

**ALASKA STATE LEGISLATURE**  
**HOUSE JUDICIARY STANDING COMMITTEE**

April 23, 2003

1:10 p.m.

**MEMBERS PRESENT**

Representative Lesil McGuire, Chair  
Representative Tom Anderson, Vice Chair  
Representative Jim Holm  
Representative Dan Ogg  
Representative Ralph Samuels  
Representative Les Gara

**MEMBERS ABSENT**

Representative Max Gruenberg

**COMMITTEE CALENDAR**

HOUSE BILL NO. 102

"An Act relating to concealed deadly weapons."

- MOVED CSHB 102(STA) OUT OF COMMITTEE

HOUSE BILL NO. 31

"An Act relating to initiative and referendum petitions; and providing for an effective date."

- MOVED HB 31 OUT OF COMMITTEE

HOUSE JOINT RESOLUTION NO. 5

Proposing an amendment to the Constitution of the State of Alaska relating to initiative and referendum petitions.

- MOVED HJR 5 OUT OF COMMITTEE

SPONSOR SUBSTITUTE FOR HOUSE BILL NO. 86

"An Act relating to permits issued by the state; and amending Rules 65, 79, and 82, Alaska Rules of Civil Procedure."

- HEARD AND HELD

**PREVIOUS ACTION**

BILL: HB 102

SHORT TITLE: CONCEALED DEADLY WEAPONS LEGAL

SPONSOR(S) : REPRESENTATIVE(S)CROFT

Jrn-Date	Jrn-Page		Action
02/14/03	0215	(H)	READ THE FIRST TIME - REFERRALS
02/14/03	0215	(H)	STA, JUD
02/19/03	0257	(H)	COSPONSOR(S): GATTO
03/13/03		(H)	STA AT 8:00 AM CAPITOL 102
03/13/03		(H)	Scheduled But Not Heard
03/27/03		(H)	STA AT 8:00 AM CAPITOL 102
03/27/03		(H)	Heard & Held
03/27/03		(H)	MINUTE(STA)
03/28/03	0688	(H)	COSPONSOR(S): ANDERSON
04/07/03	0830	(H)	COSPONSOR(S): DAHLSTROM, KOTT
04/08/03		(H)	STA AT 8:00 AM CAPITOL 102
04/08/03		(H)	Heard & Held
04/08/03		(H)	MINUTE(STA)
04/10/03		(H)	STA AT 9:00 AM CAPITOL 102
04/10/03		(H)	Moved CSHB 102(STA) Out of Committee -- Time Change --
04/10/03		(H)	MINUTE(STA)
04/14/03	0960	(H)	STA RPT CS(STA) 3DP 3NR
04/14/03	0960	(H)	DP: GRUENBERG, DAHLSTROM, HOLM;
04/14/03	0960	(H)	NR: SEATON, BERKOWITZ, WEYHRAUCH
04/14/03	0960	(H)	FN1: ZERO(LAW)
04/14/03	0977	(H)	COSPONSOR(S): HOLM, SEATON
04/16/03	1017	(H)	COSPONSOR(S): SAMUELS, MASEK
04/16/03		(H)	JUD AT 8:00 AM CAPITOL 120
04/16/03		(H)	Heard & Held
			MINUTE(JUD)
04/17/03	1030	(H)	COSPONSOR(S): HAWKER
04/22/03	1058	(H)	CORRECTED CS(STA) RECEIVED
04/23/03		(H)	JUD AT 1:00 PM CAPITOL 120

BILL: HB 31

SHORT TITLE: INITIATIVE/REFERENDUM PETITIONS

SPONSOR(S) : REPRESENTATIVE(S)WILLIAMS

Jrn-Date	Jrn-Page		Action
01/21/03	0039	(H)	PREFILE RELEASED (1/10/03)
01/21/03	0039	(H)	READ THE FIRST TIME - REFERRALS
01/21/03	0039	(H)	STA, JUD
03/04/03		(H)	STA AT 8:00 AM CAPITOL 102
03/04/03		(H)	Heard & Held

03/04/03		(H)	MINUTE(STA)
03/25/03		(H)	STA AT 8:00 AM CAPITOL 102
03/25/03		(H)	Moved Out of Committee
03/25/03		(H)	MINUTE(STA)
03/31/03	0703	(H)	STA RPT 2DP 4NR
03/31/03	0703	(H)	DP: HOLM, WEYHRAUCH; NR: SEATON,
03/31/03	0703	(H)	GRUENBERG, LYNN, DAHLSTROM
03/31/03	0704	(H)	FN1: ZERO(GOV)
03/31/03	0721	(H)	COSPONSOR(S): MEYER
04/04/03		(H)	JUD AT 1:00 PM CAPITOL 120
04/04/03		(H)	Heard & Held MINUTE(JUD)
04/23/03		(H)	JUD AT 1:00 PM CAPITOL 120

BILL: HJR 5

SHORT TITLE:CONST AM: INITIATIVE/REFERENDUM PETITIONS  
SPONSOR(S): REPRESENTATIVE(S)WILLIAMS

Jrn-Date	Jrn-Page		Action
01/21/03	0025	(H)	PREFILE RELEASED (1/10/03)
01/21/03	0025	(H)	READ THE FIRST TIME - REFERRALS
01/21/03	0025	(H)	STA, JUD, FIN
03/04/03		(H)	STA AT 8:00 AM CAPITOL 102
03/04/03		(H)	Heard & Held
03/04/03		(H)	MINUTE(STA)
03/25/03		(H)	STA AT 8:00 AM CAPITOL 102
03/25/03		(H)	Moved Out of Committee
03/25/03		(H)	MINUTE(STA)
03/31/03	0703	(H)	STA RPT 1DP 5NR
03/31/03	0703	(H)	DP: HOLM; NR: SEATON, GRUENBERG, LYNN,
03/31/03	0703	(H)	DAHLSTROM, WEYHRAUCH
03/31/03	0703	(H)	FN1: (GOV)
03/31/03	0721	(H)	COSPONSOR(S): MEYER
04/04/03		(H)	JUD AT 1:00 PM CAPITOL 120
04/04/03		(H)	Heard & Held MINUTE(JUD)
04/23/03		(H)	JUD AT 1:00 PM CAPITOL 120

