

HB

145

HFIN

FILE

HOUSE COMMITTEE REPORT

(11)

Date Referred to Committee: May 8, 2003

FURTHER REFERRALS:

Date of Committee Action: 5/12/03

The FINANCE Committee considered:

HB 145

HOUSE BILL NO. 145

ATTY FEES: PUBLIC INTEREST LITIGANTS

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

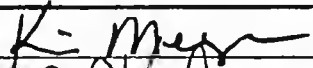
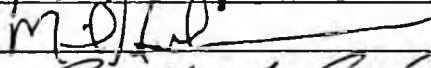

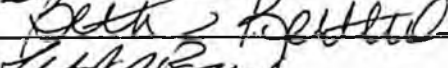
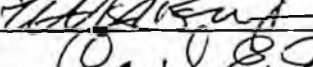
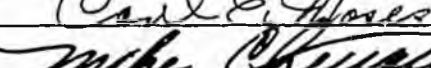





Recommends it be replaced with [] HCS or [] CS for HB 145 (FIN)
 For Senate Bills with new title: [] Technical Title [] New Title: HCR _____ [] Same Title [] New Title

- [] attach amendments
- [] add new referral to _____ Committee
- [] Letter of Intent _____ Committee

- List of Abbrev for Depts.:
- ADM
 - CED
 - COR
 - CRT
 - EED
 - DEC
 - DFG
 - GOV
 - HSS
 - LEG
 - LAW
 - LWF
 - MVA
 - DNR
 - DPS
 - REV
 - DOT
 - UA

<u>NEW FISCAL NOTES</u>				
*Assigned by Chief Clerk's Office				
List by Dept(s):	*FN#	Fiscal	Indet.	Zero

<u>PREVIOUS FISCAL NOTES</u>				
List by Dept(s):	FN#	Fiscal	Indet.	Zero
LAW	#1			✓
DOA	#3			✓

<u>Signing with recommendations</u>	Printed Last Name	DP	DNP	NR	AM
	Meyer			✓	
	Hawken			✓	
	STOLTZ			✓	
	KERTULA		✓		
	Berkowitz		✓		
	MOSES		✓		
	Chénault			✓	
	Whitaker			✓	
	FOSTER	X			
Chair: 	Harris			✓	
Chair: 	Williams	✓			

FISCAL NOTE

STATE OF ALASKA
2003 LEGISLATIVE SESSION

Fiscal Note Number: 1
 Bill Version: HB 145
 (H) Publish Date: 3/3/03

Revision Date/Time (Note if correction): _____ Dept. Affected: Law
 Title "An Act relating to public interest litigants and BRU Civil Division
to attorneys fees; and amending Rule 82, ...Civil Procedure." Component Deputy Attorney General's Office
 Sponsor Rules Committee
 Requester Governor Component No. 2205

Expenditures/Revenues (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES ()						
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FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2003) cost: 0.0

Check this box (X) if funding for this bill is included in the Governor's FY 2004 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

Under Rule 82, Alaska Rules of Civil Procedure, attorney's fees are awarded to the prevailing party. By rule, the attorney's fee awards are limited to a percentage of the actual fees depending on a number of factors, including whether the case is contested or goes to trial, and whether or not a money judgment is received. The complexity of the case and length of trial are among a list of other factors that may be used by the court to vary the size of the award. In contrast, under current Alaska case law public interest litigants may receive full attorney fees when they prevail, with no apportionment by issue, and are not liable for opposing party's fees when they lose their case.

This bill requires that attorney fee awards to or against a public interest litigant follow the same court rule as non-public interest litigants. The bill further requires that if a court increases the award from the percentages set out in (b)(1) or (b)(2) of the rule, it must apportion the attorney's fee by issue, and absent exceptional circumstances, can only award the increased fee for an issue the party prevailed upon.

Prepared by: Joan M. Kasson Phone (907) 465-5370
 Division Attorney General's Office Date/Time 1/27/03 8:28 AM
 Approved by: Kathryn Daughhettee for Gregg D. Renkes, Attorney General Date 1/27/2003
 Agency Department of Law

FISCAL NOTE #1

STATE OF ALASKA
2003 LEGISLATIVE SESSION

BILL NO. HB 145

ANALYSIS CONTINUATION

Passage of this legislation will have no impact on the Department of Law's operating budget. However, each year the department seeks supplemental funding to pay judgments and claims against the state, including public interest litigant attorney's fee awards. Total attorney's fee awards under the public interest litigant exception to Rule 82 included in judgments against the state for the last five years are as follows: FY98, \$186.4; FY99, \$413.9; FY00, \$34.7; FY01 \$298.4; FY02 \$335.9. (These numbers represent fees only, and do not include costs, pre-judgment or post-judgment interest.)

Passage of this legislation would lower, but not eliminate these awards in the future, thereby reducing the amount of supplemental requests. Public interest litigants would still be allowed to recover fees under Rule 82. Thus, the extent to which the fee awards would be reduced under this legislation would depend on the application of Rule 82 schedules to public interest litigation. In turn, this depends on the nature of the litigation and the extent to which the courts vary the award under the provisions Rule 82(b)(3).

Most public interest litigation does not involve recovery of a money judgment. When there is no money judgment, Rule 82 provides that the prevailing party can receive 30 percent of their reasonable attorney's fees if the case goes to trial, and 20 percent if it does not. This starting amount can be changed by the court after considering a list of eleven factors contained in Rule 82(b)(3), including case complexity, length of trial, reasonableness of the claims and defenses, relationship of the amount of work, the significance of the matters at stake, etc. The Judicial Council study noted in the following paragraph found that variances to the Rule 82 schedule were relatively rare for the types of civil cases the study examined. (See p. 61.) However, we have no way of knowing if the same would be true for public interest cases. At the most, assuming that all cases were non-monetary, did not go to trial, and contained no factors listed under Rule 82(b)(3), the awards would be reduced 80 percent from the amounts that would be granted under existing law. The actual reduction would almost certainly be less.

The Alaska Judicial Council, in its October 1995 report, *Alaska's English Rule: Attorney's Fee Shifting in Civil Cases*, discusses the development in Alaska of Rule 82 and the public interest exception. (<http://www.ajc.state.ak.us/Reports/atyfee.pdf>) The cases cited in the report indicate the Supreme Court intended to encourage public interest litigation by making it more financially feasible for people to litigate questions of general public concern through full reimbursement of their legal costs if they win, and by not making them pay any of the prevailing party's legal costs if they lose. (See pp. 73-77.) We have been unable to find objective data to indicate whether or not the public interest exception is a primary motivation for parties to litigate public interest issues. However, anecdotal evidence found in the Judicial Council report (pp. 129-131) suggests that the public interest exception has the effect of encouraging public interest litigation, and thus there may be fewer public interest litigation cases in the future if this bill passes.

