ALASKA STATE LEGISLATURE
HOUSE JUDICIARY STANDING COMMITTEE
May 7, 2003
1:40 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
Representative Max Gruenberg

MEMBERS ABSENT

All members present

COMMITTEE CALENDAR

HOUSE JOINT RESOLUTION NO. 26
Proposing amendments to the Constitution of the State of Alaska relating to and limiting appropriations from and inflation-proofing the Alaska permanent fund by establishing a percent of market value spending limit.

- MOVED CSHJR 26(JUD) OUT OF COMMITTEE

HOUSE BILL NO. 145
"An Act relating to public interest litigants and to attorney fees; and amending Rule 82, Alaska Rules of Civil Procedure."

- MOVED CSHB 145(JUD) OUT OF COMMITTEE

HOUSE BILL NO. 244
"An Act relating to the Code of Criminal Procedure; relating to defenses, affirmative defenses, and justifications to certain criminal acts; relating to rights of prisoners after arrest; relating to discovery, immunity from prosecution, notice of defenses, admissibility of certain evidence, and right to representation in criminal proceedings; relating to sentencing, probation, and discretionary parole; amending Rule 16, Alaska Rules of Criminal Procedure, and Rules 404, 412, 609, and 803, Alaska Rules of Evidence; and providing for an effective date."

- SCHEDULED BUT NOT HEARD

HOUSE JOINT RESOLUTION NO. 20
Proposing amendments to the Constitution of the State of Alaska repealing the prohibition on dedicated funds.

- SCHEDULED BUT NOT HEARD

HOUSE JOINT RESOLUTION NO. 4
Proposing an amendment to the Constitution of the State of Alaska relating to the duration of a regular session.

- SCHEDULED BUT NOT HEARD

HOUSE BILL NO. 157
"An Act eliminating the Alaska Public Offices Commission; transferring campaign, public official, and lobbying financial disclosure record-keeping duties to the division of elections; relating to reports, summaries, and documents regarding campaign, public official, and lobbying financial disclosure; providing for enforcement by the Department of Law; making conforming statutory amendments; and providing for an effective date."

- BILL HEARING POSTPONED

HOUSE JOINT RESOLUTION NO. 9
Proposing amendments to the Constitution of the State of Alaska relating to an appropriation limit and a spending limit.

- BILL HEARING POSTPONED

SPONSOR SUBSTITUTE FOR SENATE BILL NO. 41
"An Act relating to medical care and crimes relating to medical care, including medical care and crimes relating to the medical assistance program."

- BILL HEARING POSTPONED TO 5/10/03

CS FOR SENATE JOINT RESOLUTION NO. 5(STA)
Urging the President of the United States and the Congress to act to ensure that federal agencies do not retain records relating to lawful purchase or ownership of firearms gathered through the Brady Handgun Bill instant check system.

- BILL HEARING POSTPONED TO 5/10/03

PREVIOUS ACTION

BILL: HJR 26
SHORT TITLE:CONST. AM: PF APPROPS/INFLATION-PROOFING
SPONSOR(S): RLS BY REQUEST OF LEG BUDGET & AUDIT BY REQUEST

Jrn-Date	Jrn-Page		Action
04/17/03	1025	(H)	READ THE FIRST TIME - REFERRALS
04/17/03	1025	(H)	W&M, JUD, FIN
04/22/03		(H)	W&M AT 7:00 AM HOUSE FINANCE 519
04/22/03		(H)	Heard & Held MINUTE(W&M)
04/24/03		(H)	W&M AT 7:00 AM HOUSE FINANCE 519
04/24/03		(H)	Heard & Held MINUTE(W&M)
04/25/03		(H)	W&M AT 7:00 AM HOUSE FINANCE 519
04/25/03		(H)	Heard & Held MINUTE(W&M)
04/29/03		(H)	W&M AT 7:00 AM HOUSE FINANCE 519
04/29/03		(H)	Heard & Held -- Location Change -- MINUTE(W&M)
04/30/03		(H)	W&M AT 8:00 AM HOUSE FINANCE 519
04/30/03		(H)	Heard & Held MINUTE(W&M)
05/02/03		(H)	W&M AT 7:00 AM HOUSE FINANCE 519
05/02/03		(H)	Moved CSHJR 26(W&M) Out of Committee MINUTE(W&M)
05/02/03	1272	(H)	W&M RPT CS(W&M) NT 5DP 1DNP 1NR
05/02/03	1272	(H)	DP: HEINZE, MOSES, WILSON, HAWKER,
05/02/03	1272	(H)	WHITAKER; DNP: KOHRING; NR: GRUENBERG
05/02/03	1273	(H)	FN1: (GOV)
05/02/03	1273	(H)	FN2: ZERO(REV)
05/06/03		(H)	JUD AT 5:30 PM CAPITOL 120
05/06/03		(H)	-- Meeting Canceled --
05/07/03		(H)	JUD AT 1:00 PM CAPITOL 120

BILL: HB 145
SHORT TITLE:ATTY FEES: PUBLIC INTEREST LITIGANTS
SPONSOR(S): RLS BY REQUEST OF THE GOVERNOR

Jrn-Date	Jrn-Page		Action
03/03/03	0359	(H)	READ THE FIRST TIME - REFERRALS
03/03/03	0359	(H)	JUD, FIN
03/03/03	0359	(H)	FN1: ZERO(LAW)
03/03/03	0359	(H)	FN2: INDETERMINATE(ADM)
03/03/03	0359	(H)	GOVERNOR'S TRANSMITTAL LETTER
04/25/03		(H)	JUD AT 1:00 PM CAPITOL 120
04/25/03		(H)	Meeting Postponed to April 28
04/28/03		(H)	JUD AT 1:00 PM CAPITOL 120
04/28/03		(H)	Heard & Held MINUTE(JUD)
05/02/03		(H)	JUD AT 1:00 PM CAPITOL 120
05/02/03		(H)	Bill Hearing Postponed to 5/5
05/05/03		(H)	JUD AT 1:00 PM CAPITOL 120
05/05/03		(H)	<Bill Hearing Postponed>
05/06/03		(H)	JUD AT 5:30 PM CAPITOL 120
05/06/03		(H)	-- Meeting Canceled --
05/07/03		(H)	JUD AT 1:00 PM CAPITOL 120

WITNESS REGISTER

ROBERT D. STORER, Executive Director
Alaska Permanent Fund Corporation (APFC)
Department of Revenue (DOR)
Juneau, Alaska
POSITION STATEMENT: Presented HJR 26, which was sponsored by the House Rules Standing Committee by request of the Joint Committee on Legislative Budget and Audit by request, and responded to questions.

BOB BARTHOLOMEW, Chief Operating Officer
Alaska Permanent Fund Corporation (APFC)
Department of Revenue (DOR)
Juneau, Alaska
POSITION STATEMENT: Assisted with the presentation of HJR 26 and responded to questions.

LAURIE CHURCHILL
Nikiski, Alaska
POSITION STATEMENT: Testified in opposition to HJR 26.

CRAIG TILLERY, Assistant Attorney General

Environmental Section
Civil Division (Anchorage)
Department of Law (DOL)
Anchorage, Alaska
POSITION STATEMENT: During discussion of HB 145, responded to questions on behalf of the administration.

BENJAMIN BROWN
Legislative Assistant
Alaska State Chamber of Commerce (ASCC)
Juneau, Alaska
POSITION STATEMENT: Testified in support of HB 145 and responded to questions.

DORNE HAWXHURST
Anchorage, Alaska
POSITION STATEMENT: As a former executive director of Cordova District Fishermen United, testified in opposition to HB 145.

ALLEN JOSEPH
Association of Village Council Presidents (AVCP)
Bethel, Alaska
POSITION STATEMENT: Testified in opposition to HB 145 and responded to questions.

PAUL LAVERTY
Anchorage, Alaska
POSITION STATEMENT: Testified in opposition to HB 145.

RICH HEIG, General Manager
Greens Creek Mining Company;
President
Council of Alaska Producers
Juneau, Alaska
POSITION STATEMENT: Testified in support of HB 145 and responded to questions.

ROBERT B. BRIGGS, Staff Attorney
Disability Law Center of Alaska, Inc.
Juneau, Alaska
POSITION STATEMENT: During discussion of HB 145, provided comments on Version D and responded to questions.

ACTION NARRATIVE

TAPE 03-52, SIDE A
Number 0001

CHAIR LESIL McGUIRE called the House Judiciary Standing Committee meeting to order at 1:40 p.m. Representatives McGuire, Anderson, Ogg, and Samuels were present at the call to order. Representatives Holm, Gara, and Gruenberg arrived as the meeting was in progress.

HJR 26 - CONST. AM: PF APPROPS/INFLATION-PROOFING

[Contains brief mention of SJR 19 and HJR 3.]

Number 0048

CHAIR McGUIRE announced that the first order of business would be HOUSE JOINT RESOLUTION NO. 26, Proposing amendments to the Constitution of the State of Alaska relating to and limiting appropriations from and inflation-proofing the Alaska permanent fund by establishing a percent of market value spending limit. [Before the committee was CSHJR 26(W&M).]

Number 0075

ROBERT D. STORER, Executive Director, Alaska Permanent Fund Corporation (APFC), Department of Revenue (DOR), explained that after years of study, the proposed constitutional amendment - HJR 26 - has been requested by the Alaska Permanent Fund Corporation Board of Trustees ("the Board") to ensure that inflation-proofing is in the Alaska State Constitution so that all generations are treated equally. He indicated that inflation-proofing the Alaska permanent fund ("the fund") has been a key issue for the Board since its inception over 20 years ago. He went on to say:

> The way we propose to address inflation-proofing is by limiting the amount that can be appropriated in any given year to no more than 5 percent of the moving average of the fund. We call that "[percent] of market value" or "POMV." And what we are proposing is [that] that limit be based on the five-year moving average of the fund.

MR. STORER indicated that he next wished to speak to five key differences between [POMV] and the status quo, and that these differences have been outlined in a document provided in members' packets. He said:

The [percent] of market value, as I noted earlier, offers constitutional inflation-proofing protection for the entire fund. The status quo on inflation-proofing is by statute; it comes after the [permanent fund dividend (PFD)] and it inflation-proofs the principal only. To date, the legislature has always had the ability and has chosen to inflation-proof the fund, but that's not necessarily the case in the future. We're not predicting it; we just think memorializing it in the [Alaska State] Constitution is a very important issue.

The second item is ..., as I noted earlier, it's a spending limit: no more than 5 percent of the five-year moving average of the fund. By ... limiting the availability of only taking the real income - or the income in excess of inflation - the residual stays with the fund, and that's how you inflation-proof: you're not taking all of the income, only the real income - or the income in excess of inflation. As it stands today, the status quo, the entire earnings reserve may be appropriated.

Number 0321

And I can give you examples where, over the last four years, up to 25 percent of the fund was represented by the earnings reserve, so one could take - appropriate - 25 percent of the fund in the heavy days of the bull market. Or there's been a couple [of] times this year in the, hopefully, ... late stages of a bear market where nothing was available. So think about that volatility: you can appropriate 25 percent or zero, depending on what happens. That's how it now stands.

Markets are always volatile. You talk about during volatile markets - and I've been doing this for a long time and I haven't seen it yet where there wasn't a volatile market - it's a magnitude issue, and we've been in ... very volatile markets. The POMV approach, or what we're suggesting, actually creates greater stability than the current methodology. We have had times where the dividend alone has been in excess of 5 percent or, over the next few years, it'll be 3 percent or potentially zero. As I noted yesterday, there's still a 10-percent chance that there could be no dividend [from] the permanent fund this year. So

you get greater stability and greater predictability by doing this methodology.

MR. STORER continued:

Item four. ... When the permanent fund was created 26-27 years ago, it was a world of bonds only, and bonds are very stable; you buy them for income producing, you get the interest payment every year. And so basing your methodology, as we do now, on realized income or the realized cash flow of the fund probably made a lot of sense. But that was a different world. The fund currently is [composed] of about 50 percent in the equity markets; ... you buy more volatility on a year-to-year [basis], but you earn a higher rate of return by accepting that volatility. And so ... the current methodology did make sense 26 years ago, but we think less so right now.

Number 0510

We've spoken a lot about why 5 percent; we've stated that we believe the limit, if you will, of 5 percent is on the high end of doable. It doesn't mean that one has to appropriate all the 5 percent in any given year, but we want to limit [it] up to 5 percent. But we've looked at 76 years of data; we know that our asset allocation and our statutes will allow us to achieve, we believe, a 5 percent real rate of return over time. We're very comfortable in making that statement. So, it's consistent with our asset allocation and the long-term philosophy of a permanent fund.

That stability really goes to predictability. And there is greater stability in the payout methodology of using the moving average of a fund versus the current one. Year to year you don't know - we don't know - how much would be available until ... the end of the day [on] June 30th. But if you accept our methodology as appropriate, you will have less volatility in the payout and you will know with precision what is available in any given year. That, Madame Chair, is very briefly why we think moving to the constitutional amendment, memorializing the spending limit, is appropriate.

Number 0616

BOB BARTHOLOMEW, Chief Operating Officer, Alaska Permanent Fund Corporation (APFC), Department of Revenue (DOR), turned attention to CSHJR 26(W&M), and noted that the House Special Committee on Ways and Means, along with Legislative Legal and Research Services, outside counsel to the APFC, and [a representative from] the attorney general's office, spent 4-5 hours working on the technical aspects of the bill's language. Therefore, the resulting language in CSHJR 26(W&M) was what all parties involved felt was the best way to move forward. He offered:

> In the title, it's really just trying to make a statement of ... why we're amending the [Alaska State] Constitution and that [we] basically want to limit the appropriations, on a fiscal-year basis, that can come out of the permanent fund. And the reason we're limiting the appropriations is to assure the real value of the fund grows over time and that all we're spending is the value in excess of inflation on a year-to-year basis so you protect it.
>
> On page 1, line 10, is the first amendment to the [Alaska State] constitution. And what that's doing is just referring to a new [subsection] (b) that we're going to add to the constitution .... [On] Line 11, we're deleting the word "principal" from the constitution. And that's been something that's been a longstanding -- that people have understood that the permanent fund, the principal, could not be spent and the income could. The reason the trustees ... propose removing that, and that came after quite a lot of debate at the board meetings, is that the word "principal" -- we believe you can protect the fund, as explained on page 2, by the spending limit.
>
> And the benefit of removing the word "principal" is basically a policy decision of balancing the benefit of assuring that each year, there's going to be a distribution, versus the risk that in the short term you might dip into the fund a little bit if you have ... down years of income. So it's a balancing, and they believed it's in the best interest of the permanent fund, and the investment strategy, if we know, on a year-to-year basis, how much is going to come out of the fund and that it's limited and

predictable. Then that helps their investments; they know what to have invested, they know when they're going to have to raise money ... for the dividend or for general government. So that's a significant issue that's had a lot of debate.