BILL: HB 86

SHORT TITLE:INJUNCTIONS AGAINST PERMITTED PROJECTS  
SPONSOR(S): REPRESENTATIVE(S)FATE

Jrn-Date	Jrn-Page		Action
02/10/03	0169	(H)	READ THE FIRST TIME -

			REFERRALS
02/10/03	0169	(H)	RES, JUD
02/21/03		(H)	RES AT 1:00 PM CAPITOL 124
02/21/03		(H)	Failed To Move Out Of Committee
02/21/03		(H)	MINUTE(RES)
02/24/03		(H)	RES AT 1:00 PM CAPITOL 124
02/24/03		(H)	<Bill Hearing Postponed>
03/07/03		(H)	RES AT 1:00 PM CAPITOL 124
03/07/03		(H)	Heard & Held
03/07/03		(H)	MINUTE(RES)
04/02/03	0738	(H)	SPONSOR SUBSTITUTE INTRODUCED
04/02/03	0738	(H)	READ THE FIRST TIME - REFERRALS
04/02/03	0738	(H)	RES, JUD
04/02/03		(H)	RES AT 1:00 PM CAPITOL 124
04/02/03		(H)	Heard & Held
04/02/03		(H)	MINUTE(RES)
04/04/03	0798	(H)	COSPONSOR(S): FOSTER, ROKEBERG, HOLM,
04/04/03	0798	(H)	KOTT, LYNN, CHENAULT, DAHLSTROM, WILSON
04/04/03		(H)	RES AT 1:00 PM CAPITOL 124
04/04/03		(H)	Moved Out of Committee MINUTE(RES)
04/08/03	0837	(H)	RES RPT 6DP 1DNP
04/08/03	0837	(H)	DP: WOLF, MASEK, MORGAN, GATTO, LYNN,
04/08/03	0837	(H)	FATE; DNP: KERTTULA
04/08/03	0837	(H)	FN1: ZERO(LAW)
04/08/03	0837	(H)	REFERRED TO JUDICIARY
04/09/03	0901	(H)	COSPONSOR(S): HEINZE
04/23/03		(H)	JUD AT 1:00 PM CAPITOL 120

**WITNESS REGISTER**

MAE ALICE HOPKINS

Soldotna, Alaska

POSITION STATEMENT: Expressed concerns about HB 102.

REPRESENTATIVE ERIC CROFT

Alaska State Legislature

Juneau, Alaska

POSITION STATEMENT: Testified as sponsor of HB 102.

JOHN L. SMALLWOOD

Soldotna, Alaska

POSITION STATEMENT: Testified on HB 102, and indicated that his only concern was about the need for training.

BRIAN JUDY, Alaska State Liaison  
Institute for Legislative Action  
National Rifle Association of America (NRA)  
Sacramento, California

POSITION STATEMENT: Answered questions on HB 102.

ROD CHRISTOPHER, Owner  
Peninsula Weapons Academy  
Soldotna, Alaska

POSITION STATEMENT: During hearing on HB 102, emphasized the need for training that includes safety, handling of weapons, and knowledge of the law, both for those who carry weapons openly and those who carry them concealed.

ALVIN A. ANDERS, Chair  
Alaska Libertarian Party (Juneau);  
Secretary, Alaska Libertarian Party (Statewide)  
Juneau, Alaska

POSITION STATEMENT: Testified in opposition to HB 31 and HJR 5, saying this change is unnecessary and doesn't do what its proponents intend.

KATHRYN KURTZ, Attorney  
Legislative Legal Counsel  
Legislative Legal and Research Services  
Legislative Affairs Agency  
Juneau, Alaska

POSITION STATEMENT: As drafting attorney, offered her belief that HB 31 is vulnerable to a legal challenge without a constitutional amendment.

JIM POUND, Staff  
to Representative Hugh Fate  
Alaska State Legislature  
Juneau, Alaska

POSITION STATEMENT: Presented SSHB 86 on behalf of Representative Fate, sponsor.

#### **ACTION NARRATIVE**

**TAPE 03-42, SIDE A**

Number 0001

**CHAIR LESIL MCGUIRE** called the House Judiciary Standing Committee meeting to order at 1:10 p.m. Representatives McGuire, Anderson, Holm, Samuels, and Gara were present at the call to order. Representative Ogg arrived as the meeting was in progress.

HB 102-CONCEALED DEADLY WEAPONS LEGAL

Number 0059

CHAIR MCGUIRE announced that the first order of business would be HOUSE BILL NO. 102, "An Act relating to concealed deadly weapons." [In packets was CSHB 102(STA), Version 23-LS0515\Q, the corrected version of what was reported from the House State Affairs Standing Committee.]

Number 0123

MAE ALICE HOPKINS testified on her own behalf. She expressed concern about the portion of HB 102 that was described by Representative Croft as relating to Vermont's laws and that allows a person who meets current requirements for a concealed-weapon permit to carry a concealed weapon without the permit. She asked about the process for determining that the person actually meets the current requirements. For example, will it be done by a registration of an intent to carry [a concealed weapon]? Or will it come up when the person carrying a weapon is approached by a law enforcement official? She further asked whether this portion of the bill increases responsibility for law enforcement, whether law enforcement [agencies and personnel] would have access to the names of those who carry concealed weapons without a permit, or whether it will be assumed that anyone may be carrying a concealed weapon.

MS. HOPKINS told members that as a permit holder, she knows the importance of citizens' knowledge of the laws for concealed carrying of a deadly weapon, including restrictions. Most important, however, is knowledge and skill to handle the firearm. She asked who will check to ensure that carriers of firearms have a good understanding of the laws and know their firearms. Emphasizing that it is a community concern, Ms. Hopkins said she didn't see it addressed in the bill.

Number 0284

REPRESENTATIVE ERIC CROFT, Alaska State Legislature, sponsor of HB 102, replied that there would be no list kept by government. He added:

I'm a permit holder as well. I thought much of the information was useful. But right now somebody does not have to take any test, and the government keeps no list of people who own guns. ... The distinction that we're addressing here is between ... "concealed" or not. And no, ... I wouldn't be in favor of the government having that list, necessarily. We do think that in a number of areas we've helped law enforcement by extending more broadly the requirement that you tell [law enforcement about a concealed weapon]. ... The express reason for the bill, really, is to not have some of these requirements.

MS. HOPKINS observed that people may be overconfident and mistakenly believe they understand what is needed for them to carry [a concealed weapon], as well as everything there is to know about the firearm.

Number 0459

JOHN L. SMALLWOOD testified on his own behalf, noting that he also is a permit holder. He offered his understanding that laws currently in effect protect most citizens, and that a person isn't allowed to have a firearm in possession at home or elsewhere unless "qualified and not prohibited by federal or state law." Referring to an "instant-check" system in place for police officers relating to people who already have permits, he suggested it might be a good idea with respect to safety. Doing away with the permitting system as Vermont has done would be within the constitution, he said, but some people might think it isn't good enough. He referred to a bill passed by Senator Robin Taylor the previous year with regard to reciprocity with other states.

MR. SMALLWOOD indicated training is his only concern about the bill. He said he likes the idea, if a person is going to carry a concealed weapon and be among fellow citizens, that some kind of training be required, as well as good knowledge of laws on concealed weapons and self-defense. He also expressed concern about allowing people who don't have training to come into the state [with a concealed weapon]. As for the permit, however, Mr. Smallwood said he didn't care one way or the other, since he

believes Alaska's constitution includes the "right to carry a concealed weapon for legitimate purposes."

REPRESENTATIVE GARA asked Brian Judy, who'd testified at the previous hearing, to state the most significant parts of current handgun-training courses that wouldn't be required if this bill passes, especially safety aspects. He said the big concern is that some segment of the population that currently is required to take safety courses won't take them; he recalled debate about how many people wouldn't do so.