FISCAL NOTE

STATE OF ALASKA
2003 LEGISLATIVE SESSION

Fiscal Note Number: 3
 Bill Version: CSHB 145(JUD)
 (H) Publish Date: 5/8/03

Revision Date/Time (Note if correction): _____ Dept. Affected: Administration
 Title An Act relating to public BRU Risk Management
interest litigants..... Component Risk Management
 Sponsor Governor
 Requester (H) Jud Component No. 71

Expenditures/Revenues (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES ()						
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FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2003) cost: 0.0
 Check this box (X) if funding for this bill is included in the Governor's FY 2004 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

Risk Management is not usually involved in public interest cases, as most do not involve recovery of damages that are typical in tort actions.

Prepared by: J. Brad Thompson, Director Phone 465-2180
 Division Risk Management Date/Time 5/1/03 2:37 PM
 Approved by: Mike Miller, Commissioner Date 5/1/2003
 Agency Department of Administration

Adopted

23-GH1064H
Luckhaupt
5/8/03

J.H. moved

~~E.B. objected~~

CS FOR HOUSE BILL NO. 145()

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-THIRD LEGISLATURE - FIRST SESSION

BY

**Offered:
Referred:**

Sponsor(s): HOUSE RULES COMMITTEE BY REQUEST OF THE GOVERNOR

A BILL

FOR AN ACT ENTITLED

1 **"An Act prohibiting discrimination in the awarding of attorney fees and costs in civil**
2 **actions or appeals to or against, or in the posting of bonds or other security by, public**
3 **interest litigants; and relating to awards of attorney fees and costs in cases involving**
4 **enforcement of constitutional rights; and providing for an effective date."**

5 **BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:**

6 *** Section 1.** The uncodified law of the State of Alaska is amended by adding a new section
7 to read:

8 **PURPOSE.** (a) The judicially created doctrine respecting the award of attorney fees
9 and costs for or against public interest litigants has created an unbalanced set of incentives for
10 parties litigating issues that fall under the public interest litigant exception. This imbalance
11 has led to increased litigation, arguments made with little merit, difficulties in compromising
12 claims, and significant costs to the state and private citizens. More importantly, application of
13 the public interest litigant exception has resulted in unequal access to the courts and unequal
14 positions in litigation.

1 (b) The purpose of sec. 2 of this Act to provide for a more equal footing for parties in
2 civil action and appeals by abrogating the special status given to public interest litigants with
3 respect to the award of attorney fees and costs. It is the intent of the legislature to expressly
4 overrule the decisions of the Alaska Supreme Court in Dansereau v. Ulmer, 955 P.2d 916
5 (Alaska 1998); Southeast Alaska Conservation Council, Inc. v. State, 665 P.2d 544 (Alaska
6 1983); Thomas v. Bailey, 611 P.2d 536 (Alaska 1980); Anchorage v. McCabe, 568 P.2d 986
7 (Alaska 1977); Gilbert v. State, 526 P.2d 1131 (Alaska 1974), and their progeny, insofar as
8 they relate to the award of attorney fees and costs to or against public interest litigants in
9 future civil actions and appeals.

10 (c) This Act does not preclude the enactment of specific statutes authorizing awards
11 of costs or fees in particular situations, such as in AS 45.50.537.

12 * Sec. 2. AS 09.60.010 is amended by adding new subsections to read:

13 (b) Except as otherwise provided by statute, a court in this state may not
14 discriminate in the award of attorney fees and costs to or against a party in a civil
15 action or appeal based on the nature of the policy or interest advocated by the party,
16 the number of persons affected by the outcome of the case, whether a governmental
17 entity could be expected to bring or participate in the case, the extent of the party's
18 economic incentive to bring the case, or any combination of these factors.

19 (c) In a civil action or appeal concerning the establishment, protection, or
20 enforcement of a right under the United States Constitution or the Constitution of the
21 State of Alaska, the court

22 (1) shall award, subject to (d) and (e) of this section, full reasonable
23 attorney fees and costs to a claimant, who, as plaintiff, counterclaimant, cross-
24 claimant, or third-party plaintiff in the action or on appeal, has prevailed in asserting
25 the right;

26 (2) may not order a claimant to pay the attorney fees of the opposing
27 party devoted to claims concerning constitutional rights if the claimant as plaintiff,
28 counterclaimant, crossclaimant, or third-party plaintiff in the action or appeal did not
29 prevail in asserting the right, the action or appeal asserting the right was not frivolous,
30 and the claimant did not have sufficient economic incentive to bring the action or
31 appeal regardless of the constitutional claims involved.

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(d) In calculating an award of attorney fees and costs under (c)(1) of this section,

(1) the court shall include in the award only that portion of the services of claimant's attorney fees and associated costs that were devoted to claims concerning rights under the United States Constitution or the Constitution of the State of Alaska upon which the claimant ultimately prevailed; and

(2) the court shall make an award only if the claimant did not have sufficient economic incentive to bring the suit, regardless of the constitutional claims involved.

(e) The court, in its discretion, may abate, in full or in part, an award of attorney fees and costs otherwise payable under (c) and (d) of this section if the court finds, based upon sworn affidavits or testimony, that the full imposition of the award would inflict a substantial and undue hardship upon the party ordered to pay the fees and costs or, if the party is a public entity, upon the taxpaying constituents of the public entity.

* Sec. 3. AS 09.68.040 is amended by adding a new subsection to read:

(c) A court in this state may not excuse a litigant requesting the entry of a stay or other interlocutory relief from posting a bond or other security to protect the persons who will be adversely affected, if the excuse is based on the nature of the policy or interest advocated by the party, the number of persons affected by the outcome of the case, whether a governmental entity could be expected to bring or participate in the case, the extent of the party's economic incentive to bring the case, or any combination of these factors.

* Sec. 4. The uncodified law of the State of Alaska is amended by adding a new section to read:

APPLICABILITY. This Act applies to all civil actions and appeals filed on or after the effective date of this Act.

* Sec. 5. This Act takes effect immediately under AS 01.10.070(c).

*Offered 5/12
Failed*

AMENDMENT |

OFFERED IN THE HOUSE

BY REPRESENTATIVE BERKOWITZ

TO: CSHB 145 (FIN), Draft Version "H"

Page 1, line 1, through page 3, line 23:

Delete all material and insert:

"An Act relating to certain public interest litigation effecting natural resource permitting decisions and to expedited trials and appeals; and providing for an effective date."

RE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* **Section 1.** AS 09.20 is amended by adding a new section to read:

Article 3. Expedited Trial.

Sec. 09.20.200. Expedited resolution for certain public interest litigation. In a civil action contesting a decision of the Department of Environmental Conservation, the Department of Fish and Game, or the Department of Natural Resources making a coastal consistency determination, adopting regulations, or for which there was an opportunity for the public to comment to the agency before the final agency decision and to seek administrative review before the agency following the initial agency decision, the courts of this state shall provide expedited consideration of the action. If the action under this section proceeds to trial or oral argument, the trial or oral argument must commence not more than 120 days following the filing of the action unless the person filing the action agrees to a later date.

Renumber the following bill sections accordingly.