Number 0803

MR. BARTHOLOMEW continued:

And then on lines 13 and 14, we're deleting the language from the [Alaska State] Constitution that says all income from the permanent fund will go to the general fund except [as] provided by law. And the legislature, since 1982, has taken advantage of the "provided by law", and they've directed that all earnings would go to the earnings reserve in the permanent fund. By deleting the two sentences, what in effect happens is, all income stays in the permanent fund, subject to the 5 percent appropriation. So ... it's no longer necessary to direct the income.

On page 2 of the resolution, starting on line 2, is a fairly long sentence that does two things. It states how we intend to protect the permanent fund - ... the goal is to protect the real value over time - and that it's going to be limited to a ... 5-percent annual appropriation of the five-year average. But lines 5 and 6 are a little hard to read at first go because it talks about [that] we're going to use the market values on June 30th for the first five of the six fiscal years preceding the year that you want to spend the money.

And ... that language is in there ... so that when the legislature [comes] into session in January -- so an example this year: you've come into town, you're working on the [fiscal year (FY)] 04 budget; by looking back an extra year, it allows you to know [in] January exactly what's available from the permanent fund based on the spending limit. So you'll know, as soon as [you] start working on the budget, how much is available for either dividends or government purposes, and you don't have to ask for estimates, you don't have to ask for projections. So, ... what we'd be doing is: the FY 04 spending limit would have been

based on [the] year ended June 30, 2002. And that's the main intent; [it] was so you knew exactly what's available. It doesn't have to be appropriated, but there's certainty to the amount.

MR. BARTHOLOMEW concluded:

And then the last addition is a temporary item, and that's Section 3. And that's a transitional item which won't become a permanent part of the [Alaska State] Constitution. It just [ensures] that at the date the voters pass this, ... all the earnings of the permanent fund stay in the permanent fund - there's no debate about whether it's general fund money or other funds - it's part of the permanent fund, to be protected. And then Section 4 states that this would have to go to a general election so that all the voters in Alaska could weigh in on this change. And that would happen in November 2004, and if that was successful, then it'd be approximately early January 2005 that the change would take effect.

Number 1018

LAURIE CHURCHILL stated that she is opposed to HJR 26. She went on to say:

The PFD's appropriations should not be limited. I believe the current funding formula should be left alone. Alaska is experiencing a decline in North Slope oil production; we're currently at 50 percent of what the North Slope used to produce in the 1980s. This decline in oil production means less money is being placed into the permanent fund dividend. I'm very concerned that the Twenty-Third [Alaska State Legislature] has introduced 596 bills and resolutions, and out of these 596 resolutions and bills, ... 17 pieces of PFD legislation have been introduced. And in my personal opinion, only two of these bills are in favor of the citizens of Alaska, and I believe that SJR 19 and HJR 3 are the only ones that favor the citizens of Alaska. And I'm just asking that you please vote no on this ... HJR 26.

CHAIR McGUIRE, after determining that no one else wished to testify, closed public testimony on HJR 26.

REPRESENTATIVE GARA said he had a question about the mechanics of "this proposal." He elaborated:

> Under POMV, we'll end up taking 5 percent of the value of the permanent fund every year - I hope that a large part of that will go to a dividend .... But how does this work? The concept is that we're going to keep the value of the permanent fund up with inflation; in addition, we're going to stick a certain percentage of our oil royalties into the permanent fund so it can grow and stay ahead of inflation. I understand that part.
>
> But tell me how the 5 percent payout will keep us up with inflation in, for example, a very high-inflation year and a high-earnings year .... And then how it will do the same thing in a very low-earnings year ... and low inflation. So there are four factors that you'll face in the real world. Some years there will be high inflation; some years there will be low inflation; some years there will be great stock market and real estate asset returns; some years there will be terrible stock market and real estate asset returns - maybe negative ones. Can you tell me what happens ... in relation to keeping the value of the fund up with inflation under those four different circumstances?

Number 1199

MR. STORER remarked that in any given year, as well as in "short periods," that's a very real issue. He elaborated:

> If we looked over the last three years, we did not keep up with inflation in terms of the value of the fund. However, we did continue to inflation-proof the principal of the fund because of the discipline that's been invoked during the good years. In short periods of time - and I going to define short as three, even five years - you may not achieve the 5-percent real rate of return. Or you will, if you were to look at 1998, ... challenge why 5 percent; I don't remember exactly, but my guess is we probably earned 10- to 12-percent real rate of return over the three to five years prior to that.

It's the discipline in the longer-term time horizon, through the good and the bad times, [that] is what really matters. A lot of people focus on the bear-market side of the equation and what happens in the down years. I think one of the [important aspects] of this is not getting caught up in what I will call the mania of a bull market and think you can overspend. It really is important to create that discipline in the good and bad times. And that will ensure the maintaining [of] the purchasing power ... over time, for all generations.

I give an example of least one friend of mine who runs an endowment fund in a major university, and they got caught up in the bull market, and the university started a large capital project well in excess of what I'll call, sort of theoretically, the 5 percent; now they're not able to sustain those kinds of returns, but they have commitments, based on the heavy bull market, that they must continue to make and overpay. This creates the discipline in the good and bad years that allows you to achieve the goal. But in short periods of time, anything you suggested can happen where we could earn well in excess of 5 percent or well below that 5-percent real rate of return. If you think about it, ... [in] any given year there's so much volatility that one could not predict that ... kind of precision in even [a] one- to three-year time horizon.

Number 1325

REPRESENTATIVE GARA said that that explanation deals with what happens when the stock market does well and what happens when it does poorly, but added that he'd like a more detailed explanation regarding what would happen in years with high inflation and in years with low inflation. He elaborated:

Let's assume we have an 8-percent return in the stock market and on our real estate holdings in a particular year. What happens ... to the value of the permanent fund if, let's say, inflation is 13 percent that year, and then what happens if inflation is 2 percent that year? (Indisc. - coughing) assume an average stock market and real estate asset return, but wildly varying inflation amounts for the year.

MR. STORER replied:

> You're going to run into problems in the short term. Could I use a real-life example, if I may? Let's go back to the late '70s, where inflation was quite high and continued higher. ... So, you wrap that emotion into it and, in fact, during probably the five-year period prior to that, you did have barely positive returns on bonds and I think some - absent '73-'74 - ... positive returns on equities, but you were not keeping up with inflation. So we would not have kept up for probably about a four- or five-year period, and you'd say this isn't working.
>
> What happened around '82 is, ... we were still in a high-interest-rate environment, and you keep fighting a war that you've won. In that case, inflation was descending and stayed low for what is now 15 years. We were just looking ... at our early returns, and in the early '80s, there was one year where the permanent fund only ... basically owned [a] bond portfolio and we returned 25 percent. And I don't remember, but my guess is inflation was below 6 percent. And so, if you looked even in that five-year period, if ... our asset allocation existed in that rising, horrible, high-inflationary environment, [we would have not achieved] the goal.
>
> If [we'd] maintained that discipline, though, as we came out of that environment, and at least for 15 years and probably longer [when the] inflation war was won, then I think we've achieved an excess of a 6-percent real rate of return ever since then. So, in short periods, the answer - and I'm defining a short period in that case of five years - we would not have achieved inflation-proofing. If you stayed the course and had that discipline, you would have been successful.

Number 1463

MR. STORER, in response to a question, replied that according to two studies, about 70 percent of endowments and foundations use some sort of payout methodology that is formula driven based on a percentage of market value. Most use a three-year time horizon, but many use a five-year time horizon; the longer the moving average, the greater the stability from year to year -

ultimately the payout is the same. He offered that the proposal before the committee, the 5-percent limit, is not inconsistent with the aforementioned studies. More important, however, is that it would be consistent with the fund's asset allocation and objectives.

REPRESENTATIVE SAMUELS, on the issue of 5 percent, said, "Actually it will be less, as the average goes; that's what I'm reading from the numbers."

MR. STORER replied:

> That is correct. What happens is, you look at the payout two ways. It's 5 percent of a five-year moving average, and in a perfect world the fund is growing every year, so that 5 percent is a series of five smaller and larger. Usually they take the snap shot, then, based on the year-end value of the end point. And if you looked at that 5-percent payout, and just assumed you earned "8 nominal, 5 real," it equates to more of a 4.6-4.7 payout versus the ending value of that time period.

MR. BARTHOLOMEW noted that included in member's packets is a schedule that shows, "going forward, if the permanent fund achieved its median 8-percent return, what's the true effective rate of taking 5 percent of a five-year average," adding that it's really 4.6 percent or 4.7 percent.

REPRESENTATIVE SAMUELS asked whether any other of the 30 percent of the funds referred to in the aforementioned studies "operate the way that we do," wherein it is not known what "you're going to have in the earnings."

MR. STORER said he could not say whether any of those funds are based on realized income, but surmised that some do shorter time horizons and are, he opined, suffering from the bigger problems brought about by living day to day.

Number 1632

REPRESENTATIVE GRUENBERG remarked that HJR 26 is a very thoughtful piece of legislation and contains many dimensions. He relayed that many have said to him that HJR 26 is a good piece of legislation because it adopts an endowment principal. However, he added, all of the endowments of which he is aware, for example, university-type endowments, are different from the

permanent fund in one key respect: those other endowments generally only endow operating expenditures, rather than both operating expenditures and capital expenditures.

REPRESENTATIVE GRUENBERG referred to the four different variables mentioned earlier: high inflation, low inflation, good stock market, and bad stock market. He said:

> I would like to focus on the high-inflation model, and the fact that "this" is endowing capital expenditures as well as operating expenditures. I could foresee a circumstance [of] high inflation where a legislature might say, "We foresee a period of high inflation coming up; therefore, what we want to do is buy our capital expenditures now, while we can do so relatively cheaply, because a road will cost a lot more next year and more even than that the year after, so what we're going to do is put our money into assets that will float with the inflationary rate." And because you have a "governor" or a cap on the amount that can be appropriated in this bill, it has a weakness because it won't let the legislature deal with high inflationary rates by investing in a capital budget now. How do you answer that problem?

MR. STORER replied:

> The one thing that we've always said is, our perspective is inflation-proofing and ensuring that all generations are treated equally; ... the trustees believe it is not within their providence [to say] ... how the money is spent or appropriated, and so we've stayed away from that issue. ... There is a board of trustees; we have a charge of -- fiduciary responsibility is an important [term] ....

REPRESENTATIVE GRUENBERG pointed out, however, that the issue of how the legislature is to work with the proposed changes, should they be adopted, is something that does need to be discussed now. "We have to recognize and deal with that factual possibility," he added.

Number 1865

MR. BARTHOLOMEW surmised that Representative Gruenberg's example is that of a future legislature believing that it is in the state's best interest to spend more, in the short term, on

capital expenditures, because of high inflation. Mr. Bartholomew offered:

> The legislature does have numerous tools; [for example] issuing debt. So you would cap the distribution from the permanent fund, but ... it could fund debt. If you wanted to issue debt to take advantage of needing a large amount of money, you would have a stream of money from the permanent fund that you could commit to debt retirement. So that's just an angle of where you could ... issue debt and say, for the next five years, "I want to use 'X' amount of the 5 percent to retire that debt." So that's just an example of where, at least knowing you have a steady stream, ... we're not going to have any problems issuing debt. And I'm not saying you directly link them, but that's just an option.

REPRESENTATIVE OGG, after remarking that language in the [Alaska State] Constitution should be clear and not ambiguous, indicated that he has concerns about the language used in proposed subsection (b), which, he surmised, defines how "things" come out of the permanent fund. He posited that the first clause of subsection (b) is really just intent language and therefore not mandatory. He asked that someone explain to him why this intent language ought to be included in the constitution.

MR. BARTHOLOMEW remarked that the discussion in the House Special Committee on Ways and Means centered on that very issue. He relayed that some people favored simplifying subsection (b) to say that appropriations will be limited to 5 percent of the five-year average "with the look-back provision." Others, however, felt that because HJR 26 is proposing to remove the word "principal", it would be helpful if the language in subsection (b) contained an explanatory preface, particularly since the proposed changes would be going before the voters [if the bill passes].

Number 2057

REPRESENTATIVE OGG argued, however, that although the first clause in subsection (b) refers to protecting the fund from the effects of inflation, it does not mention protecting the fund from the effects of deflation. In addition, he noted, it uses the terms "real value" and "over the long term", and although these may be terms of art in the accounting and investment fields, he is not aware that they currently have any legal

meaning; therefore, he would like to know how these terms would be defined, for example, during an argument before the supreme court.

MR. BARTHOLOMEW indicated that there was discussion in the House Special Committee on Ways and Means regarding the aforementioned language's potential to create an open field for legal challenges. He mentioned, though, that there is other legislation going through the process that outlines the implementation of this resolution's provisions, and that the Senate has discussed using that implementing language as a vehicle for statutorily defining the aforementioned terms and statutorily outlining further the criteria by which the legislature determines whether to take the full 5 percent. He mentioned, additionally, regarding a definition of "long term", that the U.S. Department of the Treasury considers ten-year notes to be long-term securities.

REPRESENTATIVE OGG mentioned that this only indicates to him that the terms he has concern with do not already have their own legal definition that scholars or constitutional attorneys could point to and say that they know what those terms mean. He observed that even if this legislature does like the idea of going along with what the Treasury currently considers to be long term, that decision won't be binding on future legislatures that might decide they like some other definition better. He remarked that he is not comfortable with approaching [language destined for] the constitution in this manner.

MR. BARTHOLOMEW argued that the "financial and economic definitions" for the aforementioned terms would be sufficient. With regard to the term "real value", he explained that this means maintaining purchasing power even through the effects of inflation. He relayed that to the APFC, "long term" means 10 years. He pointed to existing constitutional language, which says, "unless otherwise provided by law", as proof that it is usual to not try to define everything in the constitution.

Number 2298

REPRESENTATIVE OGG asked what impact HJR 26 would have today if it had been in effect 3 years ago.