Number 0738

BRIAN JUDY, Alaska State Liaison, Institute for Legislative Action, National Rifle Association of America (NRA), replied that he and the NRA assert that the training courses really don't add much to the "safety situation" in Alaska. He said empirical evidence from many states, whether they have no training requirements or significant ones, is the same: that there aren't any training-related problems. He observed that in Alaska, a person doesn't need a permit or training to carry a weapon openly; however, someone who dons a coat to cover a firearm must take the training and "go through all the other bureaucratic hoops." He suggested that there is no problem in Alaska with people "carrying" openly or carrying concealed while engaged in an outdoor activity, which is another exemption from the permitting requirement. He concluded that nothing indicates a problem now with people who don't go through a mandatory training course, and said he doesn't think that would change.

MR. JUDY, in further response to Representative Gara, offered his belief that the existing courses go over state laws and handling of firearms, including loading and unloading. Under existing law, there also is a competency requirement that he characterized as fairly minimal.

Number 0910

ROD CHRISTOPHER, Owner, Peninsula Weapons Academy, informed members that Peninsula Weapons Academy is a firearms school in Soldotna. A weapons inspector for more than 20 years, he reported that he has done inspections for law enforcement, the military, and the private sector. People come into his CCW [carrying a concealed weapon] classes who never have held a gun before; these are mostly females - but a few males - who want to carry for protection. The personal protection course is a basic handgun course that addresses handling, safety, ammunition,

loading and unloading the gun, and so forth; it allows participants to shoot the weapon and develop a knowledge of how it feels. Emphasizing the importance of learning the laws, he expressed concern about turning people loose on the street who lack "weapons knowledge," including safe handling, and who don't know when or when not to use deadly force. He indicated those are taught in his classes, and told the committee that he believes it is a grave mistake to turn people loose on the street without training.

CHAIR MCGUIRE asked Mr. Christopher whether he'd be supportive of requirements for training, familiarity with state laws, and competency for people who carry weapons openly as well.

MR. CHRISTOPHER said he believes that it's common sense to have all those things when carrying a weapon. Furthermore, he added, "If you get into a gunfight, God forbid, and you do use deadly force and you do kill somebody, that 'concealed carry' permit is used as an affirmative defense for you in court."

CHAIR MCGUIRE remarked, "We're about to change all that in our other bill." Returning to HB 102, she asked why those requirements should be in place for people who carry concealed weapons, since they're not required for those who carry weapons openly.

MR. CHRISTOPHER replied, "I can't answer that question, because I don't know why we don't. I think we should."

REPRESENTATIVE GARA asked whether Mr. Christopher has had students who believed they could shoot at somebody in instances when it is illegal.

MR. CHRISTOPHER said yes, in almost every class he's taught. He explained, "They are not aware of the acronym JAM, which is jeopardy, ability, and means. They think if somebody breaks into your house, you can automatically shoot them. And that's not true. And this is what I'm trying to prevent."

CHAIR MCGUIRE asked whether anyone else wished to testify. Hearing no response, she then closed public testimony.

Number 1170

REPRESENTATIVE SAMUELS moved to adopt CSHB 102(STA) as the work draft. There being no objection, CSHB 102(STA) was before the committee.

REPRESENTATIVE GARA asked Representative Croft what level of burden he believes is imposed on the public by the current permit requirement, and why he believes it is unjustified.

REPRESENTATIVE CROFT responded that the burden of attending the course and training is "medium," but can result in a significant time delay for people who feel threatened and want to carry a concealed weapon. He said he'd rather leave it up to the individual. Acknowledging that there are reasonable people on both sides of the issue, he said he believes it comes down to a "a fundamental ideological ... definition on who do you trust." He noted that some people, including legislators, believe [training] ought to be a general requirement of gun ownership, and that the government should keep a list of owners as well. "I just fundamentally come down on the opposite side of the equation," he added.

CHAIR MCGUIRE said she doesn't know, but suspects there was some case law, for instance, that said although a person has a Second Amendment right to carry a weapon, the right to conceal it isn't absolute; the state has a [duty of] public protection "and so forth," and, thus, there will be qualifiers a state can place upon it. She asked to hear about any discussion that had taken place.

REPRESENTATIVE CROFT replied that he didn't know of any cases on whether carrying a concealed weapon is a fundamental constitutional right, and was fairly certain there hadn't been any cases since Alaska changed its constitution in 1996 to clarify that Alaska's [right to keep and bear arms - with no reference to concealment] - is an individual right. He said there is an ongoing question under the Second Amendment as to whether [the right to keep and bear arms] is a "militia-governmental right or individually held." Offering to look again, he surmised that there is so little case law on this because of a continuing question under federal law as to whether "it's even an enforceable right." He added, "Some courts hold that it is; some don't. It's the very reason we clarified ours to be an individual right.

Number 1386

CHAIR MCGUIRE asked what the rationale was when the Alaska legislature decided there would be no requirement for training and so on when a person carries a weapon openly, but that there would be limitations for carrying a concealed weapon.

REPRESENTATIVE CROFT said he didn't know; he offered to look. He offered his opinion that it hasn't been questioned over time or thought through as rigorously as it should have been.

REPRESENTATIVE GARA informed members that he didn't think he'd be able to vote for this bill, in contrast to the handgun bill with regard to reciprocity just voted on, on the House floor, that day. He explained that Mr. Judy and Representative Croft make a good point about the lack of statistics showing that this bill would make Alaska a more dangerous place. After weighing that heavily, however, Representative Gara said he sides with the view espoused by Mr. Christopher [with regard to the need for training] - that some people think they may use a gun [legally] in circumstances when it isn't true, and that some people benefit from a gun-safety course. He indicated those are the reasons for his discomfort with the bill.

CHAIR MCGUIRE remarked that it would be nice to know why the policy exists to begin with; she noted that she still had unanswered questions. In support of the bill, however, she said she hadn't been able to put her finger on statistical evidence that says someone who carries a concealed weapon is more likely to perpetuate violence or be a risk. Saying it has been an interesting philosophical debate, she compared it with philosophies about whether there is a need to [read manuals, know the law, and get training] to obtain a driver's license; she noted, however, that driving is a privilege, whereas there is a constitutional right to bear arms. She thanked participants.

REPRESENTATIVE SAMUELS moved to report [CSHB 102(STA)] out of committee with individual recommendations and the accompanying zero fiscal note. There being no objection, CSHB 102(STA) was reported from the House Judiciary Standing Committee.

HB 31-INITIATIVE/REFERENDUM PETITIONS

HJR 5-CONST AM: INITIATIVE/REFERENDUM PETITIONS

Number 1612

CHAIR MCGUIRE announced that the committee would next consider HOUSE BILL NO. 31, "An Act relating to initiative and referendum petitions; and providing for an effective date"; and HOUSE JOINT RESOLUTION NO. 5, Proposing an amendment to the Constitution of the State of Alaska relating to initiative and referendum petitions.

CHAIR McGUIRE recalled good points made by Representative Gara at the previous hearing with respect to the burden being placed on the initiative process in general and on the people gathering signatures, as well as the effect on costs "and so forth." She also recalled comments by Representatives Samuels and Anderson about proportional representation. She said that was her line of thinking as well, that there is an effort to heal the so-called urban-rural divide in other areas, and that even though it costs more to "reach out to rural areas," [the legislature still does so]; thus perhaps it should be done in this area also. She mentioned previous testimony via teleconference and reminded members that public testimony was still open.

