ALASKA STATE LEGISLATURE
SENATE RESOURCES STANDING COMMITTEE
March 28, 2003
3:40 p.m.

MEMBERS PRESENT

Senator Scott Ogan, Chair
Senator Thomas Wagoner, Vice Chair
Senator Fred Dyson
Senator Ralph Seekins
Senator Ben Stevens
Senator Kim Elton

MEMBERS ABSENT

Senator Georgianna Lincoln

COMMITTEE CALENDAR

HOUSE BILL NO. 69
"An Act relating to regulation of shallow natural gas leasing and closely related energy projects; and providing for an effective date."
MOVED SCS HB 69(RES) OUT OF COMMITTEE

SENATE BILL NO. 97
"An Act relating to public interest litigants and to attorney fees; and amending Rule 82, Alaska Rules of Civil Procedure."
ASSIGNED TO SUBCOMMITTEE

#SB122
SENATE BILL NO. 122
"An Act relating to an annual wildlife conservation pass and the fee for that pass; relating to nonresident and nonresident alien big game tag fees; and providing for an effective date."
SCHEDULED BUT NOT HEARD
#

PREVIOUS ACTION

HB 69 - See Resources minutes dated 2/24/03.

SB 97 - No previous action to record.

SB 122 - No previous action to record.

WITNESS REGISTER

Mr. Robert Mintz
Assistant Attorney General
Department of Law
PO Box 110300
Juneau, AK 99811-0300
POSITION STATEMENT: Described changes made to Version C of HB 69

Mr. Dan Seamount
Alaska Oil and Gas Conservation Commission
333 W 7th Ave. #100
Anchorage, AK 99501-3539
POSITION STATEMENT: Answered questions about Amendment 2 to HB 69

Mr. Randy Ruedrich
Alaska Oil and Gas Conservation Commission
333 W 7th Ave. #100
Anchorage, AK 99501-3539
POSITION STATEMENT: Answered questions about Amendment 2 to HB 69

Mr. Matt Davidson
Alaska Conservation Alliance
419 6th St.
Juneau, AK
POSITION STATEMENT: Expressed concerns about SCS HB 69(RES)

Mr. Gary Carlson
Forest Oil Corporation
1600 Broadway, Suite 2200
Denver, CO 80202
POSITION STATEMENT: Supports SB 97

Mr. Neil MacKinnon
Alaska Minerals Commission
1114 Glacier Avenue
Juneau, AK 99801
POSITION STATEMENT: Supports SB 97

Ms. Pam LaBolle
Alaska State Chamber of Commerce
217 Second Street
Juneau, Alaska 99801
POSITION STATEMENT: Supports SB 97

ACTION NARRATIVE

TAPE 03-18, SIDE A
Number 0001

CHAIR SCOTT OGAN called the Senate Resources Standing Committee meeting to order at 3:40 p.m. All members were present except Senator Lincoln, who was excused.

#HB69

HB 69-REGULATION OF SHALLOW NATURAL GAS

CHAIR OGAN told members that he had assigned HB 69 to a subcommittee chaired by Senator Dyson. He declared a conflict of interest with HB 69 and asked to be excused from taking action on it.

SENATOR BEN STEVENS objected.

CHAIR OGAN then stated that Vice Chair Tom Wagoner would chair the meeting.

SENATOR ELTON asked Chair Ogan to describe his conflict.

CHAIR OGAN said he works during the interim for a company that will be directly affected by this legislation.

VICE-CHAIR WAGONER told members that a proposed committee substitute, Version C, was before the committee.

SENATOR SEEKINS moved to adopt Version C as the working document of the committee.

VICE-CHAIR WAGONER noted without objection, the motion carried.

SENATOR DYSON moved the adoption of Amendment 1, which reads as follows.

A M E N D M E N T 1

Page 3, line 26, after "laws" delete all language through lines 31 and replace with:

> If DNR clearly demonstrates an overriding state interest, waiver of local planning authority approval and the compliance requirement may be granted by the commissioner. The commissioner shall issue specific

findings giving reasons for granting any waiver under this section.

Page 4, line 2, after (o) delete all language through line 6 and replace with:

If DNR clearly demonstrates an overriding state interest, waiver of local planning authority approval and the compliance requirement may be granted by the commissioner. The commissioner shall issue specific findings giving reasons for granting any waiver under this section.

SENATOR OGAN explained that Amendment 1 articulates that the state has a vested interest in that subsurface right and if the local regulations are so onerous, the commissioner can override them. He said he personally believes it is good state policy to protect state subsurface rights. Currently, in other states, cases have arisen in which local governments have passed regulations that prevented developers from accessing state subsurface property.

SENATOR SEEKINS said he supports this language because it is just a restatement of a truism. The state has certain rights under the Constitution; Amendment 1 reserves those rights.