FISCAL NOTE

STATE OF ALASKA
2003 LEGISLATIVE SESSION

Fiscal Note Number: 1
 Bill Version: HB 145
 (H) Publish Date: 3/3/03

Revision Date/Time (Note if correction): _____ Dept. Affected: Law
 Title "An Act relating to public interest litigants and BRU Civil Division
to attorneys fees; and amending Rule 82, ...Civil Procedure." Component Deputy Attorney General's Office
 Sponsor Rules Committee
 Requester Governor Component No. 2205

Expenditures/Revenues (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES ()						
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FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2003) cost: 0.0

Check this box (X) if funding for this bill is included in the Governor's FY 2004 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

Under Rule 92, Alaska Rules of Civil Procedure, attorney's fees are awarded to the prevailing party. By rule, the attorney's fee awards are limited to a percentage of the actual fees depending on a number of factors, including whether the case is contested or goes to trial, and whether or not a money judgment is received. The complexity of the case and length of trial are among a list of other factors that may be used by the court to vary the size of the award. In contrast, under current Alaska case law public interest litigants may receive full attorney fees when they prevail, with no apportionment by issue, and are not liable for opposing party's fees when they lose their case.

This bill requires that attorney fee awards to or against a public interest litigant follow the same court rule as non-public interest litigants. The bill further requires that if a court increases the award from the percentages set out in (b)(1) or (b)(2) of the rule, it must apportion the attorney's fee by issue, and absent exceptional circumstances, can only award the increased fee for an issue the party prevailed upon.

Prepared by: Joan M. Kasson Phone (907) 465-5370
 Division Attorney General's Office Date/Time 1/27/03 8:28 AM
 Approved by: Kathryn Daughhetee for Gregg D. Renkes, Attorney General Date 1/27/2003
 Agency Department of Law

FISCAL NOTE #1

STATE OF ALASKA
2003 LEGISLATIVE SESSION

BILL NO. HB 145

ANALYSIS CONTINUATION

Passage of this legislation will have no impact on the Department of Law's operating budget. However, each year the department seeks supplemental funding to pay judgments and claims against the state, including public interest litigant attorney's fee awards. Total attorney's fee awards under the public interest litigant exception to Rule 82 included in judgments against the state for the last five years are as follows: FY98, \$186.4; FY99, \$413.9; FY00, \$34.7; FY01 \$298.4; FY02 \$335.9. (These numbers represent fees only, and do not include costs, pre-judgment or post-judgment interest.)

Passage of this legislation would lower, but not eliminate these awards in the future, thereby reducing the amount of supplemental requests. Public interest litigants would still be allowed to recover fees under Rule 82. Thus, the extent to which the fee awards would be reduced under this legislation would depend on the application of Rule 82 schedules to public interest litigation. In turn, this depends on the nature of the litigation and the extent to which the courts vary the award under the provisions Rule 82(b)(3).

Most public interest litigation does not involve recovery of a money judgment. When there is no money judgment, Rule 82 provides that the prevailing party can receive 30 percent of their reasonable attorney's fees if the case goes to trial, and 20 percent if it does not. This starting amount can be changed by the court after considering a list of eleven factors contained in Rule 82(b)(3), including case complexity, length of trial, reasonableness of the claims and defenses, relationship of the amount of work, the significance of the matters at stake, etc. The Judicial Council study noted in the following paragraph found that variances to the Rule 82 schedule were relatively rare for the types of civil cases the study examined. (See p. 61.) However, we have no way of knowing if the same would be true for public interest cases. At the most, assuming that all cases were non-monetary, did not go to trial, and contained no factors listed under Rule 82(b)(3), the awards would be reduced 80 percent from the amounts that would be granted under existing law. The actual reduction would almost certainly be less.

The Alaska Judicial Council, in its October 1995 report, *Alaska's English Rule: Attorney's Fee Shifting in Civil Cases*, discusses the development in Alaska of Rule 82 and the public interest exception. (<http://www.ajc.state.ak.us/Reports/atyfee.pdf>) The cases cited in the report indicate the Supreme Court intended to encourage public interest litigation by making it more financially feasible for people to litigate questions of general public concern through full reimbursement of their legal costs if they win, and by not making them pay any of the prevailing party's legal costs if they lose. (See pp. 73-77.) We have been unable to find objective data to indicate whether or not the public interest exception is a primary motivation for parties to litigate public interest issues. However, anecdotal evidence found in the Judicial Council report (pp. 129-131) suggests that the public interest exception has the effect of encouraging public interest litigation, and thus there may be fewer public interest litigation cases in the future if this bill passes.

FISCAL NOTE

STATE OF ALASKA
2003 LEGISLATIVE SESSION

Fiscal Note Number: 3
 Bill Version: CSHB 145(JUD)
 (H) Publish Date: 5/8/03

Revision Date/Time (Note if correction): _____ Dept. Affected: Administration
 Title An Act relating to public BRU Risk Management
interest litigants..... Component Risk Management
 Sponsor Governor
 Requester (H) Jud Component No. 71

Expenditures/Revenues (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES ()						
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FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2003) cost: 0.0

Check this box (X) if funding for this bill is included in the Governor's FY 2004 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

Risk Management is not usually involved in public interest cases, as most do not involve recovery of damages that are typical in tort actions.

Prepared by: J. Brad Thompson, Director Phone 465-2180
 Division Risk Management Date/Time 5/1/03 2:37 PM
 Approved by: Mike Miller, Commissioner Date 5/1/2003
 Agency Department of Administration

THE
FOLLOWING
DOCUMENT(S)
ARE
POOR
ORIGINAL
COPIES

Testimony
House Finance
~~Ms. 3, 2001~~
May 9, 2003

Dear _____:

Since before statehood, Alaska Civil Procedure allowed a prevailing party in a civil lawsuit to recover a portion of its attorney's fees. If the prevailing party recovered a money judgment, the party could automatically recover approximately ten percent (10%) of that judgment as an additional recovery for attorney's fees incurred. If the prevailing party was the defendant, the defendant recovered a portion (now 20%—30%) of its attorney's fees incurred. The purpose for the rule was and is to encourage settlement and to partially compensate parties who are forced to go to litigation to vindicate their rights or defenses.

Beginning in 1968, the Alaska Supreme Court developed what is now called the Public Interest Litigant Doctrine, which provided that if a prevailing party was considered a public interest litigant, the person recovered all of its attorney's fees. If the public interest litigant lost, it did not have to pay any of the other parties' attorney's fees. When the over one hundred cases that have applied this doctrine since 1968 are reviewed, it is clear that the Alaska Supreme Court has selected certain groups that it considers, in its political judgment, more worthy than other interests when the litigation involves public interest issues. Subsistence groups, native cultural interests, newspapers, environmental protection and conservation groups (but not miners), homeowners on zoning issues when attempting to prevent development (but not the developers), and sometimes commercial fishermen (but not when attacking the regulations on set netting) have qualified.

On the other hand, oil companies, miners, logging companies, trucking companies, developers, and labor unions have consistently been denied public interest litigation status on the grounds that in each case they had a "sufficient economic incentive to bring a lawsuit," which disqualified them.

The end result is that under the doctrine certain groups are preferred over others according to the political judgment of the Alaska Supreme Court, which political judgment does not necessarily coincide with the political views and values of the majority of Alaskans, as represented by their elected officials in the legislature. Comparing the groups that are accorded this special status to those who are denied it shows a very marked and distinct anti-development, pro-preservationist political slant.

