HB

145

HOUSE COMMITTEE REPORT

(7)
Date Referred to Committee: March 3, 2003 **FURTHER REFERRALS: Finance**

Date of Committee Action: May 7, 2003

The JUDICIARY 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* [X] CS *for* HB 145 (JUD)
For Senate Bills with new title: [ ] Technical Title [ ] New Title: HCR_____ **[ ] Same Title [X] 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

***NEW* FISCAL NOTES**
*Assigned by Chief Clerk's Office

List by Dept(s):	*FN#	Fiscal	Indet.	Zero
ADM				✓

***PREVIOUS* FISCAL NOTES**

List by Dept(s):	FN#	Fiscal	Indet.	Zero
LAW				✓
ADM			✓	

Signing with recommendations	Printed Last Name	DP	DNP	NR	AM
	Holm			E	
	Gara		✓		
	ANDERSON	X			
	SAMUELS			—	
	Grenberg		✓		
	Ogg			✓	
Chair:	McGuire	✓			
Chair:					

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 24, 2003

Representative Lesil McGuire
House Judiciary Committee
Alaska State Legislature
State Capitol
Juneau, AK 99801

Re: HB 145 - "Attorneys fees: Public Interest Litigants"

Dear Representative McGuire:

Attached are the Sectional Analysis and the Governor's transmittal letter for House Bill 145 for the packet for your committee members for the hearing on the bill scheduled for tomorrow.

On April 21, 2003, we transmitted to you a proposed amendment for the bill. A copy of which is also attached for your convenience.

If you have any questions, please feel free to contact me.

Sincerely,

GREGG D. RENKES
Attorney General

By: David W. Marquez
David W. Marquez
Assistant Attorney General

DWM:lb

Cc: Mike Tibbles, Legislative Director, Office of the Governor
Deborah Behr, Legislation and Regulations Attorney, Department of Law

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 09.60.010 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.

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

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: Deborah F. Behr for
David W. Marquez
Legislative Liaison

DWM:CT:SZ

AMENDMENT

OFFERED IN THE HOUSE BY _____

JUDICIARY COMMITTEE

TO: HB 145

Page 1, line 1, following "fees", through line 2:

Delete "; and amending Rule 82, Alaska Rules of Civil Procedure"

Page 1, line 11, following "action":

Insert "or an appeal from an administrative agency,"

Page 1, line 13, following "Resources", through line 14:

Delete "making a coastal consistency determination, adopting"

Insert "through which one or more of those agencies makes a coastal consistency determination or adopts

Page 2, line 3, following "litigant" through line 5:

Delete "as provided in Rule 82(g), Alaska Rules of Civil Procedure, on the effective date of this Act"

Insert "in the same manner as attorney's fees may be awarded to or against a non-public interest litigant"

Page 2, line 6, through page 3, line 2:

Delete all material and insert new bill sections to read:

"* Sec. 2. AS 09.60.010 is amended by adding a new subsection to read:

(b) In this section, "public interest litigant" means a party bringing a civil action or appeal that

(1) is designed to effectuate strong public policies;

(2) will benefit numerous people;

(3) could only be expected to be brought by a private party; and

(4) the party bringing the civil action or appeal would lack sufficient economic incentive to bring if it did not involve issues of general importance.

* Sec. 3. 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."

Amendment by No 1 to SB HB 145 (JUD) By Brunkhorst

Page 2 line 13 FAILS

Sec. ___ AS 09.60.010 is amended by adding

a new subsection to read:

(c) Nothing in this section shall prohibit the court from awarding a successful public interest litigant reasonable attorney's fees or refusing to award any cost or attorney's fees against an unsuccessful public interest litigant if the court finds that determines such an order is warranted under Alaska Rule of Civil Procedure 82(b)(3) or Alaska Rule of Appellate Procedure 508(e).

