

ALASKA STATE LEGISLATURE
SENATE JUDICIARY STANDING COMMITTEE

April 23, 2003

1:07 p.m.

MEMBERS PRESENT

Senator Ralph Seekins, Chair
Senator Scott Ogan, Vice Chair
Senator Gene Therriault
Senator Johnny Ellis
Senator Hollis French

MEMBERS ABSENT

All members present

COMMITTEE CALENDAR

SENATE BILL NO. 97

"An Act relating to public interest litigants and to attorney fees; and amending Rule 82, Alaska Rules of Civil Procedure."

HEARD AND HELD

SENATE BILL NO. 98

"An Act relating to civil liability for guest passengers on an aircraft or watercraft; and providing for an effective date."

HEARD AND HELD

SENATE BILL NO. 89

"An Act amending the definition of 'lobbyist' in the Regulation of Lobbying Act, and as it applies in the act setting standards of conduct for legislators and legislative employees, to define 'regular' and 'substantial' as those terms describe activities for which a person receives consideration for the purpose of influencing legislative or administrative action."

MOVED CSSB 89(JUD) OUT OF COMMITTEE

PREVIOUS ACTION

SB 97 - See Resources minutes dated 3/28/03 and 4/7/03.

SB 98 - See Transportation minutes dated 4/8/03.

SB 89 - See Judiciary minutes dated 3/26/03, 3/31/03 and 4/4/03.

WITNESS REGISTER

Mr. Chris Kennedy

Department of Law
PO Box 110300
Juneau, AK 99811-0300

POSITION STATEMENT: Presented SB 97 for the Administration

Mr. Bob Briggs
Disability Law Center
230 South Franklin
Juneau, AK 99801

POSITION STATEMENT: Expressed concern about creating a precedent of restricting the access of a particular group to the court.

Mr. Rich Heig
General Manager
Greens Creek Mine
Juneau, Alaska

POSITION STATEMENT: Supports SB 97

Ms. Pam LaBolle
Alaska State Chamber of Commerce
217 Second Street
Juneau, Alaska 99801

POSITION STATEMENT: Supports SB 97

Mr. Paul Laverty
No address provided

POSITION STATEMENT: Opposed to SB 97

Ms. Nancy Wainwright
No address provided

POSITION STATEMENT: Emphasized the need for accurate information in regard to SB 97

Mr. Alan Joseph
Association of Village Council Presidents

POSITION STATEMENT: Opposed to SB 97

Senator Con Bunde
Alaska State Capitol
Juneau, AK 99801-1182

POSITION STATEMENT: Sponsor of SB 98

ACTION NARRATIVE

TAPE 03-26, SIDE A

CHAIR RALPH SEEKINS called the Senate Judiciary Standing Committee meeting to order at 1:07 p.m. Senators Therriault, Ogan, French and Chair Seekins were present. Chair Seekins announced the committee would take up two new bills, SB 97 and SB 98, and possibly SB 89 that was previously heard. The committee then took a brief at-ease.

SB 97-ATTY FEES: PUBLIC INTEREST LITIGANTS

MR. CHRIS KENNEDY, assistant attorney general in the environmental section of the Department of Law (DOL), presented SB 97 as follows.

The public interest litigant doctrine was created by the Alaska Supreme Court in the 1970s. The court has defined a public interest litigant to be a person who brings litigation that seeks to effectuate strong public policies, would benefit numerous people, could only be brought by a private party, and that lacks sufficient economic incentive for a private party to sue if it weren't for that broader public importance.

Litigants who qualify as public interest litigants benefit from an uneven playing field with regard to attorney fees. They obtain reimbursement for their full attorney fees if they win. They may even obtain fee reimbursement if they do not actually prevail in court but they're determined to have been a catalyst for changed behavior by the other party. If they lose, on the other hand, the winning party can recover no fees at all from them. The public interest litigant doctrine is not part of Court Rule 82. It's a common law doctrine that operates outside of the court rule framework.

When it is applied to the state, the public interest litigant doctrine represents a substantial public subsidy for suits against the state. In the natural resource area, the state has paid out about three-quarters of a million dollars to public interest litigants in the last 10 years. In giving you that statistic, I'm talking about ordinary natural resource cases. I'm excluding the mental health land case, which is kind of a special and, hopefully, a one-time event.

The payees for these public interest litigant fees have included Greenpeace, Trustees for Alaska, Southeast Alaska Conservation Council and a number of other entities. That payout of funds to these parties understates the degree of the subsidy. The flip side of the public interest litigant doctrine is that these parties did not have to worry about paying the state's fees if the state prevailed. This means that the calculus going into litigation is very different for them. People seeking to overturn or obstruct actions of the state have an affirmative incentive to take a chance on doubtful claims because they may win and earn large rewards in the form of full fees without having the counterbalancing risk of even partial fees being awarded against them. The public interest litigant doctrine strongly encourages litigation of the kind that is quite expensive to the state.

SB 97 restores balance to these litigation incentives in the natural resource area, concentrating on cases that are arrived out of decisions that involve considerable public attention and public review. The parties seeking to challenge these decisions would have to engage in the same balancing of limited financial rewards for victory and limited financial penalties for being wrong that everyone else does. Hence, most public interest organizations are well financed. They can engage effectively in the calculus without any disadvantage. They do not require a subsidy to pursue their agenda.

The amendment you see before you adjusts SB 97 in two important ways. First of all, it clarifies that this leveling of the playing field applies to administrative appeals and not just to ordinary civil actions. The previous version of the bill simply said that civil actions would be covered and, apparently, at least some of the case law differentiates between a civil action and administrative appeal.

Secondly, this change would delete the court amendment part of the rule. The bill had attempted to go beyond limiting the public interest litigant doctrine and to address awards of enhanced fees under Civil Rule 82-3. It was decided, based on comments received since the bill was introduced, that the bill should address only public interest litigant doctrine and not to seek to

tie the court's hand under Rule 82 at this time. So, it becomes really a one-subject bill and makes no amendment whatsoever to the court rule.