MR. STORER offered his belief that "we'd be about the same place." He elaborated:

> We went through a bull market where we were earning extraordinarily high real rates of return through about March of about 2000, and then we started earning negative real rates of return because of the stock market. So, the answer [to] what is long term, ... that is a term of art; I think it's sort of ten years or longer [as] a decent benchmark .... I'd be surprised if we didn't earn a 5-percent real rate of return, looking back over the last 10 years.

MR. BARTHOLOMEW added that the APFC can show that over the last 10 years, it has earned in excess of a 5-percent real [rate of return]. And because the state, for the last three or five years, has not spent more than 5 percent of the fund's market value and because the fund has earned more than 5 percent, both the state and the fund would be in the exact same financial position they are in today. He noted that under the current funding formulas, the legislature could have spent more than 5 percent during those years, but didn't.

REPRESENTATIVE OGG remarked, however:

> My question was trying to focus, not on so much the 5-percent part of spending it, but was on the words "real value" and "long term" and how they would apply in that particular situation. And "real value" -- because you're running through a period of (indisc.) great growth, the fund itself increases in value to like $29 billion. Is that a "real value" any more? And then it drops [to $23 billion]. ... Where does "real value" fit in there at that point in time?

TAPE 03-52, SIDE B
Number 2386

MR. STORER said that he is comfortable saying that the APFC achieved "that goal, that objective, during that period." The value of the fund was just slightly less than $29 [billion] in [the first part of] 2000, and the subsequent drop in value occurred in three ways: payouts of over $2 billion in dividends; subtractions from the earnings reserve to be put into the principal; and the market drop. He added, "Over the last -- from that period, the first fiscal year (indisc.) a negative 3.25; second fiscal year, negative 2.25; and I'm delighted to say we're slightly positive this fiscal year to date as of last night." Therefore, he remarked, the drop in the fund's value was not all due to the market; in fact, he added, "we were able

to inflation-proof and meet the dividend distribution during that three-year period as well."

MR. BARTHOLOMEW added:

> When it reached $29 billion, and the NASDAQ marked had just finished a year of returning 80 percent, there was a lot of [questions] of was that real. And people that bought it at that time have learned it wasn't. And so, the principal, what was protected against inflation, back then, was $21 billion. So we had $8 billion above principal, and I think the market has told us it wasn't all real. The $21 billion, luckily, is still real. ... If the market corrected another year, the value of the fund would go below that, and so "real" is trying to maintain that principal ... - the purchasing power of that principal. So, as we move forward, that's what's real to us. And we're going to have up years again, and the fund's going to grow, but it may grow faster than the sustainable markets, and we're going to come back down or ... vice versa - it could go down and then up.

REPRESENTATIVE OGG remarked that the foregoing explanation just begs more questions. That's the problem with "real value", he said, because according to his interpretation of that explanation, "real value" appears to be tied to the NASDAQ and whatever its value is. Or is it the "real value" with respect to the value of Alaska's economy or the cost of real estate? The purchasing power with regard to real estate in Alaska has not decreased from $29 billion down to $23 billion, he observed. He reiterated that he has concerns with how the terms "real value" and "long term" will be interpreted. Why confuse people with language like that?

MR. STORER mentioned that he tends to define "real value", in terms of purchasing power, by using a Consumer Price Index (CPI) as the criteria regarding inflation.

Number 2231

CHAIR McGUIRE indicated that she could see Representative Ogg's point regarding the ambiguity of the aforementioned terms. However, although such terms might typically be seen in the intent section of "regular" bills, retaining the first clause of the proposed subsection (b) will clarify for the voters the intent of the proposed changes to the constitution.

REPRESENTATIVE GARA said:

> My big fear is that we're going to do something to jeopardize the permanent fund, and I know that POMV is a careful attempt to not do that. But it still worries me. If there's one great decision we've ever made in this state, I believe it's the creation of the permanent fund. But I worry about some of these 10-year horizons where, to an economist, 10 years is a short amount of time, [but] to legislators, to school children, 10 years is an incredibly meaningful part of their life.
>
> And so I'm worried that if we take 5 percent of the value of the permanent fund out every year, and we have one of these 15-year difficult periods for the stock market, though that's looked at as a blip on the screen by economists, that's a whole generation of school children here. And I'm wondering whether it is wise to spend upwards of 5 percent of the value of the permanent fund when we might have a 15-year period of economic downturns.

REPRESENTATIVE GARA concluded:

> So, I guess the first question is, can you tell me ... how long have economic downturns - and I'm talking about economic downturns which mean stock market downturns or level periods - how long have some of these periods lasted in the past? What kind of periods are we facing where we might see declines in the value of the permanent fund plus 5 percent withdrawals from the value of the permanent fund? In order for me know to how much we might possibly damage the permanent fund, under a proposal like this, I guess I'd like to know what those timeframes have been historically.

Number 2105

MR. STORER replied:

> There are more up markets than down markets, ... and I'm talking about the stock market here, which is really the driver of higher rates of return. ... And so ... in my mind, that 5 percent is a limit; one does

not have to take 5 percent, ... but it creates a discipline on the upside. ... Depending on how you want to define the Depression, ... there were four significant downturns.

The Depression had a several-year downturn. And then the stock market went up 50 percent, and then it had a few more years of downturn, and then the stock market went up with few down years after that. After that, prior to what we're experiencing right now, the worst years were in 1973 and 1974, and nobody wanted to own stock in 1975. And ... one could say that was the beginning of this long run that we've just experienced. Now we have - now, which has gone on for ... almost exactly three years - this bear market. ...

I found there were 14 observations where there was a negative year followed by a positive year. The average rate of return, when it turned positive, was up 28 percent; that was with a high of 50 percent, and that was in the middle of the Depression, to a low of up 4 percent - and I forget when that was - I think it might have been in the mid-'70s. And so, ... typically, if you accept that data, and I do, ... when you come out of the bear market, the stock market will go up rather dramatically because of the depressed prices in the stock market.

Number 2001

MR. STORER continued:

I'm not prepared to suggest that will happen in this time, because we went to such a high bubble preceding this - or high valuation - that we're more back into normal valuation; so I'm not about to suggest that this market will turn around and we'll achieve a 28 percent or anything like that. So, ... [there were] four real periods of prolonged bear markets. Two periods ... - you could break it down - were in the Depression, when we were in a deflationary period. One was ... in the middle of the oil crisis and commodity shortages and inflation and sort of in that "guns and butter" era ... at the end of the Vietnam war. And then the one we're going through right now, which was preceded by an extraordinary bull market. But most of the time, the stock markets have gone up.

REPRESENTATIVE GARA sought to clarify his question:

> There have been periods of time where the stock market hits a peak. It goes down and it doesn't reach that peak again for five years, ten years, I think even sometimes longer than that. Those are the long periods of drought that I'm wondering about. What have been the longest periods of time where ... [the] stock market has hit its peak and then not reached that peak again - the longest period between those. Because that's the period I'm worried about, is we hit a high moment for the permanent fund, we're the legislators for the next 15 years, [but] we're spending 5 percent of the value of the permanent fund in a long period where we never get back to the peak of the stock market.

MR. STORER replied:

> The two periods that were prolonged, I can't remember the years, but one was during the Depression, where I guess it was 1929 was a peak and I ... think it was 10 or 15 years or maybe longer that we came back up to that era in terms of valuation of the stock market. The other, if I remember correctly, in the late '60s - either '66 or '68 - the "Dow" hit 1,000, [and] it may have taken 10 years for the Dow to hit 1,000 again. I'm offering extremes, but those extremes did happen.

Number 1899

> That is also, keep in mind, why we diversify our portfolios. The permanent fund is only about half invested in equities. Our bond portfolios and our real estate portfolios have been achieving double-digit returns during this last three years since ... That's why you don't want to get caught up in the mania, and the permanent fund did not, in terms of thinking you're supposed to put all your money in the stock market, and we've benefited from that in the bear market.
>
> While our returns have been negative, they've been considerably less than our peer group out there; we've been achieving very high comparative returns. So ... you want to diversify ... in a manner that helps you

achieve you're goals, both in your long-term objectives and your risk. That's a risk; we look at that modeling every day.

REPRESENTATIVE GARA brought attention to Amendment 1, a handwritten amendment which, with original punctuation, read:

At p.2 line 6 after "year."
c) the Permanent fund Dividend shall equal at least the greater of: 1) the Dividend paid in 2003 or 2004, adjusted for inflation, or; 2) 50% of the amount stated in section (b) of this section, which ever is greater. The Legislature may issue a Dividend greater than these amounts in any year.
d) Concetual [sic] - Sevability [sic] of section (c) if it results in a ruling, that causes the Permanent funds earnings to be taxable by the U.S. Internal Revenue Service.

REPRESENTATIVE GARA, before offering Amendment 1, pointed out that the line that contains "or; 2) 50%" should instead contain "or; 2) a per recipient share of 50%", and that subsection (d) contains two misspelled words that should read "conceptual" and "severability".

Number 1784

REPRESENTATIVE GARA made a motion to adopt Amendment 1 [text provided previously].

Number 1782

CHAIR McGUIRE objected.

REPRESENTATIVE GARA offered that Amendment 1 would constitutionalize the dividend. He said:

My worry is that if we adopt this constitutional amendment, it might be seen by some as a first step towards getting rid of the dividend itself. And so if we're going to authorize the legislature to spend any of the permanent fund, I think this is the time to make sure that we enshrine the dividend in the [Alaska State] Constitution as well. So, this amendment enshrines the dividend in the constitution so the legislature can't get rid of the dividend program.

It also sets a minimum amount to be paid for the dividend. So this vote will happen in November of 2004 if this resolution passes; I don't want the dividend to go down lower [than] the most recent dividend before the vote comes along. So the proposal is that the dividend shall never be any lower than the greater of the 2003 or 2004 dividend; the dividend shall never be lower than a per recipient share of half of the money that we take out of the permanent fund.

And just so members of the committee know, I spoke to [Mr.] Bartholomew; if projections work out well, it seems like by 2004 the dividend might be about $900, [and] it seems this year, if we have a dividend, it might be about $1100. If we pass this amendment, and we split the use of this 5 percent fifty-fifty between state government and the dividend, at fifty-fifty, in 2004, that would be something close to a $900 dividend. ... So in that year, for example, under this proposal, the dividend would be higher; it would be no lower than the prior year's dividend.

But the concept is that we should enshrine the dividend, we should make sure that it doesn't keep going down, and we should also give the legislature the flexibility to issue a larger dividend beyond that. But I want to set minimums. I'm just worried that we're going to start losing the dividend. The dividend, I think, does a very good job of sharing the wealth among Alaskans; there are very few programs anywhere where people of all walks of life share in wealth.

And I think it's become something that our economy relies upon; I think I've seen [numbers] that show the drastic affects upon this economy if we were to take the dividend out of the economy. That's not to mention the obvious uses that many people use for the dividend, which is ... payment of prescription drugs, [and] payment for food and shelter and clothing. So, that's the idea.

Number 1653

REPRESENTATIVE GARA continued:

> There's a subsection (d), which addresses a legal issue; there is some argument back and forth that if we constitutionalize the dividend, that somehow the IRS [Internal Revenue Service] might start taxing permanent fund earnings. I don't believe that that would happen, I've looked at the arguments myself, I'm not a scholar on the issue though, and so what subsection (d) would do, and this is a conceptual part of this amendment, ... [is] include a severability clause that said if constitutionalizing the dividend caused the IRS to start taxing the permanent fund, then we would not go that route because we wouldn't want the permanent fund to be taxed.
>
> So that would make this [subsection] severable. And there have been previous versions of a POMV amendment that have included a severability clause. So that's just conceptual for now, but when the amendment passes, then we'll draft the amendment's language, as we'll need to do.

REPRESENTATIVE SAMUELS said that he agrees with Representative Gara regarding the importance of the dividend on the economy, but does not agree that HJR 26 gives the legislature any more authorization to appropriate money from the earnings of the fund than it already has. "We can do that right now," he added. He indicated a reluctance to vary from the framework that the Board has proposed. He opined that Amendment 1 would muddy the water, would be divisive, and would do the people of Alaska a disservice.

Number 1444

A roll call vote was taken. Representative Gara voted in favor of Amendment 1. Representatives Ogg, Samuels, Gruenberg, Anderson, and McGuire voted against it. Therefore, Amendment 1 failed by a vote of 1-5.

Number 1431

REPRESENTATIVE GRUENBERG made a motion to adopt Amendment 2, to delete from page 2, lines 2-3, "To protect the permanent fund from the effects of inflation and thereby assure that the real value of the permanent fund will be preserved over the long term,"; and on page 2, line 4, capitalize the "a" in "appropriations". Thus subsection (b) would begin with "(b)

Appropriations". He noted that the House Special Committee on Ways and Means had a lot of discussion regarding this language.

Number 1412

REPRESENTATIVE SAMUELS objected for the purpose of discussion.

REPRESENTATIVE GRUENBERG said that although he originally liked the language he is proposing to delete, he has since changed his mind and would now prefer to have it removed. He elaborated:

> One reason is that there may be other reasons why appropriations should not exceed 5 percent. The protection of the ... permanent fund ... from the effects of inflation may only be one reason. I'm going to give you another reason that's just as valid, and that is because the limitation on appropriations is a spending limit, and that in itself is another very good reason for having this here. So that's my first reason for wanting to delete it. ...
>
> The second reason is because we had a lot of debate in [House Special Committee on Ways and Means] on whether this is mandatory language or merely descriptive, and it caused a lot of legal discussion, and I think the less legal discussion we have, and ambiguity in a constitutional provision, the better.
>
> And the third reason, independent reason, is because there are very few constitutional provisions that have descriptive language in them. And they asked this question of me ..., "Is there any other place in the constitution with descriptive language?" And the only place I could think of was our "right to bear arms" amendment, where originally it said the well regulated [Militia] being necessary, et cetera, et cetera, and that caused a lot of problems with that amendment, and we had to amend it to assure a private right. So it really caused ... litigation in another state and caused us to have to amend the constitution. And it's just much cleaner not to have that language in. And so for those three reasons, I would move to delete ....

CHAIR McGUIRE said that she tended to agree for those same reasons, as well as for the reasons brought forth by Representative Ogg. She mentioned that the only reason for

keeping it in would be to assist the voters in interpreting the remainder of subsection (b)

Number 1259

REPRESENTATIVE GRUENBERG noted that the language he is proposing to delete could be inserted in the voter pamphlet, which the courts typically look to as part of legislative history.

