracting parties.

1986 Informal Op.Att'y Gen. 539.)

1986 Informal Op.Att'y Gen. 321.

July 3, 1984

Does the Act apply to a contract between a borough and an oil company under which the oil company agreed to construct a natural gas pipeline paid for by the borough to an industrial center? The oil company will own the pipeline subject to a two-year option in the borough to acquire ownership of the pipeline if it can obtain the necessary permits during that period.

Yes. Even though ownership may remain in private hands, the contract is directly with a public entity. The provision of gas to the industrial center will serve the interest of the general public and the borough hopes ultimately to own the pipeline.

1984 Informal Op.Att'y Gen. 33.

December 21, 1983

Does the Act apply to a construction contract between a rural electrification association (not a state agency or instrumentality) and a contractor for the construction of a substation and transmission line using state funds? The line and substation are necessary for the utilization of a state hydro-electric project but are not currently owned by the state.

Yes. The project "involves the undertaking or provision of traditional government facilities, services, or activities" and thus is covered by the Act because the transmission line and substation are needed to utilize the state-owned hydro-electric project. Further, the author of the Attorney General's opinion "understand[s]" that the line and substation eventually will be owned by the state.

1983 Informal Op.Att'y Gen. 450.

June 9, 1983

Does the Act cover the Alaska State Housing Authority in general and specifically with respect to construction of a senior citizen housing project in Fairbanks?

Alaska State Housing Authority is covered as a state agency. Concerning the senior citizen housing project the Act does

not apply because of an exemption (AS 18.55.110) which applies where federal funding would be jeopardized as it would for the Fairbanks project because HUD regards the state's prevailing wage rates under the Act to be "excessive."

1983 Informal Op.Att'y Gen. 421.

May 23, 1983

Does the Act cover a state grant to the Alaska Native Brotherhood for the construction of a meeting hall?

No. The uses to which the building will be put are not the type that are traditionally provided by government. (This conclusion was subsequently affirmed in *Federation*, 713 P.2d 1208).

1983 Informal Op.Att'y Gen. 395.

March 11, 1983

Does the Act apply to designated grants to private nonprofit corporations to construct buildings such as a daycare center, a "human services complex," and a public works facility?

The answer depends on the nature of the particular project. If the project involves "the undertaking or provision of traditional government facilities, services, or activities it is covered by the Act ... [h]owever, if the work contracted out is not like that traditionally carried out or provided by government, it is not covered...."

1983 Informal Op.Att'y Gen. 235.

I think that a review of these examples illustrates the imprudence of substituting the rubric "significant state involvement" for "public construction." The clean-up contract (1991 Informal Op.Att'y Gen. 201), the weatherization contracts (1986 Informal Op.Att'y Gen. 321), and the designated grants (1983 Informal Op.Att'y Gen. 235), all seem to be completely publicly funded—it would be impossible to say that they are lacking in significant state involvement. Yet, because of the private nature of the use and ownership of the property involved in each case, it seems difficult to argue with the conclusion that the projects do not involve public construction.

2. The only exception is the opinion relating to the exemption in AS 18.55.110. *See* 1983 Informal Op.Att'y Gen. 421.

The wide variety of fact situations illustrated by these examples counsels against an attempt to devise an all-purpose test to determine when a project is public construction. Still, I think that focusing on what seem to be the two most important factors rather than the five referred to in today's majority opinion should be dispositive in most cases. The factors to which I refer are (1) the nature of the intended use of the public work or building and (2) the nature of the ownership of the public work or building.

I select these two factors for the following reasons. Asking whether the nature of the intended use is public or private in character focuses on the "public" aspect of the statutory terms "public construction" and "public works." *See* AS 36.05, AS 36.95.010(3). Further, intended public use seems to be a *sine qua non* for the application of the Act in the two cases we have decided, *Sitka*, 644 P.2d 227, and *Federation*, 713 P.2d 1208, in the fact situations on which the Attorney General's opinions are based,[2] and in the opinions of other state courts referred to in today's opinion.

Focusing on public ownership of a work or building directs the analysis to the central, though not exclusive, meaning of the statutory term "under contract for the state." *See* AS 36.95.010(3). In *Sitka* and *Federation* the presence or absence of public ownership is consistent with the results reached. Thus, in *Sitka*, the project was publicly owned and the Act applied, and in *Federation* the project was privately owned and the Act did not apply. This pattern, however, does not hold in all of the state cases referred to in today's opinion. In industrial development agency cases projects are publicly owned subject to long-term leases to private businesses. This form of ownership exists to facilitate financing with tax exempt bonds and is held not to require application of prevailing wage statutes. *See Daniels v. City of Fort Smith*, 268 Ark. 157, 594 S.W.2d 238, 239–41 (1980); *Zickuhr v. Bowling*, 97 Ill.App.3d 534, 53 Ill.Dec. 65, 423 N.E.2d 257 (1981); *Gregory v. City of Lewisport*, 369 S.W.2d 133, 135–36 (Ky.1963); *Eric County Indus. Dev. Agency v. Roberts*, 94 A.D.2d 532, 465 N.Y.S.2d 301 (1983), *aff'd*, 63 N.Y.2d 810, 482 N.Y.S.2d 267, 472 N.E.2d 43 (1984); *Penfield Mechanical Contractors, Inc. v. Roberts*, 119 Misc.2d 105, 462 N.Y.S.2d 393 (N.Y.Sup.), *aff'd*, 98 A.D.2d 992, 470 N.Y.S.2d 1021 (1983), *aff'd*, 63 N.Y.2d 784, 481 N.Y.S.2d 72, 470 N.E.2d 870 (1984). In these cases, private use of the project was of overriding importance. Referring to the fact situations presented in the Attorney General's opinions, whether ownership is or is expected to be public is consistent with the results reached in all of the cases except for the designated grants case (1983 Informal Op.Att'y Gen. 235) where despite private ownership, public use was held to control.

Where a project is one in which the two factors, nature of use and nature of ownership, coincide, whether or not to apply the Act can be easily resolved. If a building is intended for a use which is traditionally associated with government and it is government-owned, the contract to build the building should clearly come within the terms of the Act. A state-owned building used for state offices, a municipality-owned building used for a school, and state- or municipality-owned airports or roads are just a few of the numerous examples that fit in this category. Similarly, where the use of a building is one which is not traditionally associated with government and the building is privately owned, I suggest that the Act clearly should not apply even if there is significant state funding. Examples would include construction with state funds of a privately owned building to be used as a meeting place for a private organization,[3] or a contract between the state and a contractor to improve the energy efficiency of a privately owned building used as a private home.[4]

The difficult cases are those where there is private ownership, but a traditionally public use, or public ownership, but a traditionally private use. An example of the former might include a privately owned building which is subject to a long-term lease to the state for a public use which was entered into prior to construction.[5] Examples of the latter would include a state-owned building which the state has acquired merely for investment purposes but the use of which is private in nature,[6] or where the state acquires by or in lieu of foreclosure a structure dedicated to private uses which must be rehabilitated. These are cases where the factors of ownership and use point in opposite directions. In order to decide whether the projects in such cases are "public construction" additional analysis will be needed.[7]

V.

I view the project in this case as one in which the use and ownership factors coincide. Both indicate that the construction of the

3. *See Federation*, 713 P.2d 1208.

4. *See* 1991 Informal Op.Att'y Gen. 201, the Attorney General's opinion concerning weatherization.

5. *See Gregory*, 369 S.W.2d at 135-36.

6. *See* AS 37.13.120(g)(16), which permits the Alaska Permanent Fund to own all of a commercial real estate project if the total value of all real estate investments of the fund do not exceed $150 million (if total real estate investments exceed $150 million, equity participation is limited to no more than a sixty-seven percent beneficial ownership interest in any particular project).

7. However, case law from other states suggests that the nature of the use of the project is generally the most important factor. *See Daniels*, 594 S.W.2d at 238–40 (industrial facility backed by public financing not subject to prevailing wage law because it was not for public use); *Zickuhr*, 53 Ill.Dec. at 67–70, 423 N.E.2d at 259–62 (private warehouse paid for with municipal bonds not for public use and consequently not covered by prevailing wage law); *Gregory*, 369 S.W.2d at 135 (industrial plant financed by public bonds not subject to prevailing wage statute, since statute "aimed primarily at construction of buildings for *public use*"); *National R.R. Passenger Corp. v. Hartnett*, 169 A.D.2d 127, 572 N.Y.S.2d 386, 388-90 (1991) (construction of railroad line for private rail company not subject to prevailing wage law even though state provided 40% of financing, had right to veto contractors and significant changes in project, and retained contingent reversionary rights); *Eric*, 465 N.Y.S.2d at 305–06 (printing plant given public financing not "public works" and not covered by prevailing wage law, as "public works" are those projects constructed for public use); *Penfield*, 462 N.Y.S.2d at 395 (private office and storage facility not public works within meaning of prevailing wage statute because it was not for public use).

Comfort Inn is not within the coverage of the Act.

The Comfort Inn is used as a hotel It is available for use to hotel patrons in a manner which is not at all different from any private hotel and it is in competition with other hotels. Its use is, inarguably, private.[8]

The ownership factor also weighs against application of the Act. The Alaska Railroad Corporation holds a minority ownership position, forty percent, in Inn-Vestment Associates of Alaska, the partnership which owns the Comfort Inn. I consider that minority ownership on the part of the state does not satisfy the public ownership factor for two reasons. First, AS 36.95.010(3) defines "public construction" as construction "under contract for the state," and the partnership is not an alter ego of the state. Second, minority shares in enterprises are typically acquired for investment—profit-making—reasons.[9]

For the above reasons, I conclude that the construction of the Anchorage Comfort Inn was not "public construction" or a "public work" to which the Act applies. Both the use and the ownership of the project indicate that the Act should not apply.

8. Today's opinion refers to a use factor but discusses public purpose rather than public use in its application of that factor. The existence of a public purpose is of course a requisite for any state spending. Article IX, section 6 of the Alaska Constitution prohibits any appropriation of public money "except for a public purpose." Consistent with the public purpose clause of our constitution, public money can be spent on private buildings. *See Walker v. Alaska State Mortgage Ass'n*, 416 P.2d 245, 251-53 (Alaska 1966); *DeArmond v. Alaska State Dev. Corp.*, 376 P.2d 717, 721-22 (Alaska 1962). This does not mean, however, that the uses of the private buildings thus benefitted are in any sense public. The distinction between a public purpose which justifies the expenditure of funds and the public use of a project which justifies application of a prevailing wage law has received judicial recognition. *See Daniels*, 594 S.W.2d at 240 ("[W]e find no language ... which indicates that the terms 'public purpose' and 'public use' are synonymous...."); *Zicknhr*, 53 Ill.Dec. at 69, 423 N.E.2d at 261 ("While it seems clear that the city ... will publicly benefit from the employment opportunities afforded by the presence of the new warehouse, and while it is also clear that the provisions of the Bond Act are for a public purpose and benefit, it is just as clear that the actual use of the project is private in nature."); *Erie*, 465 N.Y.S.2d at 306 ("The public purpose of the financing scheme must not be confused with the purely private purpose of the venture itself, its structure and its operation.").