1:15 p.m.

SENATOR FRENCH asked Mr. Kennedy if he said the current policy requires a substantial public subsidy, which in essence provides an affirmative incentive for public interest litigants to push doubtful claims.

MR. KENNEDY said that is correct.

SENATOR FRENCH said when he reviewed the record of public interest litigation, he found the natural resource cases cost less than 10 percent of the total public interest attorneys' fees paid by the state in the last 10 years.

MR. KENNEDY said he would have to review the chart, but Senator French is correct in that the great majority of public interest fees over the last 10 years have been awarded in non-natural resource cases. He thought the ratio of all cases to natural resources cases was 10:1.

SENATOR FRENCH said the amount paid to plaintiffs for natural resource litigation over 10 years is about \$718,000, which equals about \$71,000 per year. He said that is not an astronomical amount to pay one lawyer each year to challenge the government on its application of natural resource law. He asked if that amount is close to the amount Mr. Kennedy is paid.

MR. KENNEDY said that is correct.

SENATOR FRENCH said he is also curious about the idea that there is no financial disincentive for public interest litigants to bring cases. He surmised if that were true, one would expect to see outrageous claims filed in court and continually dismissed.

MR. KENNEDY said he does not believe it would follow that they would pursue frivolous claims because there is a financial disincentive for pursuing baseless claims. He said it is true that some claims filed against the state by public interest litigants are very speculative and are encouraged by their insulation from having to pay state fees and the fact that they might receive a financial payout if they prevail.

SENATOR FRENCH asked for an example of a frivolous claim brought in the natural resources arena.

MR. KENNEDY said he differentiated frivolous cases from speculative cases and that he is not suggesting these claims are necessarily frivolous. He said an example would be the Prince William Sound contingency plan litigation, which has been fought through several lawsuits in recent years. In the most recent case, the public interest litigants raised 84 issues in superior court and prevailed on none. On appeal, the litigants filed 98 appellate points and did not prevail on those. The only argument left is about attorney fees. He said it is the presence of the public interest litigant doctrine that enables people to bring a case like that and face no financial consequences for doing so.

CHAIR SEEKINS announced that Senator Ellis joined the committee. He then asked Mr. Kennedy if the Prince William Sound case was brought to delay or harass or whether it is a legitimate concern that needs to be addressed to protect the public.

MR. KENNEDY said he would not go as far as saying it was brought to delay or harass. He thought the environmental section of DOL felt it contained speculative and far-fetched claims on matters that were extensively explored through the public comment process. From a public policy standpoint, DOL does not believe it was not useful to have the court hear those claims again.

CHAIR SEEKINS asked whether SB 97, if enacted, would act as a disincentive to bring speculative and far-fetched cases to the court.

MR. KENNEDY replied he believes SB 97 would act as a disincentive. He thought claims would be more focused because litigants would be forced to cull their claims to those with more merit.

SENATOR OGAN referred to Senator French's comment that in the last 10 years \$718,000 has been paid for attorneys' fees in public interest litigant cases. A case involving drilling in Cook Inlet tied that project up for a substantial time period and cost the company millions of dollars. He said it seems to him that SB 97 is an attempt to be consistent with the Governor's policy of streamlining development and to make Alaska an attractive place to invest. He asked Mr. Kennedy if he concurs.

MR. KENNEDY said he very much concurs. He would hate to see everyone get "hung up" on the \$718,000 because the real financial effect of these cases is in the cost to the state to respond and in the effect they have on private parties whose projects may be stalled for many years, resulting in costly delays.

SENATOR OGAN indicated that he works for a resource development company and is very aware of the costs associated with planning, permitting and mobilizing equipment and people and the costs of putting everything on hold because of a public interest litigant lawsuit. These cases cost millions of dollars to the private sector and to the state treasury.

CHAIR SEEKINS asked Mr. Kennedy how much the state could have attempted to recover from cases in which it prevailed if SB 97 was enacted 10 years ago.

MR. KENNEDY said he does not believe that figure has been determined and that it would be a tall order to calculate that figure. He estimated that one attorney in his office spent two years working full time on the Prince William Sound case. In addition, the oil shippers had to pay private attorneys substantial amounts as well. He said he does not want to single out that case, but it is one he is very familiar with.

SENATOR OGAN said he wasn't only referring to the cost of attorney's fees for the private sector; he was also referring to the cost of equipment depreciation while it sits idle. He noted it costs twice as much to do business in Alaska as it does in the Lower 48 because of labor and shipping. Therefore, to ship equipment to Alaska and have it sit idle while the management must stay to keep the "engine running" until the litigation is cleared up is very costly.

CHAIR SEEKINS announced the committee would take public testimony.

MR. BOB BRIGGS, staff attorney for the Disability Law Center of Alaska, told members that the Disability Law Center is required by federal law to be authorized as the state's system to represent Alaskans with disabilities in all forums, including the courts. One of the Center's tools is to seek litigation to redress a grievance. The Center disagrees with the concept of eliminating the public interest litigant exception.

MR. BRIGGS said he comes to this debate as a former U.S. assistant attorney representing the federal government in environmental and other kinds of lawsuits. In addition, he worked as an assistant attorney general for the State of Alaska. Throughout his career, he has worked to represent public interests. He said what is in the public's interest is always subject to debate. In this debate, it is important to keep in mind the aspect of the public interest litigant exception, which is to preserve the right of access to the courts for those who may not have the financial incentive and ability to get access otherwise.

MR. BRIGGS asked members to look at two Alaska court rules: Rule 82 of the Alaska Rules of Civil Procedure, and Rule 508 of the Alaska Rules of Appellate Procedure. The concept of the public interest litigant section is given context in these two rules. Civil Rule 82 lists the various factors that a court is to consider when deciding whether to award attorney's fees to a prevailing party and to calculate the amount of that fee. One of those factors is 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. He said in essence, that rule contains the basic expression of the right of access to the courts that the rule attempts to protect. The public interest litigant doctrine is merely an explanation of that basic concept. Other factors include adjustment of the award based on vexatious or bad-faith conduct, the relationship of the amount of work performed and the significance of the matters at stake.