MR. BARTHOLOMEW, after noting that the Board would be comfortable with either keeping the aforementioned language or deleting it, suggested that the title of HJR 26 should not be changed, even though it, too, contains some of the same language, since the proposed constitutional amendment will be placed, word for word, in the voter pamphlet.

REPRESENTATIVE GRUENBERG said he had no objection to keeping the title the same.

CHAIR McGUIRE, for the benefit of Representative Holm, who had just joined the meeting, detailed the changes being proposed by Amendment 2.

REPRESENTATIVE SAMUELS [withdrew] his objection to Amendment 2.

Number 1123

REPRESENTATIVE GARA stated that he objected to Amendment 2.

REPRESENTATIVE GARA, regarding failed Amendment 1, mentioned to Representative Holm that "nobody would let me constitutionalize the dividend."

REPRESENTATIVE HOLM indicated that had he been present, he, too, would have voted against Amendment 1.

REPRESENTATIVE GARA, speaking to his objection to Amendment 2, said:

> I understand the argument of the folks who want this out of the constitutional language. I like it. I think courts will often look at legislative intent [and] they'll look at constitutional intent. I think it's fine to have intent language in a statute or in the constitution as long as it doesn't mess up the wording of the statute or constitution. The mechanics of this provision will be that 5 percent of the value

of the permanent fund can be spent. It's clear. ... So I don't see that the intent, the statement that we want to protect the permanent fund from inflation, harms this at all.

... I can't envision a circumstance where it would interfere with the operation of this constitutional amendment, and I think it is nice for the public to have an explanatory statement in the constitution. I think we do that with our "free speech" clause; I think we do that with a number of other constitutional provisions where we have extra language that the courts use for intent purposes. But at a minimum this, I think, helps the public also understand that they have the right to have the permanent fund, over the long term, protected from inflation. So, that's my objection.

CHAIR McGUIRE said that this was a tough issue for her because she agrees with both sides of the argument. She remarked that she wants HJR 26 to succeed, both "in its intent" and with the electorate.

REPRESENTATIVE HOLM noted that he could see both sides of the argument, but indicated that he agrees with the point that over time, the constitution could become quite cumbersome because of the addition of intent language. He also suggested the possibility that the current intent language may no longer apply in the future.

The committee took an at-ease from 3:04 p.m. to 3:05 p.m.

Number 0891

REPRESENTATIVE OGG asked whether the language currently in subsection (b) would prohibit funds from being appropriated for reasons other than the protection of the permanent fund from the effects of inflation.

MR. BARTHOLOMEW replied:

It's my understanding that there's no prohibition to taking money out of the permanent fund up to the level of 5 percent. So, the constitutional amendment would say, up to 5 percent, it's the power of appropriation that removes it and there's no stipulation [as] to why you would take it out or whether you could or

couldn't. It's up to 5 [percent]. It would prohibit you, for any reason, above -- you could not go above that 5 [percent]. That's a hard and fast limit.

REPRESENTATIVE OGG pointed out, however, that the first clause of subsection (b) seemingly specifies "To protect" as the particular purpose for which funds may be appropriated. He asked whether money could be taken out of the permanent fund without [subsection] (b).

MR. BARTHOLOMEW explained that since Section 1 of HJR 26 removes the word "principal" from the constitution, lacking subsection (b), no money could be removed from the permanent fund because the constitution would then say that the permanent fund could only be used for income-producing [investments]. Thus the permanent fund would grow forever.

REPRESENTATIVE SAMUELS suggested, then, that by not deleting the first clause of subsection (b), the legislature could appropriate money beyond the 5-percent limit if the goal of protecting the permanent fund from the effects of inflation is reached.

REPRESENTATIVE GRUENBERG added that although he was not sure, that might actually be the case. He suggested that the legislature really doesn't want to cause litigation over this issue.

CHAIR McGUIRE agreed.

Number 0635

A roll call vote was taken. Representatives Holm, Samuels, Gruenberg, Ogg, and McGuire voted in favor of Amendment 2. Representative Gara voted against it. Therefore, Amendment 2 was adopted by a vote of 5-1.

Number 0574

REPRESENTATIVE SAMUELS moved to report CSHJR 26(W&M), as amended, out of committee with individual recommendations and the accompanying fiscal notes. There being no objection, CSHJR 26(JUD) was reported from the House Judiciary Standing Committee.

The committee took an at-ease from 3:14 p.m. to 3:25 p.m.

HB 145 - ATTY FEES: PUBLIC INTEREST LITIGANTS

[Contains brief mention of HB 86 and SB 97.]

Number 0557

CHAIR McGUIRE announced that the final order of business would be HOUSE BILL NO. 145, "An Act relating to public interest litigants and to attorney fees; and amending Rule 82, Alaska Rules of Civil Procedure."

Number 0506

CRAIG TILLERY, Assistant Attorney General, Environmental Section, Civil Division (Anchorage), Department of Law (DOL), having presented HB 145 on behalf of the administration at the bill's last hearing, indicated that he was available for questions.

Number 0490

BENJAMIN BROWN, Legislative Assistant, Alaska State Chamber of Commerce (ASCC), noted that the ASCC is a membership organization of over 700 small, medium, and large businesses and 35 local chambers of commerce. He stated that the ASCC strongly supports HB 145, which, he opined, will bring sanity and reason back to the "public interest litigant doctrine." He went on to say:

> As you know, [Madame Chair and members of the committee], Rule 82 is the provision of the Alaska Rules of Civil Procedure that governs the award of [attorney] fees in civil litigation. Probably more for the edification [of] anyone who's listening who is not as conversant as members of the [House Judiciary Standing Committee] are likely [to] be with the English rule in Alaska, Alaska is among a small minority of jurisdictions in the United States that actually has the English rule for [attorney] fees. In most jurisdictions, it doesn't matter who wins or loses, you pay for your own attorneys. You could have costs awarded, but costs are often a lot less than [attorney] fees in most lengthy and sizable civil litigations.
>
> ... I think Alaska, coming late to the process of developing its judicial system, saw some wisdom in

[the English rule for attorney fees], and I mention that as a preface to my comments on the public interest litigant doctrine as an exception to our version of the English rule. Our version of the English rule, under Rule 82, which begins with the phrase, "Except as otherwise provided by law or agreed to by the parties", gives a certain range of percentages, from 1 to 20 percent, in cases where there's a monetary judgment recovered. In cases where there's no monetary recovery, the range is between 20 and 30 percent that one party or the other can recover ... of his or her [attorney] fees.

When we look at the kinds of cases that are often brought by public interest litigants, they are cases without monetary recovery because they're not brought for monetary damages; they're brought for declaratory judgments and injunctive relief, and usually with some sort of attempt to effectuate a public policy and, in many cases, to prevent a permitted project or some other development from going forward. Again, as I stated a moment ago, [Rule 82] begins with the phrase "Except as otherwise provided by", and the enabling statute for Rule 82 is the one that's being amended by Section 1 of the bill: "**[Sec. 09.60.010] Costs and attorney fees allowed to a prevailing party**".

Number 0300

MR. BROWN continued:

So I take it perforce as kind of beyond legal argument that any other provision of law in [Sec. 09.60.010] can, without a court rule change, effect a change in Civil Rule 82. And the change that this bill seeks to effectuate is to narrow an exception to the ... attorney fees rule called the public interest litigant doctrine, which has been articulated by the [Alaska] Supreme Court in a number of cases: Citizens Coalition For Tort Reform v. McAlpine, Anchorage Daily News v. Anchorage School District, and it comes up again and again.

It's a four-part test wherein the court will look at the nature of ..., usually, the plaintiff, who's the purported public interest litigant, and see if that party meets a pretty stringent test of "A, B, C, and

D" and, on that basis, determine whether or not to accord them public interest litigant status. If the party is so fortunate as to pass the court's four-part test, it can recover not 20 or 30 percent, but 100 percent of its [attorney] fees if it prevails on even a single issue. And there was a case called [Matanuska Electric Association v. Rewire The Board] where the court struck down the doctrine of apportioning prevailing parties - the extent to which they prevail - and if they prevailed in a few issues, the courts said, "Well, then, they prevailed overall, and if they're a public interest litigant, they can get the whole shebang back."

Number 0179

MR. BROWN went on to say:

So it's really a very strong exception, to Rule 82, that [the] court has crafted here. The [ASCC] doesn't want to get rid of the public interest litigant doctrine; the [ASCC] supports ... the governor's approach set out in House Bill 145 in a very, very limited number of actions: those that appeal an administrative agency decision from the Department of Environmental Conservation [DEC], the [Alaska] Department of Fish and Game [ADF&G], or the Department of Natural Resources [DNR], in which one of those three departments has made a coastal consistency determination, adopted regulations, or made an administrative-law decision and allowed for an opportunity for that decision to be reviewed under the normal processes of administrative law.

In those contexts, when it's that kind of an action with the state as the defendant, it's - I think - wise not to allow the ... [Alaska] Supreme Court's exceptional public interest litigant doctrine to skew the scales and not restrict the potential recovery to 20 to 30 percent or impose liability for the plaintiff's cost on the defendant: the state. And the reason for that is this: this will just make the court have to return to the stated language of Rule 82 if it really feels that there are exceptional circumstances that justify an award of greater than 30 percent. If you look at Rule 82(b)(3), there are a number of exceptions within Rule 82 that can achieve

the same purposes as the public interest litigant doctrine.

MR. BROWN, to illustrate this last point, paraphrased from Rule 82(b)(3), which, with some formatting changes, read:

> (3) The court may vary an attorney's fee award calculated under subparagraph (b)(1) or (2) of this rule if, upon consideration of the factors listed below, the court determines a variation is warranted:
> (A) the complexity of the litigation;
> (B) the length of trial;
> (C) the reasonableness of the attorneys' hourly rates and the number of hours expended;
> (D) the reasonableness of the number of attorneys used;
> (E) the attorneys' efforts to minimize fees;
> (F) the reasonableness of the claims and defenses pursued by each side;
> (G) vexatious or bad faith conduct;
> (H) the relationship between the amount of work performed and the significance of the matters at stake;
> (I) the extent to which a given fee award may be so onerous to the non-prevailing party that it would deter similarly situated litigants from the voluntary use of the courts;
> (J) the extent to which the fees incurred by the prevailing party suggest that they had been influenced by considerations apart from the case at bar, such as a desire to discourage claims by others against the prevailing party or its insurer; and
> (K) other equitable factors deemed relevant. If the court varies an award, the court shall explain the reasons for the variation.

TAPE 03-53, SIDE A
Number 0001

MR. BROWN, after suggesting that subparagraphs (F), (I), and (J) are quite important and germane to public interest litigants, opined that when HB 145 is adopted, it will still be possible, for a court that thinks it's necessary, to treat someone that would otherwise be a public interest litigant in a special way. Instead of using the four-part public interest litigant doctrine test, if the court, for example, felt that subparagraph (K) applied, it would simply have to state its reasons on the

record. He opined that HB 145 is a very good bill that will help bring a level playing field back to litigation, a playing field that has been somewhat skewed by some attempted usurpations in recent years of the public interest litigant doctrine.

Number 0111

REPRESENTATIVE HOLM moved to adopt the proposed committee substitute (CS) for HB 145, Version 23-GH1064\D, Luckhaupt, 4/30/03, as the work draft. There being no objection, Version D was before the committee.

REPRESENTATIVE GARA, to Mr. Brown, said: "Clearly, this is a political fight, and ... it interests me that you say the [ASCC] supports the 'public interest litigant rule,' just not in this area of cases - these natural resource cases. Am I right about that?"

MR. BROWN replied:

> The [ASCC] supports Rule 82 [attorney] fees because this modification of the English rule puts an incentive into the litigation process that makes people not file frivolous suits and realize that there may be a downside to their causing others to spend money to defend a suit that is not likely to be prevailed upon. As far as the public interest litigant doctrine, I think the [ASCC's] position is, is that Rule 82 ought to work as Rule 82 in the vast majority of situations, and the public interest litigant doctrine ought to be restricted to those litigants who are truly pursuing cases in the public interest, which probably means that the state isn't going to be a defendant all of the time in those cases.

REPRESENTATIVE GARA, referring to Mr. Brown's comment regarding "attempted usurpations," said:

> The kinds of cases this bill would take out of the "public interest litigant role" rubric are of a kind, according to [a Legislative Legal and Research Services report] that only 19 of those have been filed since 1993. None of them have been found to be frivolous. So, what we've done is we've allowed people to use the "public interest rule," and just so

members know, the public interest rule says that if you file a case that is not for your own financial benefit - you're not going to make money off of the case - we're going to encourage your right to ... access to the courts by saying, if you lose and it's not a frivolous case, you're not liable for [attorney] fees, and if you win, you can get reasonable [attorney] fees paid to the people who took the case for you.

And so in the 19 of these cases that have occurred in the last 10 years, I guess you have a problem with some of them. But I don't know what the problem is, because ... I've seen a summary of those cases and I haven't seen any found to be frivolous - I haven't seen any found to be abusive cases. So how is this rule being abused?

Number 0348

MR. BROWN replied:

Just to clarify, ... the significance of an individual's potential financial interest versus the public interest is but one part of the four-part test. And, indeed, if I'm not mistaken, the [Alaska] Supreme Court, in - it was a Homer case, a gentleman who was concerned about rezoning -- just because an individual has a potential personal financial stake does not deny that person the potential of being a public interest litigant. It's possible to have a personal financial interest as well as being concerned on behalf of the broader public interest. So that's the clarification of what the [four-part] test is.

Look at the defendants that are named in this proposed amendment ...: They're the Department of Environmental Conservation [DEC], the [Alaska] Department of Fish and Game [ADF&G], and the Department of Natural Resources [DNR]. Look at the nature of the actions being appealed here: coastal consistency determinations, adoption of regulations where there was an opportunity for public comment and an opportunity to seek administrative review. Those are already public processes; they already have the benefit of the full panoply of administrative law. Individuals who have been able to go through those

processes can go to court if they're dissatisfied with the result of those processes.