• would have the effect of leveling the playing field so that no groups are accorded special treatment in the awarding of or immunity from attorney's fees according to their political characteristics. The applicable rule of civil procedure, Rule 82, still will permit the trial judge to either raise or lower the amount of attorney's fees awarded based upon a variety of specified factors, but all of which would be applied equally to all litigants.

May 9, 2003

~~May 7, 2001~~

Page 2

For these reasons, the Alaska Support Industry Alliance strongly supports the passage of ~~Senate Bill 113~~, and asks for your help in accomplishing that result.

CSHB 145

Very truly yours,

ALASKA SUPPORT INDUSTRY ALLIANCE

By *Larry Houle*

Larry Houle

Its: General Manager

*Alaska Support Ind. Alliance
4220 B St #200
Anchorage, Ak 99503*

Replaced by #3

FISCAL NOTE

STATE OF ALASKA
2003 LEGISLATIVE SESSION

Fiscal Note Number: 2
Bill Version: HB 145
(H) Publish Date: 3/3/03

Revision Date/Time (Note if correction): _____ Dept. Affected: Administration
Title An Act relating to public BRU Risk Management
interest litigants..... Component Risk Management
Sponsor _____
Requester _____ Component No. 71

Expenditures/Revenues (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	*	*	*	*	*	*

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES ()						
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FUND SOURCE (Thousands of Dollars)

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

Estimate of any current year (FY2003) cost: 0.0

Check this box (X) if funding for this bill is included in the Governor's FY 2004 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

Risk Management is not usually involved in public interest cases, as most do not involve recovery of damages that are typical in tort actions.

Prepared by: J. Brad Thompson, Director Phone _____
Division Risk Management Date/Time 2/3/03 11:52 AM
Approved by: _____ Date 2/3/2003
Agency Administration

FRANK H. MURKOWSKI
GOVERNOR
GOVERNOR@GOV.STATE.AK.US



STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

HB145
P.O. Box 110001
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February 28, 2003

The Honorable Pete Kott
Speaker of the House
Alaska State Legislature
State Capitol, Room 208
Juneau, AK 99801-1182

Dear Speaker Kott:

Under the authority of art. III, sec. 18, of the Alaska Constitution, I am transmitting a bill that would change the Alaska Rules of Civil Procedure as they apply to the award of attorney's fees. First, the bill provides for specific rules that govern the award of attorney's fees to or against certain public interest litigants. The bill does so by specifically requiring that any award of attorney's fees to or against public interest litigants for cases contesting decisions by the Department of Environmental Conservation, the Department of Fish and Game, or the Department of Natural Resources making a coastal consistency determination, adopting regulations, or in which the public had an opportunity to comment to the agency and seek administrative review before the agency, be governed by Alaska Rule of Civil Procedure 82 (Rule 82). The bill would then amend Rule 82 to require that attorney's fees be awarded to or against a public interest litigant in those situations in the same manner as attorney's fees are awarded to or against non-public interest litigants under Rule 82(b). Second, the bill provides, for all litigants, that in the absence of exceptional circumstances courts may award increased fees only for issues upon which a party prevailed.

Under Rule 82, attorney's fees are awarded to the prevailing party. By rule, the attorney's fee awards are limited to a specified percentage of the actual fees, with the precise percentage dependent upon a number of factors, including whether the case is contested or goes to trial, and whether or not a money judgment is received. The complexity of the case and length of trial are among a list of other factors that may be used by the court to vary the size of the award. Upon consideration of a variety of factors, a court may apportion fees based upon the issues and whether a party prevailed. In contrast, current Alaska case law creates an exception to Rule 82 by which, in most circumstances, public interest

The Honorable Pete Kott
February 10, 2003
Page 2

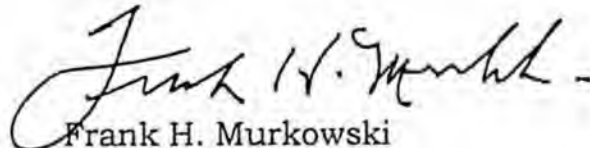
litigants who prevail receive full attorney's fees, with no apportionment by issue, but are not liable for an opposing party's fees if the public interest litigant loses the case.

The attorney's fee exception for public interest litigants creates several undesirable incentives when decisions of the state are called into question. First, those seeking to preserve an action of the state have an incentive to avoid litigation because of the possibility of full attorney's fees being awarded against them. This is compounded by the fact that those seeking to overturn 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 the counterbalancing risk of even partial fees being awarded against them. This is of particular concern in the area of resource development where well-financed groups have sought to use litigation to impede the state's efforts to proceed with the orderly development of its resources.

This bill would redress this imbalance in the narrow group of cases involving the resource agencies.

I urge your prompt consideration and passage of this bill.

Sincerely,



Frank H. Murkowski
Governor

HB 145

Public Interest Litigation

93-03

Type	Cases	FY	Cost	SubTotal
Redistricting/	SE Conf v. Hickel	93	635.8	
Reapportionment	SE Conf v. Hickel	95	106.9	
	2001 Redistricting	02	1,501.9	
	2001 Redistricting	03	240.9	
				2,485.5
Mental Health	Weiss v. State	93-03	4,578.7	
				4,578.7
Legislation	Bess v. Ulmer (same sex marriage)	99	50.2	
	Planned Parenthood (partial birth abortion)	01	102.7	
	Planned Parenthood (GR Med abortion)	02	228.0	
	ACLU v. State 96 campaign finance reform	02	107.8	
				488.7
CBR	Hickel v. Cowper (CBR) (amt for approp)	95	43.7	
	Cowper v. Knowles (CBR approp lang)	97	4.3	
				48.0
Prisoners	Cleary Case	95	82.0	
	Cleary Case	96	119.5	
	Cleary Case	97	85.9	
	Cleary Case	99	56.7	
	Cleary Case	00	13.2	
	Cleary Case	01	119.4	
	Cleary Case	02	9.3	
				486.0
Elections/Ballots	Kwethluk IRA v. Coghill (open polling places)	95	11.0	
Initiatives/Etc	O'Callaghan v. Coghill (open/closed primary)	97	25.0	
	Pullen v. Ulmer (FISH Initiative)	98	24.2	
	Dansereau v. Ulmer (94 gubernatorial election)	98	63.3	
	AK for Efficient Gov't v. State (ballot measure #2 - capitol move)	03	24.0	
				167.5
Subsistence	Toksook Bay v. State (herring fishery)	95	33.3	
	Ken Sorenson v. State (moose hunting)	96	60.0	
	Payton v. State (Upper Yentna salmon)	98	54.7	
				148.0
Natural Resources	Stein v. State (placer mining)	93	14.0	
	Trustees for AK v. Gorsuch (coal mining)	94	39.8	
	Kuitsarak v. Swope offshor platinum Goodnews	94	37.9	
	SE AK Consv Council v. State (Kuiu Island)	95	44.7	
	Trustees for AK v. State (oil/gas lease best int)	96	42.8	
	Tuiksarmute v. Heinze (water permit mining)	96	6.2	
	Ninilchik Council v. State (o/g lease sale #78)	97	85.0	
	Port Graham/Nanwalek v. State (discharge Cook Inlet platforms)	98	24.0	
	Kachemak Bay Soc v. State (o/g lease sale 85A)	99	37.0	
	Cook Inlet Keeper v. State (oil/gas lease sale)	01	81.7	
	NAEC/Sierra Club v. State (ROW electric line)	01	99.1	
	Greenpeace v. State (Northstar water permitting)	01	12.5	
	Gilbertson v. State (RS2477 easement)	01	2.2	
	Neighborhood Mine Watch v. State (ROW Fairbanks Gold Mining)	03	22.2	
	Lynn Canal Consv v. State (reg uses state land)	03	20.2	
				569.3
Local Gov't	Ekwo/Lake & Pen Borough v. LBC (boundary)	95	51.4	
	Keane v. LBC (City of Pilot Point)	96	11.0	
				62.4
Misc.	Capital Information Group v. State (public docume	97	20.0	
	Alexie v. State (cultural adoption, child support)	00	34.7	
				54.7
TOTAL	(actual total is \$9,090,422) (numbers rounded off)			9,088.8