MR. BRIGGS suggested that a court that presided over a case in which all 84 claims were lost should take that into consideration when calculating the attorney's fee assessed against the losing party. That might be grounds for finding the litigation to be vexatious or filed in bad-faith. That would cause the court to not recognize the status of the public interest litigant as such. He pointed out the public interest litigant exception is flexible and is designed to allow courts to look at the merits of the case and the way the parties conducted themselves.

MR. BRIGGS explained that Appellate Rule 508 does not have the same laundry list of factors, but it does expressly state that if a court determines that an appeal or cross appeal is frivolous or that it has been brought for the purpose of delay, it may award actual attorney's fees. In any case, a court can decide to award full fees against the litigant. He told members

he sat on the Civil Rule 82 committee in 1983 when the rule was revised. He was partially responsible for the explanatory notation on pages 211 and 212. He was partially motivated to serve by the fact that he had served as a government attorney and recognized the power of government against the individual, and the importance of providing individuals with the power to question government action through the courts.

MR. BRIGGS said SB 97 does not appear to affect the rights of Alaskans with disabilities to access the courts. However, its vagueness raises the question of whether it will have that effect. The proposed amendment seems to narrow the focus even more so that the bill would only focus on the decisions of three state agencies. That makes the bill less threatening to the right of access of Alaskans with disabilities and to other Alaskans with public interest claims.

He urged members to consider the words of Justice Kennedy of the U.S. Supreme Court when deciding whether this legislation is wise in its effect on the rights of some people to gain access to the courts. He quoted Justice Kennedy from the case of Legal Services Corporation vs. Velasquez:

Interpretation of the law and the Constitution is the primary mission of the judiciary when it acts within the sphere of its authority to resolve a case or controversy. An informed independent judiciary presumes an informed, independent bar. By seeking to prohibit the analysis of certain legal issues, and to truncate presentation to the courts, the enactment under review prohibits speech and expression upon which courts must depend for the proper exercise of the judicial power. Congress cannot wrest the law from the Constitution, which is its source. Those then who controvert the principle that the Constitution is to be considered in court as a paramount law are reduced to the necessity of maintaining that courts must close their eyes to the Constitution and see only the law.

MR. BRIGGS said in that case, the court was looking at restrictions made by Congress on the legal claims that Legal Services Corporation lawyers could make in representing their clients. SB 97 does not restrict the kinds of claims that could be brought but it creates an obstacle for certain kinds of plaintiffs to bring actions in court. He said he is aware of the need to diversify Alaska's economy, including the need for more resource development. However, he urged members to think twice

before restricting access to the courts for one group of Alaskans because that action could create a precedent for other groups.

CHAIR SEEKINS said this legislation limits the kind of actions that can be brought; it does not limit any group of Alaskans.

MR. BRIGGS said he misspoke and the Chair is correct. His point is that if access to the court is restricted for certain kinds of actions that will open the door to restricting access to the court as a forum available to others.

CHAIR SEEKINS said that is the intent of the bill. He asked how many legislators served on the committee that reviewed Civil Rule 82 in 1983.

MR. BRIGGS said he does not believe any legislators served. He recalled that an Alaska Supreme Court justice and attorneys who had primarily represented tort litigants served. At the time, the rule was up for debate because of a concern that there was too much tort litigation.

CHAIR SEEKINS asked Mr. Briggs if he finds it odd that the Legislature might want to discuss what the officers of the court decided to do, in terms of what kind of cases can be brought.

MR. BRIGGS said it is absolutely within the Legislature's prerogative to amend any court rule.

SENATOR THERRIAULT referred to Rule 508 (court determination of a frivolous appeal or cross-appeal) and asked how often that finding is made.

MR. BRIGGS did not know but said when cases are decided, whether by settlement or judgment, the litigants must file a report so it might be possible to determine the number cases from the database of reports.

SENATOR THERRIAULT said he asked because he believes judges are very reluctant to declare a case to be frivolous. He said he doesn't believe that language prevents the potential for abuse.

1:42 p.m.

SENATOR FRENCH thanked Mr. Briggs for his analysis in light of his background as an attorney for the federal and state governments. He asked if Mr. Briggs would be surprised to learn

that in the last 10 years, a total of 15 natural resource cases were found to be public interest litigant cases. He also asked if Mr. Briggs is surprised to learn the number of those cases have decreased over time. He questioned how that decrease supports the idea that this rule spurs on weak claims.

MR. BRIGGS said he is not well schooled on the amount of money DOL has sought in payment of claims and judgments. The only data he has heard is the data referred to by Senator French. The committee does not have data from private litigants on their costs, which is unfortunate. However, from the data that is available, it is clear that the largest beneficiaries of public interest litigation have been attorneys who have represented litigants in redistricting cases. He suggested that is exactly what the public interest litigant exception is supposed to do, which is to encourage access to the courts on important subjects such as the validity of elections.

CHAIR SEEKINS asked Senator French to share his data with the rest of the committee.

SENATOR FRENCH agreed to do so.

SENATOR THERRIAULT said he agrees with Mr. Briggs about the redistricting litigation because those cases are based on a constitutional interpretation of socio-economic compactness, etcetera. In discussions he has had with other members of the Senate, he has sensed a certain amount of agreement on the issue of maintaining access to the court system for the disabled community. His read on the current bill is that the committee is trying to prevent any impact to those kinds of cases.

MR. BRIGGS said the Disability Law Center recognizes the committee's effort to narrow the focus of the bill [to natural resource cases] and appreciates it. He maintained that it is difficult to create a better environment for resource development while preserving access to the courts for others who are not focused on that particular debate. The Center takes no position on the bill but he cautioned members that, like many subjects that involve constitutional issues, raising the prospect of defining one special class whose rights are not subject to such protection creates a precedent. That is his biggest concern.