Number 1708

ALVIN A. ANDERS, Chair, Alaska Libertarian Party (Juneau); Secretary, Alaska Libertarian Party (Statewide), referred to his previous testimony and said this bill should be opposed because it is unnecessary and doesn't accomplish what its proponents want it to do; the initiative process works fine, helping to increase turnout and voter registration and allowing citizens to decide contentious issues. If the sponsors' real goal is to include more of the state in the initiative process - rather than just having the new requirements act as a "veto" on issues they don't want to see on the ballot - Mr. Anders asserted that the legislation doesn't accomplish what the sponsors want.

MR. ANDERS suggested it would be better to make the initiative one page so that it could be posted on the Internet, downloaded as an Adobe Acrobat file, printed, signed, and mailed in. Offering a copy of an initiative petition used in Anchorage and other areas in the state as an example of a one-page form, he assured the committee that it works fine, that citizens' signatures are still checked for voter registration, and that having one page instead of a booklet will make it easier for "folks in the hinterlands" to fill out and mail in without feeling that they have to get 150 signatures in order to turn in their petition booklet. He said that reform could be done without having to do a constitutional amendment.

MR. ANDERS said he'd like the committee to vote against the legislation. He suggested that the "very good reform" supported by Ken Jacobus and the Republican Party with regard to instant-runoff voting failed in the 2002 election because voters were already upset with the Republicans for the closed primary and saw the instant-runoff voting as another way that Republicans

were trying to seize control of the state. Saying it should have passed, he said that type of reform is the way to go.

CHAIR MCGUIRE asked whether anyone else wished to testify on HB 31 or HJR 5; hearing no response, she then closed public testimony on both.

CHAIR MCGUIRE turned attention specifically to HB 31. She requested a motion.

Number 1890

REPRESENTATIVE OGG moved [to adopt the proposed CS for HB 31, Version 23-LS0201\D, Kurtz, 4/7/03, as a work draft].

REPRESENTATIVE GARA objected. Saying he wouldn't talk about his many substantive objections to the bill, he noted, however, that the constitution says all that is required is a certain total of signatures from voters who reside in two-thirds of the districts throughout the state; the bill makes the signature requirement much more difficult, defeating the intent of the [Alaska State] Constitution's framers, to his belief. He suggested the bill would be sent back as clearly being unconstitutional.

CHAIR MCGUIRE clarified that the motion to adopt the proposed CS was in error. She requested a motion to rescind it.

REPRESENTATIVE OGG [moved to rescind his motion]. There being no objection, it was so ordered.

Number 1990

REPRESENTATIVE OGG [moved to report HB 31 out of committee with individual recommendations and the accompanying zero fiscal note].

REPRESENTATIVE GARA objected. He requested that Kathryn Kurtz tell the committee what she thinks about the bill's constitutionality.

Number 2018

KATHRYN KURTZ, Attorney, Legislative Legal Counsel, Legislative Legal and Research Services, Legislative Affairs Agency, drafting attorney for HB 31, offered her sense that the bill adds a requirement for initiative petitions above and beyond what is specified in the constitution; she suggested that

without a constitutional amendment, the bill is potentially vulnerable to legal challenge.

REPRESENTATIVE GARA asked Ms. Kurtz, if she were a judge ruling on the information she has, whether she would say it is more likely than not that the bill would be unconstitutional.

MS. KURTZ replied, "I would."

CHAIR McGUIRE pointed out that HJR 5 proposes an amendment to the constitution for that reason. She expressed appreciation to Ms. Kurtz for her legal memorandum on the subject, and said there is no question that both the statute and the constitution need to be amended [if this law is to be changed].

REPRESENTATIVE GARA maintained his objection.

A roll call vote was taken. Representatives Samuels, Anderson, Ogg, Holm, and McGuire voted in favor of reporting HB 31 from committee. Representative Gara voted against it. Therefore, HB 31 was reported from the House Judiciary Standing Committee by a vote of 5-1.

Number 2132

REPRESENTATIVE OGG moved to report HJR 5 out of committee [with individual recommendations and the accompanying fiscal note].

REPRESENTATIVE GARA objected. He explained that he'd heard all the points in favor of changing the initiative process, but disagreed. First, he said, this will limit peoples' constitutional rights, which he believes should only occur when there is an incredibly compelling reason to do it; however, he'd heard no such compelling reason. Furthermore, although it isn't the intention of the sponsor or the committee, he said that making it more burdensome to collect signatures will preserve the initiative process only for the wealthiest people who have the staff to go to [30] different districts to gain 500 or 1,000 signatures in each district.

REPRESENTATIVE GARA offered his belief that perhaps Alaskans' most important right with regard to democracy is the right to take a matter into their own hands and put it on the ballot. With respect to the ability of people who live outside of Anchorage to have initiatives placed on the ballot, he said the current system is fair because no matter how many signatures are obtained from various districts, the question is whether the

majority of Alaskans will vote for an initiative at the ballot box. He said that is how democracy works, and that he couldn't support HJR 5.

REPRESENTATIVE HOLM offered his belief that the preservation of the rights of one set of people at the expense of another is in jeopardy without passage of this [legislation]. He suggested that Alaska is unique because more than half of the population lives in one area and thus can pass laws that adversely affect rural residents all over the state. He asserted that people in this country have a representative republic, not a democracy. He added, "We try to make sure that the majority cannot act in an unruly manner to subject the minority to its whims." Representative Holm said it isn't unreasonable to require a seat at the table for people whose cultures and lives will be affected by laws or initiatives. He suggested that this [constitutional change] would allow that seat at the table, and that it would be a grave injustice to do otherwise.

REPRESENTATIVE OGG concurred with Representative Holm's comments. He also suggested that the movement here is towards exercising democracy in its truest form, since [the proposed constitutional change] will be submitted to the voters.

**TAPE 03-42, SIDE B**

Number 2380

REPRESENTATIVE OGG concluded by saying this is a suggestion [to voters] that this is a good direction, and that if they see fit to pass it, they will. If not, the people will have spoken.

REPRESENTATIVE GARA acknowledged that as a fair point, and said although [HB 31] takes away peoples' rights without asking their permission, HJR 5 asks their permission before doing so. Nevertheless, he said he thinks [changing the initiative process in this way] is a bad policy for the reasons he'd stated earlier.

Number 2297

A roll call vote was taken. Representatives Anderson, Ogg, Holm, Samuels, and McGuire voted in favor of reporting HJR 5 from committee. Representative Gara voted against it. Therefore, HJR 5 was reported from the House Judiciary Standing Committee by a vote of 5-1.

[HB 31 was reported from committee earlier by a vote of 5-1.]

HB 86-INJUNCTIONS AGAINST PERMITTED PROJECTS

Number 2287

CHAIR McGUIRE announced that the final order of business would be SPONSOR SUBSTITUTE FOR HOUSE BILL NO. 86, "An Act relating to permits issued by the state; and amending Rules 65, 79, and 82, Alaska Rules of Civil Procedure."

CHAIR McGUIRE indicated no testifiers had signed up.