SENATOR ELTON asked if a precedent for this language exists anywhere else in statute.

SENATOR OGAN said there is a precedent in the section on public projects.

SENATOR ELTON stated the original language in Version C was problematic for the Alaska Municipal League (AML) and questioned whether AML supports Amendment 1.

SENATOR OGAN said it does and that a representative from the AML was available to testify.

VICE-CHAIR WAGONER asked if any of the public participants wanted to testify on Amendment 1. There was no response.

SENATOR BEN STEVENS asked if the sponsor endorses Amendment 1.

VICE-CHAIR WAGONER asked that the record reflect that the sponsor nodded affirmatively in support of Amendment 1.

SENATOR OGAN informed members the citation for the waiver for public projects is AS 35.30.030.

With no further objection to the adoption of Amendment 1, VICE-CHAIR WAGONER announced the motion carried.

SENATOR DYSON moved to adopt Amendment 2, proposed by the Department of Law. He told members Department of Law staff has advised that the language in Amendment 2 is more consistent with existing statutory language and will help to avoid litigation. Amendment 2 reads as follows.

A M E N D M E N T 2

OFFERED IN THE SENATE RESOURCES COMMITTEE BY SENATOR DYSON

TO: SCS HB 69 (23-LS0428\C)

Page 1, line 7
Delete "unconventional"
Insert "shallow"

Page 1, lines 7-8
Delete ", including coal bed methane,"

Page 1, line 9
Delete "unconventional"
Insert "shallow"

Page 1, line 12
Delete "unconventional"
Insert "shallow"

Page 2, line 3:
Delete "unconventional"
Insert "shallow"

Page 2, line 7, following "as"
Delete "unconventional"
Insert "shallow"

Page 2, line 15
Delete "unconventional"
Insert "shallow"

Page 2, line 17

Delete "unconventional"
Insert "shallow"

Page 2, line 21
Delete "unconventional"
Insert "shallow"

Page 2, line 22
Delete ", including coal bed methane"

Page 2, line 25
Delete "unconventional"
Insert "shallow"

Delete ",including coal bed methane,"

Page 2, line 26, following "and, if so,"
Delete "establish the response"
Insert "whether the volume of oil encountered will be of such quantities that an oil discharge prevention and contingency plan will be required."

Page 2, lines 27-28
Delete all material.

Page 3, line 2
Delete "unconventional"
Insert "shallow"

Page 3, line 25
Delete "unconventional"
Insert "shallow"

Page 3, line 30
Delete "unconventional"
Insert "shallow"

Page 3 lines 30-31
Delete ", including coal bed methane,"

Page 4, line 1
Delete "title"
Insert "chapter"

Page 4, line 1
Insert a new bill section to read:

"*Sec.5 AS 31.05.170 is amended by adding a new paragraph to read:

(15) "shallow natural gas" means coal bed methane, natural gas drilled for under a lease authorized by AS 38.05.177, or natural gas drilled for in a well whose true vertical depth is 4,000 feet or less."

Renumber the following bill sections accordingly.

Page 4, line 1:
Delete "AS 38.05.177"
Insert "AS 38.05"

Delete "subsection"
Insert "section"

Page 4, line 2
Delete "(o)"
Insert "Sec. 38.05.178. Regulation of shallow natural gas; relationship of chapter to other laws."

Page 4, line 13
Delete "unconventional"
Insert "shallow"

Page 4, lines 13-14
Delete ", including coal bed methane,"

Page 4, line 6
Insert "For purposes of this section, 'shallow natural gas' has the meaning given in AS 31.05.170"

Page 4, line 13
Delete "unconventional [SHALLOW]
Insert "shallow"

Page 4, lines 13-14
Delete "including coal bed methane gas,"

Page 4, line 15, following "determines"
Insert "under AS 31.05.030(j) that"

Page 4, line 16, following "(1)"
Delete "under AS 31.05.030(j) that"

Page 4, line 16, following "for"
Delete "unconventional"

Insert "shallow"

Page 4, line 19, following "plan"
Delete "with an appropriate response planning standard described in"

Page 4, line 20
Delete "AS 46.04.030(k)"

Page 4, following line 22
Insert a new bill section to read
"*Sec.8. AS 46.04.900 is amended by adding a new paragraph to read:
(30) "shallow natural gas" has the meaning given in AS 31.05.170"

Renumber the following bill sections accordingly.

Page 4, line 26
Delete "unconventional"
Insert "shallow"

Page 4, line 26
Delete "unconventional"
Insert "shallow"

Page 4, following line 30
Insert a new bill section to read:
"*Sec.10 AS 46.40.210 is amended by adding a new paragraph to read:
(10) "shallow natural gas" has the meaning given in AS 31.05.170."

Renumber the remaining bill section accordingly.

SENATOR OGAN objected for the purpose of discussion.