APR 21 2003

LEGISLATIVE RESEARCH REPORT

APRIL 21, 2003



REPORT NUMBER 03.150

PUBLIC INTEREST LITIGATION IN ALASKA, 1993 - 2003

PREPARED FOR REPRESENTATIVE ETHAN BERKOWITZ

BY PATRICIA YOUNG, MANAGER

You asked us to identify public interest litigation before the Alaska court within the past ten years.¹ In addition to the name of each case, you asked for the year, the amount of the judgment, and a very brief description of the topic at issue.

As you know, a public interest litigant is a plaintiff who seeks to stop or to amend some development or policy of government rather than to achieve some private goal. Such a litigant must adhere throughout a civil suit to the same rules and procedures as every other litigant. The question of status as a litigant acting in the public interest arises only in the context of awards of attorney's fees and costs that accompany the decision in the case.

Neither the rules of court nor pertinent statutes directly address public interest litigants; however, by long-standing judicial practice, such litigants are exempt from the normal application of Civil Rule 82. Under this rule, the losing party in a civil action generally pays a portion of the reasonable attorney's fees of the prevailing party. If, however, the court makes a specific finding that a plaintiff qualifies as acting in the public interest, the plaintiff is exempt from paying the fees

¹ Please note the following limitations to our search. (1) There is no way to identify cases that settle before a judicial decision is reached. (2) Decisions issued by the superior court are not published, although because the legislature must appropriate funds for any judgment against the State, we can identify those public interest cases that result in such judgments. Aside from that record, however, there is no ready way to identify superior court cases that do not result in a judgment against the State, unless the decision is appealed to the Supreme Court and public interest status is at issue. (3) There is no ready system for identifying cases against municipal governments and other governmental bodies unless they are appealed to the Supreme Court and public interest status is at issue.

of the prevailing party.² If the plaintiff prevails, the losing party pays full reasonable attorney's fees.³

Table 1 shows those cases before the Alaska court that the Department of Law and the Division of Legislative Audit identified as public interest cases resulting in judgments against the State, as well as the amount of fees paid. Table 2 shows those cases in which a public interest plaintiff lost and, therefore, paid no fees to the State, as well as cases involving governmental bodies other than the State. We identified these cases by searching the Lexis database of Alaska cases for the past ten years.

I hope you find this information to be useful. Please do not hesitate to contact us if you have questions or need additional information.

² According to the Court in *Anchorage v. McCabe*, 568 P.2d 986 (Alaska 1977),

The public interest exception to [Civil Rule 82] is designed to encourage plaintiffs . . . to raise issues of public interest by removing the awesome financial burden of such a suit.

As a matter of sound policy, attorney's fees should not be assessed against public interest plaintiffs because awarding fees in this type of controversy will deter citizens from litigating questions of general public concern for fear of incurring the expense of the other party's attorney's fees.

³ The criteria the court uses in weighing a plaintiff's private motivation against the extent of public interest involved appear among the annotations to Civil Rule 82 as follows: (1) Is the case designed to effectuate strong public policies? (2) If the plaintiff succeeds will numerous people receive benefits from the lawsuit? (3) Can only a private party have been expected to bring the suit? (4) Would the purported public interest litigant have sufficient economic incentive to file suit even if the action involved only narrow issues lacking general importance?

Table 1: Public Interest Cases and Fees Paid by the State, FY 1993 - FY 2003

Case	Description	Attorneys Fees
FY 93		
Stein v. State (Trustees for Alaska)	NPDES placer mining permits	\$14,049
Trustees for Alaska v. Gorsuch	Coal mining permit	\$39,890
S.E. Conference v. Hickel	Reapportionment	\$635,868
	FY 93 Subtotal	\$689,806
FY 94		
Kuitsarak v. Swope	Offshore prospecting permits for platinum in Goodnews Bay	\$30,000
Kuitsarak v. Swope	Offshore prospecting permits for platinum in Goodnews Bay	\$7,894
	FY 94 Subtotal	\$37,894
FY 95		
Hickel v. Cowper	Interpretation of Article IX, Section 17 of the Alaska Constitution--"amount available for appropriation."	\$43,756
S.E. Conference v. Hickel (Minimum required exclusive of attorneys fees)	Reapportionment	\$106,928
Southeast Alaska Conservation Council v. State	DNR's granting of concurrence under section 906(k) of ANILCA through No-Name Bay, Kuiu Island	\$44,705
Cleary v. Smith	Prisoners' rights	\$82,047
Native Village of Toksook Bay v. State	Right to subsistence herring fishery	\$33,385
City of Ekwok & Lake & Peninsula Borough v. Local Boundary Commission	Challenging boundary of Lake & Peninsula Borough	\$51,407
Ikwethluk IRA Council v. Coghill	Elections case regarding failure to open certain polling places in 10/94 elections	\$11,063
	FY 95 Subtotal	\$373,290
FY 96		
Trustees of Alaska v. State	Challenging DNR's best interest finding in O&G lease sale #55	\$42,855
Tuiksarmute v. Heinze	Appealing decision by DNR Div of Water to extend water appropriation permits to mining company	\$6,225
Cleary v. Smith	Prisoners' rights	\$119,524
Keane v. LBC	LBC decision incorporating the City of Pilot Point	\$11,038
Ken Sorenson v. State	Subsistence - moose hunting	\$60,000
	FY 96 Subtotal	\$239,641
FY 97		
Cowper v. Knowles	CBRF appropriation language	\$4,331
O'Callaghan v. Coghill	Open/closed primary issue	\$25,000
Cleary v. Smith	Prisoners' rights	\$85,958
Capital Info Group v. State	Deliberative process executive privilege	\$20,000
Ninilchik Traditional Council v. State	Cook Inlet Oil & Gas lease sale #78	\$85,000
	FY 97 Subtotal	\$220,289

Table 1: Public Interest Cases and Fees Paid by the State, FY 1993 - FY 2003 — Continued