MR. BRIGGS said he has advised families that if they pursue a case against the state and the state prevails, the family will face a large risk of liability. Some families decide they cannot

afford to take that risk. He said one way the Legislature could accomplish its goal is to at least maintain the freedom of risk. Class action litigation, in his view, occurs when people have lost the political battle and turn to the court to gain some support for their position. He said he personally believes the full fees doctrine, when one wins, does encourage litigation because litigation is very expensive for private lawyers who have to pay the rent. On the other hand, non-profit groups that are funded to pursue a particular interest will probably still go to court but they won't be so chilled by facing the prospect of [liability].

SENATOR THERRIAULT asked Mr. Briggs if he believes there is justification to limiting the upside but removing the downside risk.

MR. BRIGGS said the downside risk is what chills the right of access of regular people to the courts more than anything else.

MR. RICH HEIG, general manager of the Greens Creek Mining Company and president of the Council of Alaska Producers, said he would be speaking on behalf of the Council of Alaska Producers. He said he hopes SB 97 can be passed in some form during this session. He recognizes that public interest litigation can be necessary at times, but the resources industry is heavily burdened with extensive state, federal and, in some cases, local permitting requirements. The permitting process can take years to complete and includes public hearing opportunities, public comment opportunities, and administrative review by the commissioners of the agencies. The process of administrative appeals following the permit process is very time consuming and costly to both the agencies and the industry. He agreed with Senator Ogan that the big issue for industry is not so much the cost of reimbursement of attorney's fees for public interest litigants, but the cost and time associated with getting through the process. Once a company gets to the end of the permitting process, it cannot be assured the process is complete because a decision can be appealed to the court system. If SB 97 has the potential to reduce the cost of litigation, and the time and cost it takes to begin development, it can be very beneficial to industry without any increased risk to the environment.

SENATOR OGAN asked Mr. Heig if he would like to see a more linear process of jumping through the hoops so that a company knows when it is done with the permit process.

MR. HEIG said Greens Creek just spent two years to get to "hoop A" in the environmental impact statement (EIS) process. This week it will go out for its draft EIS. From here on out, Greens Creek will work within specified time periods for the remainder of the federal permitting process. The state is working concurrently with that time schedule on solid waste permit and other issues. At the end of this process, in January of next year, Greens Creek expects to go through the appeals process. He said it is important for Greens Creek to know it can reach an end goal and bring an operation into development.

SENATOR OGAN asked how much money Greens Creek has spent so far to obtain permits and to do core samples.

TAPE 03-26, SIDE B

MR. HEIG explained the Greens Creek permit application is for a 30 acre expansion to its existing facility. He estimated the total cost over the last couple of years to be between \$1 million and \$1.5 million.

SENATOR OGAN asked Mr. Heig to estimate the total cost assuming an appeal takes place and that SB 97 is not enacted.

MR. HEIG said he expects the actual costs to decrease this year because of the structured time period to take public comment and wait for a record of decisions. If Greens Creek goes into a court proceeding next January, the cost will depend on the length of time and the legal costs. He said that will cost at least \$500,000.

SENATOR OGAN surmised that Greens Creek could spend at least \$2 million and then face litigation that potentially could kill the project.

MR. HEIG said Greens Creek will run out of tailings capacity in March of 2005. Construction to build a new tailings facility will take one season. If it loses next year's construction season because of an appeal, Greens Creek could be forced to shutdown in early 2005 until the process is completed.

SENATOR OGAN asked the amount of Greens Creek's annual payroll.

MR. HEIG answered about \$25 million.

1:57 p.m.

MS. PAM LABOLLE, President of the Alaska State Chamber of Commerce, stated support for SB 97. She told members the Alaska State Chamber worked very hard to bring Court Rule 82 into being and believes it is fair to all. Under Rule 82, if the prevailing party is the defendant, it recovers 20 to 30 percent of the attorney fees incurred, the rationale being that it encourages settlement and provides partial compensation to parties who are forced to litigate to defend their rights. The Alaska Supreme Court's public interest litigant policy has watered down Civil Rule 82. It provides an incentive to file even weak claims because the public interest litigant suffers no economic burden if it loses.

MS. LABOLLE maintained that public interest litigants will not be treated unfairly under SB 97; they will simply be treated like all other Alaskans. Public interest litigants have the same opportunity to participate during the process of creating administrative rulings. They have the right to participate in drafting legislation and to participate in all hearings before an agency. However, once an agency or the legislature makes a decision, public interest litigants have special rights that other Alaskans do not have.

She said the Alaska Chamber of Commerce is a private non-profit organization. It deems itself to be the voice of Alaska business, which is a public interest. The business interests in the state provide most of the non-government jobs and most of the economic engine. Yet, the three times the Chamber has sued during her tenure, the Chamber was not deemed a public interest litigant. She said, as a previous witness stated, that experience can be very chilling. The Chamber has to decide whether a case is worth pursuing if it might have to pay 30 percent of the attorney's fees of the other party. Members pitch in \$25 to \$100 if they believe a case is important enough. The Chamber has had to play by the rules like all other Alaskans. The Chamber feels that since public interest litigants have the right to participate in every other step of the process on an equal footing with other Alaskans, it should also be on an equal footing when using the court system.

SENATOR FRENCH asked Ms. LaBolle if she favors eliminating the public interest litigant doctrine altogether.

MS. LABOLLE said she does; the Chamber feels that Court Rule 82 provides a level playing field and applies to all Alaskans.

CHAIR SEEKINS took teleconference testimony.