Number 2275

JIM POUND, Staff to Representative Hugh Fate, Alaska State Legislature, presented SSHB 86 on behalf of Representative Fate, sponsor, noting that the bill had been rewritten in order to pass muster constitutionally. Mr. Pound explained that it approaches the issue of asking for and receiving injunctions that delay work on already permitted projects. Under current law, a plaintiff who files for an injunction against a project and loses in court is responsible for part of the court costs and part of the attorney fees for the defendant. Indicating the bill will guide the judiciary but leave decisions up to the bench, he told members that SSHB 86 makes those who improperly seek and cause an injunction responsible for full court costs and attorney fees.

MR. POUND explained that SSHB 86 also adds statutory language which requires that costs incurred as the result of a delay will be paid for by the responsible party; those include wages and salaries for employees working on the project, material costs, and penalties and interest on contracts associated with the project. When a project is permitted, a contractor goes to work hiring employees and purchasing materials; these are commitments that a contractor makes. An improper delay of a project costs more than just court costs and attorney fees, he said; it disrupts the lives of the contractor, his or her employees, and subcontractors who do the work. "It is unreasonable for someone to have an effect on this many lives without bearing some of the true cost," he concluded, adding that SSHB 86 means that the responsible party will have to be responsible. He urged support for the bill.

CHAIR McGUIRE brought attention to the phrase "bad faith legal challenge" on page 1, line 10. She asked whether that is

referring to Rule 11 [of the Alaska Rules of Civil Procedure] as the standard that will be in law.

MR. POUND replied that "bad faith" comes up a lot in insurance [case] law and that it seems every judge has a different definition for what it is or isn't. "We're leaving that to the discretion of the bench," he specified.

CHAIR McGUIRE offered her belief that Rule 11 sets up that standard, whereas this would leave it to the judge's discretion. She asked at what stage of the litigation the bad-faith determination would be made.

MR. POUND offered his understanding that in most cases, it will be determined with the final decision by the judge or jury because it will fall under "the substantially prevail situation."

Number 2155

REPRESENTATIVE OGG asked why the present court rules that deal with frivolous lawsuits don't cover this issue.

MR. POUND replied that existing court rules allow for partial court costs and partial attorney fees, but nothing else for a construction-type project.

REPRESENTATIVE OGG noted that [page 1, line 11] says "substantially prevail". He asked whether someone could prevail and yet not "substantially prevail", and thus could be a winner but also a loser under this.

MR. POUND responded:

That is another one of the terms, sort of like "bad faith", where a lot of it ... really depends on the particular court and particular judge. ... About the best definition I could come up with came out of the U.S. Fifth Circuit Court [of Appeals is]: a plaintiff may be considered a prevailing party - which they do reference back to "substantially prevail" - if they succeeded on any significant issue of litigation ..., which achieves some of the benefits that the party sought in bringing the suit.

Number 2078

REPRESENTATIVE OGG asked whether Mr. Pound believes that "prevailing" isn't a high enough [standard].

MR. POUND responded, "I believe we need to have a higher standard in order to spell out what the legislative intent is." He relayed that the goal is to eliminate frivolous suits and frivolous injunctions before the process ever starts.

REPRESENTATIVE OGG observed that there are penalties for people who bring frivolous lawsuits. He requested clarification about bringing those together [under] the "substantially prevail" standard.

MR. POUND replied that frivolous lawsuits fall into one category that presently allows for partial court costs and partial attorney fees. However, this primarily deals with permitted projects that have gone through the entire public process and "all the hoops" to get the needed permits. He used as an example an intertie from the Healy coal project up to Fairbanks that had gone through all the permitting: Someone filed a lawsuit saying it was an eyesore and received an injunction that held the project up for nearly a year and a half. There were millions of dollars in attorney fees [and court costs]. There also were people, including contractors and laborers, who were unable to work on the project, although they'd planned to do so and had made related commitments to subcontractors and for materials. He said that while it may not be considered a frivolous lawsuit, the judge may look at the information basic to the injunction process, grant the injunction, and then later decide there was no reason for it in the first place.

REPRESENTATIVE OGG asked whether the court action was determined to have been frivolous in the preceding example.

MR. POUND apologized, saying he wasn't that familiar with the case, but knows the project is now moving forward. He offered his belief that "all the company got out of it was [attorney] fees and court costs."

CHAIR McGUIRE shared a point brought to her attention, that Rule 11 deals with sanctions against attorneys, rather than plaintiffs themselves.

Number 1912

REPRESENTATIVE ANDERSON remarked that he could see the merit of the bill on face value, since an injunction delays a project,

thereby slowing development and economic growth, and since a person would be less likely - under the bill - to unjustly pursue delaying a project. Conversely, however, it would discourage a person from [rightly] seeking an injunction against a state-permitted project. He mentioned the confusion in the committee over Rule 11 and bad faith; he suggested that discussing those is appropriate for the committee.

REPRESENTATIVE ANDERSON acknowledged that sometimes injunctions produce results beneficial to the public. He referred to page 2 [lines 6-7], which read, "(5) any other costs or damages that the person who is materially damaged demonstrates were caused by the disruption." Characterizing those damages as "fairly expansive," he cautioned against making it so prohibitive that people are frightened away from to [seeking an appropriate injunction]. He again highlighted the undefined nature of "bad faith."

MR. POUND reiterated that the "bad-faith" argument is seen a lot in "insurance case law." He suggested that leaving its definition up to the bench would be best.

CHAIR MCGUIRE asked, "Why don't we just make it ... discretionary to the judge to award damages as well, so the defining of 'bad faith' is [discretionary] and then the awarding of damages is discretionary too? Why do we have it as 'shall be liable'?"

MR. POUND indicated that [the bill] expands it beyond the discretionary court costs and attorney fees that currently can be awarded under the court rules.

Number 1751

REPRESENTATIVE GARA explained his concerns. First, the bill is confusing, he said, apart from the substance. It says a person should not be allowed to file a bad-faith injunction. Although it is a fair point, Representative Gara noted that he'd asked legislative counsel to share with him the standards one must meet before being able to obtain an injunction or preliminary injunction in the first place. He reported that injunctions rarely are granted; furthermore, the issue of whether a claim is frivolous is always dealt with in an injunction case at the outset.

REPRESENTATIVE GARA, to that point, referred to page 3 of a memorandum [dated April 7, 2003] he'd received from Kathryn

Kurtz, legislative drafter, noting that it quotes from an Alaska case with regard to the abuse-of-discretion standard and balance-of-hardships test used by the Alaska Supreme Court to review preliminary and temporary injunctions. Representative Gara pointed out that it says the plaintiff must raise serious and substantial questions going to the merits of the case; that is, the issues raised cannot be frivolous or obviously without merit. Representative Gara summarized by saying that before a court will prohibit someone from doing something pending the outcome of a trial, the court already imposes a heightened standard and says that it had better not be a frivolous claim, and there is a hearing on that.

REPRESENTATIVE GARA questioned the need for the bill, noting that if it passes, the court would make the determination at the outset and have a hearing to ensure there was merit to the claim; the defendant would get a second bite at the apple later by requesting another hearing on whether the claim was frivolous. He said it seems the protection already exists, and asked whether the need to change existing law had been [thoroughly] considered.

MR. POUND responded, "Essentially, that's correct. But the reality of it is," he added, "when it's all said and done, the judge looks at the defendant and says, 'We'll award you part of your [attorney] fees and part of your court costs.'"