FY 98		
Case	Description	Attorneys Fees
Payton v. State	Upper Yentna River salmon subsistence	\$54,780
Port Graham & Nanwalek v. State	"Zero discharge" in Cook Inlet from drilling platforms	\$24,047
Pullen v. Ulmer	Challenging the Lt. Governor's certification of the F.I.S.H. Initiative for placement on the November 1996 ballot	\$24,254
Dansereau v. Ulmer	1994 Gubernatorial election	\$83,356
	FY 98 Subtotal	\$186,437
FY 99		
Case	Description	Attorneys Fees
Bess v. Ulmer	Challenging same sex marriage constitutional amendment	\$50,245
Cleary v. Smith	Prisoners' rights	\$56,734
Kachemak Bay Conservation Society v. State	Cook Inlet Oil & Gas lease sale #85A	\$37,050
	FY 99 Subtotal	\$144,029
FY 00		
Cleary v. Smith	Prisoners' rights	\$13,221
Alexie v. State	Effect of cultural adoption on child support obligation	\$34,742
	FY 00 Subtotal	\$47,963
FY 01		
Planned Parenthood v. State	Unconstitutionality of partial birth abortions	\$102,725
Cook Inlet Keeper v. State	Challenge to DNR's best interest finding in oil & gas lease sale	\$81,795
NAEC/Sierra Club v. State	Challenge to DNR's ROW permitting process for an electric transmission line	\$99,102
Cleary v. Smith	Prisoners' rights	\$119,379
Greenpeace v. State	Water permitting related to the Northstar project	\$12,488
Gilbertson v. State	Challenge to DNR process of identifying RS2477 easements.	\$2,263
	FY 01 Subtotal	\$417,751
FY 02		
Planned Parenthood v. State	Abortion funding for the General Relief Medical Program	\$228,062
Cleary v. Smith	Prisoners' rights	\$9,295
ACLU v. State	Challenge to 1996 campaign finance reform legislation	\$107,814
In Re 2001 Redistricting Cases v. Alaska Redistricting Board	Reapportionment	\$1,501,967
	FY 02 Subtotal	\$1,847,137

Table 1: Public Interest Cases and Fees Paid by the State, FY 1993 - FY 2003 — Continued

FY 03		
Neighborhood Mine Watch v. State, DNR and Fbks Gold Mining Inc.	Best interest finding for ROW issued & requirement to assess economic impacts to businesses neighboring the ROW	\$22,242
Alaskans for Efficient Government v. State	Challenge to ballot measure 2 in re legislative session move	\$24,000
Lynn Canal Conservation, Inc. v. State	DNR's list of generally allowed uses on state land must be promulgated by regulation	\$20,260
In Re 2001 Redistricting Cases v. Alaska Redistricting Board	Reapportionment	\$240,923
	FY 03 To Date	\$307,425
All Years		
Weiss v. State	Mental Health Land Trust breach	\$4,578,758
Total Payments FY93 - FY 03 (to date)		\$9,090,422

NOTES: This table shows fiscal years in which judgments were paid, not necessarily years in which cases were decided. Not included are cases that settled out of court, and public interest cases that did not result in a judgment against the State (unless the decision was appealed to the Supreme Court and public interest status was at issue).

Amounts paid represent awards of attorney fees and exclude awards for costs, with the exception of the FY02 amount for *In Re 2001 Redistricting Cases*. In that consolidated case, the Redistricting Board and the Craig plaintiffs stipulated in superior court to the award of fees and costs in the amount of \$173,922. A relatively small but unspecified portion of this amount represents costs. In every other regard, the court orders in this case were specific as to the amounts for fees and costs, and of those awards, costs represented approximately 11 percent of the total.

A statute that would eliminate the court's authority to award full attorneys fees under its own rules would not entirely eliminate instances in which the court could award full fees: some other state and federal laws allows for full fees. At this writing, federal law could have been a factor in determining fees awarded under *Cleary v. Smith*. In *Weiss v. State*, the plaintiffs received an appropriation of \$3,500,000 for the land work. The appropriation did not go through the judgment process, which removes litigants from the public interest litigant category. That amount is therefore not reflected in the above nearly \$4.6 million for *Weiss*.

SOURCE: Kathryn Daughhatee, Administrative Services Director, Department of Law, (907) 465-3673, and Pat Davidson, Legislative Auditor, Division of Legislative Audit, (907) 465-3830.

**Table 2: Other Public Interest Litigation Before the Alaska Supreme Court, FY 1993
FY 2003**

Case Name	Citation	Subject
Valleys Borough Support Comm. v. Local Boundary Commission	863 P.2d 232 (1993)	Incorporation of Borough
Municipality of Anchorage v. Citizens for Representative Governance	880 P.2d 1058 (1994)	Validity of petitions to recall school board members from office.
Eyak Traditional Elders Counsel v. Sherstone, Inc., 904 P.2d 420	904 P.2d 420 (1995)	Attorney's fees after voluntary dismissal of action to enjoin logging on land alleged to be ancestral village & burial grounds
Spenard Action Comm. v. Lot 3, Block 1, Evergreen Subdivision	902 P.2d 766 (1995)	Subsistence hunting and fishing--challenge to "all Alaskans" eligibility
Kodiak Seafood Processors Ass'n v. State	900 P.2d 1191 (1995)	Permit to a private fisher for exploratory fishing in closed waters
State v. United Cook Inlet Drift Ass'n	895 P.2d 947 (1995)	Subsistence hunting and fishing--challenge to "all Alaskans" eligibility
Kearn v. Local Boundary Commission	893 P.2d 1239 (1995)	Incorporation of city
Griswold v. City of Homer	925 P.2d 1015 (1996)	Validity of a city ordinance re zoning, and conflict of interest
Lavery v. Alaska Railroad Corp.	13 P.3d 725 (2000)	Extraction of gravel & Public Notice Clause, Alaska Const. art. VIII, § 10
Gwich'in Steering Comm. v. Office of the Governor	10 P.3d 572 (2000)	Deliberative process executive privilege (re ANWR lobbying activity)
Matanuska Elec. Ass'n Inc. v. Rewire the Bd.	36 P.3d 685 (2001)	Rural electric cooperative--removal of directors
Anchorage Police Dep't Empl's. Ass'n v. Municipality of Anchorage	24 P.3d 547 (2001)	Substance abuse testing for police and fire department employees in safety-sensitive positions
Cabana v. Kenai Peninsula Borough	21 P.3d 833 (2001)	Whether classification of municipal land is a legislative decision or quasi-judicial and subject to appeal
Koyukuk River Tribal Task Force v. Rue	63 P.3d 1019 (2003)	Moose management

NOTES: Included are Alaska Supreme Court public interest cases against the State in which the plaintiff lost (i.e., no fees paid and, therefore the case is not included in Table 1). It also includes cases (both winning and losing) against other governmental entities that were appealed to the Supreme Court and for which status as a public interest litigant was at issue. Not included are cases that settled out of court and those public interest cases that resulted in judgments for attorney's fees against the State.

SOURCE: Lexis search of Alaska cases within the past ten years.