MR. PAUL LAVERTY told members he is a self-employed civil engineer who brought suit against the Alaska Railroad Corporation (ARRC) in 2000 for the illegal [award] of a contract that awarded 1 million tons of gravel to a private Anchorage corporation. No public testimony, notice or bid occurred for that contract on the open market. In bringing the lawsuit, he brought the ARRC's board of directors' attention to the fact that this was something it needed to look into. He also brought it to the attention of former Senator Loren Leman, Representative Kay Brown and Representative Terry Martin. Representative Martin served on the Legislative Budget and Audit (LBA) Committee at the time and requested an audit be done. The committee issued audit number 08-4547-96 that upheld some of Mr. Laverty's concerns about the legality of the contract.

MR. LAVERTY told members that after the audit was released, he again contacted the three legislators asking them to forward the report to the attorney general for action to nullify the contract. When that did not occur, he filed the lawsuit after much soul searching because he was not sure whether he would be liable for attorney's fees. After his suit rolled through the entire process, he was deemed to be a public interest litigant; therefore, his attorney was awarded his fees.

MR. LAVERTY said that SB 97 would preclude citizens like himself from bringing forth actions against state agencies that have complete disregard for their internal procurement rules and the Alaska Constitution. He urged members to think before limiting private citizens' abilities to bring action against the government after they have made every attempt to remedy the situation outside of court. He stated opposition to SB 97.

2:10 p.m.

MS. NANCY WAINWRIGHT, an Anchorage attorney, said she believes whatever decision the committee makes should be based on accurate information. She cautioned that the assistant attorney general might have provided the committee with some erroneous facts. She said she is the attorney that represented the individual plaintiff - it was not a well-funded group - in the Prince William Sound tanker farm lawsuit. She took that case as part of her pro-bono requirements for the Alaska Bar Association. This individual was deemed to be an indigent and he was a fisherman who was severely impacted by the Exxon Valdez oil spill. He took a sincere interest in trying to make things better for the future rather than to seek recriminations. He and

numerous other administrative appellants, including the Kodiak Island Borough, the City of Cordova, and numerous fishermen and fishing groups, began a long saga of trying to get through the Department of Environmental Conservation's (DEC) administrative appeals process. By the time the decision was rendered, the tanker plans had expired. She pointed out that although there were 84 points on appeal listed for the court, only five substantive issues and three procedural issues were briefed. Because the plans had expired, the court found the case moot. Therefore, the assistant attorney general's statement that her client did not prevail on any issues is not exactly accurate.

MS. WAINWRIGHT said were it not for her client and the other appellant's actions, there would be no protection for the Copper River delta with specific plans to respond to an oil spill. The use of state-of-the-art tractor tugs was negotiated during the time of this appeal. They escort the tankers and are world renowned in their effectiveness. Sensitive areas inside and outside of Prince William Sound that need special plans to protect them because of their unique configurations would not be protected. Those are the kinds of issues this single individual pursued all of the way to the Supreme Court. She felt it is very misleading for the assistant attorney general to suggest that by listing certain issues on appeal, which is just a procedural step, and not carrying those forward in a brief somehow justifies eliminating public interest litigant status for everyone.

MS. WAINWRIGHT said she has practiced law in Alaska for 16 years and believes it is very important that this committee be given accurate facts upon which to base this very important decision. She thanked members and offered to answer questions.

SENATOR THERRIAULT asked if the lower court determined that her fees should not be paid.

MS. WAINWRIGHT said that is correct and the court made that determination because the case was found to be moot so there was no prevailing party in that sense. However, the court did say her client prevailed on certain issues but none of significance. That is what has been appealed to the Supreme Court.

MR. ALAN JOSEPH, Association of Village Council Presidents (AVCP), told members that the AVCP sent a letter in opposition to SB 97 and HB 145. He gave the following highlights of that letter.

Public interest litigant protections are important because people are able to bring lawsuits on matters in which they have no direct financial stake. These bills will make it much harder to challenge public land and wildlife decisions made by state agencies that undermine the [Native] way of life.

A recent amendment to SB 97 offered in the Senate Resources Committee makes the bill even worse. That amendment would make the lifting of public interest litigant protections apply to all public interest lawsuits, whether they involve state resource agencies or not.

The consequences will be devastating for rural Native people. For instance, two lawsuits are pending in the Alaska Court System: Kasillie vs. State, an equal protection lawsuit, and Alaska Intertribal Council vs. State, an equal police protection lawsuit. The AVCP believes the individual residents of its region show great courage by stepping forward as plaintiffs in these lawsuits. They are complex lawsuits that require a great amount of attorney time. Currently the plaintiffs are protected by their public interest litigant status should their lawsuits prove unsuccessful. SB 97 will do away with that protection and leave the plaintiffs exposed to the risk of having to pay the state's legal fees and they would lose everything they own. It is likely that passage of these bills will discourage people from filing any lawsuits against the state at all. AVCP thinks that is the intent of this legislation. These bills were put forth by the DOL in an effort to intimidate those who stand up to them in court. The AVCP finds it highly ironic that an administration that wants to cut government is putting forward legislation that is designed to coerce people into not standing up to abuses by the government.

MR. JOSEPH said although proponents of this legislation say it will even the playing field, the rich and well-to-do will be able to obtain high priced attorneys to represent their interests in court and they usually do because they have an economic incentive to bring these lawsuits. In contrast, public interest litigants do not have a financial interest in the outcome of the lawsuits.

CHAIR SEEKINS announced that with no further questions or testimony, SB 97 would be held in committee and that he would close public testimony. He then announced an at-ease for several minutes.

SB 98-LIABILITY: PLANE AND BOAT PASSENGERS

CHAIR SEEKINS announced that Version H of SB 98 was before the committee.

SENATOR CON BUNDE, sponsor of SB 98, provided the following background information on the measure, which he referred to as the "good neighbor bill."

Thousands of Alaskans own airplanes and boats and magnify their enjoyment of Alaska's out of doors by showing access to our outdoors with friends, relatives, neighbors. That's the good news. Perhaps the equally important news, but not always so good, is that there are certain inherent risks in accessing Alaska's wilderness and out of doors. Traveling off the highways and byways does have some inherent risk.