9. This rationale seems appropriate, given that the legislature chose not to extend the Act to private projects, probably because the Act would tend to discourage some private projects. *See supra* § III.

John WASKEY, Appellant,

v.

MUNICIPALITY OF ANCHORAGE, Appellee.

No. S-6549.

Supreme Court of Alaska.

Jan. 12, 1996.

Arrestee sued municipality for negligence, constitutional violations, and false arrest and false imprisonment. The Superior Court, Third Judicial District, Anchorage, Milton M. Souter, J., granted summary judgment in favor of municipality, and arrestee appealed. The Supreme Court, Matthews, J., held that: (1) arresting officer had no duty of care to properly ascertain and record arrestee's identity, and (2) arrest of arrestee pursuant to facially valid arrest warrant for arrestee's brother did not give rise to claim for false imprisonment.

Affirmed.

1. Municipal Corporations ⇐747(3)

Arresting officer owed arrestee no duty of care to properly ascertain and record arrestee's identity, and thus arrestee could not maintain action against municipality for negligence based on his erroneous arrest.

2. False Imprisonment ⇐2, 16

False arrest and false imprisonment are not separate torts; false arrest is one way to commit false imprisonment.

3. False Imprisonment ⇐2

Elements of false arrest-imprisonment tort are restraint upon plaintiff's freedom, without proper legal authority.

4. False Imprisonment ⇐12

Municipality's erroneous arrest of arrestee pursuant to facially valid arrest warrant for arrestee's brother did not give rise to claim for false imprisonment.

Eric Chancy Croft, Hedland, Fleischer, Friedman, Brennan & Cooke, Anchorage, for Appellant.

Stephanie Galbraith Moore, Assistant Municipal Attorney, Mary K. Hughes, Municipal Attorney, Anchorage, for Appellee.

Before COMPTON, C.J., and RABINOWITZ, MATTHEWS and EASTAUGH, JJ.

OPINION

MATTHEWS, Justice.

I. *FACTS AND PROCEEDINGS*

Evan Waskey (Evan) was arrested and charged with assault after engaging in a street fight. He told the arresting officer that his name was John Evan Waskey, which is actually his brother's name. Evan then jumped bail and a bench warrant was issued requiring the arrest of "John Evan Waskey" for failing to appear. Appellant (John) was arrested on the warrant and detained for ten days. When the Municipality learned that it was Evan, not John, who was originally arrested and charged, the charges against John were dismissed.

John filed a civil action in tort against the Municipality containing counts sounding in negligence, constitutional violations, and false arrest and false imprisonment. The Municipality moved for summary judgment on each count. The superior court granted the Municipality's motion. John appeals.

On appeal, John argues that an arresting officer owes a duty of care enforceable in tort to ensure that people arrested are who they say they are, and that the arresting officer negligently failed to perform this duty. Second, John argues that his claim for false arrest should not have been dismissed as there is no municipal immunity for false arrest.

In response, the Municipality argues that negligent police investigation into the identity of a person arrested violates no duty enforceable in tort. In addition, the Municipality argues that no suit for false arrest may be maintained against the Municipality because the arrest of John was made pursuant to a facially valid warrant. We agree with the Municipality on both points and thus affirm.

II. *DISCUSSION*

A. *Duty of Care*

[1] John argues that police officers owe a duty of care to properly ascertain and record an arrestee's identity. In his opening brief he suggests that this duty should be found to exist based on the factors articulated by this court in *D.S.W. v. Fairbanks North Star Borough School District*, 628 P.2d 554, 555 (Alaska 1981).[1] We have decided two cases more closely related to this case which make

1. In *D.S.W. v. Fairbanks North Star Borough School District*, this court articulated the factors to be considered in determining whether an "actionable duty of care" exists:

> The foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost and prevalence of insurance for the risk involved.

D.S.W., 628 P.2d 554, 555 (quoting *Peter W. v. San Francisco Unified School District*, 60 Cal. App.3d 814, 131 Cal.Rptr. 854, 859-60 (1976)).

In this case John argues that "the harm to [him] is foreseeable, the injury is certain, the connection between the conduct and the injury is close, the policy of preventing future harm is important, the burden on defendant is relatively light, the consequences for the community are positive, and it is more feasible for the Municipality to procure insurance."

ALASKA AFL-CIO

2501 Commercial Drive · Anchorage, Alaska 99501 · 907-258-6284 · Fax 274-0570

MANO FREY
Executive President

BRUCE LUDWIG
Secretary / Treasurer

April 30, 2001

Senator Randy Phillips
Alaska State Capitol, Room 103
Juneau, AK 99801-1182

Dear Senator Phillips:

I am writing to let you know that Alaska AFL-CIO supports the legislation being proposed by the Alaska Railroad and the United Transportation Union which will clarify that employees of the corporation are covered by Alaska's Wage and Hour Act and which will also allow the train and engine men on the Railroad, represented by the United Transportation Union to opt out of the Wage and Hour Act if the parties mutually agree to do so in a collective bargaining agreement. I understand that the UTU employees are negotiating to work as exempt salaried employees. I also understand that the UTU employees are subject to the federal Hours of Service Act so there is no danger of excessive or unreasonable work hours for the employees involved.

Thank you for your attention to this matter.

Sincerely,

Mano Frey
Executive President
Alaska AFL-CIO

FISCAL NOTE

STATE OF ALASKA
2001 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: SB 170
() Publish Date:

Revision Date/Time (Note if correction): 04/12/2001 12:30p.m.
Dept. Affected: DCED
Title: Wage and Hour protections for employees of the Alaska Railroad
BRU: ARRC
Component:
Sponsor: Senate Labor and Commerce by request
Requester: Senate Labor and Commerce
Component Number:

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007
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 EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

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

Estimate of any current year (FY2001) cost: 0.0

Check this box (X) if funding for this bill is included in the Governor's FY 2002 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

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

Senate Bill 170 does not impact the state's budget because the Alaska Railroad does not require any state funding to operate. Alaska Railroad employees are paid for through corporate revenues. They are not covered by state public employee contracts, nor do they receive state-funded pensions and benefits. Approximately 545 of the Alaska Railroad's employees are represented by five unions that negotiate contracts with the corporation.

Prepared by: Wendy Lindskoog, Director External Affairs
Phone (907)265-2498
Division: Alaska Railroad Corporation
Date/Time 04/12/2001 12:30p.m.
Approved by: Commissioner Deborah B. Sedwick
Date 4/12/2001
Agency: Department of Community & Economic Development

For distribution information, call the Governor's Legislative Office

(Rev 2/7/2001 OMB)

SB

175

FISCAL NOTE

STATE OF ALASKA
2002 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: SB 175
() Publish Date:

Revision Date/Time (Note if correction):
Dept. Affected: Revenue
Title: Municipal Protests of Gaming Permits
BRU: Revenue Operations
Component: Tax Division
Sponsor: Senator Elton
Requester: Senate Labor and Commerce
Component No.: 2476

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008
Personal Services						
Travel						
Contractual	10.0	10.0	10.0	10.0	10.0	10.0
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	**10.0**	**10.0**	**10.0**	**10.0**	**10.0**	**10.0**
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	10.0	10.0	10.0	10.0	10.0	10.0
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	**10.0**	**10.0**	**10.0**	**10.0**	**10.0**	**10.0**

Estimate of any current year (FY2002) cost: 0.0
Check this box (X) if funding for this bill is included in the Governor's FY 2003 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

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

* This fiscal note anticipates that two charitable gaming license cases would go to formal hearing each year. The $10.0 contractual expense is to cover the cost of a contracted hearing officer for those cases. The actual costs would vary and the actual number of cases would determine the amount needed.

Prepared by: Carl Meyer
Phone 465-2343
Division: Tax Division
Date/Time 1/28/02 12:13 PM
Approved by: Larry Persily, Deputy Commissioner
Date 01/28/2002
Agency: Department of Revenue

(Revised 9/2001 OMB)

- **Section 1** amends AS 05.15.030(a) to permit a municipality to protest, by resolution, the issuance of a permit or license to an applicant for the authority to conduct a gaming activity within the jurisdiction of the municipality, or to recommend conditions to be placed on the permit or license. The resolution must state the reasons for the protest. The Department of Revenue shall deny the permit or license, or condition the permit or license as recommended by the resolution, unless the department finds following a hearing that the protest or conditions are arbitrary, capricious or unreasonable, or that the conditions conflict with state law.

  A municipality may file a protest with the department only after it has provided the applicant a hearing to present a defense *(Line 11, Page 1).* Although we believe the sponsor intends that this first hearing be held by the municipality, and not the department, it is not entirely clear in the draft legislation, and we recommend that the language be clarified.

  The department then must hold its own hearing on the municipality's protest against the license issuance or renewal *(Line 3, Page 2).*

- **Section 2** provides that a municipality holding a license or permit that competes with the applicant may only protest the issuance of the permit or license based upon the applicant's failure to pay municipal taxes, and may not otherwise recommend conditions on the permit or license.

Analysis

The draft bill as written would require two hearings. The first hearing would be at the municipal level. Following that hearing, a municipality may protest the license issuance or renewal to the department. That would then initiate a second hearing — this time at the department level — to consider the protest.

Each department hearing will require a hearing examiner to hear, decide and issue a written decision in the matter. Each hearing will also require an appeals officer from the Tax Division, as well as a representative from the Gaming Section. There are more than 1,000 licensed organizations statewide, authorized to conduct charitable gaming, and more than 40 licensed operators and multiple-beneficiary permitees in business across the state. The volume of protests, and therefore the volume of hearings, generated by this legislation could be sizable, although we do not expect that municipalities would protest very many licenses.

Under this draft legislation, the department must deny the application unless it finds a protest or recommended conditions to be arbitrary, capricious or unreasonable. The department would prefer more parameters within the legislation to direct us in deciding these cases. We believe any adverse decision to an applicant is likely to be litigated, considering the department's experiences with the gaming industry.

The legislation also would allow municipalities to recommend conditions for a permit or license, something that the department finds problematic. This will have the effect of inserting the state between disputes of the municipalities and applicants, which is something the department would prefer to avoid.

There is only a narrow time frame between the application filing and the beginning of the new gaming year. Therefore, the department's experience is that denying or conditioning a permit will mean that everything related to that action must be expedited within that narrow time frame. Furthermore, Alaska courts have enjoined actions that deny a permit until the applicant is afforded due process, which includes appeal rights. Thus, all actions related to the application are undertaken on a compressed schedule. In the interim, the department may not be able to deny or condition the permit or license until the dispute is finally resolved.