STATE OF ALASKA

FRANK H. MURKOWSKI,
GOVERNOR

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL

P.O. BOX 110300
JUNEAU, ALASKA 99811-0300
PHONE: (907) 465-3600
FAX: (907) 465-2075

April 21, 2003

Representative Lesil McGuire
State Capitol, Room 118
Juneau, AK 99801-1182

Re: HB 145: Attorneys fees: public interest litigants

Dear Representative McGuire:

The judicially created doctrine respecting the award of attorney's fees for or against a party deemed to be a public interest litigant has created an unbalanced set of incentives for parties litigating issues that fall under the public interest litigant rule. This imbalance has led to increased litigation, arguments made with little merit, difficulties in compromising claims, and significant costs to the state and private citizens.

These concerns are particularly acute in litigation related to natural resource issues. Moreover, unlike other areas of public interest law, there are a number of dedicated and well funded entities whose purpose is to litigate issues of public concern in the natural resource area. Thus, while many years ago there may have been a legitimate need to provide an incentive for public interest litigation on natural resource issues, that need no longer exists. The absence of a compelling need, coupled with the concerns described above that have arisen from application of the public interest exception to natural resource litigation, led us to the conclusion that it is appropriate for the legislature to limit the public interest litigant exception.

For that reason the Governor earlier requested the introduction of legislation designed to limit the application of the public interest doctrine in certain natural resource cases where substantial amounts of public involvement were already provided. That bill is now in front of your committee.

I am attaching a proposed amendment to that legislation. The amendment is intended to clarify that the bill applies to administrative appeals as well as civil lawsuits initiated in state court. It also clarifies that limitations on the types of decision listed, including coastal consistency determinations, the adoption of regulations and decisions for which there was an opportunity for public comment and administrative review, are applicable to the three agencies listed. This change is in response to concerns that the limitations applied only to DNR or, in the alternative, were inclusive of other agencies. The amendments also delete

Representative Lesil McGuire
Re: HB 145: Attorneys fees: public interest litigants

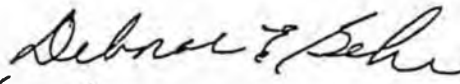
April 21, 2003
Page 2

sections 2 and 3 of the bill, proposed changes to the Alaska Rules of Civil Procedure. Based upon comments received since the bill was introduced, it was felt that it was not appropriate to change the court rules at this time. Thus the bill would be limited to statutory changes that only affect the court created public interest litigant doctrine. Because of these changes the bill would no longer require a two-thirds majority and thus section 4 would not be necessary. It is therefore also deleted.

Thank you for your consideration of these amendments.

Sincerely,

GREGG D. RENKES
Attorney General

By: 
David W. Marquez
Legislative Liaison

DWM:CT:SZ

Sectional Analysis HB 145 and SB 97

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

Section 1 of the bill amends AS 09.60.0 0 to require that attorney's fee awards to or against a public interest litigant in civil cases contesting decisions by the Departments of Environmental Conservation, Fish and Game, and Natural Resources which make a coastal consistency determination or adopt regulations or decisions by those agencies for which the public had an opportunity to comment to the agency and seek administrative review before the agency, may only be made as provided in the proposed new subsection (g) to Rule 82, found in section 3 of the bill and described below. Section 1 makes it clear that such attorney's fee awards must conform to the language in subsection (g) expressed in this bill and not to later amendments to subsection (g).

Section 2 of the bill would amend Alaska Rule of Civil Procedure 82 by adding a new paragraph to subsection (b) providing that if a court increases the award from the percentages set out in (b)(1) or (b)(2) of the rule, it must apportion the attorney's fee by issue and, absent exceptional circumstances, can only award the increased fee for an issue the party prevailed upon. This would change the current application of Civil Rule 82 which courts construe to allow, but not require, apportionment of attorney's fees by issue.

Section 3 of the bill would add a new subsection (g) to Alaska Rule of Civil Procedure 82 providing that attorney's fees to or against public interest litigants for cases contesting decisions by the Departments of Environmental Conservation, Fish and Game, and Natural Resources making a coastal consistency determinations, adopting regulations, or for which the public had an opportunity to comment to the agency and seek administrative review before the agency, are to be awarded in the same manner as attorney's fees are awarded to or against non-public interest litigants under subsection (b) of Rule 82. This would change current Alaska case law which creates an exception to Rule 82 by which, in most circumstances, public interest litigants who prevail in civil litigation receive full attorney's fees, with no apportionment by issue, but are not liable for an opposing party's fees if the public interest litigant loses the case.

Because sections 2 and 3 of the bill amend the Alaska Civil Rules, they must receive a two-thirds vote in each house in order to become law. Section 1 only requires a majority vote. For section 1 to have its intended effect, it is necessary that sections 2 and 3 also are passed by the legislature. Thus, Section 4 of this bill provides that section 1 takes effect only if sections 2 and 3 receive a two-thirds majority vote in each house.

GREATER * FAIRBANKS CHAMBER OF COMMERCE

250 Cushman St., Suite 2D, Fairbanks, AK 99701-466
phone: (907) 452-1105, fax: (907) 456-690

e-mail: staff@fairbankschamber.org
website: www.fairbankschamber.org

Introduced By: Governmental Affairs
Date Introduced: March 11, 2003
Date Passed: March 11, 2003
Date Transmitted: March 11, 2003

Resolution 03-0311

A RESOLUTION BY THE GREATER FAIRBANKS CHAMBER OF COMMERCE TO SUPPORT THE PASSAGE OF A BILL RELATING TO PUBLIC INTEREST LITIGANTS AND ATTORNEY FEES

WHEREAS a critical component to business development in the State of Alaska is ensuring that development projects, once permitted by the appropriate State Agencies, can proceed without delay; and,

WHEREAS groups opposed to development routinely file litigation with the sole objective of either preventing or delaying permitted development with absolutely no financial downside to them if they lose the litigation; and,

WHEREAS those groups who regularly oppose business development are not simply concerned citizen groups but rather special interest groups supported financially by national and/or international organizations whose stated mission is to prevent development; and,

WHEREAS the State of Alaska as well as industry and developers are forced to defend themselves in lengthy and costly litigation with little chance of recovering any costs or attorney fees even when they prevail in the litigation; and,

WHEREAS legislation, such as Senate Bill 97 introduced by Governor Frank Murkowski, to modify Alaska's existing rules and regulations by eliminating public interest litigant status in appeals of Administrative decisions, in which the party was afforded an opportunity for public input and administrative appeal, and by awarding fees and costs to the prevailing party in such litigation would ensure fairness and a level playing field for all litigants; and,

WHEREAS an additional legislative provision to require disclosure of funding sources by those who seek to qualify as litigants and/or who seek to file an Administrative appeal would permit those defending the litigation to know the identity of those who are actually supporting the litigation and the amount of that financial support; and,

WHEREAS such legislation would inhibit frivolous litigation by ensuring that there is a consequence to those who file such litigation; and,

WHEREAS such legislation is critical to promoting and achieving responsible business development in the State of Alaska;