SB 98 is designed to clarify that people who accept an invitation to a plane or boat trip also accept some of these inherent risks. I call it the 'good neighbor bill,' Mr. Chairman and committee members, because as Representative Ogan probably has experienced and others that may have had a boat or airplane at one time in their lives that a neighbor will say, gee, that's really a nice boat you got there and I'd sure like to go for a ride sometime, I'd be happy to help you pay for the gas.' And, unfortunately in today's society, by being a good neighbor and taking a friend, a neighbor out, the boat owner or airplane owner are putting themselves and their families' assets at great risk - great risk because at this point if there's any unforeseen and truly accidental occurrence, they are liable for suit.

Common law recognizes that certain activities do carry inherent risk and participants take some responsibility for injuries they may sustain while participating in those activities. Currently in state statute there's laws about private runways, zoos, unimproved land, the ski safety act. Unfortunately in today's society, people often sue without consideration for their own responsibility for participating in these activities. This has made insurance almost unaffordable for most Alaskan plane and boat owners and, in some cases, forcing them to forego insurance at all and/or refuse to take guests along or simply just get out of the business. When I

say business I mean the activity, not a commercial.... Certainly both flying and boating have these inherent risks that I discussed earlier. This bill would suggest that if you participate in an activity like that and the owner - the operator - are not guilty of gross negligence or intentional misconduct, then the passenger should indeed accept some of the inherent risk.

SB 98 does not - let me emphasize not - absolve owners from all responsibility to maintain and operate their equipment in a safe and prudent manner. SB 98 only applies to private owners; it doesn't apply to commercial planes or boats. SB 98 will discourage expensive, frivolous lawsuits and help contain rising insurance costs. I'd like to point out that it doesn't discourage a person from getting insurance and some people do because there's a liability to folks outside of the plane or the boat as well and wise people would carry some liability coverage there if they can afford it. What it does exempt the owner/operator from is a suit in excess of the insurance coverage that they have or, in the event that they simply are not able to even at any cost or any reasonable cost get insurance, it says, if you notify your passenger that there is an inherent risk, that you are without insurance, that they are assuming some of the risk if they join you, then you are not liable or subject to a suit at all.

So, two things could happen. One, you have insurance; you're not sued beyond the coverage. The other is you don't have insurance, you notify the passenger of this, and then you're not subject to suit at all, assuming you're not grossly negligent, you're not involved in any intentional misconduct - criminal activity. With that, Mr. Chairman, I'll make myself available for questions.

CHAIR SEEKINS referred to the language on page 2, line 7 that reads "if not being used for commercial purposes" and asked what the definition of "commercial" is.

SENATOR BUNDE said the FAA has very clear and strict aircraft regulations: a passenger can reimburse for his or her share of the gas, oil and operating expenses. Any costs beyond one's share of the operating expenses, if one is operating under the FAA rules for commercial operation, are considered to be

commercial. The FAA does not have a clear definition of "commercial" for boating but, obviously, the intent is that it applies to anyone who is operating for a profit or for hire.

CHAIR SEEKINS asked whether a boat owned by a company that is used to entertain would be covered under SB 98.

SENATOR BUNDE said it would. An amendment in the Senate Transportation Committee addressed that scenario. If a common carrier, for example an aircraft company, owns a boat for its employees' recreational use, it would fall under this bill if that boat is not used commercially at all. If the company uses the boat for profit, it would fall outside of the bill.

SENATOR OGAN pointed out the Coast Guard has regulations that require an operator to have a six-pack license for commercial use of a boat. He asked how guides would be affected by this legislation if they fly under Part 91. He indicated that a guide might use an airplane to fly people around but the plane would not be used commercially for hire. He suggested clarifying that matter in the legislation.

SENATOR BUNDE said the guide scenario would be a for-profit venture. He said the FAA has been tightening up on Part 91 operations for guiding and is urging people to become single pilot 135 operations.

SENATOR OGAN said he does not believe the FAA has required that at this point in time so he questioned whether Senator Bunde intends to exempt guides from liability under SB 98. He then suggested changing the phrase to "not being used for lawful commercial purposes" so that drug smugglers are not covered.

SENATOR BUNDE said any boat or aircraft that is used in a business venture, such as guiding, would not be covered under SB 98. This bill is aimed at private recreational activities only, not for any commercial venture in any shape or form. Regarding unlawful businesses, SB 98 contains language that exempts only recreational activities that do not involve any illegal activities.

CHAIR SEEKINS asked whether he would be covered if he flew a friend around in his company-owned airplane.

SENATOR BUNDE said he would as long as he does not own an air taxi company.

SENATOR OGAN said that an illegal activity like bootlegging might apply in Alaska. A person could offer to fly someone around with the intent of delivering liquor to a dry village.

SENATOR BUNDE said SB 98 would not cover anyone who is involved in gross negligence, intentional misconduct, or an illegal activity.

SENATOR FRENCH asked Senator Bunde if he could provide examples of outrageous lawsuits that have been filed and successfully prosecuted under the existing laws.

SENATOR BUNDE replied:

I would, I guess, try to answer by indicating that any commercial air taxi that I'm familiar with felt that they had to insure for at least \$1 million per seat to feel that they were adequately covered because of potential lawsuits and often that meant Lloyds of London to find that kind of coverage. So, specific lawsuits, you know, I just know there's a lot of anxiety out there so - what's a relative loss? Somebody who instead of a lot of other hobbies they do a lot of sweat equity to have a boat or an airplane but they're of middle class but modest means - you know a \$100,000 loss could mean their home and with court costs and things it doesn't take very long to get to \$100,000.

SENATOR OGAN referred to the language on page 3, lines 3 through 7, and asked if that language is included in case a child takes a parent's boat without his or her knowledge.

SENATOR BUNDE said that's correct. In addition, if a stranger or someone without direct permission took your boat, that person would not be exempt.