SENATOR KIM ELTON

SB 175
Granting Local Governments the Right to Protest Gaming Permits

Sponsor Statement

Charitable gaming in Alaska is big business. In 2000 Alaskans bought more than $300 million worth of pull tabs and bingo cards, up $7 million from the year before. While some of the money goes to nonprofit organizations, vendors and operators also see significant revenue from Alaskans who like to gamble. Local governments sometimes find themselves without the tools they need to handle disputes with gambling operations that function under state law.

Without this bill, a local government having trouble with a gaming operation has limited options: it could ban all charitable gaming, ban only pull-tabs, or forever prohibit a particular individual or group from conducting gaming activities in the municipality. SB 175 creates an intermediate step before such drastic action must be taken by giving local governments the right to protest charitable gaming permits, just as they can alcohol licenses.

According to the Alcoholic Beverage Control board, the most common reasons for protesting liquor licenses are failure to meet local safety codes and failure to pay municipal taxes. When taxes are in dispute, the protest mechanism lets municipalities insist the disputed amount go into an escrow account before the city lifts its protest. Recent experiences with tax disputes over charitable gaming have showed the need for this tool. In Juneau, three permittees or multiple-permit groups refused to pay city sales tax on pull-tabs. These groups refused to put the disputed amounts in escrow while challenging the tax in court. When the court finally ordered them to pay, they had a tax arrearage of nearly $1 million, a debt that threatens the solvency of the nonprofits involved, and the services they provide to their communities.

SB 175 also allows municipalities to condition licenses to mitigate problems that arise, such as safety violations or underage gambling. Since local governments may also hold charitable gaming permits, SB 175 precludes municipalities that hold gaming permits from protesting or conditioning for any reason except nonpayment of taxes.

ALASKA SENATE
STATE CAPITOL • JUNEAU, ALASKA 99801-1182 • (907) 465-4947 • FAX (907) 465-2108
SENATOR_KIM_ELTON@LEGIS.STATE.AK.US

- **Section 1** amends AS 05.15.030(a) to permit a municipality to protest, by resolution, the issuance of a permit or license to an applicant for the authority to conduct a gaming activity within the jurisdiction of the municipality, or to recommend conditions to be placed on the permit or license. The resolution must state the reasons for the protest. The Department of Revenue shall deny the permit or license, or condition the permit or license as recommended by the resolution, unless the department finds following a hearing that the protest or conditions are arbitrary, capricious or unreasonable, or that the conditions conflict with state law.

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Presented by: The Manager
Introduced: 02/05/2001
Drafted by: J.R. Corso

RESOLUTION OF THE CITY AND BOROUGH OF JUNEAU, ALASKA

Serial No. 2077

A Resolution Urging the Alaska Legislature to Provide for Effective Local Protest of Pull-Tab Licenses and to Require Licensing of Pull-Tab Employees.

WHEREAS, recent experience has shown that substantial volumes of money flow through pull-tab operations, and any failure to collect and remit sales taxes on this volume can have a substantial effect on local revenues, and

WHEREAS, it is essential that the City and Borough be equipped with effective tools to enforce sales tax laws and other local laws applicable to pull-tabs, and

WHEREAS, a tool that has proved its effectiveness in a similar context is AS 04.11.480, by which the State of Alaska authorizes local governments to protest the issuance or renewal of a state liquor license, and

WHEREAS, unless the protest is arbitrary, capricious or unreasonable, it will be honored by the State and the liquor license will be denied, or will be granted with conditions requested by the local governing body, and

WHEREAS, this statute gives local governments a clear voice in the alcohol regulation process, allowing them to point out those few licensees who are delinquent in the payment of local taxes, who serve minors, or who otherwise operate in an unlawful manner, and

WHEREAS, the state system for regulating pull-tabs provides under AS 05.15.030 that local governments may protest the issuance of pull-tab licenses, but only on the grounds that a licensee lacks the qualifications prescribed by the State, and even then the protest is merely advisory, and

WHEREAS, local governments deserve better than this rudimentary control over gambling in their jurisdiction, and

WHEREAS, the people who operate and manage pull-tab operations are crucial to the effectiveness and efficiency of any regulatory system, whether these people are employed by permittees, vendors, operators, or otherwise, and,

WHEREAS, there is presently no system under Alaska statutes to license pull-tab employees, and

WHEREAS, licensing of pull-tab employees would allow training and examination as a means of ensuring compliance with the regulations applicable to pull-tab operations;

NOW, THEREFORE, BE IT RESOLVED BY THE ASSEMBLY OF THE CITY AND BOROUGH OF JUNEAU, ALASKA:

Section 1. Request for Legislation. The Assembly respectfully requests that the Alaska Legislature undertake statutory reform of AS 05.15 for the purpose of establishing an effective local protest of gambling licenses, for licensing of pull-tab employees, and for such other regulation as may serve the public interest.

Section 2. Distribution. The Clerk shall deliver copies of this resolution to the legislative delegation.

Section 3. Effective Date. This resolution shall be effective immediately upon adoption.

Adopted this 5th day of February, 2001.

Sally Smith

Sally Smith, Mayor

Attest:

Laurie J. Sica

Laurie J. Sica, Clerk

Feb 1, 2001 Juneau Empire

City scores on pulltabs

Judge says operators must pay up

By FERNAND CHANDONNET
THE JUNEAU EMPIRE

The latest round in a $900,000 battle between Juneau and pulltab operators who refuse to pay sales taxes has been decided in favor of the city.

On Wednesday, retired Justice Jay Rabinowitz turned down the appeal by Last Chance Co-op, Multiple Charities Association Co-op and Alaska Native Brotherhood Camp 2 of a city administrative decision that the 1996 1 percent sales tax increase applies to the pulltabs and that the tax was to be collected on gross receipts.

Rabinowitz also threw out the pulltabs' request for a trial to determine the facts of the case, and granted the city's request for a summary judgment for payment of about $900,000 in back taxes, interest and penalties.

> "These are gamblers. They know when to hold 'em and when to fold 'em."
>
> — City Attorney John Corso

"It rules in favor of the city on all issues," said Assistant City Attorney John Hartle, who represented the city in oral arguments

Please see Pulltabs, Page 8

Pulltabs...

Continued from Page 1

before Rabinowitz last Friday. "It shows me the (city) sales tax administrator made a good call in her original determination" that the pulltab operators had to pay the tax in the manner requested by the city. "The city has been saying this from Day One."

The operators – dubbed Multiple Beneficiary Permittees by the state – have the right to appeal the Superior Court decision to the state Supreme Court, according to City Attorney John Corso. "But these are gamblers," he said. "They know when to hold 'em and when to fold 'em."

Asked about an assertion by MBP attorney John Rice that the city was ready to foreclose on the Alaska Native Brotherhood Hall, Hartle said the city's collection ordinance that won't allow organizations to appeal delinquencies unless they pay the arrears first," Munoz said. "You can't blatantly ignore the tax that is due."

The MBPs did in fact appeal the city decision last summer without paying the disputed tax first.

"The assembly is also interested in having input into the gaming permit before the gaming board issues it" to the MBP, Munoz said.

Munoz likened the process to state-issued liquor licenses, which routinely come under city review before they are granted or renewed – or rejected if the licensee is found by the assembly's Human Resources Committee not to be in compliance with city code.

A reinterpretation of state regulations to allow collection from current revenues for past debts may still not be enough to precipitate collection – at least from Last

took away that MBP's 2001 pulltab permit after finding Last Chance hadn't distributed enough of its take to charities since 1995, as mandated by state regulation.

Asked about repeated complaints by MBP operators that the combination of the city's 5 percent sales tax and the high prize payout – in some cases, 80 percent – was ruinous to the pulltab operations and prevented them from distributing money to charities, Hartle said, "As for the tax, that's a policy call for the assembly."

And as for the prize payout, "that's completely at the discretion of the sellers," he said.

MBP attorney Rice did not return calls requesting comment.

•••••

Fernand Chandonnet can be reached at fchandonnet@juneau-

Feb 1, 2001 Juneau Empire

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Please see Pulltabs, Page 8

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Fernand Chandonnet can be reached at fchandonnet@juneau-

City may give break to pulltabs

02/26/01 Juneau Empire

Assembly weighs plans to collect back taxes

By BILL McALLISTER
THE JUNEAU EMPIRE

The Juneau Assembly must decide whether to seek all of the nearly $1 million the city is owed by three gaming groups. But for now, it is not going after most of the nonprofit organizations that benefited from the pulltab operations in dispute.

"If we hold firm (on the total amount), we run the risk of getting zip." Deputy Mayor John MacKinnon said during an informal finance subcommittee meeting Monday at the Capital Cafe.

That's because the gaming groups don't have assets to seize, aside from their gaming revenue, and could fold up shop at any time without paying, MacKinnon said. After an unfavorable court ruling, the groups reportedly have offered to pay the principal they owe if the city changes its tax policy.

In figuring out its collection strategy, city officials also should

Please see Pulltabs, Page 8

Pulltabs...

Continued from Page 1

try to clean up charitable gambling, says a gaming manager for three other local charities.

David Sanden, gaming manager for nonprofit organizations Juneau Dance Unlimited, Juneau Montessori Center and Juneau Lighthouse Association, told MacKinnon and assembly member Don Etheridge that they should take a comprehensive look at gambling and ask the state for regulatory authority.

"We want this industry to be a clean, reputable revenue stream" for charities, Sanden said. His clients don't like the guilt by association that comes from being in the gaming industry, he said, and he's worried the Legislature might put an end to charitable gambling if problems persist. Etheridge said city officials might approach the Legislature about making changes in the law.

This month, former Supreme Court Justice Jay Rabinowitz turned down an appeal by Last Chance Co-op, Multiple Charities Association Co-op and Alaska Native Brotherhood Camp 2 Inc. of a city administrative decision on a 1 percent sales tax increase from 1996. Rabinowitz, acting as a Superior Court judge, ruled that the tax applies to pulltabs and is to be collected on the gross amount wagered.

There is a past due bill of $627,871 in sales taxes, plus another $348,764 in interest, penalties and attorney's fees, said Assistant City Attorney John Hartle. The three gaming groups, managed by George Wright, stopped paying the sales tax in October 1998, although there has been a $53,000 lump sum payment since the judge's ruling, Hartle said. Last Chance just lost its state gaming license for not meeting minimum contributions to charity.

The groups can appeal to the state Supreme Court, but would have to post a bond equal to the amount they owe in order to keep the city from seeking to enforce the judgment, Hartle said. He said the city will ask Rabinowitz to issue an enforceable judgment, which will start the clock running on a 30-day appeal period.

For now, Hartle said, the city has no plans to go after the 12 nonprofit organizations that benefited from pulltab proceeds generated by Last Chance and Multiple Charities, which are known as multiple-beneficiary permittees.

"Politically, you don't want to go after soccer balls," Sanden agreed. But he said he wouldn't want to see the city pursue less than the principal it's owed, either. If a negotiated settlement comes in at less than what the three groups should have paid in sales taxes, "We'd probably be there with our hands out, saying, 'What about us?' " he said.