VICE-CHAIR WAGONER asked Mr. Mintz to explain the intent of Amendment 2 to the committee.

MR. ROBERT MINTZ, Assistant Attorney General, Department of Law (DOL), explained to members that Amendment 2 was drafted by the DOL after consultation with representatives of the Alaska Oil and Gas Conservation Commission (AOGCC), Department of Natural Resources (DNR), and the Department of Environmental Conservation (DEC). It is intended to do three things.

- The term "unconventional natural gas" was changed to "shallow natural gas" throughout the legislation. The title of the bill uses the term "shallow natural gas" so the term was made consistent to avoid a potential problem with the title not describing the subject of the bill. The common understanding of "unconventional natural gas" includes gas at deep depths.
- It provides a statutory definition of "shallow natural gas." DOL felt that inclusion was important because as the bill has been developed, it actually affects not only the AOGCC statute, but also DEC and DNR. The definition makes clear what projects would and would not be covered by the bill.

MR. MINTZ told members that an AOGCC member would explain the definition to members.

MR. DAN SEAMOUNT, Alaska Oil and Gas Conservation Commission, said both the AOGCC and DNR discussed ways to define shallow natural gas and agreed on this definition. Any one or more of three criteria is sufficient to meet the definition. One criterion is coal bed methane. Because there is a practical depth limitation involved, coal can be squeezed to a point where gas cannot flow out of it at that depth, probably at about 4,000 feet. The second criterion could be covered by a DNR shallow gas lease, under AS 38.05.177. The third criterion is natural gas drilled for in a well with a true vertical depth (TVD) of not more than 4,000 feet. Both the AOGCC and DNR felt these criteria would cover the types of projects the committee intends to cover under this legislation.

MR. MINTZ then told members the third change in Amendment 2 will correct an inconsistency in the language between what the AOGCC is expected to do under Section 6 of the bill (related to oil spill contingency plans) and what the AOGCC is authorized to do under Section 2 of the bill (the AOGCC's powers and responsibilities). Using the language from Section 6 in Section 2 will avoid any uncertainty about the AOGCC's authority. In addition, a superfluous phrase was deleted.

MR. MINTZ noted a fourth change in Amendment 2 is technical and relates to Section 5. As written, the committee substitute adds a new subsection to Section 177 of AS 38.05, the shallow gas leasing statute. Because the coverage of Section 5 is broader than shallow gas leasing and the concept of shallow natural gas is broader than what is provided for under the leasing statute,

DOL thought placing Section 5 in the shallow gas leasing section could cause confusion. DOL instead suggested it be placed in a new section by itself. Amendment 2 adds that new section.

SENATOR OGAN referred to page 2, lines 22-25 of Amendment 2, and asked if the intent of that language is to prevent AOGCC from playing the role traditionally played by DEC.

MR. MINTZ said that is a policy call for the committee to make. He said Section 2 is only supposed to provide express authority for the AOGCC to do what Section 6 asks it to do. The language on lines 22-25 would make the language consistent with Section 6.

SENATOR OGAN asked if AS 31 is the AOGCC statute.

MR. MINTZ said that is correct.

SENATOR OGAN asked, "So you don't want AOGCC to be in the business of establishing a response? That's more what DEC - I mean is that why we're doing this basically - the DEC job description?"

MR. RANDY RUEDRICH, AOGCC, told members that two sections of the bill were inconsistent. Section 6 contained the requirements to provide information, which are left unchanged. Section 2 required the AOGCC to do the task described in Section 6. The amendment attempts to make consistent what the AOGCC is being asked to do with what it is doing. He said the AOGCC will be defining the likely flow rates to give to the DEC for the establishment of a spill contingency plan.

SENATOR OGAN asked if the line number changes on page 4 reflect the adoption of the committee substitute.

MR. MINTZ said that is correct. He explained that Amendment 2 was originally drafted to apply to Version B. However, when Version C was introduced, handwritten revisions were made to apply to Version C. He acknowledged that because of limited time, he cannot assure that all of the necessary revisions were included. [Amendment 2 as typed above contains the handwritten revisions provided by Mr. Mintz that apply to Version C.]

VICE-CHAIR WAGONER announced that with no further questions or objections, CSHB 69(RES) [Version C] as amended was before the committee.

SENATOR OGAN moved that the bill drafter be able to make any technical conforming changes necessary to incorporate Amendment 1 as he believed some clean-up changes may be required.

VICE-CHAIR WAGONER suggested that the motion allow the chair to make sure the changes are technical in nature before the draft is considered finalized.

SENATOR BEN STEVENS asked Senator Ogan to clarify why he believes Amendment 1 will require a technical correction.

SENATOR OGAN said he is concerned the heading will not conform. He added that he is only asking the committee to give the legal drafter the ability to make technical corrections, not substantive changes. He said the legal drafter made that suggestion because he did not draft Amendment 1.