REPRESENTATIVE GARA replied, "I could agree with what you wanted; I think what you want is already in the law, though." He offered his understanding that [the sponsor wants more than partial attorney fees] if someone has filed a frivolous claim and obtained an injunction; in that case, he agreed that the person should be entitled to full attorney fees, but relayed his belief that [a party already may be awarded full attorney fees] under Rule 11 or Rule 82, the way the courts interpret it, when a claim is frivolous. He suggested that it is "sort of circular" whether an injunction can properly be obtained on a frivolous claim in the first place, because it appears that hurdle with the court must be cleared first. Highlighting how unlikely it would be to have a frivolous injunction, he reiterated that he agreed with awarding full attorney fees if it happened.

REPRESENTATIVE GARA explained that his bigger concern with the bill, however, is that it goes beyond awarding full attorney fees. It says the plaintiff may be charged for all lost profits during the time the injunction was in place. He said that if

the other remedies were deleted and it just said full attorney fees, he'd sign off on the bill right now. However, he said he worries about real-world examples.

Number 1699

REPRESENTATIVE GARA offered an example of a "gas lease off the Kenai River" for which some fishermen believe that it is a bad idea and that the gas lease is illegal. They succeed in getting an injunction from a court that sees it as a good-faith claim. The injunction lasts two years, and ultimately the plaintiffs lose for whatever reason. It has cost the oil company millions of dollars. Representative Gara noted that under the bill, a fisherman or average person, when filing for such an injunction, could be liable for millions of dollars. Furthermore, under Rule 65, the person would have to post a multimillion-dollar bond before filing the suit. He suggested that it would leave injunction law available to just the richest of people, knocking 95 percent of Alaskans out of the mix. He asked why that would be good policy.

MR. POUND answered by posing a scenario in which a commercial fisherman owns a boat, has boat payments, has house payments, and has a crew working for him. If a group decides to get an injunction because that fisherman might catch a seal in his net, that fisherman would lose the entire season of fishing and instead spend it in court, hiring an attorney and incurring court costs. He asked, "If it was a frivolous case, why should you not be allowed to recover your loss?"

REPRESENTATIVE GARA replied:

If we could write a law that said in that case, you can get the remedies you have in this bill, but in the other case, when you're trying to get them against the fisherman and you're the oil company and you wouldn't apply this bill, I'd be OK with that. But the reality is, to apply it in your case, you also have to [have] it apply in my case. And by passing this bill, it's going to be a bill of ... general applicability. It will be used by the large oil companies to scare a fisherman out of court in the first place.

MR. POUND responded, "I'm not inclined to say that the large oil companies won't use this." He suggested a hypothetical situation in which an oil-service company subcontracts to another company, which subcontracts to another company, which,

ultimately, hires an employee, all under a contract. Once a project is stopped at the highest level, it has a trickle-down effect that hurts not just the large corporation, but also the individual who just wants to go to work.

Number 1448

REPRESENTATIVE GARA asked Mr. Pound whether he has any evidence that too many frivolous injunctions are being granted today.

MR. POUND replied:

I have no specific -- but this is also a preventative [measure]. We have many large projects that are getting ready to start in this state in the next four years; ... certainly the potential is going to increase as we start looking at resource development in the state.

REPRESENTATIVE SAMUELS remarked that it's not only the lost profits, but also the lost operating expense. He suggested deciding on a policy, regardless of whether it is a big oil company or some small construction company. If someone is filing an injunction in bad faith and talks a judge into it, and the judge later decides [the plaintiff] should have known better, that the person should be punished, he opined.

REPRESENTATIVE HOLM, on the issue of whether any frivolous lawsuits have been filed, mentioned a right-of-way for Golden Valley Electric Association (GVEA) that was completely permitted across the Tanana Flats. When someone sued, it cost \$7 million and nine years of greater costs in electrical power to the people of Interior Alaska, but there was no penalty, no charges for attorney fees, and no reimbursement whatsoever, he said. He added that he believes this bill is intended reduce lawsuits.

REPRESENTATIVE HOLM opined that [Representative Gara] is more concerned about preserving the profits of attorneys, whereas he himself is worried about preserving the profits of others.

Number 1273

REPRESENTATIVE GARA objected on "a point of personal privilege."

REPRESENTATIVE HOLM asked, "This bill preserves the profits of attorneys, right?"

CHAIR McGUIRE warned: "Well, let's be careful, there, Representative Holm. Representative Gara doesn't practice in this area of law, and I don't think he's trying to preserve profits."

REPRESENTATIVE HOLM suggested there is a concern about preserving the ability of attorneys to be compensated for what they are doing. He then referred to the discussion that this bill allows the judge to decide whether the case is substantial or has merit. He said he could offer hundreds of examples - although he didn't have them at his fingertips - where judges have, in his opinion, "ruled very inappropriately." He said it may be correct that Rule 11 says attorneys can be sanctioned for inappropriate or frivolous actions, but then he alluded to a successful lawsuit against [the McDonald's Corporation] over some very hot coffee, and suggested that many times, judges take cases just to make a name for themselves.

CHAIR McGUIRE acknowledged Representative Holm's frustration. She said she doesn't believe the bill's premise is wrong, and opined that injunctions probably are too liberally granted in some areas. However, she observed, at least seven different terms seem vague, including "substantially prevail", "materially damage", "disrupt", and "improperly disrupt". Notwithstanding Mr. Pound's suggestion that "bad faith" would be interpreted by a judge, she emphasized there is still a need to consider sideboards and definitions. She asked whether, for example, if a judge determines that a person was correct on two claims but not a third, does that constitute "substantially prevail"?

CHAIR McGUIRE also asked Mr. Pound whether there had been any consideration given to looking at Rule 65 itself with regard to raising the standard for when a court will actually grant an injunction. Instead of imposing large penalties on people [who obtain injunctions], she suggested that a higher standard could provide a "stopping point" for the judge because of the consequences on businesses, jobs, "and so forth." She remarked that if something is right, it is right for big businesses, small businesses, and individual employees. She noted that corporations represent working people because they provide jobs for the average men and women in Alaska.

Number 0963

CHAIR McGUIRE added that she's long believed Rule 11 doesn't have enough teeth, but questioned whether creating a whole new "crime/penalty" is the right way to go. She agreed with

[Representative Anderson] about not wanting a chilling effect on a person who believes something is wrong but who doesn't have a million-dollar bond. She again asked Mr. Pound whether there had been any consideration given to looking at Rule 65 itself and raising the standard for injunctions.

MR. POUND referred to discussions with the Department of Law and said the department was leaning towards dropping any reference to the court rules whatsoever. He noted that he had an amendment to that effect.

CHAIR MCGUIRE clarified that she agrees there are many instances when someone files for an injunction to purposely disrupt an economically viable and environmentally sound project for impure motives; she said Rule 11 could apply to an attorney that would bring that [action]. Putting that aside and looking at the plaintiffs themselves, however, she explained:

We're saying that bad faith is a standard in and of itself, and I don't disagree that we ought to have one. But I think it's the commiserate damages that you're then asking this individual ... to pay, which could be literally billions of dollars, that is somewhat troubling to me from the standpoint of chilling legitimate injunctions that might be granted.