There is no bad blood among the nonprofit groups, Sanden emphasized, but he said it wouldn't be fair to give a tax break to gaming groups who haven't complied with the law.

"He could come with his hand out, but I don't think he would be received very warmly," MacKinnon said later. "Unfortunately, you're being penalized for being honest."

The gaming groups who are : arrears have offered to pay th principal over four years if the ci changes its tax policy during tha period, Hartle said. They hav asked that the 5 percent tax be ap plied to the "ideal net," th amount left after prizes are pai out, rather than the gross amour wagered.

In effect, that would be taxin 20 percent of the money that i now taxable, because that polic would have to be applied to al gaming groups, MacKinnon saic It's doubtful whether the back tax es would be enough even to offse the lower revenue from tha change in policy, although a for mal analysis still needs to b done, he said.

Wright could not be reached fo comment, nor could his attorney John Rice.

*****

Bill McAllister can be reached at billm@juneauempire.com.

Juneau Empire
Friday, January 18, 2002

City holds all the cards but still folds its hand
Empire editorial

Walk into a bank, slip the teller a note demanding cash, walk out the door with $1 million in a grocery bag and consider the consequences when the police arrest you halfway down the block.

Walk into a bank, fill out a loan application, walk out an appropriate number of meetings later with a significant amount of money and consider the consequences when, after three years, you've never made a payment toward your $650,000 loan.

Let April 15 come and go without filing a tax return on your six-figure income, which, by the way, has not been subject to any payroll withholding. When the IRS contacts you, tell the agency you don't think you should have to pay taxes. Consider the consequences when, three years later, the tax bill on your earnings exceeds $650,000 but you still have not filed a return - much less made a payment or subjected your income to withholding deductions.

In the first example, you're going to prison for several years for bank robbery.

In the second, you're probably going to prison for a few years for some version of fraud or theft.

In the third example, count on the IRS confiscating all your possessions and auctioning them to settle your back taxes and interest and penalties - plus seeking to have you imprisoned for ignoring your lawful obligation to pay your taxes in a timely fashion.

Now consider the deal the city and three pulltab parlors are working on.

A year ago retired Alaska Supreme Court Justice Jay Rabinowitz ruled three Juneau pulltab operations were wrong in deciding they didn't have to pay any sales taxes. The law was so clear on the matter that Rabinowitz would not even permit the case to go to trial.

While refusing to pay city sales taxes, the Last Chance pulltab parlor nevertheless had deducted the amount of sales taxes it was supposed to pay in filing its reports with the state Tax Division's Gaming Unit. By taking the deduction on taxes it did not pay, Last Chance reduced the amount of money due to be returned to the qualified nonprofits it supports.

The city and pulltab parlors have been negotiating a settlement ever since Rabinowitz' lopsided decision in favor of the city. What leverage could the pulltab operators bring to

the negotiating table? The threat that parting now with the money they collected between 1998 and 2001 might hurt their business? That in settling their debts now, the pulltab parlors might not be able to pay the required 30 percent of their income to the nonprofits they support?

The pulltab parlor lawyers must play a pretty good game of poker. The city says it is willing to give the scofflaws 10 years (t-e-n years!) each to fork over the sales taxes they've owed as far back as 1998.

And the city is waiving all penalties.

And slicing the interest rate on the unpaid balance.

And reducing the attorneys' fees it is entitled to collect from the pulltabs from $66,000 to $200 each.

Is there a lesson to be learned?

When you want to win at poker, make sure the city is your opponent. If you bluff, the city may fold, even if it has been dealt a winning hand.

FISCAL NOTE

STATE OF ALASKA
2001 LEGISLATIVE SESSION

Fiscal Note Number: 1
Bill Version: SB 175
(S) Publish Date: 4/28/01

Revision Date/Time (Note if correction): April 25, 2001, 9 a.m.
Dept. Affected: Revenue
Title: Municipal Protests of Gaming Permits
BRU: Revenue Operations
Component: Tax Division
Sponsor: Senator Elton
Requester: Senate Community and Regional Affairs
Component Number: 2476

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007
Personal Services						
Travel						
Contractual	5.0 - 10.0 *	5.0 - 10.0 *	5.0 - 10.0 *	5.0 - 10.0 *	5.0 - 10.0 *	5.0 - 10.0 *
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscelianeous						
TOTAL OPERATING	5.0 - 10.0 *	5.0 - 10.0 *	5.0 - 10.0 *	5.0 - 10.0 *	5.0 - 10.0 *	5.0 - 10.0 *
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	5.0 - 10.0 *	5.0 - 10.0 *	5.0 - 10.0 *	5.0 - 10.0 *	5.0 - 10.0 *	5.0 - 10.0 *
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type)						
TOTAL	5.0 - 10.0 *	5.0 - 10.0 *	5.0 - 10.0 *	5.0 - 10.0 *	5.0 - 10.0 *	5.0 - 10.0 *

Estimate of any current year (FY2001) cost: 0.0

Check this box (X) if funding for this bill is included in the Governor's FY 2002 budget proposal: [ ]

POSITIONS

Full-time						
Part-time						
Temporary						

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

* This fiscal note anticipates that one or two charitable gaming license cases would go to formal hearing each year. The $5.0 to $10.0 contractual expense is to cover the cost of a contracted hearing officer for those cases. The actual costs would vary and the actual number of cases would determine the amount needed.

Prepared by: Carl Meyer
Phone 465-2343
Division Tax Division
Date/Time April 24, 2001, 1:30 p.m.
Approved by: Larry Persily, Deputy Commissioner
Date 04/25/2001
Agency Department of Revenue

For distribution information, call the Governor's Legislative Office

(Rev 2/7/2001 OMB)

SB

176

Senate Bill 176 **"An Act relating to distributorships."**

Sponsor: **Senate Labor & Commerce Committee *by request***

SPONSOR STATEMENT

The proposed Alaska Small Business Protection Act bill is necessary to level the playing field between large, well-financed manufacturers and distributors, and small businesses in Alaska. Passage of this legislation will protect Alaska's small businesses from unreasonable manipulation by manufacturers and distributors, foster economic growth and development, and keep capital in Alaska.

Alaska is one of the few states without a law addressing distributorship agreements. This bill fixes gross inequities that occur as Alaskan businesses develop markets for products and services based upon specific product lines under distributorship agreements.

As small businesses invest capital and commit to growth and infrastructure based on distributorship agreements, they inherently become dependent upon those product lines. In many cases, this dependency allows manufacturers to unilaterally force changes in distribution contracts to the detriment of Alaskan businesses, and ultimately, the employees and other entities with whom they have committed in order to fulfill obligations under the original contract.

In many cases, if Alaska's businesses do not agree with new contract terms demanded by the manufacturer/distributor, they are terminated and left with inventory they are unable to sell and which typically, manufacturers/distributors refuse to buy back. This loss of capital ranges from $500 to $500,000 or more, depending upon the business and the amount of inventory required to fulfill the terms of the original agreement. Additionally, many of these contracts make it possible to unilaterally terminate the distributorship agreement if a small business owner wishes to sell his or her business, thereby eliminating much or all of the goodwill value established over years of service.

While businesses are free to sue to recover losses, making claims in civil court is extremely cost prohibitive, especially for a business that may have had its entire income stream cut off. In one prominent 1995 Anchorage case, the small business was selling approximately $2.0 million per year in product. It had $700,000 invested in inventory at the time of termination that the manufacturer/distributor refused to repurchase. However, after the Alaskan business successfully won its case in court, the manufacturer/distributor appealed the outcome. The case continues to date, with legal fees and court costs in excess of one million, and climbing. Many Alaskan small business distributors cannot afford the massive legal costs to pursue these claims through the courts, and still remain in business.

Senate Bill 176 **"An Act relating to distributorships."**

Sponsor: **Senate Labor & Commerce Committee *by request***

SECTIONAL ANALYSIS

The proposed Alaska Small Business Protection Act bill is necessary to level the playing field between large, well-financed manufacturers and distributors, and small businesses in Alaska. Passage of this legislation will protect Alaska's small businesses from unreasonable manipulation by manufacturers and distributors, foster economic growth and development, and keep capital in Alaska.

Section 1. Amends AS 45.45 by adding new sections dealing with distributorships, and agreements between distributors and dealers. It evens out the playing field between large, well-financed distributors/manufacturers and Alaska's small businesses, requiring fair play in regard to distributorship agreement relationships through specified rules and courses of action.

Alaska is one of the few states without a law specifically addressing distributorship agreements. This bill fixes gross inequities that occur as Alaskan businesses develop markets for products and services based upon specific product lines under distributorship agreements.

As small businesses invest capital and commit to growth and infrastructure based on distributorship agreements, they inherently become dependent upon those product lines. In many cases, this dependency allows manufacturers to unilaterally force changes in distribution contracts to the detriment of Alaskan businesses, and ultimately, the employees and other entities with whom they have committed in order to fulfill obligations under the original contract.

In many cases, an Alaskan business serves a particular field, such as the oil or fishing industry, and is "locked in" to specific product or service lines dictated by industry need. Arbitrary loss of a product line or right to provide goods or services can spell the end for many of these businesses, with economic upheaval suffered by employees and other businesses entities dependent upon the dealer.

Sec. 45.45.700. Prevents coercion of a dealer to perform certain acts by using duress or threats to terminate distributorship agreement or another agreement between the distributor or the dealer. Defines "certain acts" as (1) the purchase or delivery of merchandise that has not been ordered by the dealer; (2) the assignment, sale or disposal of a contract or property; or (3) the expenditure of money.

Sec. 45.45.710. Defines actions constituting unfair termination of a distributorship as (1) termination without due regard to the value of the dealer's business, or without just provocation; or (2) by making or causing substantial change to the economic position of the dealer in a way that is detrimental to that dealer.

While businesses are free to sue to recover losses, making claims in civil court can be extremely cost prohibitive, especially for a business that may have had its entire income stream cut off. In one prominent 1995 Anchorage case, the small business was selling approximately $2.0 million per year in product under a distributorship agreement. It had $700,000 invested in inventory at the time of termination that the distributor refused to repurchase. However, after the Alaskan business successfully won its case in court, the distributor appealed the outcome. The case continues to date, with legal fees and court costs in excess of one million, and climbing. Many Alaskan small business distributors cannot afford the massive legal costs to pursue these claims through the courts, and still remain in business.

Sec. 45.45.715. Provides for civil action in court by the dealer if a distributor violates Sections 700 or 710 above. (1) Allows the dealer to recover damages suffered as a result of the termination; (2) enjoins the distributor from terminating the distributorship agreement; (3) enjoins the distributor from making or causing a substantial change in the economic position of the dealer that is detrimental to the dealer; and (4) provides that an injunction may be obtained by the dealer provided the dealer demonstrates there is a reasonable likelihood that the termination will result in a loss of goodwill for the dealer's business or a decline in the value of that business.