If they go to court and they prevail, they can get - assuming they want declaratory relief and don't seek a monetary judgment - ... up to 30 percent of their [attorney] fees back. That seems more than fair and reasonable to me. ... This would not have affected the Rewire the Board case. But in that case, the potential does exist where someone can file a laundry list of 20 alleged deficiencies in an administrative finding. Were they, under the Rewire the Board ... holding, to prevail on but one of those 20, all the [attorney] fees could be recovered from the other party. That potential exists ... if you look at the different cases right now.

So even though ..., on your list of 19 cases with the state as the defendant, you may not see a potential problem, I submit that a potential problem does exist. And I further submit that Rule 82 goes far enough to protect the interests of litigants, who don't have to necessarily rely on the public interest litigant doctrine, when under [subparagraph] (K) they can convince a judge that there are other equitable factors that are indeed relevant that justify giving them more than 30 percent that they would otherwise be capped at in Rule 82.

Number 0507

REPRESENTATIVE GARA suggested that he and Mr. Brown were talking past each other. He said:

Let's just be honest about this: there are folks out here who want to keep environmental groups from filing litigation. And that's why this bill has now been limited to natural resource cases even though in every one of the years over the last 10 years, this bill has tried to wipe out the public interest rule for everybody. But now ... this year's version of the bill focuses on natural resource cases. So, we're going to allow the public interest right to everybody else except for those who challenge that small class of cases you mentioned.

Why is it not fair to let people have open access to challenge their government, [first]? And [second], how can somebody afford to challenge their government in court if the case doesn't involve money, so the person doesn't have a financial interest in the case, and they're an average person who makes, let's say, $25,000 a year and they can't afford to hire an attorney? So you're somebody who believes that government is doing something terrible - they're refusing to leave a no-logging buffer zone along a stream bank - and [you] feel that this stream is therefore going to be endangered and the trout in that stream are going to be endangered, and [you] want to go get an attorney.

And under current law, [you] can say to the attorney, "If you win, the state will pay our [attorney] fees. But under the rule you propose, if [you] win, the state's not going to pay [your attorney] fees. The public member is too poor to pay the [attorney] fees. How do they challenge their government's conduct? That's the question. I mean, 30 percent of your [attorney] fees isn't a lot of money if you don't have a lot of money to start out with. So why is that fair to that person?

Number 0618

MR. BROWN responded:

Well, 30 percent as allowed in Alaska's English rule in Rule 82 is 30 percent more than in the vast majority of jurisdictions in this country and, indeed, in the federal system. [Also], your hypothetical conversation between a potential public interest litigant and his potential attorney is just that - a hypothetical. I could posit a number of other hypotheticals ... that might be less shining examples of the way people go about doing this. And I'm not submitting that it's about trying to make money off the [attorney] fees, solely; I think that people that bring these cases really do care and really believe that they're fighting a noble cause.

But I hope that they've chosen to fight that noble cause in the administrative context, previously. I hope they've done their best to convince the decision

makers in the agencies at the [ADF&G, DNR, or DEC] that a certain decision should be made a certain way. I hope that if that decision hasn't come out to their favor - and probably at this point they've engaged counsel, and they're not going to be able to use Rule 82 to recover the cost of that for the administrative action - but if they're going to be effective advocates even in the administrative context, well, it's likely that there's some sort of representation involved or they're really learning a lot and becoming good pro se advocates for themselves.

They also have an opportunity, at the administrative level, for these types of cases, to appeal and seek review within the administrative agency. It's only when they go to court that this comes into play. And, again, when they go to court, because they've had a greater chance to avail themselves of administrative law against the state, which I submit is not a presumptively tainted defendant ... - we are all the State of Alaska - this defendant should not be subjected to a punitive rule that places it at a disadvantage.

And the level playing field of Rule 82 affords plenty of protection for someone who wants to pursue what he or she thinks is a noble cause after an administrative decision has been rendered. ... I'm sorry if that doesn't answer your question, because I think I'm looking at a different hypothetical going into it than you are looking at it going into it, and I think maybe that influences what is fair or unfair when we get to the point of someone taking a case to superior court.

Number 0755

REPRESENTATIVE GARA remarked:

I've seen agencies make terrible decisions. That's the whole point of the public interest rule, is when an agency makes an terrible decision that impacts a community, a citizen from that community should be able to challenge it. But if they can't afford to hire an attorney and we're not going to now let them recover their [attorney] fees if they win, I think there are a lot of circumstances, not just a few circumstances, where bad agency decisions are going to

> remain in effect. And maybe we have a different view as to how many bad agency decisions there are, but I think there are a lot, and I don't think that agencies are always responsive to the public.

MR. BROWN replied that under Rule 82(b)(3)(I), a judge is free to consider the extent to which a given fee award may be so onerous to the non-prevailing party that it would deter similarly situated litigants from voluntary use of the courts. Even if HB 145 becomes law, that provision of the Alaska Rules of Civil Procedure would still apply, he concluded, adding, "a good judge ought to be able to take recourse to that and put the reasons for the variation down in his or her finding, so if it's further appealed to the [Alaska] Supreme Court, they can take a final look at it."

REPRESENTATIVE GARA asked Mr. Brown how many times subparagraph (K) has been used to fully compensate someone for his/her attorney fees. "I mean, are you offering something that's really going to be used, that really has been effective, or are you offering something that's not really going to be used and hasn't been effective?" he also asked.

CHAIR McGUIRE suggested that any response would merely be hypothetical, and that that provision of Rule 82 hasn't been used because the recourse of being awarded attorney fees in public interest litigation has been available. She surmised that Mr. Brown is simply offering that the subparagraphs of Rule 82(b)(3) would be used when the current remedy is no longer available.

Number 0868

REPRESENTATIVE GARA said:

> I disagree, though. The public interest rule only applies - only compensates people for their [attorney] fees - in cases against the state. There are times where people file suits against corporations, I suppose, or private businesses, where they have no financial incentive to do it. It happens all the time. The question is, has subsection (K) ever been used to their benefit to compensate them for their full [attorney] fees. I don't think it really has in more than one or two cases. But if you know for a fact that it has been a useful tool, I'd like to hear the statistics or some of the statistics. If not,

then I don't see how we can we determine that that is a useful alternative.

MR. BROWN responded:

I'm not prepared to provide that statistical evidence right now. ... We can go over what the four-part test is. I don't know that it actually restricts the defendant to being the state of Alaska. I don't really know if I read that as necessary, and that may have been the case thus far. I do know that the plaintiff cannot be a governmental entity; the plaintiff has to by private entity. But, I guess, under your logic, we have to stick with the rule as it currently exists, because we are afraid that Rule 82 isn't going to do enough.

But before the public interest litigant was created by the supreme court, Rule 82 had its provisions that allow for this, and it was adopted by the supreme court under the language of [AS 09.60.010]. So, it's kind of an evolutionary process. And I would hope that we could trust our court system and, indeed, our legislature, to work together to craft a reasonable set of rules that will be fair to everyone and will not increase unnecessary ... litigation, but at the same time will not cause the state to have to pay unreasonable fees for cases that perhaps ought not to have been brought or so vigorously litigated in the first place.

Number 0964

REPRESENTATIVE SAMUELS asked, "Does the [ASCC] feel that a lawsuit should be part of the process on every project?"

MR. BROWN said that the ASCC does not want to see the courts misused. The administrative law process works quite well, he opined, adding that other pending legislation will improve the process even more. He suggested that those proposed changes will make his arguments stronger. He offered that under the current administrative permitting process, such a strong record is created that the court is precluded from trying to reopen issues when there is such a self-contained record. The ASCC doesn't want an incentive in the rules that takes things out of the administrative law context that ought not be taken out.

REPRESENTATIVE SAMUELS surmised: "So everyone should have something in the kitty if you want to go play."

MR. BROWN indicated that although he would not phrase it that way, he did understand Representative Samuels's point.

REPRESENTATIVE HOLM, after noting that Representative Gara spoke of the right of a litigant to recover, asked Mr. Brown: "Wherein is it more right for a person to recover their fees and make you pay for them? You, as another citizen of ... Alaska, why should you be the one that has to pay for them for frivolous litigation?"

MR. BROWN replied:

> I agree. And it would be possible to do away with the English rule altogether. ... That would be a draconian response to abuses of a system that allows one party to recover his or her [attorney] fees from another party. We're not even discussing that here. We want to keep the English rule; we want to keep Rule 82 with its exceptions for a judge that really feels that they need to be put to use. It's the far-reaching public interest litigant doctrine that I think we're looking at here, and trying to rein it in, in a very narrow number of cases. And I don't think it's unwise and, while reasonable minds might disagree, I think ... - I hope I'm making a strong argument - that this is going to return things to where they ought to be: in the center, fair to both sides.

Number 1100

REPRESENTATIVE GARA raised a point of order. He said:

> The last question related to whether it was fair to recover full [attorney] fees against another citizen. This rule we're talking about right now, the public interest rule only applies to cases against the state government or state government subdivisions. That's the rule. That's the rule we're talking about.

CHAIR McGUIRE stated that Representative Gara is correct, adding that there has been much debate going back and forth between the government and corporations.

REPRESENTATIVE HOLM remarked that he is merely trying to make the point that "we are the government." In other words, when someone sues the state government, he/she is "suing all of us."

REPRESENTATIVE GRUENBERG sought confirmation that the intent of Version D is to require the court, "if they apply the McCabe line of cases," to meet the requirements of Rule 82(b)(3) - to make the special findings required under it.

MR. BROWN reminded members that although the ASCC supports HB 145, it is not the bill's sponsor. The ASCC is hopeful that Rule 82 as written, rather than as interpreted by the courts with the public interest litigant doctrine, will govern in the future, for the narrow category of cases being excepted via HB 145. He posited that the special findings required by Rule 82(b)(3) will end up being more appropriate, on a case-by-case basis, than the four-part test for "public interest litigant" status.

REPRESENTATIVE GRUENBERG said:

> One thing does bother me. Constitutionally, to amend a [court] rule, the legislature has to have a two-thirds majority. ... It does seem to me that that would be required; if [we] are ... to avoid litigation and the attendant fiscal note, we probably ought to pass this by a two-thirds majority. Right?

MR. BROWN offered his belief that a court rule change is not necessary because of the way the introductory language to Rule 82 is written. He suggested having others address that question.

REPRESENTATIVE GARA asked Mr. Brown if he'd seen any written opinions on that point.

MR. BROWN said he had not.

Number 1381

DORNE HAWXHURST said that she could offer a specific case, as opposed to a hypothetical case, that will show why HB 145 should be rejected. She elaborated:

> In 1995 I was the executive director of Cordova District Fisherman United [CDFU], and in that capacity I had the opportunity to participate with other

public-interest appellants in the "Prince William Sound Tanker Plan" appeal. Some of the other appellants were the United Fisherman of Alaska [UFA], the City of Cordova, and the Kodiak Island Borough; a number of individual fisherman also appealed. So [these] were not just so-called environmental groups. Now, the issue in the appeal was whether or not DEC had implemented the law that this legislature enacted in 1990 after the [Exxon Valdez] spill - that was House Bill 567. The law required the oil shippers to have better oil-spill plans so we would never again have to suffer as we did after the [Exxon Valdez] spill.

One of the most important requirements of the law was that the oil-spill plans had to protect environmentally sensitive areas including areas like the Copper River delta, the Copper River flats, which are vital to the health of our state's fishing industry. Now, the reason the fishermen appealed was because after the public comment period closed on the tanker plans, the DEC removed the requirements that the oil companies identify a plan to protect the Copper River delta, and this was under pressure from the oil companies. And, as Representative Gara said, this an example of a bad agency decision - using his words "a bad agency decision."

Number 1473

MS. HAWXHURST continued:

So the fishermen had to take on DEC and the oil shippers' lawyers in order to get the oil-spill plans to protect the delta as required by law. We also raised other issues like the failure of DEC to require best-available-technology escorts for these tankers that were racing by our backyard. The administrative appeal was prohibitively expensive to most appellants. The City of Cordova withdrew in frustration over the expense of the appeal process and DEC, as did several other appellants. After three years in the appeal process, DEC finally decided to settle with [CDFU] and the [UFA] and to require a plan to protect the delta and to require the tanker [tugs].

So, although there were other issues that CDFU felt strongly about, they decided not to bear the cost of going forward. The administrative record alone, not including [attorney] fees, cost $10,000. So I understand that the attorney general's office has held the "Prince William Sound Tanker Plan" case out before you, or at least the Senate Judiciary [Standing] Committee, as one reason to get rid of ... public interest litigant status. I urge this committee to look at that lawsuit as a reason to keep public interest litigant status for suits against DEC.

[The] DEC's abuse of the process after the public comment period had closed and its failure to carry out the law have cost the state hundreds of thousands of dollars in litigation costs, and has put the public and individual fishermen through years of litigation to finally get DEC to do the right thing, to carry out this legislature's directive. Now, I'm personally grateful to the fishermen and the individuals who continued and caused DEC to finally abide by the law. Alaskan's who value their salmon fishery would be equally grateful if they knew the facts of the case.

Approving this bill is not going to level the so-called playing field with other litigants. It's going to block those individuals who are trying to provide a public service to our state by volunteering their time and money to see that the laws are properly enforced. As a former executive director of Cordova District Fisherman United and as the wife of a displaced Alaskan fisherman - displaced by the [Exxon Valdez] spill - I would ask that you reject HB 145. It will prevent individuals from being able to protect their (indisc.) from DEC's abuses and from seeking to carry out the laws that ... this legislature has passed as a public service to Alaskans. And, as Mr. Brown has said, we are all the State of Alaska. Thank you so much.

Number 1574

REPRESENTATIVE GARA asked what additional protections the appellants were able to garner from DEC.

MS. HAWXHURST replied:

> I most specifically was concerned, on behalf of the Cordova fishermen, with what was proposed in our backyard with the ... Copper River delta and flats, and also the transportation of the tankers using the best available technology. If you would like to learn of the other benefits that we derived through this, I would suggest that you ask that of Nancy Wainwright, who was our public interest attorney for this process. And we were really very grateful to be able to have an attorney, because we could not get through this otherwise. We weren't even given standing, for example, with the local coastal council. It was really unbelievably difficult.

Number 1669

ALLEN JOSEPH, Association of Village Council Presidents (AVCP), stated his position as being that HB 145 should not pass. He also mentioned that he has testified on this issue in the past and continues to oppose the idea that public interest litigants should be held liable for attorney fees when they sue the state for the benefit of the public. Government is not perfect; however, it is made better when members of the public point out excesses and wrongs that should be corrected. Sometimes lawsuits are needed to get government's attention; therefore, he opined, there should be an avenue for people to sue the state without being penalized. Public interest lawsuits are sometimes complex and take a long time to resolve. As a result, the costs can be enormous. For that reason, he said, he opposes HB 145, and suggested that it should not pass.