SENATOR ELLIS asked Senator Bunde what facts he could provide related to [liability suits for] boating and private plane operations. He also asked if Senator Bunde has a commitment from insurance companies to reduce or maintain insurance rates if this legislation passes.

SENATOR BUNDE said he has no commitment from insurance companies and, if he did, he would be suspicious of it. He said insurance companies base rates on actuarial data so that the loss they are likely to sustain does not increase. However, the likelihood of

an increase to rates may be reduced. In addition, the number of competitive companies should increase. He said the best we can hope for is a decrease in the rate of increase. He repeated that it is very challenging to get coverage in the amount of \$1 million per seat and it involves reinsuring through Lloyds of London.

SENATOR ELLIS maintained that rate increases are based on factors other than actuarial information, such as what the market will bear. He said he thought insurance companies might have promised Senator Bunde something if this legislation passes.

SENATOR BUNDE said he has received no promise from the insurance companies and he has been generous in his opinion that the insurance business operates on the principle of insuring for the highest rate for the lowest risk and, if there's a loss, they delay payment to make money on the float. That is their responsibility to their stockholders.

SENATOR ELLIS commented that Senator Bunde has a more realistic view than many policy makers.

SENATOR FRENCH commented that the letters of support for the legislation contain two main factors: high insurance rates and fear of frivolous lawsuits. He said he couldn't speak to insurance rates because he does not own a boat or plane, but frivolous lawsuits are penalized under our justice system. People who bring frivolous lawsuits must pay for the opposing party's attorneys. He said he believes the fear of frivolous lawsuits may be exaggerated.

SENATOR BUNDE said he does not know that he would use the word "frivolous" but he is more concerned about a sympathetic jury that might think a boat owner has deep pockets.

SENATOR OGAN said as a life long boater he has spent thousands of hours on the water and, as pilot he has spent hundreds of hours in the air. He said one of the joys of owning a plane and a boat is sharing them with friends and family. He noted with the inherent risks in traveling in Alaska, this bill would let people who do share get a better sleep so it is worthwhile.

2:45 p.m.

TAPE 03-27, SIDE A

SENATOR BUNDE said everyone who has lived in Alaska for a while tends to become complacent about the scenery. He finds it refreshing to take someone to see Mt. McKinley for the first time because doing so reinvigorates his appreciation for where he lives.

CHAIR SEEKINS said he knows from firsthand experience that insuring boats and airplanes is costly. On top of the cost of insurance, there is the Rule 82 charge. He thanked Senator Bunde and announced he would hold SB 98 in committee.

SB 89-LOBBYING/ LEGISLATIVE ETHICS

CHAIR SEEKINS informed members that a proposed committee substitute was prepared (version I). He said the committee substitute clarifies that someone who engages clientele for the business, occupation, service or profession of including legislative or administrative action is a lobbyist. It further defines those people who fall in the "four-hour group." It also includes one more definition that uses the phrase "communicate directly."

SENATOR ELLIS asked if Version I is new to this meeting.

CHAIR SEEKINS said it is. He explained the handout is a visual aide to show how the committee substitute (CS) will read in its final form.

SENATOR THERRIAULT moved to adopt version I as the working document before the committee.

SENATOR ELLIS objected and asked for another explanation of the substantive changes.

CHAIR SEEKINS explained:

... It takes the professional lobbyist and puts them in the first place rather than in the second place so they just switched around (A) and (B) from the old bill. It basically says that if you are a professional lobbyist, you are one. And then, secondly, it goes in paragraph (B), which would be on page 2 - it says that a person who receives wages or other economic consideration, including reimbursement of travel and expenses, to communicate directly with any public official for the express purpose of influencing legislative or administrative action and during more

than 40 hours in any 30 day period in one calendar year, would also be required to be a registered lobbyist.

He said the words "regular" and "substantial" were removed. It says instead that if a person engages in certain activities for a certain length of time, that person is considered to be a lobbyist.

SENATOR THERRIAULT referred to Subsection 8(B)(ii) and noted it now says 40 hours in any 30-day period.

CHAIR SEEKINS agreed and clarified that the words, "in any 30-day period in one calendar year" were added.

SENATOR ELLIS removed his objection, therefore version I was adopted.

SENATOR FRENCH asked if, under version I, a lobbyist is considered to be anyone who engages clientele for the business, meaning anyone who actively represents another person. He asked if he offered to work for GCI for \$1,000 per month to do a specific job in the Legislature that only took him 10 minutes, he would be considered to be a professional lobbyist.

CHAIR SEEKINS said he would and, as he understands the current law, he would have to register before he could begin to represent GCI.

SENATOR FRENCH then asked if the other category of lobbyist is someone who receives wages or other economic consideration, including reimbursement for reasonable travel and living expenses, which would include a sole business owner.

CHAIR SEEKINS said it could be a sole business owner, an employee, or anyone who was paid or got compensated as part of his or her job. He added if it is solely one's job, that person is in a different category.

SENATOR FRENCH asked if Chair Seekins' service manager came to the legislature to discuss a bill about repair procedures and was paid a wage and reimbursed for travel, that employee would not be considered to be a lobbyist because he did not spend more than 40 hours in any 30 day period.

CHAIR SEEKINS said that is correct.

SENATOR FRENCH asked if that would affect the "public" lobbyist - the schoolteachers or school board lobbyists.

CHAIR SEEKINS said it would not because public employees are exempt.

SENATOR THERRIAULT said he prefers 40 hours in any 30 day period, as opposed to one month. He did not want to see people use the calendar month to postpone discussions until the beginning of the next month and "reset the clock."

SENATOR OGAN asked why the language on page 1, line 9, that reads, "by means including but not limited to the provision or use of information, statistics, studies, or analyses in written or oral form or format" was deleted.

CHAIR SEEKINS said he does not know why that language was there in the first place. He explained, "Quite frankly, influencing legislative action would mean to me to communicate directly for the purpose of influencing legislative action." That is already included in the first part of the bill.