In many cases, if Alaska's businesses do not agree with new contract terms demanded by the manufacturer/distributor, they are terminated and left with inventory they are unable to sell and which typically, manufacturers/distributors refuse to buy back. This loss of capital ranges from $500 to $500,000 or more, depending upon the business and the amount of inventory required to fulfill the terms of the original agreement.

This bill also provides legal protections in the case of the dealer's death. The loss of life is always traumatic – in the very least, financially, and emotionally. By setting out specific rules in Alaska law, the settling of the estate in regard to the distributorship agreement and the financial disposition of the dealer's business is less likely to result in expensive legal battles and additional strain to the deceased's heirs.

Additionally, many of these contracts make it possible to unilaterally terminate the distributorship agreement if a small business owner wishes to sell his or her business, thereby eliminating much or all of the goodwill value established over years of service.

Sec. 45.45.720. Provides for disposition of merchandise purchased from the distributor, and remaining in dealer's inventory upon contract termination. Requires the distributor to pay the dealer for merchandise held as of the date of contract termination if the dealer does not wish to keep said merchandise. This section also provides that the distributor will pay 100 percent of original cost of current and unused merchandise, and return transportation charges; or 85 percent of the current net price for repair parts, including superceded parts; and 5 percent of the current net price of repair parts to cover the handling, packing and transportation of those repair parts back to the distributor. If a repair part is not listed, then the current net price is the higher of the original purchase price or the latest price published by the

distributor for the repair part, if the dealer has actual proof of purchase of the repair part from the distributor, and if the repair part was purchased within ten years before the termination.

Once payment has been made, title to merchandise passes to the distributor making the payment, and the distributor is entitled to possession of said merchandise.

Sec. 45.45.725. Requires distributor to make payment to dealer no later than three months following termination of agreement. Also requires a final, detailed statement of account for the merchandise.

Sec. 45.45.730. Provides remedy if distributor fails or refuses to make payment for merchandise as provided in above sections. The dealer is entitled to bring action in court for the amount of the payments.

Sec. 45.45.735. Provides, upon death of the dealer, for repurchase of merchandise by the distributor if the distributorship agreement is not continued from the personal representative, heirs, or devisees of the dealer. The same repurchase terms apply as noted in Sections 720(a) and (c), 725 and 730.

Sec. 45.45.740. Prohibits termination of existing agreement by the distributor if the termination is based upon (1) a change of management or ownership of the dealership, unless the distributor can show that said change would be detrimental to the representation or reputation of the distributor's products; (2) refusal by the existing dealer to purchase or accept delivery of merchandise or a service, unless necessary for the operation of the distributor's merchandise that is sold by the dealer; (3) the fact that the existing dealer owns, has an interest in, participates in the management of, or holds another distributor agreement for the sale or lease of line-make merchandise in the same facilities where the dealer sells or leases the distributor's merchandise; or (4) refusal by the existing dealer to participate in a national advertising campaign or contest, to purchase promotional products or display devices, or to display decoration or materials at the expense of the existing dealer.

Sec. 45.45.745. Requires the distributor to purchase that portion of the dealer's business adversely affected if the distributor wants to terminate the distributorship agreement, or wants to substantially change or actually changes the competitive situation of the distributor's dealer. Purchase would include good will, assets, and machinery, at commercially reasonable business valuations.

The following sections prohibit a distributor from requiring a dealer "sign away his or her rights" in the distributorship agreement, obligate him or herself to pay the distributor's legal fees, or from otherwise circumventing Alaska law in regard to distributorship agreements. It allows a common sense approach to dispute resolution, as long as the distributor does not dictate the terms of conflict resolution via binding arbitration in the agreement before a conflict arises.

Sec. 45.45.750. Prohibits a distributor from requiring a dealer to agree to any of the following terms in a distributorship agreement, or in another agreement that is ancillary to a distributor agreement, as a condition of an offer, grant, or renewal of a distributorship or ancillary agreement: (1) a requirement that the dealer waive a trial by jury in court cases involving the distributor; (2) a requirement that disputes between the distributor and the dealer be submitted to binding arbitration or to any other binding alternative dispute resolution procedure, unless agreed to by both parties at the time of the dispute; (3) a requirement that the dealer pay the attorney fees of the distributor; or (4) a requirement that the agreement be subject to the laws of any state other than Alaska.

This section also provides that the provisions of this section do not apply to an agreement where a lease or sale of real property is the main purpose of the agreement.

Sec. 45.45.750. Provides exemptions where these sections do not apply – specifically, (1) a distributor agreement that would be considered a franchise regulated by 15 USC 2801-2841 (Petroleum Marketing Practices Act); and (2) a situation regulated by AS 45.50.800 – 45.50.850; or (3) a distributor agreement for the sale, repair, or servicing of motor vehicles that are required to be registered under AS 29.10.

Sec. 45.45.790. Defines "dealer" to mean a person who enters into a distributorship agreement, and who, under the agreement, receives (purchases) merchandise or services from a distributor.

"Distributor" is defined as a person who enters into a distributorship agreement, and who, under the agreement, provides (sells) merchandise or services to a dealer. The term "distributor" also includes a wholesaler, a manufacturer, a person that is a parent corporation or an affiliated corporation of a person identified as a wholesaler or manufacturer, or a field representative, an officer, and agent, or another direct or indirect representative of a person identified as a "distributor."

A "distributor agreement" means an agreement, whether express, implied, oral or written, between two persons by which a person receives the right to (1) sell or lease merchandise or services at retail or wholesale; or (2) use a trade name, trademark, service mark, logotype, advertising, or other commercial symbol; and (3) in which the parties to the agreement have a joint interest, whether equal or unequal, in the offering, selling, or leasing of the merchandise or services.

"Merchandise" includes parts and accessories.

"Terminate" means failing to renew.

Section 2. This section adds a new section to the uncodified law of the State of Alaska, and amends Rule 65(b), Alaska Rules of Civil Procedure, by specifying the type of

damages that must be shown in order to receive an injunction, which may be interpreted to include a temporary restraining order.

Section 3. Provides for an effective date for applicability of this Act – on or after the effective date of this Act, or on or after January 1, 2001, if the distributorship agreement is still in effect on the effective date of this Act. Provides that AS 45.45.715 and AS 45.45.745 only apply to a distributorship agreement entered into on or after the effective date of this Act.

FISCAL NOTE

STATE OF ALASKA
2001 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: SB 176
() Publish Date:

Revision Date/Time (Note if correction): 04/16/2001 2:35p.m.
Dept. Affected: DCED
Title: An act relating to Distributorships
BRU: Banking, Securities &
Component: Corporations
Sponsor: Senate Labor & Commerce By Request
Requester: Senate Labor and Commerce
Component Number: 1233

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007
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 EXPENDITURES						
CHANGE IN REVENUES ( )	0.0	0.0	0.0	0.0	0.0	0.0

FUND SOURCE (Thousands of Dollars)

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

Estimate of any current year (FY2001) cost: 0.0

Check this box (X) if funding for this bill is included in the Governor's FY 2002 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

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

This Legislation has no fiscal impact on this Department.

Prepared by: Franklin Terry Elder, Director
Phone 907-465-2521
Division Banking, Securities & Corporations
Date/Time 04/16/2001 2:35p.m.
Approved by: Commissioner Deborah B. Sedwick
Date 4/16/2001
Agency Department of Community & Economic Development

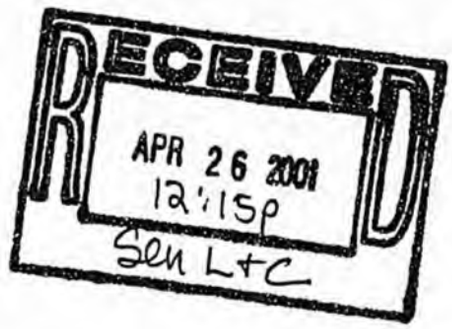
For distribution information, call the Governor's Legislative Office

(Rev 2/7/2001 OMB)

SB

189

RVIA



April 25, 2001

The Honorable Randy Phillips
Chairman
Senate Labor and Commerce Committee
Alaska Senate
State Capitol Room 103
Juneau, AK 99801-1182

Dear Chairman Phillips:

The Recreation Vehicle Industry Association (RVIA) is a nonprofit national trade association that represents the recreation vehicle (RV) manufacturers and component parts suppliers that together account for 98 percent of all RVs manufactured in the United States. RVIA would like to offer the following comments on SB 189, which would enact a new law regulating motor vehicle franchises. Although this bill was designed to specifically regulate the automobile industry, its provisions apply to all registered motor vehicles, including both motorhomes and towable RVs. While RVIA has no position on the bill as it applies to automobiles, we do strongly believe that the inclusion of RVs is inappropriate because of the significant differences that exist between the automobile industry and RV industry. These differences include but are not limited to the following:

- Unlike the automobile industry where manufacturers do NOT use the contents of their dealer agreement to compete with each other, the terms of an RV manufacturer/dealer agreement are a point of competition between RV manufacturers who use these agreements to entice dealers to carry their products versus their competitors. Some of the points of competition between the various RV manufacturer's dealer agreements include:
  - part rates
  - warranty rates/terms
  - transfer/succession rights
  - territory
  - termination benefits/terms

- Unlike automobile dealers who have a tremendous brand specific investment and therefore remain with the same manufacturer(s), RV dealers have little brand specific investment and switch manufacturers, often without dispute or ill will in order to better their product mix and/or dealer agreement terms

- Unlike the automobile industry which has approximately 35 manufacturers worldwide, the RV industry has nearly 100 domestic manufacturers, 75 percent of which produce fewer than 100 vehicles per year;

- Unlike the auto industry which has a handful of manufacturers and an abundant supply of dealers, the inverse is true in the RV industry which has an abundant supply of manufacturers and too few dealers. This disparity results in RV manufacturers competing with each other on virtually all aspects of their relationship with their dealers. This gives RV dealers significant clout over RV manufacturers who can demand little brand specific investment from RV dealers without fear of losing those dealers to a competitor. As a result of this highly competitive environment, RV manufacturers have **few, if any, requirements for:**
  - vehicle stocking (as low as one unit in stock or on order);
  - parts inventory
  - service technician training
  - capitalization beyond the ability to acquire floorplanning
  - brand exclusive facilities

These points are important to recognize and understand because they contribute to a substantially different business relationship between RV manufacturers and RV dealers as compared to the relationship between automobile manufacturers and their dealers. These differences need to be taken into account in examining SB 189, which was designed specifically to govern the automotive manufacturer/dealer relationship. In fact, there are a number of states that exclude RVs from their automotive franchise laws in recognition of the fact that the automobile and RV industries are not comparable.

The inclusion of RVs under the automotive franchise law as proposed by SB 189 will almost certainly have a seriously negative impact on the RV market in Alaska and, consequently, an adverse effect on Alaskan RV consumers. In light of this and the issues detailed above, we respectfully request you amend SB 189 to exempt RVs – both motorhome and towable units – from the measure.

Thank you for your consideration of these comments on these issues which are so important to our industry.