SENATOR ELTON commented that if any technical amendments need to be made, he would also like a copy.

SENATOR OGAN indicated the legislation could also be changed on the Senate floor, if necessary.

There being no further discussion or objections, VICE-CHAIR WAGONER announced the motion carried and that the committee would take public testimony.

MR. MATT DAVIDSON, representing the Alaska Conservation Voters, expressed concern that the public has had very little chance to review the changes to HB 69 made in the Senate. He said he agrees that the development of coal bed methane and shallow gas drilling has huge potential for the development of energy across the state, especially in rural areas where energy costs are very high. Unfortunately, the bill does not recognize the potential risks of this type of development to groundwater, surface water, community development and public and private lands. The bill is lacking in that it does not instruct the agencies to take a proper look at these impacts. He asked that the bill recognize, in its findings section, the potential impacts to the waters, neighborhoods and communities of the state from coal bed methane.

MR. DAVIDSON said the bill erroneously implies that the impacts of coal bed methane developments are less of a threat to the resources of the state. He agrees they differ from deep well drilling, but the impacts to private landowners and surface waters in the Rocky Mountains have been very big. He described

the process of coal bed methane development, particularly reinjection, and problems associated with salinity, seepage, and groundwater levels and contamination. He repeated the findings section should reflect those risks and that AOGCC should develop regulations to address them.

MR. DAVIDSON said he believes it is inappropriate to leave the variance provision in Sections 1 and 3 of the bill. A variance will not be necessary once regulations are developed to properly manage coal bed methane production. He urged the committee to add the sunset provision to the variance language.

MR. DAVIDSON said he also believes it is inappropriate that the public notice of the variances continues to be included in the legislation. There has been no compelling testimony as to why the variances are necessary. The AOGCC is currently processing some of the variances requested by Evergreen Drilling. He said he continues to object to the language limiting local government planning in Sections 4 and 5. Coal bed methane has tremendous impacts on private land. A local government should have the right to tell the producer and the state that it does not want a compressor station built next to a school. His final point was that the exemption to coastal zone consistency review is inappropriate because coal bed methane produces wastewater and has the potential to affect marine and other ecosystems and should not be exempted.

SENATOR OGAN told Mr. Davidson that the subcommittee held a number of meetings and publicly noticed each one. He then told Mr. Davidson, regarding ground and surface water contamination, the plans that Evergreen Resources submitted to the AOGCC contain double protection to ensure no aquifer infiltration. He said water is not actually injected to produce the well. The water is drawn down to lower the pressure in the reservoir, which makes the methane to rise. He said some of that water does have low salinity levels. That is reinjected below the level of production into bedrock. It is virtually impossible for that water to infiltrate the aquifer. He also told Mr. Davidson that the boroughs will be able to say they do not want a compressor station next to a school through land use and planning. This bill does not remove that ability; it does allow the commissioner to waive local requests if there is a compelling issue but he believes those mitigating concerns can be addressed in the permit.

SENATOR OGAN said he believes Mr. Davidson must have been referring to a New York Times article about methane seepage in

the Powder River Basin. He said the methane seepage was a natural seepage that had been there forever. He pointed out that methane is non-toxic. He has seen friends in the Mat-Su Valley turn on their faucets, hold a match and light a fire. He noted the coal is very shallow in some places in the Mat-Su Valley. Those people are actually drawing water out of coal. Their water wells produce gas.

SENATOR ELTON commented that it is easy to talk about a lot of these issues as if the public has the same understanding of them. Often what gets in the way is a lack of knowledge. He said the issue is that at one end the bill constricts the possibility of public notice, at the other end, communities are being told they have no say. That sets up a situation where no rational discussion will take place because there will be no forum in which to do so. He asked whether situations in the past have occurred that warrant the new sections in the bill.

SENATOR OGAN asked to respond to a previous comment and said the only thing this bill does is to change public notices for technical changes made by the AOGCC, basically for down-hole operations. He said a technical change might be requested when a company wants to make minor changes to its plan of operation because it encountered a slightly different geology than expected. He said the public still has plenty of opportunity to comment on the leasing issue itself and mitigating measures on the overall plan. He pointed out to date, no one has requested a public hearing on any of those technical changes.

SENATOR ELTON asked if any situation has arisen that requires the kind of relief this bill seeks.

SENATOR OGAN said, to the best of his knowledge, there have been no requests on these technical down-hole issues, and that they have all been public noticed with the AOGCC. He told members that someone who wants to delay a project could request a hearing, which requires a 30-day notice. That could force an operation to shut down over a technical change to a plan that the AOGCC commissioners are capable of deciding upon without harming the public. He said he believes this change is consistent with the Governor's attempt to streamline the regulatory process.