SENATOR THERRIAULT asked that a staff member from the Alaska Public Offices Commission (APOC) respond to that question.

MS. BROOKE MILES, Executive Director of APOC, said she was also curious about why it was dropped. However, since lobbying is done through direct communication, specifying the kind of materials used within that communication is unnecessary.

CHAIR SEEKINS said he removed it to get rid of the clutter.

SENATOR ELLIS indicated that Chair Seekins' original proposal contained 80 hours and APOC proposed an increase from four to 16 hours. He asked why Chair Seekins cut his original 80 hours to 40 hours.

CHAIR SEEKINS said he looked at what other states do in terms of time. He noted that 40 hours is actually a little less than one-third of the time an average person works in a month. Therefore, if a person lobbies for more than one-third of his time per month, he feels that person should be a registered lobbyist. He said APOC's proposal of 16 hours is a move in the right direction but it did not go far enough.

SENATOR ELLIS asked if the chair could concede that some people could come to Juneau and spend 80 hours lobbying and not have

much of an impact, while others who are not professional lobbyists could spend an hour and have an enormous impact on the public treasury or the public interest. He said he would hate to see this policy change be naive about how business is really conducted in the Capitol.

CHAIR SEEKINS said from his limited experience, he believes the amount of time someone spends lobbying is nowhere equated to the effectiveness of their effort.

SENATOR OGAN said a good lobbyist might only need to be here for two hours while a bad one might spend 80. He said it is hard to quantify, but a number has to be put on somewhere.

SENATOR ELLIS asked, with all due respect to the Chair, why the committee would accept the chair's judgment, with his admitted limited experience, regarding a reasonable time limit in place of what has been recommended by the APOC, who has been observing this business for years.

CHAIR SEEKINS said he does not see it as a matter of judgment; it is a matter of preference. He believes APOC would agree to a higher number than 16. He added that 40 hours is one opinion of where the loop is that is not too big or too small yet captures and requires those people who lobby as a profession or as part of their job to be registered lobbyists. Those who are not but can provide insight to legislators should not be precluded from the rest of the process. He said he is not sure they are lobbying when they are being helpful and pointing out pitfalls. That is different than trying to influence legislation. He said what he really doesn't want is to limit public input in any way.

SENATOR OGAN commented that in response to Senator Ellis's point, ultimately the committee as a whole, the Senate as a whole, and the full body will make the decision. Anyone is free to propose amendments to the bill.

SENATOR ELLIS said he would vote for 20 hours.

CHAIR SEEKINS said 40 hours is less than 25 percent of a full time job.

SENATOR FRENCH said his perspective is from the viewpoint of his average constituent who is busy with life and may send one e-mail during an entire session, but most likely sends none. Most people do not bother to communicate with their legislators at all. He said he wants to make certain his constituents know who

has influence over him and feels that legislators should err on the side of caution about making sure the public knows who is talking one-on-one to legislators about bills. With a limit of 40 hours, a person could spend about 4 days per month pushing legislation at the legislature without ever having to register. That is much more time than any of his constituents will ever spend and much more time than the general public will spend behind closed doors pushing legislation, and those people will never have to tell the world they are lobbying. He said he would prefer to limit the number of hours to 8 so that if a person spends more than one full working day per month with legislators, that person is doing way more than the average person and should register for that particular legislative year. If that activity was a one-time situation, the person does not have to register the next year and can donate to anyone he or she wants to.

CHAIR SEEKINS asked whether that would include public employees and, if not, why not if they are pushing an agenda.

3:10 p.m.

SENATOR FRENCH said it would not because those people would be advocating for a systemic change, which does not benefit them directly. He pointed out a commissioner who discusses the need for a change to the Department of Corrections' budget or the need for more prison guards does not have a personal stake in that issue.

CHAIR SEEKINS said if the public has the right to know who is influencing legislators, the public should know who everyone is and legislators should be the ones to report.

SENATOR THERRIAULT said Chair Seekins decreased his initial number of 80 hours and he recalls the first debate where anything off of the existing four hours was considered to gut the regulations. He said both ends of the spectrum have seen considerable movement. He stated:

I am a little bit troubled by the focus on perhaps a few individuals and just the previous comments that says, well, if you want to come down and exercise your right to speak to an elected official, you can do so if you agree to give up your constitutional rights for a year. I just don't understand why that's necessary.

SENATOR FRENCH replied if it is Senator Therriault's position that it is a constitutional right to donate money, that's a constitutional right that he has yet to have explained to him in a Supreme Court case. Supreme Court cases have long differentiated between speaking, advocating and spending money on one's own behalf and finding some right to donate money. He does not believe there is a case that says a person has a right to donate money. It is a false dichotomy that has run throughout much of the debate on this issue.

CHAIR SEEKINS asked the wish of the committee.

SENATOR THERRIAULT asked if a fiscal note was provided.

MS. MILES told members that APOC submitted a zero fiscal note.

SENATOR THERRIAULT noted he had one dated April 4 that was prepared by the committee.

MS. MILES affirmed that APOC submitted a zero fiscal note.

SENATOR THERRIAULT moved CSSB 89(JUD), version I, from committee with individual recommendations and the accompanying fiscal note.

SENATOR ELLIS objected. He said he fully appreciates that Ms. Miles and APOC staff have been under a lot of pressure and tension this legislative session due to a lot of discussion among legislators and the administration about several pieces of legislation. He said he wanted to recognize what they have been through and appreciates Ms. Miles' and APOC's attempt to speak up for the public interest.

CHAIR SEEKINS said that APOC has worked well with he and his staff and, while they may not agree on all points, APOC staff has acted very professionally.

The motion to move CSSB 89(JUD) from committee carried with Senators Ellis and French opposed and Senators Ogan, Therriault and Chair Seekins in favor.

With no further business to come before the committee, Chair Seekins adjourned the meeting at 3:13 p.m.