And so I guess what I'm wondering is whether or not we don't want to go back one step - rather than the point at which it's already said and done and you've got a billion-dollar penalty hanging over your head - that you go back up one step, to the granting of the injunction itself, and put more teeth in that, so that the judge has the ability to say, "This doesn't look right, feel right, or anything else; we're not granting the injunction." And ... if these injunctions have been granted in a frivolous way, clearly, either the judge ... has done it improperly or the judge doesn't have enough tools at his or her disposal.

CHAIR MCGUIRE, in response to Mr. Pound, specified that she was speaking of Rule 65, not Rule 11, since the latter clearly deals with sanctions against attorneys.

Number 0748

REPRESENTATIVE OGG suggested focusing on the laws themselves. He said the fishing industry has been held up many times by "the environmental side of programs," even though in good faith. He suggested the problem is that the statutes and regulations under which the agencies manage the fisheries aren't tight enough as written. He explained, "They don't have the information, or they're written in such a way that, in good faith, somebody can come and, based on that law, say that this fishery is not being managed properly." He read from Rule 11 and indicated that if the permit law is wrong itself, an injunction could be done in good faith and yet there could be a chilling effect "based on what you have here."

REPRESENTATIVE OGG offered his belief that a defendant has the ability to file a counterclaim for compensatory damages under the present law in relation to an injunction. He questioned the need to duplicate it with SSHB 86.

MR. POUND responded that this bill is primarily designed to clarify what those compensatory damages could be. Now, he suggested, it is anyone's guess regarding what would be awarded under existing statute.

REPRESENTATIVE OGG noted that Mr. Pound hadn't previously mentioned counterclaims, and said he wanted more time to study this bill.

REPRESENTATIVE SAMUELS referred to page 2 and said somebody is going to pay for the costs incurred. Assuming it is a bad-faith injunction, he suggested that everyone will pay for it because of higher insurance costs "and so forth." He said he agreed with the need to separate the good-faith claims from the bad-faith claims, however, adding that people who go forward with bad-faith claims should pay full costs, not just attorney fees.

Number 0423

CHAIR McGUIRE said she believed that was a valid point. When the situation is at the point when the bill applies, she noted, everyone will be in a bad spot: all the costs will have been expended, and someone will have to pay them. She emphasized, however, that she wants to "bump it back a step" to avoid all the damages that anyone would pay, one way or the other. She again mentioned altering the injunction standard.

CHAIR McGUIRE offered her understanding that the statute brought up by Representative Ogg is AS 09.40.230, mentioned in the

memorandum [from Ms. Kurtz]. She suggested that that statute could be a place [for amendment], since it pertains to the authorization for an injunction itself. She proposed perhaps adding a [paragraph] (4) to that statute to specify that it cannot be based on bad faith "and so forth," to raise [the standard] more, "if you don't think Rule 11 gets you there."

REPRESENTATIVE GARA suggested, heated discussion to the contrary, that there wasn't that much difference of opinion on the bill. He surmised that if Rule 11 were clarified to provide full attorney fees for a frivolous lawsuit, that would resolve the problem. He said that this isn't a matter of people suing corporations. Rather, this addresses the public process - the right of citizens to challenge their government's conduct. He cautioned about treading softly in this area, noting that this bill only comes into play if the government issues a permit and a citizen believes the government didn't act properly. He said that businesses know this is part of the governmental process: the permit is issued, and someone may challenge it, which is likely to happen on a controversial project - the public is invited to the table.

REPRESENTATIVE GARA pointed out that what stops people from improperly challenging the government's conduct in a way that causes businesses huge amounts of unjustified damages is the threat of paying huge amounts of attorney fees if the lawsuit is unsuccessful - the bigger the project, the more attorney fees. He noted that even against a small business, attorney fees might be \$50,000, whereas against a large business the amount of might be up to \$1 million. Again proposing to clarify Rule 11, he emphasized that the law already deters people from doing frivolous things in court.

REPRESENTATIVE GARA suggested this bill could be rewritten to deter people from doing things frivolously, but cautioned against requiring damages to include [all those listed in the bill]. He emphasized that this could "chill somebody out of the courtroom" and would take away citizens' rights to challenge government conduct in cases involving large and medium-sized corporations.

REPRESENTATIVE GARA referred to Representative Holm's mention of the GVEA case; he noted that Representative Holm had indicated the court allowed the injunction and that the plaintiff wasn't penalized. Representative Gara remarked that this suggests that what Representative Ogg said was correct.

**TAPE 03-43, SIDE A**

Number 0001

REPRESENTATIVE GARA, elaborating, said that perhaps when the law allows for an injunction, maybe it's the law that the sponsor has the dispute with - maybe the law is a bad law - but the court was enforcing the law. He suggested that if the plaintiff had a frivolous claim, it would not have held up the project for 10 years. The claim probably involved a law that many would disagree with; that's different from a frivolous claim. By increasing the penalty for attorney fees and lost profits, the legislature has just closed the courtroom doors, taken away peoples' due process rights, and peoples' rights to challenge the government. It's a balance.

REPRESENTATIVE GARA acknowledged Representative Samuels's point that there's a burden on the business community, especially when they're doing things right. Alaskans try to appoint the best judges possible, he noted, adding that there is a high standard before a plaintiff can get an injunction. He said he would like to hear strong evidence that injunctions are being issued willy-nilly, for no good reason; he remarked that he doesn't think that is happening. He surmised that judges have made terrible mistakes in the past, but noted that it's not happening in a big enough way to justify a radical change in the law as is proposed by SSHB 86.

REPRESENTATIVE OGG read sections of Rule 65, noting that there is always a balancing test in the court: The plaintiff must be faced with irreparable harm, and the plaintiffs have to make a showing of what that is. In some [cases], he explained, the court will require bonding by the plaintiff to cover the damages the defendant may suffer should the case not work out in the [plaintiff's] favor. The court has plenty of tools, he said, adding that the plaintiff must raise serious and substantial questions going to the merits of the case. All of these things are discussed by the court and the opposing parties before the judge grants the injunction.

Number 0201

REPRESENTATIVE OGG said that [an injunction] is a very serious move on the part of the court and there are high standards before the court will grant an injunction. He said some study of this would be helpful before the committee starts changing things. Maybe the answer, he surmised, involves adding more teeth to the statute that deals with injunctions. He said he

agrees that these standards should surface early in the lawsuit process, not after everybody has expended time and energy in court; that determination of a frivolous case needs to be made upfront. He said he thinks that Rule 65 requires that [merit] has to be [demonstrated] before an injunction is granted.

REPRESENTATIVE SAMUELS reiterated that "somebody has to pay." He then proffered the following example of an air carrier with an injunction prohibiting it from flying to certain destinations. While the injunction is in force, the carrier still has to make aircraft payments, still has 450 employees to pay, and still has leases to pay and sales to honor. The business's money is tied up, with the company never knowing when the injunction will be lifted. The situation worsens: the employees being laid off are finding other jobs, and there are training costs for new ticket agents and ramp workers. That's the way a large oil company looks at an injunction, he surmised. So once the injunction is lifted, and the case is determined to be frivolous according to SSHB 86, who makes the business whole, he asked. Who makes up for the aircraft that were returned or who gets the company out of bankruptcy?