SENATOR ELTON maintained that one can always envision a situation in which public notice and public hearings could create problems, even if they haven't in the past.

MR. DAVIDSON told members that he testified at the first subcommittee hearing, at which time the first committee substitute was introduced. That was the first time he saw the municipal language and called the Mat-Su Borough to inform staff. Since then, the chair of the subcommittee asked him to hold his comments and bring them before the full committee. He said he appreciates Senator Ogan's knowledge of coal bed methane. He noted that the State of Montana just considered a bill to regulate the discharge of water drawn from coal bed methane. The farmers and ranchers want it regulated because they cannot use that water on their operations. He pointed out that neither the state nor the AOGCC has a lot of experience with coal bed methane production or drilling so he feels it is appropriate to discuss potential issues in communities.

SENATOR OGAN said he agrees that other states have had problems with water discharges. However, in some areas of Colorado, the water is so pure it is drinking water quality. Ranchers love it because they can get a water supply they did not have before. However, there are problems with salinity in other areas. That is not the case in Alaska because that water cannot be discharged on the ground; it must be reinjected below 4,000 feet.

MR. DAVIDSON told members his goal is that the legislation recognize that impacts from coal bed methane production can occur. He asked the committee to consider the comments from the Mat-Su Borough because placing limits on Title 29 authorities' ability to zone these production wells is important.

VICE-CHAIR WAGONER said he thought the committee had the concurrence of the Mat-Su borough on the bill as amended.

TAPE 03-18, SIDE B

SENATOR OGAN invited Mr. Davidson to contact staff at Evergreen Resources who would be glad to give him a tour and explain their operations. He said he believes Mr. Davidson would be impressed with how conscientious Evergreen is about its operations.

MR. DAVIDSON said he is not arguing Evergreen's intentions or that this legislation is a back door way to do business, he just believes the public deserves to recognize the potential impacts.

VICE-CHAIR WAGONER announced a 10-minute at-ease. When the committee reconvened, he said he would entertain a motion to move the legislation from committee.

SENATOR SEEKINS said he would like to express support for the rally going on in front of the Capitol Building to support our troops and President Bush. He then moved SCSHB 69(RES) with individual recommendations.

SENATOR ELTON objected and asked what the original motion was.

VICE-CHAIR WAGONER said the original motion was to adopt Version C and then the committee adopted two amendments.

SENATOR ELTON asked for an explanation of the differences between Versions B and C.

SENATOR DYSON explained that when the subcommittee sent its proposal to the legal drafters, it had a line drawn through a few words but the drafter did not exclude those words. Senator Dyson did not notice that the words remained when he reviewed the draft committee substitute. He said those words kept the municipalities from having any say, which the subcommittee did not intend. Those words were removed in Version C and, as far as he knows, that is the only difference between the two versions. He said he takes total responsibility for the error and apologized for the mistake.

SENATOR ELTON removed his objection and VICE-CHAIR WAGONER announced that without objection, the motion carried.
#

VICE-CHAIR WAGONER called a brief at-ease and, upon reconvening the meeting, handed the gavel back to Chair Ogan.

#SB 97

SB 97-ATTY FEES: PUBLIC INTEREST LITIGANTS

CHAIR OGAN asked a representative from the Administration to present the bill.

MR. CRAIG TILLERY, Assistant Attorney General with the Department of Law (DOL), gave the following explanation of SB 97. This legislation relates to public interest litigants and more generally to attorney fees, and it provides a specific amendment to Civil Rule 82. A public interest litigant is a doctrine developed by the Alaska Supreme Court, which provides that if someone is deemed a public interest litigant in a case and wins the case, the person is awarded full attorney's fees. If the person loses the case, no attorney's fees are assessed

against him or her. If the person wins only a small portion of the case, except in exceptional circumstances, there is no apportionment for that issue so full attorney's fees are awarded. In addition, under the catalyst theory, even if a person does not win a small part of the case but the agency might later adopt a change reflective of the lawsuit, the award of attorney's fees might be assessed.

MR. TILLERY said the public interest litigant provision is not a court rule; it was developed by the Alaska Supreme Court in case law. It applies both to civil actions and to appeals. He said SB 183 was introduced and passed the Senate but not the House during the last legislative session. It would have amended Rule 82 to remove the public interest litigant rule for anyone. SB 97 follows a similar approach but is limited to certain decisions made by the Departments of Environmental Conservation, Natural Resources and Fish and Game. Those decisions are coastal consistency determinations, the adoption of regulations or decisions for which there is an opportunity for public comment and for administrative review of the decision. In those circumstances, public interest litigants would be treated the same as other litigants under the bill. In each of the above named situations, the state already paid for extensive public participation.