REPRESENTATIVE GARA asked Mr. Joseph whether he felt he had the means to hire an attorney for the purpose of challenging one of the state's resource agencies over a decision threatening his community.

MR. JOSEPH said no, adding that most such cases take years to resolve.

REPRESENTATIVE GARA noted that he'd received a letter from the AVCP in opposition to HB 145. He asked Mr. Joseph if he knows people who have used the "public interest litigant laws" in the past.

MR. JOSEPH relayed that he knew Willie Kasayulie from the village of Akiachak who sued the state "to bring equal maintenance costs for schools ... in rural areas." He added

that a lot of people in his area have supported the "police-protection lawsuit" filed against the state by the Alaska Inter-Tribal Council. In addition to these two examples, he acknowledged that [members of his community] have been on the other end of public interest lawsuits such as the McDowell v. State case regarding subsistence, and the Alaskans For a Common Language, Inc. v. Kritz case regarding instituting English as a common language. He added, however, that regardless of cases such as the latter two, the AVCP still feels that the current public interest litigant laws should not be changed.

CHAIR McGUIRE pointed out that [Version D] would not affect [most] of the types of cases that Mr. Joseph referred to.

Number 1899

PAUL LAVERTY said he would be testifying in opposition to HB 145. He predicted that even though [Version D] would not apply to some of the types of cases Mr. Joseph referred to, once the exceptions to the public interest litigant laws are carved out, it will open the crack for other exceptions to be added in the future. "We're starting down a slippery slope to widen the prohibition on public interest lawsuits," he added. He went on to say:

> Public interest lawsuits are our last check and balance [that] private citizens can bring against government actions that ... disregard [either] regulations, laws, or the [Alaska] State Constitution. I personally have been involved as a public interest litigant, and that resulted in the [Alaska] Supreme Court case of [Laverty v. Alaska Railroad Corporation (12/1/00) sp-5338]. In my particular case, what happened was, a member of the administration for the railroad essentially gave away 1 million tons of gravel to a couple of developers here in Anchorage. And there was no bidding on this contract nor was it noticed as a public notice of the disposal of state resources.
>
> When I learned about this action, I testified before the [Board of Directors of the Alaska Railroad Corporation], brought it to their attention, which at this time they were not aware of because of the way the contract was written: it didn't require board approval. I asked them to rescind the contract because I didn't think it was in the best interest of

the Alaska Railroad [Corporation], nor was it publicly noticed like it should have been. When the [Board of Directors of the Alaska Railroad Corporation] took no action, I sent a letter to then [Senator] Loren Leman, Representative Kay Brown, and Representative Terry Martin, bringing the situation to their attention.

Number 2029

And at that point, Representative Martin, who was the head of the Legislative Budget and Audit Committee, requested [that the Division of Legislative Audit] perform an audit of this situation. And the audit ... resulted in a Report Number 08-4547-9...(indisc. - coughing), which upheld some of the concerns I had, in that, one, ... this contract wasn't necessarily in the best interests of the Alaska Railroad Corporation and it violated their own internal procurement regulations. And it was also potentially in violation of the [Alaska] State Constitution that required public notice before disposal of Alaska assets could be conducted.

MR. LAVERTY continued:

After getting that report from your audit committee, I again asked Representatives Martin, Brown, and Senator Leman to take some sort of an action and to "null and void" that contract. And, specifically, I asked them in a letter to send a report on [to] the Alaska attorney general's office to determine whether or not ... this was an actual legal contract. When that did not occur, I was finally forced to make a rather difficult decision: whether or not I wanted to pursue this through the state's legal system. And let me tell you, it was not a simple decision that I made, taking on the Alaska Railroad Corporation, given that I had, at that time, no financial resources to pursue it out of pocket.

So, I was able to find an attorney, and we argued the matter before district court and superior court and state supreme court. And the [Alaska] Supreme Court found that yes, indeed, the points I had raised in my initial lawsuit were valid and that the Alaska Railroad [Corporation] did indeed violate the [Alaska] State Constitution.

So I would just urge the committee to realize that ... there's going to be times ... when the administration of the state government may change and the shoe may be on the other foot with regard to decisions handed down by these resource-oversight commissions and departments in the state government, and that by doing away with the ability for public interest litigants to bring suit on some of these actions, [it] may be detrimental in the long run down the road. So, again, I just voice my opposition to House Bill 145 ....

Number 2168

RICH HEIG, General Manager, Greens Creek Mining Company; President, Council of Alaska Producers, first noted that the Council of Alaska Producers is a consortium of hard rock mining companies, both existing and potential, that have interests in Alaska. He indicated that the Council of Alaska Producers appreciates the work being done on HB 145, and hopes that it will pass in some form this session. He went on to say:

We believe that ... public interest litigation may be necessary at times, we accept that, but we'd like to see a more balanced field from a legal-fee standpoint. The resource industries are presently burdened, and generally rightfully so, with extensive state, federal, and local ... permitting requirements .... The process can take several years. We have been in a process of acquiring EIS [Environmental Impact Statement] at this point in time at Greens Creek; we've been in the process for over two years, and we just went out for a draft - the draft was just published ... about two weeks ago.

The process also includes ... a public comment period - it includes public hearing opportunities - [and] the process includes administrative review. So that is quite an extensive process in front of us, as a resource industry, as it is. The potential for civil or administrative appeals following that permitting process -- it's difficult, it's time consuming, and it's very costly, both for the agencies and the industry, and I'll speak from the industry standpoint.

The real issue to the industry is the cost associated with prolonged development stages when a permit has

> been issued, and we go into a period where we don't know where the end of that time period will be because of the potential for ... public litigation. Good projects can be delayed for extended periods of time. The risk beyond the permitting approval process is worrisome to industries; we don't know when, at times, we'll be allowed to develop a project or carry on, because we're waiting for an amendment to be approved.

Number 2285

MR. HEIG concluded:

> If this legislation has the opportunity to reduce public -- or reduce costs of litigation where there is little chance of the public interest group prevailing, ... that's good. But more important to the agencies and to the industry is the cost associated with prolonging the development of [a] project. And from that standpoint, we support ... HB 145, and we ask and urge ... you to pass this legislation. Thank you.

MR. HEIG, in response to questions, indicated that the aforementioned EIS process that Greens Creek Mining Company is currently undertaking has cost approximately $1.5 million; that the overall environmental costs are "probably a million more than that" because of ongoing regulatory requirements and the company's own environmental standards; and that the "footprint of Greens Creek is about 360 acres," which includes the mining site; facilities site; Hawk Inlet sites; various disposal sites; and the roads, which make up about half of the total acreage.

REPRESENTATIVE GRUENBERG asked Mr. Heig whether either of his organizations or similar groups have found it necessary to engage in what might be considered public interest litigation.

MR. HEIG indicated that there was an instance in the Fairbanks area involving Fairbanks Gold Mining, Inc., and the True North Project, and an instance involving Greens Creek Mining Company that "hasn't occurred yet" in which a new solid-waste permit from DEC might be challenged via litigation.

TAPE 03-53, SIDE B
Number 2370

REPRESENTATIVE GRUENBERG surmised that if the latter occurs, then Greens Creek Mining Company might be dragged along involuntarily, so to speak.

MR. HEIG concurred, indicating that his company would engender legal fees in supporting the agency. He also indicated that the permit in question will be modified as the process unfolds.

REPRESENTATIVE GRUENBERG asked Mr. Heig whether his organization or another industry group might find it necessary to challenge an unreasonable governmental agency decision from time to time.

MR. HEIG said he did not know, but surmised that an organization itself probably would not because of a lack of funds; however, individual companies within such an organization might do so.

REPRESENTATIVE GARA sought confirmation that the aforementioned $1.5 million costs are related to current governmental agency requirements and not to public interest litigation, which is what the legislation addresses.

MR. HEIG confirmed that the aforementioned costs are not related to public interest litigation.

REPRESENTATIVE GARA said:

> The other thing I would ask you about is, ... I wonder whether we're giving away too many rights - giving away too many of the public's rights. And there has to be a balance between reasonable development and reasonable environmental protection. We've just passed a bill in the House the other day - HB 86; ... the purpose of the bill was to protect companies against injunction lawsuits where the injunction lawsuit wasn't well-founded, and so we passed a bill that said if you file a bad-faith injunction lawsuit you're liable for the damages you cause to a company. Is that not enough? Are you familiar with that bill at all?

MR. HEIG said he is not familiar with that legislation.

REPRESENTATIVE GARA asked:

> I suppose if this legislature were to protect you from bad-faith injunction lawsuits, would that be enough and might you be able to tolerate the remainder - us

allowing to continue this public interest rule in environmental cases - if you were protected against bad-faith injunction lawsuits?"

Number 2178

MR. HEIG replied:

> I have no problem with public interest litigation if ... there's a purpose served, and when I speak of a balanced field, if it minimizes frivolous suits, if it minimizes suits where it's being challenged to take up time in hope that the industry will fall by the wayside, [then] I would like to see ..., if the public litigants lose, that their fees are not recovered.

REPRESENTATIVE GARA said:

> I guess I don't know that we're that far apart. If we assured you that we passed a bill that said you can't file bad-faith injunction lawsuits, and if we assured you that if somebody filed a frivolous public interest litigant suit against you, you could recover full [attorney] fees against them for harassing you, would that be enough? Could we leave the public interest rule in effect in the remainder of cases outside of those contexts?

MR. HEIG replied, "The way I see it, from a simple standpoint, ... from a balanced field, is that if the public litigants lose, there should be no funding for what they've done; they should be able to supply their own funding for their legal challenges."

REPRESENTATIVE GARA agreed.

REPRESENTATIVE OGG remarked that some of the legislation that the legislature has been working on is, in a sense, passing authority to commissioners or people in administrative positions to waive local regulations so that they can make decisions without the normal public processes. In those types of situations, he asked of Mr. Heig, if a governmental agency made a decision that goes against his company and caused it to raise a legal challenge, for example, because a future administration waived regulations without any public process, would he still feel the same way.

MR. HEIG declined to speculate.

Number 1905

ROBERT B. BRIGGS, Staff Attorney, Disability Law Center of Alaska, Inc., first explained that his organization is the agency designated by federal statute, and by virtue of receiving federal grants, to provide protection and advocacy services for Alaskans with disabilities. He went on to say:

> One aspect of our services include legal services, which at times do include filing lawsuits in court. Often, we have disputes with the state, over state benefits. Our initial concern with HB 145 was that it might apply to decisions that affect our clients. ... A letter by David Marquez, Assistant Attorney General, ... dated April 21, 2003, signed by Ms. Deborah Behr in Mr. Marquez's name, ... clarifies that [Version D] ... is intended to very narrowly limit the effect of the bill.
>
> The letter contains two important clarifications. One is that the bill clearly applies to administrative appeals as well as civil lawsuits initiated in state court. The reason that clarification is important is because there are two aspects of the "public interest litigant exception" as it is applied by the Alaska Supreme Court. First, it applies as an exception to Alaska Rule of Civil Procedure 82. The second way that the doctrine is applied is in deciding how to award costs under Rule 508 of the Alaska Rules of Appellate Procedure; [those] costs are specifically defined to include [attorney] fees. So, Mr. Marquez's letter, as interpretation of [Version D] ..., clarifies that ... administrative appeals would be covered by this bill, as well as actions brought in the first instance in superior court. ...

Number 1709

MR. BRIGGS continued:

> The letter also provides important clarification as further amplified by the colloquy between the members of this committee that the bill only applies to decisions by three state agencies, and in so doing clarifies that the bill is not intended to apply generally to other public interest litigation that may

be brought against other agencies of the State of Alaska or other agencies of other entities of government: municipal entities or regional entities. Those are important clarifications that the committee needs to understand as they vote on this bill.

... I've been involved with debate about the public interest litigant exception for at least the last four years. I bring to that debate the experience of having worked as an attorney for the U.S. Army Corp of Engineers, as an attorney in the U.S. attorney's office as an assistant attorney general, and I've come to understand that the power of government, when an individual is litigating against the government, is quite awesome. And for that reason, I think the ... Alaska Supreme Court wisely recognized that in certain kinds of litigation, it was important to have what we know of as the public interest litigant exception.

With the important refinements that have been made by ... [Version D], as explained by Assistant Attorney General Marquez's letter, the Disability Law Center [of Alaska] has no objection to the bill. However, we do recognize that there may be claims against some of those agencies; we think the range of public interest litigation that might be brought against those agencies is likely to be narrow and limited. Anybody who advocates on behalf of people with disabilities must understand the extreme financial pressure our legislature and our state fiscal system is under. And we do not want to oppose resource development in the state, because we stand to benefit from that to the extent general fund revenues are increased.

Number 1695

MR. BRIGGS added:

I do want to caution the committee, however - because I always want to be clear about my views on bills - that in regulating this area, the committee comes close to touching upon ... a couple of very sensitive issues. One is the question of whether the bill violates constitutional protections of free speech. There are U.S. Supreme Court opinions which say that the filing of a lawsuit is itself an act of free speech. And I'm thinking specifically of some

litigation from the early 1960s involving the NAACP [National Association for the Advancement of Colored People]. And so, it is possible for someone to challenge this bill as an attempt - an unconstitutional attempt - to quiet the effort of certain viewpoints from being addressed in the court system.

I think the reason behind this bill obviously was, as some say, "to level the playing the field." But I think the supreme court recognized, in adopting the public interest litigant exception, that the playing field was not level to begin with, that in order to encourage people to act as private attorneys general, and I think also as an element of providing access to the court, that it was necessary to insulate certain parties from liability for [attorney] fees, should they lose good-faith claims that are brought, and that they should recover full fees should they prevail on those claims. ... I think ... the lawyers on this committee understand some of the basics of those doctrines.

I think other people have testified about the high cost of litigation, and that, basically, is why the public interest litigant exception is there: litigation costs have skyrocketed. And those high costs stand as a very important impediment to the expression of certain ideas in the court system. And, as we have pointed out in previous testimony on SB 97, the founders of not only our U.S. Constitution but our Alaska [State] Constitution wisely decided that our citizens should have three avenues of petitioning government to redress grievances, not one.