Costs and

Costs or

Conceptual Amendment 2 to CSHB 145 (JUD) By Brunkow

FAILS

Page 2 Line 13

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

Sec. Indirect Court Rule Amendment

Sections 1 and 2 of this Act have the effect of amending Alaska Civil Rule 82 and therefore take effect only if they receive the two-thirds majority vote of each house required by art. IX, sec. 15 Constitution of the State of Alaska.

Amendment 3 Case NO

~~Conceptual~~

P.2 line 3

After "litigant," ~~reasonable~~ the rate of attorney's fees awarded may not exceed $125/hour. If a ~~claim~~ ~~of~~ public interest litigant's [redacted] case is deemed frivolous by the court, full attorney's fees at a rate that may not exceed $125/hr. may be awarded ~~to the prevailing defendant~~ to the defendant against whom ~~the~~ that case was filed.

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

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State Capitol, Room 118
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Thank you for your consideration of these amendments.

Sincerely,

GREGG D. RENKES
Attorney General

By: Debra E. Sehl
David W. Marquez
Legislative Liaison

DWM:CT:SZ

AMENDMENT

OFFERED IN THE HOUSE BY _____

JUDICIARY COMMITTEE

TO: HB 145

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Page 1, line 11, following "**action**":

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Delete "**making a coastal consistency determination, adopting**"

Insert "**through which one or more of those agencies makes a coastal consistency determination or adopts**

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Delete "**as provided in Rule 82(g), Alaska Rules of Civil Procedure, on the effective date of this Act**"

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(b) In this section, "public interest litigant" means a party bringing a civil action or appeal that

(1) is designed to effectuate strong public policies;

(2) will benefit numerous people;

(3) could only be expected to be brought by a private party; and

(4) the party bringing the civil action or appeal would lack sufficient economic incentive to bring if it did not involve issues of general importance.

* **Sec. 3.** 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."

6 of 41 DOCUMENTS

CITIZENS COALITION FOR TORT REFORM, INC., Appellant, v. STEPHEN A. McALPINE, Lt. Governor of the State of Alaska; ALASKA ACADEMY OF TRIAL LAWYERS, Appellees

No. 3686, File No. S-3714

Supreme Court of Alaska

810 P.2d 162; 1991 Alas. LEXIS 29

April 26, 1991

SUBSEQUENT HISTORY:
[**1] As Corrected.

PRIOR HISTORY:
Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, Karen Hunt, Judge. 3AN 87 11043 Civil.

CASE SUMMARY

PROCEDURAL POSTURE: Appellant tort reform coalition filed an application for certification of an initiative relating to, among other things, the regulation of attorney fees. Appellee lieutenant governor denied certification of the initiative. The Superior Court of Anchorage (Alaska) granted a motion for summary judgment in favor of the lieutenant governor and the coalition appealed.

OVERVIEW: The tort reform coalition filed an application for certification of an initiative. One of the items that the initiative purported to regulate was attorney fees. The lieutenant governor denied certification of the initiative. The coalition brought an action and the superior court granted a motion for summary judgment in favor of the lieutenant governor. On review, the court affirmed the order granting summary judgment. The court found that it had the authority to regulate the courts and the practice of law under Alaska Const. art IV § 1. Further, the court found that it had repeatedly exercised its authority to regulate the practice of law, including attorney fees. The court reasoned further that Alaska Const. art. XI, § 7 expressly forbid an initiative to prescribe a rule of court and that under Alaska Const. art. IV, § 15 such rules could only be changed by two-thirds of the legislature.

OUTCOME: The court affirmed the order that granted summary judgment in favor of the lieutenant governor on the issue of whether the lieutenant governor properly denied certification of an initiative proposed the tort reform coalition.

LexisNexis(TM) HEADNOTES - Core Concepts

Governments > Legislation > Initiative & Referendum Process
[HN1] The initiative shall not be used to dedicate revenues, make or repeal appropriations, create courts, define the jurisdiction of courts or prescribe their rules, or enact local or special legislation. Alaska Const. art. XI, § 7. *Alaska Stat. § 15.45.010* provides that the people may exercise, through the initiative, the law-making powers of the legislature, subject to the same restrictions that appear in article XI, § 7.