REPRESENTATIVE GARA remarked that if such an example were the reality, he would be much more sympathetic to the bill. But its not, he assured members, adding that "that's why nobody has ever gotten an injunction against your company to keep it from flying all over the state."

REPRESENTATIVE SAMUELS argued there have been injunctions against airlines.

Number 0514

REPRESENTATIVE GARA said it's not so easy to get an injunction for no reason, adding that SSHB 86 has to do with a reality that's different from the hypothetical case Representative Samuels presented. This bill concerns state permits and whether someone can get an injunction that says a state permit is invalid. He said he disagrees that somebody can get an injunction easily for no reason; it's just not that easy and it doesn't happen. Were injunctions against state permits an everyday circumstance, were this happening all the time, he said, he would support this bill. But its not; he said the committee is considering a bill to deal with a circumstance that doesn't exist. If the committee considers the circumstances that do exist, all of a sudden the injunctions start looking reasonable. Were there rampant injunctions out there for

illogical reasons, he would be much more sympathetic, he said; however, that isn't the case.

CHAIR MCGUIRE remarked that, clearly, [injunctions] will involve things in which development is occurring and generally it pertains to sub-surface development, oil and gas, minerals, railroads, et cetera. She noted that there is a tendency to villainize the oil and gas and development industries of the state.

CHAIR MCGUIRE requested a few real-life examples from the sponsor's staff. She said that she agrees with what Representative Samuels and Mr. Pound are saying with respect to the policy, and with what Representatives Gara and Ogg are saying with regard to the chilling effect. She acknowledged that more information would help identify any areas in which injunctions are being improperly granted. Furthermore, she also acknowledged, this could be the fault of the legislature in not changing the court rule or the statute or both in order to provide the judge more guidance. She agreed that Rule 11 in combination with Rule 65 and AS 09.40.230, regarding authorizations for injunctions in the Alaska Statutes, should be enough for a judge to review something that's clearly in bad faith and [deny the injunction] based upon one of the aforementioned.

Number 0912

MR. POUND directed the committee's attention to the committee packet, which included six pages from Stoel Rives, LLP, of cases from states other than Alaska that are representations from environmental law. He offered the following as a quote from Fran Ulmer: "Anyone advocating more marine protection areas in Alaska must be able to demonstrate convincing scientific evidence that such an extreme action is necessary and not be driven by simplistic desire to limit commercial fishing."

MR. POUND explained that when an individual or group challenges a permit, the first process should be the administrative process. Ultimately, when these go to court, they go through superior court, where they fall under a different set of guidelines because there are standards of review for administrative proceedings at the superior court level. Mr. Pound claimed that nonprofit law firms tend to approach many of their cases in the same manner as the advertising which implies that [Alaska] is killing wolves left and right. He added that

he wouldn't put it past such groups to use the same tactics in their initial argument to obtain an injunction.

Number 1039

CHAIR MCGUIRE noted that a judge is allowed to weigh scientific information. Therefore, she suggested including a separate standard for environmental-related injunctions under Title 9 wherein "the Fran Ulmer standard" is adopted. Such a standard would require that one demonstrate convincing scientific evidence that an extreme action is necessary.

MR. POUND pointed out that such language was included in the original legislation; however, there was a [potential] problem pertaining to due process. Therefore, the sponsor substitute was introduced and its language is a variation of Utah's law.

CHAIR MCGUIRE noted that the judge is already ascertaining whether it's broad and in good faith. She also noted that in the area of injunctions, a series of three different additional questions must be answered before an injunction can be issued. Therefore, she said she still questions why a judge couldn't decide whether the injunction request is based on scientific information. She asked if there is a legal opinion on the due process issue.

MR. POUND answered that both Legislative Legal and Research Services and the Department of Law agreed that there were due process problems.

REPRESENTATIVE HOLM said that the GVEA situation is a classic example of "this." He noted that when he was on the borough assembly, it dealt with this problem at length because [the process resulted in] 100,000 people in the borough having increased electric payments for seven years. When the process finally went through for an expansion of GVEA, Fort Knox entered [the market] and the cut price in the area by 20 percent. He relayed his understanding that Representative Fate is trying to create a positive environment for economic development rather than one that is under the thumb of potential litigation. He agreed that [the legislature] doesn't want to chill the ability of people to question government.

REPRESENTATIVE HOLM asked if there is some methodology whereby [the law] could require judges to come down on certain sides of issues rather than providing freedom with their judgments. Although he said he didn't know how the process works, he said

he did know how it impacts people when the process is stopped even though the individual has gone through all the proper steps. For example, he noted, the Susitna Dam was stopped due to litigation. He added that if the purpose is to put Alaska on firm financial footing, then these issues need to be addressed without destroying the ability of people to address government's inappropriate actions.

Number 1381

REPRESENTATIVE OGG stated that when there is an ambiguity in law, the courts try to tighten it up and make it clear, which the legislature can do when it sees the need to clarify the court's discretion. He pointed to mandatory sentencing as an example, and noted the need to be careful when crafting such. Representative Ogg mentioned that in none of the cases cited in the backup material was there an example in which the appellate court said an injunction was granted and it was frivolous to begin with, [or] that the trial judge made an error at the inception. Representative Ogg requested that concrete examples be provided to the committee, preferably from the Ninth Circuit Court of Appeals or the Alaska Supreme Court. If there aren't any cases in Alaska in which the courts say that the injunction was granted on a frivolous basis, then there isn't a problem, he surmised; if there are such cases, the judges' [remarks] could be reviewed and the language could be crafted such that it does the most good.

REPRESENTATIVE GARA reminded the committee of a well-meaning district attorney who was recently before the committee presenting one side of a case saying it was outrageous. However, the district attorney left out the other side. Therefore, Representative Gara said, it would be helpful to have both sides of the story in the examples. He said he believes this is about snail darters and the Susitna Dam, in some sense. In such cases, the problem isn't the injunction process but rather the law that the court is enforcing.

REPRESENTATIVE GARA relayed his understanding that in the snail darter situation, there was a law that said snail darters are an endangered species. If there is a law specifying that, or supporting such a conclusion, then perhaps an injunction is warranted and maybe someone should revisit the law classifying the snail darter as an endangered species. With regard to the Susitna Dam, Representative Gara recalled that there was a vigorous debate with regard to whether the project was one in which the economic benefits exceeded its fisheries impact or

whether the fisheries impact exceed the economic benefits; again, the question relates to Alaska's law rather than the injunction process. Representative Gara predicted that in most of these cases, one would find examples in which courts are enforcing existing laws.

Number 1611

REPRESENTATIVE SAMUELS offered his belief that a dam project would involve groups that are philosophically opposed to the dam and that would look for a way to slow down the project. With regard to the suggestion that injunctions are part of the process, he opined that injunctions are part of the problem with the process.

CHAIR McGUIRE announced that she would hold SSHB 86 over until [the next meeting].

#### **ADJOURNMENT**

Number 1684

There being no further business before the committee, the House Judiciary Standing Committee meeting was adjourned at 5:17 p.m.