Sincerely,

Bill Baker
Director, Government Affairs

STATE OF ALASKA

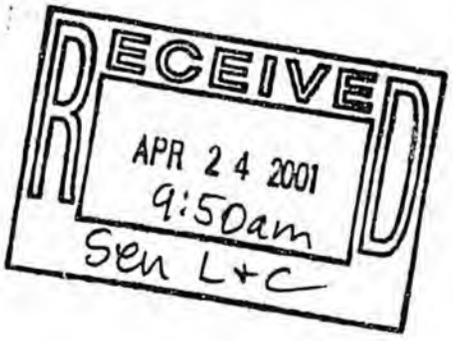
TONY KNOWLES, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

1031 WEST 4TH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501-5903
PHONE: (907)269-5100
FAX: (907)276-8554

April 24, 2001



Senator Randy Phillips, Chair
Senate Labor and Commerce Committee
Alaska State Legislature
State Capitol
Juneau, AK 99801

Re: SB 189 – Motor Vehicle Sales and Dealers

Dear Chairman Phillips:

This letter responds to your request for written comments on SB 189, relating to motor vehicle dealers and manufacturers. The Department of Law's concerns about this bill include antitrust, consumer protection, and constitutional issues, some of which may also be addressed by other interested persons. The Department does recognize, however, that automobile dealer franchise laws exist in many states, and most have been upheld when challenged on antitrust and constitutional grounds. Accordingly, these comments are not intended to suggest that legislation of this type is not appropriate, but it is the Department's opinion that some provisions of SB 189 exceed the permissible boundaries of legitimate state regulation of these unique franchise relationships.

BACKGROUND; THE "AUTOMOBILE DEALERS' DAY IN COURT ACT"

The automobile franchise agreement has been referred to as a "contract of adhesion" since the typical terms of such an agreement are often dictated by the manufacturer with the express purpose of protecting the manufacturer while granting few, if any, rights to dealers. Since the early 1930's, courts have denied dealers redress in cases of termination or non-renewal of a franchise because the manufacturer has been immune from attack under the express terms of the agreement. *Ford Motor Co. v. Kirkmyer Motor Co.*, 65 F.2d 1001 (4th Cir. 1933). Courts historically have refused to add any requirement of "good faith" to these contracts since they were "freely entered into" by the parties. *Id.*

As a result of the agitation this seemingly unfair predicament caused dealers, states began enacting automobile franchise laws as early as 1937. In 1956, the Federal Government followed suit, enacting the "Automobile Dealers Day in Court Act," 15 USC §§ 1221-1225 (the "ADDCA" or "Act"). The Act contains two primary directives: (1) it allows dealers to bring an action against a manufacturer who fails to act in "good faith" in performing or complying with the terms of a franchise agreement, or in terminating, canceling, or failing to renew a franchise; and (2) it expressly provides that state statutes are not impaired unless in direct conflict with the Act.

It has been repeatedly stated that the purpose of the Act is to redress the economic imbalance and unequal bargaining power between large automobile manufacturers and local dealerships, protecting dealers from unfair termination and other retaliatory and coercive practices. *Northview Motors, Inc v. Chrysler Motors Corp.*, 227 F.3d 78 (3rd Cir. 2000). The two primary conditions that are necessary for a cause of action under the Act are 1) the existence of an automobile franchise agreement and 2) a showing that the manufacturer failed to act in "good faith." Good faith is defined in § 1221(e) of the Act to mean a duty to act in a fair and equitable manner so as to guarantee freedom from coercion, intimidation, or threats. Since its enactment, there have been numerous cases that discuss the applicability of the Act to various situations.

OTHER STATE STATUTES

Nearly all states have some kind of automobile franchise law that has expanded on the ADDCA. The scope of these statutes varies greatly from state to state. Some states, such as Arizona, limit their authority to the prohibition of very specific and narrow conduct by a manufacturer (e.g., establishing manufacturer-owned dealerships). Other states, like North Carolina, have more sweeping laws that set standards to be met by the dealers and manufacturers, and establish administrative tribunals empowered to hear disputes between the parties to a franchise agreement. Manufacturers that have challenged these laws on constitutional and other grounds have, for the most part, failed to defeat them.

The common thread that weaves through state regulation of the automobile franchise relationship is a recognition that manufacturers posses an unfair bargaining advantage over dealers that, if used arbitrarily, can be contrary to the public interest. The primary features of most state statutes include the following:

1. A licensing requirement of some kind for auto dealers and manufacturers and, in some cases, factory representatives and salespeople;

2. The establishment of criteria to be met in order to obtain one of the above licenses;

3. A provision that requires the manufacturer and dealer to act in good faith;

4. Criteria to be considered before a manufacturer can terminate, cancel, or not renew a franchise agreement;

5. Provisions relating to the transfer of a dealership, including transfer upon death of a dealer;

6. Criteria to be considered before a new dealership can be established;

7. Provisions requiring the re-purchase of inventory and equipment if a franchise is terminated, canceled, or not renewed and setting forth ways to value the inventory and equipment;

8. An administrative procedure for challenging the conduct of a manufacturer and/or a dealer.

In addition to the above, some states also regulate other conduct between the manufacturer and dealer, including warranty and transportation issues, service contracts and financing.

The primary advantage to dealers in having state franchise laws (as opposed to relying on the ADDCA) is two-fold. First, state laws can more clearly define what conduct will be tolerated and establish criteria to be considered in reviewing that conduct. Second, state laws can establish an administrative proceeding for resolving these disputes that can be less expensive than pursuing claims in federal or state court – expenses some dealers simply cannot afford.

SPECIFIC PROVISIONS HELD UNCONSTITIONAL

Auto franchise laws come under constitutional attack primarily in three areas.

1. **Retroactivity.** The one area that courts have generally agreed upon is that state legislation cannot be applied retroactively to a franchise agreement entered into before the effective date of the statute, if the effect of the statute would be to make a material change in the obligations of the franchise agreement. This kind of retroactive application violates the constitutional prohibition against laws that impair the obligation of contracts. State courts in Georgia, Colorado, Illinois, Massachusetts, Michigan, Ohio, Rhode Island, South Carolina, Vermont, New Hampshire, and Wisconsin (and perhaps others) have ruled that auto franchise laws could not be applied retroactively. Federal

authorities have also expressed this rule. *See Dale Baker Oldsmobile, Inc. v. Fiat Motors of North America, Inc.* 794 F.2d 213 (6th Cir. 1986).

2. **Burden on Interstate Commerce.** Some state courts have held certain provisions of their auto franchise laws unconstitutional to the extent the law has imposed unreasonable burdens on interstate commerce. Provisions that tend to limit the manufacturer's ability to market its cars for retail sales can create an undue burden on interstate commerce. In most states, however, the courts have upheld the laws against such attack absent a showing that the law has the effect of lessening the flow of automobiles into the state or reducing sales in the state. *See General Motors Corp. v. Capitol Chevrolet Co.*, 645 SW2d 230 (Tenn. 19983); *Tober Foreign Motors, Inc. v. Reiter Oldsmobile, Inc.*, 381 NE2d 908 (Mass 1978).

3. **Violation of Antitrust laws.** Most challenges to auto franchise laws on antitrust grounds have failed because state and federal regulations in this area do not generally give existing dealers control over so large a part of the manufacturer's market as to stifle competition or control prices. *See American Motors Sales Corp. v. Peters*, 317 SE2d 351 (N.C. 1984) (analyzing North Carolina law used as model for proposed Alaska law).

THE PROPOSED ALASKA STATUTE—SB 189/HB 182

SB 189 (and its companion bill, HB 182) ("the Bill") is largely patterned after North Carolina's auto franchise law, with a few other "dealer friendly" provisions that have come from other state laws or are based on specific Alaska concerns. The basic structure of the Bill provides:

1. A licensing requirement for manufacturers, dealers, salespeople, and factory representatives;

2. Criteria that must be considered before a dealer franchise can be terminated, cancelled, or not renewed;

3. That the Commissioner of the Department of Administration (Commissioner) is responsible for administering the Bill;

4. For a Motor Vehicle Advisory Board that can give guidance to the Commissioner on disputes and appeals that arise under the Bill.

The general concern with this Bill is that there has been no demonstrated need for it. There is no evidence that dealers are losing money or that existing franchise relationships have caused any public harm. Another concern is that Alaska's unique

geographic location and population may not make this kind of legislation attractive for Alaska. There are extremely limited numbers of dealers (with the exception of Ford, General Motors/Chevrolet, and Chrysler, only one of each dealer) in Alaska. Legislative comments on other state's franchise laws have recognized that consumers have multiple options within a short distance, even where dealers may have an exclusive market area within a 10-mile radius. Consumers in Alaska do not have that option, and this law may discourage the opening of other dealerships.

The Department of Law has concerns with the following provisions of the bill.

1. **Retroactivity.** As set forth above, the provision of SB 189 that apply the Bill retroactively are unconstitutional, and they should be stricken. The Bill should only apply to future franchise agreements or to renewed agreements that specifically recognize the applicability of this law.

2. **Licensing of Salespeople.** This provision does not have any purpose. There are no standards to be met before a license must be issued to a salesperson other than the payment of a fee. If a licensing requirement for salespeople were imposed, some kind of training should be implemented before a license is issued. For example, each salesperson should be required to attend a training session given by the dealer/employer for a minimum number of hours. The training program should be approved by the Department of Administration and/or the Department of Law, and contain instruction on consumer protection laws, motor vehicle laws (including title and registration issues), retail installment sales contracts and other financing issues, lemon laws, etc. Otherwise, a false sense of public trust may be conveyed to the consumer when a salesperson represents he/she is "licensed."

3. **Licensing of Dealers and Manufacturers.** As the Auto Dealers' Association recommended, a bond of at least $100,000 should be required as a condition of receiving and maintaining a dealer or manufacturer license. The current $10,000 bond is outdated and completely inadequate.

4. **Restrictions on Number of Dealers Salespersons Can Work For.** Proposed Sec. 45.25.190 would prohibit a salesperson from being employed by more than one dealer at a time. This restriction does not appear to have any rational basis, and it imposes restrictions on an individual's right to work.

5. **Prohibited Practices.** SB 189 contains several provisions relating to practices that are prohibited by "licensees" under the Bill. The Commissioner of the Department of Administration is given the authority to investigate violations and impose civil penalties of up to $10,000 per violation. The bill does not make it clear, however, that the Commissioner has the authority to issue subpoenas for the production of

documents and witnesses, which should be included in Sec 45.25.710. It should also be made clear whether the information obtained by the Commissioner during an investigation must remain confidential, or whether it can be made public.

In addition, there is some overlap between this Bill and the authority vested in the Attorney General, under AS 45,50.471, to investigate unfair and deceptive trade practices. Under the existing Alaska Consumer Protection Act, any act or practice regulated by another agency is exempt from the provisions of the CP Act, and the Attorney General is without authority to investigate such practices. SB 189 should be amended to make clear that the authority of the Attorney General to investigate any violation of the bill is not abrogated. Reference to the Commissioner's authority to "prevent or investigate allegations of unfair methods of competition, unfair deceptive acts or practices" should be removed (page 39, lines 16-17). The Commissioner should only be given specific authority to investigate and prevent violations of the chapter.