Number 1598

MR. BRIGGS said:

The first, of course, is the legislature, and this is seeking to change the laws that guide us all, by petitioning our individual legislators. The second, of course, is the executive branch. And the third is seeking to resolve a dispute by filing an action in court. So this ... bill, if passed, will have the effect of saying that a certain class of people, who are recognized by the court as under the public

interest litigant exception, will no longer have the benefit of that rule. I think it is unfortunate that this committee does not have better statistical evidence to support the decision being made here, because undoubtedly there will be equal protection claims raised by those who are adversely affected by this bill should it pass.

... Perhaps some of you also have the data that is available, and it is very difficult to parse. For example, the data from the attorney general's office does not generally give much description of the nature of the litigation for which funding requests are being asked. And so it is very difficult, just looking at lists of that litigation, to say, "Okay, this was a public interest litigant case, or it wasn't," or, "This was a particular type of public interest litigant case." The most definitive data I have seen on this subject comes from a legislative memorandum which apparently researched published cases that are reported in the Pacific Reporter, and ... gave a description of the case, the name of the party, as well as the amount of [attorney] fees awarded.

The total for a 10-year period that was awarded, supposedly under the public interest litigant exception, was $9 million, which sounds like a lot. But in reality, $4.5 million of those awards came in one case: the Weiss case, which was a mental health case. I've inquired [of] the executive director of the Alaska Mental Health Trust Authority, who has informed me that the ... [attorney] fees awarded in that case were actually done by settlement, not by any award by a judge after litigation ... over the entitlement to [attorney] fees.

Number 1472

MR. BRIGGS added:

So I'm not sure it is fair to include the Weiss [attorney] fees in ... this mix here of numbers, partly because that award was for interim fees, which involved a very large class action. And so I think the Weiss case is an unusual case. I'm not sure it should be entered into the calculus of deciding ... who is affected by the public interest litigant

exception. But even including it, this was the breakdown I came up with: 7.9 percent of the cases reported were natural resource or environmental cases - that actually surprised me, given the fact that we are a ... state still developing our natural resources; 9.5 percent of the awards were for civil-rights cases, which I classified as miscellaneous civil rights other than the Weiss case; 30.4 percent of the cases involved elections or redistricting; and only 1.8 percent involved miscellaneous other cases.

If you subtract out the Weiss case, the figures look a little more like the world that I think is being talked about before you today. If you subtract Weiss, that leaves $4.5 million that has been awarded under the public interest litigant exception: 16 percent of the awards went for natural resource and environmental cases; 19 percent to civil rights cases; 61 percent to election and redistricting cases; and 3.6 percent ... I provide that data simply because I think you need to have some basis for deciding how to treat somebody differently if this bill is to pass and it is to pass equal-protection muster.

This body has debated the public interest litigant exception a lot. I ... left one important research file at the office, but I did [spend] some effort at looking back to see what previous legislatures have done with regard to this exception. And I should point out as an aside that I sat on the "Alaska Civil Rule 82" committee back in 1983, when its revision was being debated. And I was one of those who felt that it was wise for the Alaska Supreme Court to adopt a notation in Supreme Court Order [(SCO) 1118am] that specifically preserved the public interest litigant exception.

Number 1347

MR. BRIGGS went on to say:

And our recommendation was followed by the [Alaska] Supreme Court, and if you go look up [SCO 1118am] you will see that notation [is] adopted not as a statement that it should be published as a notation; [instead] it is in fact a separate paragraph of the [SCO]. And so, if you look at the [SCO] itself, it says the

public interest litigant exception is not affected by this rule. And I say that because one legal question here is: what is a court rule? Is it simply a body of rules that is contained in something called the Alaska Rules of Civil Procedure and the Alaska Rules of Appellate Procedure?

I suspect, although I have not found [an Alaska] Supreme Court case to definitively state this, ... that the Alaska Supreme Court would say, "A rule is what we say is a rule." And it could very well be that a court order such as [SCO 1118am] is [an Alaska] Supreme Court rule just as the notation that is attached to the publication of ... Civil Rule 82 ... could be interpreted [that] it was intended to be a court rule. I say that because you've already heard from one member of this committee that perhaps Article IV, Section 15, of the [Alaska] State Constitution may require this statute to be passed as a court rule if it's to ... survive judicial scrutiny.

I should point out that since 1993, ... every statute that has amended Civil Rule 82 has specifically done it with a nod to the Alaska Supreme Court by specific court rule amendment adopted by a two-thirds majority. I believe I heard early testimony that ... because Civil Rule 82 has at its beginning a statement, quote, "Except as otherwise provided by law", that therefore the [Alaska] Supreme Court was somehow signaling to the legislature that a two-thirds majority was no longer required.

I've never heard it said, when I sat through the Civil Rule 82 debate in 1993, which resulted in the complete rule that you see today - well, the rule as it existed, it did include the "Except as otherwise provided by law" language - I don't recall any debate about that subject. I think it was just an oversight by the committee. Obviously, the [Alaska] Supreme Court may have thought about it, and it certainly is a plausible interpretation. But, on the other hand, the fact that the public interest litigant rule has never been codified into Rule 82 may be further evidence that the Alaska Supreme Court certainly intends that it continue to be viewed as a separate rule that cannot be changed except by a two-thirds majority of

this body. With that, I conclude my testimony and will respond to any questions you have.

Number 1179

REPRESENTATIVE GRUENBERG broached the idea of making an amendment that would specify that HB 145 is an indirect court rule amendment.

REPRESENTATIVE GARA, speaking to Mr. Briggs, said:

I am aware of - at least I have information about - a case that involved a handicapped Alaskan who wanted fair access to fishing and hunting programs. And I have the vaguest understanding of the case, but it seems to be a case that is a public interest litigant case that [would] be precluded if we passed this bill - at least it would be affected if we passed this bill. ... Was that a case that would be affected by this bill and what was it?

MR. BRIGGS replied:

I think the answer is yes. I'm aware of two cases involving Alaskans with disabilities that have been brought against public resource management agencies. The first case -- and ... neither of them involved court cases, and so, to that extent, I guess maybe the correct answer to your question is, because they did not proceed along far enough, they would not have been affected by this bill.

The first case was a case that our agency brought; it was a complaint ... brought against the [Alaska] Department of Fish and Game, seeking relaxation of rules against motorized access to a non-motorized area in order to engage in, I believe, bear hunting by someone who had paraplegia and wanted to use a four-wheeler to go into this area to engage in hunting. And I believe it was resolved by the department wisely deciding that the Americans With Disabilities Act [ADA] ... or [Alaska's] anti-discrimination statutes might require [reasonable] accommodation of this person's disability, and so they relaxed the rule for that person.

Number 1001

MR. BRIGGS continued:

> The second case I'm aware of was a case involving an attorney here in Juneau named Mike Stanley who represents fishermen in fishing-permit appeals, and ... I talked with him some about this case as he developed it. My understanding of the case was that it was a commercial fishing permit applicant who was not given appropriate credits for fishing. I'm not exactly sure of the particulars, but I think that there was a claim that the [ADA] required, because of this fisherman's disability, some relaxation of the rules with regard to how his ... credits for [a] fishing permit were calculated. And he prevailed in an administrative proceeding on that ADA claim.
>
> So, technically, neither one of the cases would have been affected by this bill because they were both resolved administratively before ever getting to court. But, yes, the reality is that there ... may be some cases in the future, by Alaskans with disabilities, ... where they want to assert a case against the [Alaska] Department of Fish and Game, the Department of Natural Resources, or the Department Environmental Conservation. Now, the most likely claim is going to be an employment discrimination claim, which is going to be claim where the person has a personal interest, and so that person is probably not going to be viewed as a public interest litigant unless they can try to create some claim that is broader than themselves.

Number 0936

MR. BRIGGS concluded:

> But we have decided that because the range of people with disabilities that would be affected by the bill as amended is narrow, we do not oppose this bill. And I apologize if it's sounds like I'm making the brief for people who do oppose this bill; I'm not trying to do that. I am trying to have this body make an informed decision that at least tries to address the legal concerns that I think a supreme court is going to look at when the bill is reviewed.

MR. BRIGGS, in response to a question, clarified that the Disability Law Center of Alaska is neutral on the bill, and is providing testimony because, generally, the public interest litigant exception is very important to its clients. He added:

> I can say [that] I've seen the looks in the eyes of families when I say, "You know, if we take this case all the way, against the state, the bill could be hundreds of thousands of dollars in legal fees; unless you're classified as a public interest litigant, you'll be liable for those fees - you, your family, your house." And that chills the decision to file a lawsuit unless there is a reasonable expectation that we can classify the case as a public interest litigant case.

CHAIR McGUIRE, after ascertaining that no one else wished to testify, closed public testimony on HB 145.

Number 0832

REPRESENTATIVE SAMUELS made a motion to adopt the new fiscal note provided by the Division of Risk Management, Department of Administration. There being no objection, it was so ordered.

Number 0790

REPRESENTATIVE GRUENBERG made a motion to adopt Amendment 1, a handwritten amendment, which read [original punctuation provided]:

> Page 2 line 13
> Sec. __ AS 09.60.010 is amended by adding a new subsection to read:
> (c) Nothing in this section shall prohibit the court from awarding a successful public interest litigant costs and reasonable attorney's fees or refusing to award any costs or attorney's fees against an unsuccessful public interest litigant if the court determines that such an order is warranted under Alaska Rule of Civil Procedure 82(b)(3).

Number 0782

CHAIR McGUIRE objected.

REPRESENTATIVE GRUENBERG offered that Amendment 1 would merely stipulate that the court should do as Mr. Brown predicted it would do, and after reading portions of Amendment 1 out loud, said it will apply to both Civil Rule 82(b)(3) and Appellate Rule 508(e). He opined that Amendment 1 would solve a lot of problems and give the court discretion as long as it made special findings that an award is warranted.

MR. TILLERY opined that Amendment 1 appears to be unnecessary, and that the administration would not support it. He added that the language in Amendment 1 is true for any litigant regardless of whether he/she is a public interest litigant.

REPRESENTATIVE GRUENBERG suggested that if Amendment 1 does nothing else, then, it would at least provide the public with notice that the courts have such authority.

MR. TILLERY expressed opposition to including unnecessary language in statute.

CHAIR McGUIRE indicated that she opposes Amendment 1.

REPRESENTATIVE GARA said:

> Under current law, the court will defer to the intent of Rule 82, which is to award [attorney] fees against the party that loses. What [Amendment 1] does is it tells the court that it's our intent that it be allowed to exercise its discretion not to award [attorney] fees against a citizen who files a public interest case. If we don't adopt [Amendment 1], the courts will award [attorney] fees against public interest litigants. So, without the statement of intent that comes with this ... [amendment], make no mistake about it, citizens who file public interest cases will be held liable for [attorney] fees under Rule 82 - I feel very confident in that - for crippling amounts, potentially.

CHAIR McGUIRE observed that that is the purpose of the bill, adding, however, that the courts retain the discretion to alter the award.

Number 0308

A roll call vote was taken. Representatives Gara and Gruenberg voted in favor of Amendment 1. Representatives Samuels,

Anderson, Ogg, Holm, and McGuire voted against it. Therefore, Amendment 1 failed by a vote of 2-5.

Number 0284

REPRESENTATIVE GRUENBERG made a motion to adopt Conceptual Amendment 2, a handwritten amendment, which read [original punctuation provided]:

> page 2 line 13
> Sec__ The uncodified law of the State of Alaska is amended by adding a new section to read:
> Indirect Court Rule Amendment
> Sections 1 and 2 of this Act have the effect of amending Alaska Civil Rule 82 and therefore take effect of they receive the two-thirds majority vote of each house required by art. IV, sec.15 Constitution of the State of Alaska.

Number 0254

CHAIR McGUIRE objected, and offered her belief that the language in Rule 82, "Except as otherwise provided by law" makes a court rule change and its accompanying two-thirds majority vote unnecessary.

REPRESENTATIVE GRUENBERG recalled from Mr. Briggs's testimony that all other statutory changes to Rule 82 have involved a two-thirds majority vote. He opined that a court would be likely to find that HB 145 is an indirect court rule amendment, thus requiring a two-thirds majority to pass. He suggested that adoption of Conceptual Amendment 2 would avoid costly litigation.

CHAIR McGUIRE predicted that HB 145 would pass by a two-thirds majority anyway.

REPRESENTATIVE GRUENBERG pointed out, however, that regardless of whether a bill passes by two-thirds, the issue of whether to adopt a court rule change requires a separate vote.

REPRESENTATIVE GARA mentioned that the [Alaska State] Constitution says that a court rule change requires a two-thirds vote from each body, that that particular constitutional provision was taken from New Jersey's constitution, and that there was a case - John S. Westervelt's Sons v. Regency, Inc. - in New Jersey predating the [Alaska State] Constitution that

interprets New Jersey's constitution as classifying attorney fee awards as a court rule. He said he strongly believes that HB 154 is changing a court rule.

TAPE 03-54, SIDE A
Number 0001

REPRESENTATIVE GARA said he is very troubled by the fact that every time this legislation has come up in the past - every year since 1993 - it has been considered a court rule change. He suggested that frustration over the fact that such legislation has not yet garnered the required two-thirds majority vote has prompted some to proffer the conclusion that a two-thirds vote is not required this time. "All along, I think, we've all believed that a two-thirds vote is required," he added. He also said:

> I think we're entering dangerous ground. I think to be safe we should include a statement that this is considered a court rule change. I think we're doing something very, very risky by passing a bill that at [the] least, under any analysis, raises a very fair chance that the courts are going to strike the law down two years from now. So the safe thing to do would be to consider it a court rule change, and I support the amendment.

CHAIR McGUIRE relayed that a note passed to her makes the point that in creating the public interest litigant doctrine, the [Alaska] Supreme Court could have prefaced Civil Rule 82 with language mandating a court rule change, but did not do so.

Number 0204

A roll call vote was taken. Representatives Gara and Gruenberg voted in favor of Conceptual Amendment 2. Representatives Anderson, Ogg, Holm, Samuels, and McGuire voted against it. Therefore, Conceptual Amendment 2 failed by a vote of 2-5.

Number 0236

REPRESENTATIVE GARA then introduced Amendment 3, a handwritten amendment, which read [original punctuation provided]:

> P.2 line 3
> After "litigant," the rate of attorney's fees awarded may not exceed $125/hour. If a public

interest litigant's case is deemed frivolous by the court, full attorney's fees at a rate that may not exceed $125/hr. may be awarded to the defendant against whom that case was filed.