MR. TILLERY said one suggestion likely to be proposed as an amendment is due to a glitch on his part. SB 97 should also amend Appellate Rule 508, which has the public interest litigant exception attached to it. He said one more section of SB 97 is not specific to public interest litigants. Civil Rule 82 contains a fee variance in which, under certain circumstances, one can get enhanced or lowered fees. SB 97 contains a provision that says in those situations, if a fee is varied by an increased award, the enhanced fees may only be awarded for issues on which the party prevailed except in exceptional circumstances. He pointed out the exceptional circumstances are not defined in the bill but the Supreme Court term often uses that term in its opinions to denote very rare circumstances.

MR. TILLERY said the purpose of SB 97 is several-fold. It is an effort to balance the incentives in litigation between those who would attack a state resource agency decision and those who would defend it. It would change the law to force all litigants, whether they be public interest litigants or not, to engage in a cost benefit analysis that regular litigants must do prior to filing a suit. In looking at the kinds of costs that DOL has been required to bear over the last 6 or 7 years, in almost

every instance the entities that litigated against the state with public interest litigant status are entities that are well financed with a number of lawyers. Those entities can engage very effectively in this kind of cost benefit analysis without any disadvantage. Most public interest lawsuits are against the state and they are costly. DOL has expended over $475,000 over a 7-year period. That money could be better spent elsewhere and there is a risk that it could become a factor in state decision making.

MR. TILLERY noted that public interest litigant fees are also available against private individuals. That may or may not raise the specter of inhibiting the private party's ability to resort to the courts to defend a lawsuit and to take a certain position and follow it to the end of the lawsuit. Depending on the size of the entity, it may not be a big problem but, for even a moderate sized corporation, fees can easily amount to $100,000. He said DOL expects this bill to reduce excessive, unjustified claims. The lack of apportionment of awards has resulted in lawsuits where DOL has "the kitchen sink thrown at us and a lot of other appliances." In a recent case, 84 separate points on appeal were taken to Superior Court. The number of successful points on appeal was zero. From that decision, 98 points were taken to the Supreme Court on appeal. The case became moot and the only remaining issue was whether the litigant would get attorney's fees. The current system provides no incentive to make a reasoned decision as to which counts should be pursued and which should not. Attorney time to defend against non-meritorious claims is costly to DOL.

MR. TILLERY said the philosophy of this approach is very narrowly drawn. From FY 95 to FY 01, there were 32 fee orders. Of those, only 10 would have fallen under this rule. This approach does not discourage anyone from bringing a lawsuit or restrict anyone's ability to do so; it only removes a positive incentive to bring a large complex lawsuit and makes the litigant decide the important issues upfront. Generally, they all involve situations where there was already extensive public involvement by the parties and a number of opportunities both to be heard and for public review.

MR. TILLERY said under SB 97, the courts remain free to vary awards under the civil and appellate rules for a variety of reasons, such as the complexity of the litigation. However, awards will no longer be varied because the party is a public interest litigant.

CHAIR OGAN asked whether committee members had questions.

SENATOR ELTON said his understanding of what SB 97 accomplishes is that in discrete incidences described, no attorney fees for public interest litigants will be awarded unless the litigant has followed a prescribed course of action for participation at the administrative level. He asked if a court can make that decision right now based on the circumstances.

MR. TILLERY said SB 97 does not prevent the award of attorney's fees like other cases allow. However, if public interest litigants lose, they pay attorney's fees like anyone else.

SENATOR ELTON said that can happen now.

MR. TILLERY said the Supreme Court has made it very clear once the court deems a person a public interest litigant, it is required to award full fees except in cases of vexatious conduct, bad faith, and a few others.

SENATOR ELTON asked if the case of the 84 non-meritorious points that grew to 98 on appeal would be considered vexatious.

MR. TILLERY said DOL would consider it a vexatious case but DOL's experience has been that courts generally do not find counts to be vexatious because they are devoid of merit. To be considered vexatious, a case tends to require active bad faith or some indication that the case was filed simply for the purpose of harassment. DOL rarely gets the court to rule with it on that issue.

SENATOR ELTON asked if the court would consider a case that is totally void of merit to be vexatious.

MR. TILLERY said DOL has not found that the courts refuse to award attorney's fees simply because a count is totally devoid of merit.

SENATOR WAGONER asked if the $475,000 cost was the total expense to the state.

MR. TILLERY said that $475,000 was expended on public interest litigants that would most likely fit under this bill. The actual cost for all public interest litigants during that period was actually much greater. He said at least one of those cases was $1 million. The $475,000 does not include the time spent by DOL attorneys on cases that DOL believes were without merit and

would have been brought much more compactly if SB 97 were in effect.

CHAIR OGAN asked who the typical litigants are in these cases and who represents them.

MR. TILLERY said a solitary attorney brought the case with so many counts that he mentioned. Most of the cases were brought by organizations such as the Trustees for Alaska.