The Department of Law already has regulations that prohibit some of the conducted targeted by this Bill. A careful review and coordination with the department's regulations will be necessary to avoid inconsistency.

6. **Motor Vehicle Dealer Advisory Board.** As written, the composition of the Board violates fundamental principles of due process, which requires that any hearing convened for the purpose of adjudicating individual rights must be "fair." The Board should be restructured so that the various interests are more evenly represented so as to avoid the appearance of bias in favor of the dealers.

The purpose of the Board is also unclear. The Bill provides the Board shall "advise the commissioner" regarding disputes and appeals under the chapter and violations of the chapter by a licensee. Yet, the Board has no investigative authority, no subpoena power, and no authority to recommend penalties. Accordingly, the Board is nothing more that a procedural "way station" that must be dealt with before action on a dispute, appeal, or alleged violation can be taken by the Commissioner. This may unduly delay resolution of disputes.

7. **Miscellaneous.** The Bill provides that the Attorney General is required to seek advice of the Board before issuing a "business directive" affecting the sale, leasing, or repair of a motor vehicle in the state. Sec. 45.25.730(g). The department recommends this provision be eliminated as it would interfere with the Attorney General's ability to enforce the Alaska Consumer Protection Act.

CONFLICT WITH OTHER LAWS

Some of the conflicts this Bill presents with existing laws are as follows:

- **Sec 45.25.500 -- Installment Sales.** This section of the Bill deals with motor vehicle retail installment sales contracts. Alaska Statute 45.10.010 et seq., the Alaska Retail Installment Sales Act, already provides comprehensive regulation of these contracts.

- **Sec. 45.25.410 -- Warranty Obligations.** This section sets forth manufacturer warranty obligations. The Magnuson-Moss Warranty Act, 15 U.S.C. Sec. 2300, contains comprehensive rules that govern warranties which may conflict with these provisions.

- **Sec. 45.25.420 -- Transportation Damages.** There are numerous federal laws that deal with interstate transportation of goods that may preempt this section.

- **Sec 45.25.400 and 25.430 and 25.600 – Prohibited and Unlawful Practices.** Alaska's Unfair Trade Practice and Consumer Protection Act, AS 45.50.471, already makes these practices unlawful.

- **Sec. 45.25.410(s) -- Notice of Hazardous Materials.** This section may be preempted by RCRA, which provides comprehensive regulation of hazardous substances.

Although the bill states that its provisions will "control" over other conflicting provisions of Title 45, the bill will create confusion when interpreting other laws.

Thank you for the opportunity to provide these comments. Please let me know if you have any questions.

Sincerely,

BRUCE M. BOTELHO
ATTORNEY GENERAL

By: Clyde E. Sniffen, Jr.
Clyde E. Sniffen, Jr.
Assistant Attorney General

CES:jcm

STATE OF ALASKA

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DEPARTMENT OF ADMINISTRATION
DIVISION OF MOTOR VEHICLES

April 23, 2001

The Honorable Randy Phillips
Alaska State Senate
State Capitol
Juneau, AK 99801-1182

Re: Senate Bill 189, Division of Motor Vehicle comments

Dear Senator Phillips:

Senate Bill 189 would repeal current dealer laws and institutes the provisions of SB 189. Under current law, only dealers and buyer's agents are registered. The Division of Motor Vehicles (DMV) had 366 dealers and no buyer's agents registered as of February 1, 2001. DMV cannot recall ever having a buyer's agent registered.

Under current law, dealer licensing requires:

- Completion of an application
- Payment of a biennial $50 fee
- Posting of a $10,000 bond; $3000 if a motorcycle dealership

In the time given for written comment on SB 189, DMV has below identified major areas of concern and recommended language changes where possible. If recommended changes are made, other sections of the bill may require amendment.

1. DMV questions the need for licensing of manufacturers, manufacturer's representatives, salesman, distributors, or distributor's representatives. Beyond that, the division questions the need for licensing beyond the requirement for a business license. Unlike other occupational licensing, no licensing criteria are set forth in the proposed legislation. As a dealer testified in last week's hearing on SB 189, licensing is proposed as a revenue stream for the cost of implementing the bill. *(Licensing provisions are contained in Pages 2, line 23 through Page 6, line 12 of the bill.)*

Because they are the public's point of contact for most vehicle purchases, DMV does support continued licensing of dealers but recommends that any licensing be done by the Division of Occupational Licensing in the Department of Community and Economic Development where all other state occupational and business licensing is lodged. The current practice of licensing dealers by DMV is an anomaly in state law. The division recommends deleting the reference to "servicing" so that dealer licensing is structured

upon the sale, lease, broker or exchange of new or used vehicles. The division also recommends deleting the reference to "fiscal" years for the two-year license period to conform to the expiration of other occupational and business licenses on December 31. (*Dealer License, Page 4, lines 10 – 19)* Specifically, DMV recommends:

Sec. 45.25.140. Dealer license. (a) The commissioner may issue a motor vehicle dealer license that permits the licensee to engage in the business of [SERVICING] selling, leasing, brokering, or exchanging new [and] or used vehicles of any kind and to engage in all other business pursuits that are reasonably associated with a new or used vehicle sales [AND SERVICE] business.

[(b) A MOTOR VEHICLE DEALER LICENSE PERMITS A LICENSEE WHO IS AN OWNER OR PART OWNER OF THE BUINESS OF THE LICENSEE TO ACT AS A VEHICLE SALESPERSON WITHOUT OBTAINING A MOTOR VEHICLE SALESPERSON LICENSE.]

(c) A motor vehicle dealer license shall be issued for a period of two [FISCAL] calendar years, expiring on December 31. The fee for all or part of the license period is $400.

SB 189 repeals the dealer bonding requirement in AS 08.66.060. DMV supports dealer bonding and believes that the current $10,000 bond is insufficient to cover the cost of a motor vehicle. The division believes that the minimum bond requirement should be $50,000 and recommends the following new sections be added:

"AS 45.25.? (a) An applicant for a dealer license under AS 45.25.140 shall file with the application and shall maintain in force while licensed a bond in favor of the state, executed by a surety approved by the commissioner of administration, in the amount of $50,000, except that a dealer who sells only motorcycles shall maintain in force while licensed a bond in favor of the state, executed and approved in the same manner as bonds required of other dealers under this section, in the amount of $25,000. The condition of the bond shall be that the dealer will conduct business in accordance with this chapter and other laws of Alaska and will not commit fraud or make fraudulent representations in the course of business.

(b) a surety may cancel the bond upon thirty days advance notice in writing to the commissioner or the commissioner's designee. However, cancellation does not relieve a surety of liability arising before cancellation or a liability that has accrued upon the bond before cancellation. The commissioner or a designee shall retain the canceled bond on file and may not relieve a surety of a liability arising before cancellation.

(c) A bond filed with an original application will be valid for renewal of a dealer license unless the surety has provided a written notice of cancellation.

AS 45.25.? If a person suffers loss or damage by reason of fraud, fraudulent representations, or violation of any provision of statute by a dealer, the person has a right of action against the dealer and a personal right of action against the surety

upon the bond. The aggregate liability of the surety does not exceed the amount of the bond."

Additionally, *Page 44, line 28* defines a dealer as "a person . . . who sells . . . . three or more new or used motor vehicles in any 12 consecutive months." Alaska's current definition of "dealer" contains no minimum amount of sales and this has presented problems. States' definition of dealers average at five sales per consecutive 12-month period. DMV recommends five instead of three sales per 12 consecutive months. *Page 44, line 28* would then read:

" who sells, leases, solicits, brokers, or arranges for sale or lease, of [THREE] five or more new or used motor vehicles in any 12 consecutive months, regardless of who . . "

2. DMV does not understand the requirement for or support the state issuing an ID card to every dealer and salesperson *(Page 5, lines 17 – 23.* Employee turnover is significant and the conduct and ethics of a salesperson is the responsibility of the employer. Companies requiring employees to have an ID card may obtain that card privately. The Division recommends deleting *lines 17 – 23, Page 5.*

3. The bulk of the bill speaks to the commercial, contractual and working relationships between manufacturers and their franchises. The Commissioner of Administration is inserted to mediate disputes or disagreements between parties and determine other issues, many of which are of a commercial nature, including economic determinations about new entry into markets, transfer of ownership, renewal or termination of franchise agreements. (*References to the commissioner's mediation are inserted throughout the bill.*)

Before the commissioner can act, SB 189 mandates that the commissioner refers all matters to a Motor Vehicle Advisory Board (*Page 39, line 30 through Page 40, lines 1 – 29*). Similarly, before the Attorney General can issue a directive affecting a licensed business, it must be referred to the Board. The Board is staffed and has significant responsibility and authority. DMV questions whether this is an appropriate role for the Commissioner of Administration or the state and whether such a board is necessary.

4. The Motor Vehicle Advisory Board is a 6 member board composed of 4 new car franchise dealers, 1 used car dealer and 1 public member (*Page 40, lines 1 – 10).* Consideration should be given whether this is a balanced composition.

5. The commissioner may assess penalties for violations of the law; however, "If the violation involves multiple transactions within a 30-day period, the multiple transactions constitute a single violation." (*Page 41, lines 2 – 4*) DMV recommends that each violation be treated as a separate occurrence.

6. Under current law, "dealers" include those who sell trailers (camping trailers, snow machine or boat, utility or semi-trailers; units without power). Their inclusion under SB 189 is questionable. The vehicles are subject to registration which is the qualification to

be classed as a "motor vehicle" (*Page 44, lines 24-25*) in the bill, but trailers are not a "motor vehicle" as defined in AS 28.40.100 because they are not self-propelled. DMV sees no reason to license as dealers those businesses that do not sell, lease, broker, etc. self-propelled vehicles. To resolve this conflict, DMV recommends that *Page 44, lines 24 –25* be amended as follows:

"(26) "motor vehicle" means a [MOTOR] vehicle [THAT IS REQUIRED TO BE REGISTERED UNDER AS 28.10;] **which is self-propelled except a vehicle moved by human or animal power:"**

7. AS 45.25.620 *(Page 38, line 22 – 29)* prohibits consignment lot sellers and it prohibits individuals from selling vehicles on behalf of a friend. DMV recommends deleting Section 45.25.620 *(Page 38, lines 21 – 28).*

8. To be licensed as a dealer under the proposed legislation, one must have a "principal place of business" (*Pages 41, line 15 through Page 42, line 7*). This is defined as a permanent structure with a minimum of 400 square feet of enclosed space. Fly-by-night operations rarely have an established location and it is the fly-by-nighters who present the majority of problems for consumers and DMV. However, small dealers may operate from a temporary structure such as a mobile home and have an open-air car lot. As written, these businesses could not operate. DMV recommends consideration of other language that will permit operation from a temporary type of structure.