REPRESENTATIVE GARA said:

We've heard some claim that people think the public interest rule has gone too far. I don't agree, but in the interest of drawing people from both sides together on this one, at least as many people as possible, I would agree to change the public interest rule to make sure that we don't award excessive [attorney] fees, [and] I would agree to change the public interest rule to make sure that if people file frivolous public interest cases, they be held accountable. So, what [Amendment 3] does is it caps the [attorney fees] award at $125 an hour. The going rate for [attorney] fees is somewhere between $165 and $185 an hour, sometimes more. There have been cases where people have requested and been awarded up to $300 an hour in cases the courts have deemed to be especially difficult and for whatever other reasons.

But I think this would at least satisfy a number of the concerns people have made. It would satisfy the concerns that maybe there are frivolous claims out there, though the report from [Legislative Legal and Research Services] says that of the 19 public interest litigant cases in natural resource cases it's found over the last 10 years, not a single one of them has been found to be frivolous, and plaintiffs have actually prevailed in 17 of 19 of those cases.

But that's what the amendment would do; it would just limit the [attorney] fees award to something that I hope we would all consider to be reasonable, not abusing, and do just like Representative Fate's bill does, which is go another step towards saying, if your claim is frivolous, we won't tolerate it and we'll award full [attorney] fees against you if you file a frivolous claim. I hope this is a compromise that people could live with ... as a reasonable compromise.

REPRESENTATIVE GARA, in response to a question, indicated that he would not oppose additional language that would allow the

amount of $125 to rise right along with cost of living increases.

Number 0440

CHAIR McGUIRE announced that there is objection to Amendment 3.

MR. TILLERY, after stating that HB 145 is intended to establish a level playing field, surmised that Amendment 3 would not accomplish this goal, and indicated that the administration is opposed to Amendment 3.

Number 0537

A roll call vote was taken. Representatives Gruenberg, Anderson, Ogg, Holm, Samuels, Gara, and McGuire voted against Amendment 3. Therefore, Amendment 3 failed by a vote of 0-7.

REPRESENTATIVE GRUENBERG said:

> I think that the record shows that these cases have not been frivolous, they have been brought only when necessary, and that if this bill passes it will chill public interest litigants. And it's only a question of time until the double-edged sword comes into play here, and I think the real test - and I've said this before - of litigation is whether a bill is as good coming at you as it is going with you. And there's going to come a day when industry groups are going to be filing public interest litigation against what they consider to be bad regulations or regulatory interpretations, or appealing agency decisions in this area.
>
> And the current McCabe rule, which is the seminal case in this area, the public interest interpretation of Rule 82 - and I think it's an interpretation of that rule - will protect whoever is the successful public interest litigant. And it may be the only way the public interest can by protected, so I'm going to put a "do not pass."

Number 0779

REPRESENTATIVE OGG, after saying that the language on page 1, line 14, through page 2, line [2], does not make sense to him,

suggested that perhaps the "or" on page 1, line 14, and the "and" on page 2, line 1, should be switched with each other.

Number 0801

CHAIR McGUIRE objected to this suggestion [which was later treated as Amendment 4]. She posited that the current language has a broader scope, with the intent being to encourage people to participate in the public process instead of seeking recourse via a lawsuit.

MR. TILLERY added that [Amendment 4] would make a dramatic change from what is intended. He elaborated:

> There are sort of three decisions that can come down from ... any one of those three agencies that would be affected by this bill. One of those is a coastal consistency determination. Another one is the adoption of regulations. And a third is a decision for which there was an opportunity for the public to comment to the agency before the final agency decision, and administrative review. It's not enough that ... the public simply is able to comment, but that it also must have an opportunity to seek the administrative review for that third category. Conversely, those (indisc.) public comment to seek administrative review aren't necessarily implicated in the first two. And an example might be regulations where there's a tremendous amount of public comment and so forth, but there isn't necessarily administrative review.

MR. TILLERY said that although the current language in HB 145 might be difficult to read, it is intended that there be those three distinct instances. In response to further questions, he said that all three instances have an opportunity for public comment, though not all have the possibility of administrative review. What is intended is that any one of the three agencies may either make a coastal consistency determination, adopt a regulation, or make a decision for which there was an opportunity for the public to comment and an opportunity to seek administrative review. Again, both public comment and administrative review are not necessarily going to accompany a coastal consistency determination or the adoption of a regulation.

CHAIR McGUIRE suggested that it could be looked at thus: a coastal consistency determination is "A"; adoption of a regulation is "B"; and an agency decision that includes opportunities for both public comment and administrative review is "C."

MR. TILLERY agreed with that summation.

REPRESENTATIVE OGG remarked that the current language in the bill could have been clearer, adding that his main concern is that the bill not be interpreted to mean that the aforementioned decisions could be made without some form of public process.

Number 1118

REPRESENTATIVE OGG then withdrew [Amendment 4].

REPRESENTATIVE OGG indicated that as a harvester of the resources of the state, he is very concerned about the issues being raised by HB 145. Although the bill may be aimed at curtailing lawsuits by large environmental groups with lots of funding, the public interest litigant exception is essential for the "little guy," the average harvester of Alaska's resources. Referring to Ms. Hawxhurst's example, he indicated that although he, too, would like to see organizations such as "Greenpeace" prevented from attacking some of the decisions made by Alaska's resource management agencies, it is also important for average citizens - the harvesters of Alaska's resources - to be able to seek redress from those agencies via the public interest litigant exception. He opined that HB 145 will not affect the large environmental organizations, which have the money to bring suits against state agencies; instead, it will impinge on Alaska's individual resource harvesters, who don't have the financial wherewithal to challenge bad agency decisions.

CHAIR McGUIRE expressed understanding of Representative Ogg's position.

REPRESENTATIVE HOLM said that he, too, as one involved in agriculture, is cognizant of the fact that there is a need for the public interest litigant exception in order to keep government from "taking our land through these types of processes where they classify it and don't allow us to utilize those properties that we own." He opined, however, that passage HB 145 will serve the greater good because "we cannot afford, in the state of Alaska, to be locked up by groups that come from

other places of the country purely for the purpose of locking the state of Alaska up."

Number 1497

REPRESENTATIVE GARA said:

> I've worked against this bill before I was a legislator, and I'm going to speak against it today. It's a bill that's shown up almost every year, and it's a bill that's troubled me more than almost any other legislation every year. We should let the public challenge its government, but this bill works to prevent the public from being able to challenge their government. It's the wrong way to go. Our job is to protect the public, but this ... [bill protects] the government, and it does so in an irresponsible way.
>
> ... I see a trend, this year, to closing the doors to public access. This is one example of where we're closing the doors. I believe - and I respect the opinions on the other side, but there's a bill to make it harder for people to file initiatives - ... DEC just adopted ... or is in the process of adopting pesticide rules and they held no public hearing. And I'm wondering where we're going, where we're going other than to a place where the public has no input any more - or less input. And I think more input is better.
>
> ... Let's look at the objective facts. ... We can "demagogue" this issue and talk about frivolous environmental lawsuits, but we had [Legislative Legal and Research Services] do some work for us, and they found [that] over the last 10 years, ... in this environmental area that we're trying to regulate [via] this bill, only 19 of [these public interest litigant cases] ... have been filed. [And] 17 of them were found to be cases where the plaintiff was right, and the plaintiffs weren't just environmental groups, they were fishermen, they were subsistence users, [and] they were Native Alaskans.
>
> The record just doesn't substantiate the claim by the attorney general's office that ..., "The public interest rule has," quote, "led to increased

litigation and suits without merit," end quote. It's a nice statement, but it is divorced from reality. We've uncovered no cases without merit in the last 10 years in this area. And not only is the attorney general's office wrong in claiming that there's been in increase in litigation over the years, our Legislative Affairs Agency did some research and said, between 1993 and 1997, 11 of these cases were filed, and in the most recent five years, only 8 cases were filed.

Number 1631

REPRESENTATIVE GARA continued:

So actually, there's been a decrease in this kind of litigation. Has it bankrupted the state? No. The awards to the fishermen's groups and the Native Groups and the conservation groups, and whoever the people are who filed these 19 cases over the last 10 years have averaged about $60,000 a [year] .... Not millions of dollars. So, $600,000 over the last 10 years. So I think the fears that exist aren't related to [the] reality [that] exists. Let me just talk about who we're going to close the courthouse doors to and why we're going to close the courthouse doors.

As an attorney, I know people have come into my office and I've told them that we have a very onerous rule in this state that says if you file a lawsuit and you lose, even if it was a good-faith lawsuit, you're going to be on the hook for 20 percent of the other side's [attorney] fees. And many people have looked at me and said, "I can't afford that; I would like to pursue my claims, I have a valid claim, my rights have been trampled on perhaps, but I can't take the risk that I lose, and maybe on a technicality I'll lose and I'll owe the other side 20 percent of their [attorney] fees."

Well, that's what the public interest rule does, it says, if you have a true matter of public interest, if your not filing the case to make money, if you have a true matter of public interest and you lose, but it's a good-faith claim, you don't owe your government [attorney] fees. It opens the courthouse doors to people who don't have money, and that's a good thing.

And I think ironically this bill recognizes that's a good thing because it's only trying to close the courthouse doors in natural resource cases. It leaves them open in other cases, and that's a good thing.

Number 1682

REPRESENTATIVE GARA went on to say:

But I wonder why it's picked natural resources cases, since the facts don't substantiate that any people in natural resources litigation have abused this rule over the years. ... We're going to close the courthouse doors to people - fishermen who are dissatisfied with an oil spill contingency plan that the state has approved. Let's say the state does a bad job and allows oil companies to adopt a bad oil spill contingency plan, one that endangers our fishing streams and our fishing waters, and a public member says, "I don't think that contingency plan follows the law or is strong enough."

Well, before that person can sue, if we pass this bill, they're going to have to dare to look [Exxon Mobil Corporation] in the eye and say, "If I lose my suit, I'm going to pay 20 percent of your [attorney] fees." It's a lot of money; I think they're not going to do it. It's a case they would file against the state, but it would be protracted litigation, and I think it would cost them too much to take the risk of paying 20 percent of the state's [attorney] fees.

If you're a fisherman, and you say, "You know, my fishing streams are best protected if I have a ... 150-foot no-logging buffer along my fishing stream," and DNR says, "Well, I'm only going allow a 50-foot buffer along the fishing stream." And the fisherman wants to challenge DNR's determination, because we've now moved [the Division of Habitat and Restoration] over to DNR; that fisherman is going to have to reach in his pocket and say, "If I lose this case, can I afford to pay 20 percent of the state's [attorney] fees?" I think their answer is going to be no.

Number 1757

REPRESENTATIVE GARA concluded:

So I think this is a bad rule. ... This bill has failed in prior years because every year it's portrayed as -- the public interest rule is portrayed as a rule that only Democrats or conservationists or people that the majority doesn't like files these suits. But then all of a sudden the Republicans come marching in, and they say, "No, we've used the public interest rule too." And in fact, people from all walks of life have used this public interest rule.

The subsistence case that has gotten us into this situation where we are today, that held our subsistence law unconstitutional 10 years ago, was filed by people who had a quite conservative view on the issue that they filed on. They won. They probably wouldn't have been able to do it without the public interest rule. And I respect that they took the case and they challenged government, I don't agree with the result, but I respect their right to do that. And people from all walks of life have used this rule.

... I think it's a rule that provides for open government, accessible government. I think we should never be scared of the public - we should only encourage the public to challenge our conduct - but the day we've decided that we're scared of the public and that we're going to chill the public's right to challenge our conduct, I think, is the day that we've gone the wrong way. And I know that all of the bad things I've talked about aren't the intent of any of the people who support this bill, and I understand there are good arguments on both sides, but I feel very strongly that this is poor public policy.

CHAIR McGUIRE pointed out, however, that HB 145 is not preventing someone from bringing suit; it is merely saying that in certain circumstances, the state isn't going to pay all of the attorney fees. She noted that lawsuits are not the only way to solve problems, and reiterated her suggestion that the goal of the bill is to encourage people to participate in the public process instead of seeking recourse via lawsuits.

Number 1907

REPRESENTATIVE GRUENBERG offered:

I think that many people on this committee have personally seen some action by government that they don't like. And I'm looking back at something that happened to a couple of you just a couple of days ago that we discussed in a couple of committees. And that had to do with the invasion of your rights as you went through the airport. It wasn't exactly like this, but the concept was somewhat similar. And I'm sure you can all, everybody in this room, ... foresee a circumstance where you felt or might feel that government was acting beyond the scope of it's authority. And I'm not just talking about in this area; I'm talking about in any area.

And you would have been in the legislature, and you would know how difficult and expensive it is to change a law. And you would know how difficult and expensive it is to get government, anything from the "transportation authority" on down, to change the way the bureaucracy works. It's very difficult. So the only way you could potentially change what was happening to you would be to go to some attorney and [say] ..., "I've got a problem here, and it's something that I haven't lost any money on, but it's something that has really affected my right" - whether it's a fisherman, or going through the airport, or having your dog taken away from you, or whatever happens to be important. ...

But the last refuge that each of us has to make things equal with the government is in the court of law. ... And [a law has] got to look good coming at you as well as going with you. And my question is to the committee: ... assuming that there are problems with the way certain types of lawsuits have been conducted, or [that] there might be, is this the best way of dealing with them? And there are lots of other ways that you could deal with the problem. The question is, is this the best way? Or ... are you overbroad and hit beyond the mark or ... miss the mark? And I'd just ask you to consider that because this is only one possible solution to that problem.

Number 2058

REPRESENTATIVE SAMUELS moved to report the proposed committee substitute (CS) for HB 145, Version 23-GH1064\D, Luckhaupt,

4/30/03, out of committee [with individual recommendations and the accompanying fiscal notes].

Number 2060

REPRESENTATIVE GARA objected.

Number 2081

A roll call vote was taken. Representatives Anderson, Holm, Samuels, and McGuire voted in favor of reporting the bill from committee. Representatives Ogg, Gara, and Gruenberg voted against it. Therefore, CSHB 145(JUD) was reported from the House Judiciary Standing Committee by a vote of 4-3.

ADJOURNMENT

Number 2087

The House Judiciary Standing Committee was recessed at 5:47 p.m. to a call of the chair. [The meeting never was reconvened.]