CHAIR OGAN said it would probably be unconstitutional to single out an organization that repeatedly files these cases.

MR. TILLERY said in DOL's view, targeting the bill in the way Chair Ogan suggested would be constitutionally problematic. He said that SB 97 does not go after an individual or party. It focuses on a type of case where these fees are not available, such as consumer protection cases. This prescription against public interest litigants would apply equally to the Trustees for Alaska and to the Pacific Legal Foundation, which might bring a case on behalf of an industry that is attempting to develop a project.

SENATOR BEN STEVENS asked Mr. Tillery if any public interest litigant has ever brought each department to trial separately, and how many times a public interest litigant has the opportunity to take the state to trial.

MR. TILLERY replied cases can be complex and can be brought serially and often.

SENATOR BEN STEVENS asked if the same public interest litigant brings the suit each time.

MR. TILLERY said it could.

SENATOR BEN STEVENS asked if that has happened.

MR. TILLERY said he thought an ongoing case was the Forest Oil case but that is not the only one. He explained that one suit might be filed during the exploration phase and another during the planning phase.

SENATOR BEN STEVENS asked if there is legal justification for taking a case to each individual department or whether that is a stall tactic.

MR. TILLERY said he believes the litigants are frequently forced to file cases in a serial fashion because decisions tend to be phased over a number of years. One can't sue over a production decision that was not made two years ago while the exploration aspects were being addressed. Litigants have a limited amount of time to sue once a decision is made, even though the litigant might prefer to wait and combine lawsuits.

SENATOR SEEKINS asked how one establishes public interest litigant status.

MR. TILLERY said the court uses a number of factors to make the determination. Those factors include whether the litigant is advocating public policy or whether a large number of people will be affected. The court looks to see whether there would be enough of an economic interest that the litigant has an incentive to bring the case on his or her own.

SENATOR SEEKINS asked if that status is difficult to establish.

MR. TILLERY said public interest litigant status is not something that happens every day, but the courts are comfortable making that decision.

SENATOR SEEKINS asked if he had a personal interest in a situation and found a friend who did not, whether it is conceivable he could get his friend to become a public interest litigant while Senator Seekins helped fund the case.

MR. TILLERY said first of all the friend may not have standing to bring the case. Second, the court tends to look at whether the case is the type in which a person might have an economic interest.

SENATOR SEEKINS asked if there are any disclosure requirements about who is paying for the case.

MR. TILLERY said he did not know, but the party in litigation is a matter of public record, as well as the attorneys.

SENATOR SEEKINS said he was wondering if he could have his mother front the case while he funded it without any requirement for disclosure.

MR. TILLERY said to his recollection, Senator Seekins' mother could be the litigant, and DOL could inquire into her finances if she asked that the fees be waived. He said it would be

difficult to find out who might be financing her. If Senator Seekins' mother had an economic interest in the case, it would not be likely to be a public interest litigant case.

5:37 p.m.

SENATOR SEEKINS said he asked because the only name that has been brought up is the Trustees for Alaska. That organization may be funded by an outside environmental extremist organization just to slow down progress in the state. He asked if there is any way to know who might be behind such a case.

MR. TILLEY said he believes the Trustees makes its activities public record on its website.

CHAIR OGAN commented that perhaps a better disclosure method should be considered. He noted with no further questions, he would put this measure into a subcommittee. He appointed Senator Seekins as chair of the subcommittee, and Senators Stevens and Elton as members. He encouraged participants to contact Senator Seekins' office for the schedule of subcommittee meetings. He then took public testimony.

MR. TOM CRAFFORD, Alaska Miners' Association (AMA), said he thought Mr. Tillery did an excellent job of summarizing the benefits of SB 97. He said the AMA believes this bill will create a level playing field and reduce the incentives to bring lawsuits that are aimed at delaying development projects. Given the seasonality of much of the work in Alaska, a lawsuit can delay a project for a year and the expense that can cause to a company can far exceed the attorneys' fees. He stated support for SB 97.

MR. GARY CARLSON, Senior Vice President of Forest Oil Corporation, stated support for SB 97. He told members that the Alaska Supreme Court through judicial decisions created the public interest litigant doctrine. It provides special treatment for certain litigants chosen by the Supreme Court when it comes to awarding attorneys' fees. This doctrine has been applied against the state and private parties who have been sued by the public interest litigants. It is time for the legislature to step in and assert its authority over this area. The public interest litigant doctrine represents policy making by the Supreme Court on issues that are the province of the legislature to decide. SB 97 levels the playing field and prohibits the courts from discriminating against litigants appearing in state

courts. It does so without amending existing court rules, in particular Civil Rules 82.