Benefactors

Alaska Airlines
Alaska Communications Systems
Alaska Railroad
Alveska Pipeline Service Company
AT&T Alascom
BP Exploration (Alaska) Inc
CellularOne
ConocoPhillips Alaska, Inc
CTG Alaska
Denali State Bank
Design Alaska
Fairbanks Building & Construction Trades Council, The Unions
Fairbanks Natural Gas LLC
Fairbanks Urgent Care Center
First National Bank Alaska
Flowline Alaska
Fort Knox Mine
GCI
Golden Heart Utilities
Golden Valley Electric Association
Guardian Flight, Inc
Key Bank of Alaska
Mt. McKinley Bank
North Star Computing
Northrim Bank
Santina's Flowers & Gifts
Tanana Valley Clinic
Third Sector Technologies, Inc
Tolem Ocean Trailer Express
Usibelli Coal Mine
WebWeavers
Wells Fargo Bank Alaska
Wendy's
Westmark Fairbanks Hotel & Conference Center
Williams Alaska Petroleum



Unequal Access

Closing the Door on Public Interest Litigants (HB 145)

810 N St, Ste 203, Anchorage Alaska 99501 / Ph. 907.258.6171 / Fax 907.258.6177

PO Box 22151, Juneau Alaska 99802 / Ph. 907.463.3366 / Fax 907.463.3312 / www.acvoters.org

To: Representatives

From: Matt Davidson

Date: May 8, 2003

HB 145, currently under consideration in the Alaska State Legislature, would severely limit Alaskans' ability to challenge bad government decisions. **HB 145** changes the Supreme Court rules that allow public interest litigants to recover legal expenses for challenges of decisions made by the Departments of Natural Resources, Environmental Conservation, and Fish and Game. The current Rule 82 exemption is necessary to ensure that citizens of Alaska can challenge the government when it makes overzealous or ill-informed decisions.

Public Interest Litigants, by definition, are *not* motivated by an economic incentive, but rather by an interest in the resolution of a significant public policy issue. In 1974 the Alaska Supreme Court removed barriers that enabled only the rich to challenge bad government decisions. Passage of HB 145 will give government free reign to trample on the rights of citizens without threat of public interest litigant challenges of these decisions.

While it has been argued that HB 145 target suits by environmentalists, the bill does not single out these plaintiffs. All Alaskans, such as: fishermen, homeowners, communities, tribal councils, sportsmen, and health advocates impacted by poor decisions made by DNR, ADFG, and DEC are included in the bill. These types of challenges contribute to the checks and balances necessary for sound government decision-making.

All Sides Impacted

Unsound government decisions impact all points along the ideological and political spectrum. If not for the public interest rule, citizens, such as those cited below, would be required to pay tens of thousands of dollars to the State of Alaska in attorney's fees if they do not prevail.

Citizens for the Preservation of the Kenai River, Inc. v. Sheffield, 758 P.2d 624 (Alaska 1988):

A group of boat-owners brought suit challenging the validity of a state regulation limiting horsepower of motorized boats on the Kenai River. If not for the public interest rule, the boat owners would have been required to pay tens of thousands of dollars to the state of Alaska in attorney's fees.

Payton v. State, 938 P.2d 1036 (Alaska 1997): Rural residents sued DNR for failing to establish a subsistence salmon fishery on the upper Yentna River. The Court remanded the decision to the Board of Fisheries for further consideration, and the prevailing plaintiffs were able to obtain their reasonable attorneys' fees under the public interest litigant rule.

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Alaska Survival, Inc. v. Dept. of Natural Resources, 723 P.2d 624 (Alaska 1988): An organization of local residents filed suit regarding state land disposal of 32 agricultural homesteads.

Eyak Traditional Elders Council v. Sherstone, Inc., 904 P.2d 420 (Alaska 1995): A traditional village elders council disputed logging plans regarding historic sites.

Unnecessary Changes

Existing law already protect against frivolous litigation. The courts are charged with deciding whether a plaintiff passes the public interest litigant test. Secondly, the courts already allow the courts to reduce a fee award for a variety of reasons in cases where the judge finds the requested award unreasonable. Attorneys are held accountable by the threat of significant fines for bringing frivolous claims.

Please vote against HB 145.

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8 April 2003

To Members of the 2003 Alaska Legislature:

Re: SB 97 and HB 145

Dear Legislator:

It is my understanding that the Alaska Legislature is considering Senate Bill 97 and House Bill 145 (or variants thereof) which would virtually eliminate the "public interest litigants" rule that shields Alaskans from punitive awards of attorneys fees when they act as private Attorneys General and bring suit to correct abuses of government. **These bills should be defeated in all their forms!**

I have participated, as an attorney and as a plaintiff, in a number of such suits.

In Citizens for the Preservation of the Kenai River, Inc. v. Sheffield, 758 P.2d 624 (Alaska 1988), my office represented a large number of power boating enthusiasts protesting a horse-power restriction on motor boats operating on the Kenai River. The State was trying to eliminate erosion to the banks of the Kenai caused by wakes from passing power boats. Although we pointed out that a faster boat that is able to travel "on the step" makes less wake than a slower boat that cannot "get on its step", we lost that suit. A few years ago, at least one State expert was quoted in the Daily News saying that we had been right about our position.

In McDowell v. State, 785 P.2d 1 (Alaska 1989), my office represented Mr. McDowell and several other plaintiffs in seeking to set aside the State's rural preference for Subsistence. The suit was brought on behalf of all Alaskans seeking to uphold Alaska's Constitution which provides for equal access to fish and wildlife resources in Alaska. We won that suit.

In Alaska Gun Collectors Association v. State of Alaska and Tony Knowles et al, I represented a group of Alaskans who objected to the Governor requiring that State surplus firearms be destroyed rather than sold at public auction. Suit was brought to seek an injunction prohibiting the destruction of such firearms. After some 50 firearms (some of which were highly collectable) were cut up with a welding torch, we amended our complaint to ask for monetary

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damages on behalf of the people of Alaska against the Governor, personally, for willful destruction of State property. When that happened, the Governor called a moratorium on the destruction of surplus guns. After the Legislature enacted legislation prohibiting such destruction¹, the case settled with the Governor agreeing to end the destruction of surplus firearms, and the State paying a portion of my attorneys fees.

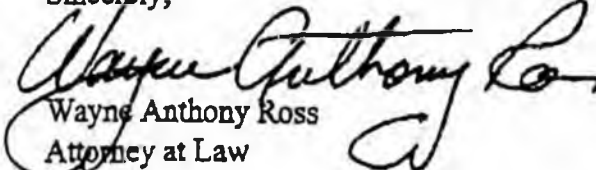
In several other cases I participated as plaintiff, along with other Republicans (and others) to challenge the State's campaign donation regulations. If I recall we won most, if not all, of those suits and all Alaskans (and especially Republican legislators and the Republican Party of Alaska) benefitted from such litigation.

None of those lawsuits would have been pursued had the specter of substantial attorney fees loomed on the horizon in the event we had lost those cases!

We ask that our citizens take an active interest in improving State government. Passage of this proposed legislation would have a chilling effect on such participation!

I urge you, most strongly, to defeat SB 97 and HB145, and all of their substitutes and amendments!

Sincerely,


Wayne Anthony Ross
Attorney at Law

¹The legislation was spurred on by the publicity garnered from our lawsuit against the Governor.