DMV would be happy to discuss in greater detail with committee staff these areas or others provisions of the bill affected by action taken on these areas.

Sincerely,

Mary Marshburn
Director

Cc: file
David Koivuniemi, Deputy Commissioner, DOA
Roxanne Stewart, Legislative Liaison, DOA

Subject: AKPIRG comments on SB 189
Date: Mon, 23 Apr 2001 11:03:51 -0700
From: akpirg <akpirg@akpirg.org>
To: Kim_Ross@legis.state.ak.us, clyde_sniffen@law.state.ak.us, eero@alaska.net, akpirg@akpirg.org

To Senator Randy Phillips
>From Stephen Conn, AkPIRG
Subject: Revisions and Amendments to SB189
April 20, 2001

Pursuant to your request, here are proposed amendments and revisions to SB 189.Draft shared with Clyde Sniffen of Dept. of Law and Rick Morrison.

45.25.170 Qualifications for Salesperson license should include police background check for crimes of moral turpitude and course of study in consumer protection law approved by Department of Law, Fair Business Practices Division.

45.25.750 Principal Place of Business should be where books, records and files regarding inventory, sales, repairs and financial matters including applications for past five years are available for inspection pursuant to legal or administrative process.
Indoor salesroom should not be required and square footage requirement eliminated.

45.25.730 Motor Dealers Advisory Board should have consumer organization members who monitor and report attempts to limit competition in the marketplace.
Subsection g on attorney general consultation should be eliminated as entirely inappropriate to Department of Law's responsibilities to broader public, including consumers.

g) delete entirely AKPIRG

Sec.45.25.410
No dispute between manufacturer and dealer shall delay repair and compensation due and owing consumer.

Add to subsections r and s - Consumers and present and former employees of dealer who may have been exposed should be notified along with franchised dealers of any hazardous or potentially hazardous material etc. etc."

Note: On matters related to hazardous materials, federal RICRA and CIRCLA laws should apply unless state law is more protective of consumers' rights.

Add to 45.25.420
Consumers should be informed if damage resulting from transportation would cause a reasonable consumer to reconsider his purchase

45.Installment sales;service contracts

To extent this section is inconsistent with state law governing retail installment sales contracts, those provisions most protective of consumers' rights shall
prevail.

Sec.45.25.520 Good section with added language to (b) (2), "specifying whether manufacturer or dealer by name or both are obliged to honor the service" contract.

Section 45.25.610 is very good

Add to (15) line 30 ("vehicle declared 'wrecked,' 'junked,' or 'totaled' by insurer or any state authority")

Sec.45.25.610
Add (25) "not give notice that buyer has a five business day or 500 mile "cooling off" period to rescind the contract. Dealer may apply normal daily rental or mileage fee for days or miles in which vehicle was held by buyer prior to notice of recession and redelivery of vehicle."

Note: On statutory language pertaining to Warranties, Magnuson-Moss Federal Statute must be read against new law with stronger consumer protections held as Alaska law.

April 23, 2001

The Honorable Randy Phillips
Chair, Senate Labor & Commerce Committee
Alaska Senate
State Capitol Room 103
Juneau, AK 99801-1182

Dear Chairman Phillips:

The Motorcycle Industry Council (MIC) is a nonprofit national trade association that represents motorcycle manufacturers and distributors and over 300 other companies involved in allied trades. The Council would like to offer the following comments on SB 189, which enacts a new law regulating motor vehicle franchises. The bill applies to all registered motor vehicles and thus includes motorcycles in all of its provisions. While MIC does not oppose reasonable franchise legislation and takes no position on the legislation as it applies to automobiles, there are several inherent differences between the motorcycle and automobile industries that make motorcycle inclusion in some of the provisions of the bill inappropriate and would serve to raise the costs of doing business. A law that results in increased business costs, in the absence of any justified need, does not make sense. We are particularly concerned with the following provisions: facility assistance payments to terminated dealers, damage disclosure, and the requirement that a manufacturer provide alternate transportation for owners whose vehicles are in service.

Regarding facility assistance payments for terminated dealers, the provision in Section 45.25.360 may have applicability in the auto industry. However, motorcycle dealerships are dissimilar to automobile dealerships in terms of their facilities and therefore it is critical that motorcycles be removed from these requirements. Whereas car dealerships are housed in single-use facilities, specifically designed to be auto dealerships, the vast majority of motorcycle dealers are in multiple-use facilities, often in strip malls and the like. Auto dealerships are often multi-million dollar operations with large unique showrooms, multi-acre display areas, service buildings housing special installed lift equipment and dedicated service bays. Motorcycle dealerships are generally basic storefront operations. They are typically much smaller, more flexible, and adaptable to many types of uses. They can easily be converted to any number of retail establishments, from carpet stores to clothing chains if the dealership ceases to operate. Accordingly, in the motorcycle industry this type of provision is unnecessary and would only provide a windfall to a small group of dealers at the ultimate expense of the consumer.

The costs associated with some poorly managed dealerships are often remarkably high. A law requiring the manufacturer or distributor to pay the dealer for his facilities will hide the chronic facility cost problem of over-investment in the facility by the dealership's upper management, rather than bring it to light and stimulating corrective action before the ownership overextends itself to the point of jeopardizing the operation. A motorcycle dealer who overinvests in his facilities or poorly manages his business is insulated from risk if protected by a law requiring the franchisor to reimburse the dealer for his facility rental costs if the franchise is terminated. Facilities decisions rest with the motorcycle dealer and as such the dealer should remain responsible. A manufacturer or distributor should not be put in a position of having to be in the real estate business after a dealer has been terminated.

MICs second concern focuses on Section 45.25.410, which requires a manufacturer to provide alternate transportation to an owner whose vehicle is being repaired under an express warranty or service plan, the inclusion of motorcycles is not appropriate as it places a much greater burden on a smaller industry. Consumers do not often depend on motorcycles as their single source of transportation and being without a motorcycle while it is being repaired is less difficult than being without one's car. Further, unlike auto dealers, motorcycle dealers generally do not maintain a demonstration or rental fleet. A motorcycle is not a one-size-

fits-all vehicle. There are numerous variables such as size, engine displacement, seat height, etc. and it is a crucial safety concern that the operator have a motorcycle properly fitted and suited to that individual. This provision, as written, requires the dealer to provide a similar model to the consumer whose vehicle is being serviced. Thus, the dealer would be required to maintain a much more extensive inventory of motorcycles. In practical terms, it would be virtually impossible for a motorcycle dealer to be able to provide a "similar model" as specified in this legislation. The provision of loaner motorcycles could have safety implications as well. Undoubtedly, including motorcycles in this provision will increase the costs of doing business and most certainly imposes a greater burden on our industry than on the larger automobile industry.

Finally, Section 45.25.420 of the bill assigns liability for damages to new motor vehicles occurring in transit to dealers. While the liability provisions in SB 189 may be appropriate for cars, the motorcycle industry's method of vehicle distribution to dealers differs from that of cars and it is vital that motorcycles be excluded from the provisions. Motorcycles are shipped partially disassembled in a crate to the dealer for set-up. The vehicle is disassembled in part to reduce its mass for transport, resulting in lower customer and environmental costs, and increased unit protection from damage during transportation. It is problematic to make the motorcycle manufacturer responsible for trucking work that it does not control. The trucking company is an independent business. Truckers have the authority and means to regulate their action while transporting crates from the manufacturer's warehouse to the dealer. If the transportation worker is not capable of acceptable quality, the transportation company must be held accountable. This is an element of existing transportation code and law throughout the U.S. The proposed section will conflict with existing law.

Additionally, the motorcycle manufacturer (who is already providing inspections of vehicle condition at various prior checkpoints) will not have knowledge of damage which occurred during transportation from the manufacturer's warehouse to the dealer prior to delivery at the dealer, yet will have to reimburse dealers for same. Presently, if the motorcycle has visible damage, the dealer makes a claim with the shipper, who reimburses the dealer for the cost of repair. If the damage is hidden, then the dealer makes a claim with the manufacturer, who reimburses the dealer. Unlike the auto industry, transportation damage for motorcycles is very small. There is no demonstrated need for such legislation to cover the motorcycle industry.

The inclusion of motorcycles in these provisions will most certainly have deleterious consequences for the motorcycle industry, and ultimately result in higher costs to consumers. In light of the issues outlined above, we respectfully urge you to amend SB 189 to, at the very least, exempt motorcycles from provisions requiring a manufacturer to pay rent or fair market value for facilities upon dealer's termination, from the damage disclosure provision, and from the requirements regarding the provision of an alternate vehicle for a consumer whose own vehicle is being repaired.

Thank you for your consideration of these comments on these issues that are so important to our industry.

Sincerely,

Kathy R. Van Kleeck

Kathy R. Van Kleeck
Vice President, Government Relations

Sponsor Statement

Alaska Motor Vehicle Act of 2001

Reason for the Act

Alaska is now the only State in the nation without a comprehensive motor vehicle act. There are many reasons for such legislation. It's undeniable that, in Alaska (more than in any other State), the manufacture, distribution, sale and repair of motor vehicles vitally affects the general economy of the State as well as the public interest and public welfare. Motor vehicle distributors and the manufacturers of motor vehicles whose physical manufacturing facilities are not located in Alaska are in fact doing business in the State through their control over, relationships with, and transactions with their Alaska dealers. Alaska's unique geographical location makes it necessary to ensure the availability of motor vehicles and parts and dependable service for motor vehicles throughout the State to protect and preserve the transportation system, the public safety and welfare, and the investments of its residents. It is therefore necessary, in the exercise of Alaska's sovereign police power, to ensure the availability of motor vehicles and parts and dependable service for motor vehicles throughout the State and to protect and preserve the transportation system, the public safety and welfare, and the investments of Alaska residents.

With help from the National Automobile Dealer's Association ("NADA") the AADA carefully examined the motor vehicle franchise laws from all the other 49 states, met with national NADA representatives and employees of several state agencies. Then, AADA surveyed each Alaska member regarding his or her concerns – both from a manufacturer/dealer standpoint and a dealer/customer standpoint. Dealers told AADA what they needed to protect and preserve the transportation system, the public safety and welfare and investments of their customers as well as their families. Because Alaska has no franchise law, AADA began from a clean sheet of paper and the effort took more than 18 months to complete. Drafts were presented, re-drafted and presented once again. NADA and other advisers from different state automobile associations reviewed the product and provided input. The final result is presented herewith.

What the Act Accomplishes

The Act accomplishes the AADA goals through eight distinct Articles:

- **Article 1** accomplishes three purposes. As required in most other states, it places all agreements between manufacturers and dealers under state law; establishes Alaska as the legal jurisdiction for disputes between manufacturers and their dealers; and forbids any use of any corporate affiliate to accomplish what would otherwise be prohibited by the Act.

- **Article 2** requires manufacturers, dealers and their employees to obtain licenses and establishes the framework for that requirement. Licensing is almost universally