MR. CARLSON asked that the public interest litigant doctrine be abrogated because it provides a perverse incentive for environmentalists and other interests opposed to development activities in Alaska to sue the state and private companies to stop projects of great benefit to Alaskans. The public interest doctrine is tailor made for environmentalists and other anti-development litigants who qualify for public interest litigant status virtually as a matter of law. These litigants face almost no risk in bringing the most frivolous challenge to a state approved project. If they win on any issues, no matter how trivial, they hit the jackpot and receive full attorneys' fees. Such decisions are not only costly to the state, but they operate as a disincentive for responsible companies to do business in Alaska. He said the Redoubt Shoal development project is a good example. He described problems Forest Oil has encountered with litigation of that project.

CHAIR OGAN asked Mr. Carlson what the costs of the delays to Forest Oil's project cost the company.

MR. CARLSON said it is difficult to characterize the exact amount because Forest Oil tried to make good use of its time while the Supreme Court shut down its operation. However, the cost was well in excess of $1 million.

CHAIR OGAN asked how long Forest Oil has been operating in Alaska.

MR. CARLSON said Forest Oil started operations in Alaska in 1997.

CHAIR OGAN asked Mr. Carlson if he believes Alaska's public interest litigant policy is a disincentive to attracting new investment to the state.

MR. CARLSON said it is. It destroys value and provides uncertainty. When a company comes to Alaska, complies with what the state has asked it to do, and is then shut down for certain periods of time because of these lawsuits, it is definitely a disincentive.

CHAIR OGAN thanked Mr. Carlson and took further testimony.

MR. NEIL MACKINNON, Vice Chair of the Alaska Minerals Commission, told members that it is no coincidence that this legislation is the Alaska Mineral Commission's first recommendation in its annual report this year. He said the members of the commission felt strongly that this is a serious problem companies are facing day in and day out. He pointed out the second part of the commission's recommendation is to require disclosure of funding sources. He told members that in 1999, the Trustees for Alaska were awarded $84,639 in court awarded attorney's fees. He said attorney's fees should also be paid by organizations that file frivolous lawsuits. He pointed out that the Trustees for Alaska spent $464,000 providing free legal counsel and advocacy to protect and sustain Alaska's natural environment. The Trustee's assets on 9/30/99 were $138,959, which is substantially more than some of the companies it is suing. He said companies want financial equality before the law, yet public interest litigants often have more assets than any of the mining companies. He asked that the subcommittee look into expanding the legislation to include financial disclosure.

CHAIR OGAN commented that a few years ago members of the Sakhalin Duma visited Alaska. He told those members about the public interest litigant doctrine; they were completely baffled by it. He then asked Mr. MacKinnon how he would respond to accusations that without the public interest litigant doctrine, companies will pollute the earth and poison everyone with toxic chemicals.

MR. MACKINNON said this bill is fairly limited as it only deals with state issued permits, for which massive hearings are held and public comment is taken. He said these cases do not represent the kind of case where the little guy is fighting the huge evil company.

CHAIR OGAN said that groups like the Sierra Club have raised so much money for the ANWR issue, they could easily afford to pay for litigation.

MR. MACKINNON repeated that a person who is fighting an evil company will not be hindered in any way by this legislation because a person who brings a case with merit is not precluded from collecting attorney's fees.

MS. PAM LABOLLE, President of the Alaska State Chamber of Commerce, stated strong support for SB 97. She said that public interest litigant status is a special one granted to a certain group of Alaskans over the interests of other Alaskans. This

status was not created by the elected representatives through the recognized public process, the legislature, but instead was created by the courts. Under this special status, litigants are provided exemption from their requirements of Rule 82. The Alaska State Chamber worked very hard to get Rule 82 into law. The Chamber feels the public interest litigant doctrine came into being through the courts in 1990 as a result of the Anchorage Daily News vs. the Anchorage School District case.

TAPE 03-19, SIDE A

MS. LABOLLE said these groups are often special interest groups posing as trusts. Such challenges typically allege as many as 15 to 20 specific deficiencies in the state's administrative finding and when the groups challenging the resource development decisions prevail, they generally do on one or two issues. However, they are awarded the full costs and attorney's fees.

MS. LABOLLE said SB 97 will return fairness to civil proceedings. Under Rules 82, the court is allowed to raise or lower the amount to be awarded based upon the established factors. The rule should be applied equally to all litigants. She urged the committee to support and pass SB 97.

MS. DEBORAH GREENBERG, Executive Director for Trustees for Alaska, told members she submitted written testimony for members' consideration. The Trustees asks to participate in Senator Seekins' subcommittee and to be notified of those hearings.

There being no further testimony, SENATOR SEEKINS asked if the subcommittee will be working on Version A and whether the proposed amendment has been adopted.

CHAIR OGAN said that is correct and that he feels it is best for the subcommittee to look at the proposed amendment. With no further business before the committee, he adjourned the meeting at 5:55 p.m.
#