Civil Procedure > Summary Judgment
Civil Procedure > Appeals > Standards of Review > De Novo Review

[HN2] The appellate court reviews appeals from the grant of summary judgment de novo. When reviewing questions of law de novo, the court's duty is to adopt the rule of law that is most persuasive in light of precedent, reason and policy.

Governments > Courts > Rule Application & Interpretation
[HN3] Alaska Const. art. IV, § 15 states: The supreme court shall make and promulgate rules governing administration of all courts. It shall make and promulgate rules governing practice and procedure in civil and criminal cases in all courts. These rules may be changed by the legislature by two-thirds vote of the members elected to each house.

Governments > Courts > Creation & Organization
[HN4] Alaska Const. art. IV, § 1 of the constitution states: The judicial power of the state is vested in a supreme court, a superior court, and the courts established by the legislature. The jurisdiction of courts shall be prescribed by law. The courts shall constitute a unified judicial system for operation and administration. Judicial districts shall be established by law.

Legal Ethics > Client Relations > Billing & Costs
[HN5] Alaska Bar R. 35 provides that, except in domestic relations cases and criminal cases, a fee may be contingent on the outcome of the matter for which service is rendered, so long as that fee meets the general requirement that an attorney's fee will be reasonable.

Governments > Legislation > Initiative & Referendum Process
[HN6] The people's broad constitutional right to legislate by initiative should be liberally construed to permit exercise of that right.

Governments > Legislation > Interpretation
[HN7] The courts must interpret all constitutional provisions, grants of power and restrictions on power alike as broadly as the people intended them to be interpreted.

Governments > Legislation > Interpretation
[HN8] Because of the concern for interpreting the constitution as the people ratified it, the courts generally are reluctant to construe abstrusely any constitutional term that has a plain ordinary meaning. Rather, absent some signs that the term at issue has acquired a peculiar meaning by statutory definition or judicial construction, the courts defer to the meaning the people themselves probably placed on the provision. Normally, such deference to the intent of the people requires adherence to the common understanding of words.

Governments > Legislation > Interpretation
[HN9] The basic principles of statutory interpretation apply to constitutions. One settled principle of interpretation provides that when words used in a prior statute or constitutional provision are omitted in a subsequent statute or provision, the court will presume that a change of meaning was intended.

Governments > Legislation > Interpretation
[HN10] Another settled principle of statutory construction holds that the courts should interpret the language of a constitutional provision in light of its purpose.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion
[HN11] The appellate courts review the trial court's determination of a party's status as a public litigant under the abuse of discretion standard.

Civil Procedure > Costs & Attorney Fees > Attorney Fees
[HN12] Four criteria for identifying a public interest litigant: (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? A litigant must satisfy all four criteria to be deemed a public interest litigant.

COUNSEL:

Michael L. Lessmeier, Hughes, Thorsness, Gantz, Powell & Brundin, Anchorage, for Appellant.

Virginia B. Ragle, Assistant Attorney General, Douglas B. Baily, Attorney General, Juneau, for Appellee **McAlpine.**

Avrum M. Gross, Gross & Burke, Juneau, for Appellee Alaska Academy of Trial Lawyers.

JUDGES:
Rabinowitz, Chief Justice, Burke, Matthews, Compton and Moore, Justices.

OPINIONBY:
BURKE

OPINION:

[*163] OPINION

In this case the lieutenant governor denied certification of an initiative that would have set maximum allowable levels of attorney's fees in personal injury cases. The lieutenant governor found that the initiative was an attempt to prescribe a rule of court, a subject that the Alaska Constitution expressly restricts from the people's power to legislate [**2] by initiative. On a motion for summary judgment, the superior court upheld the lieutenant governor's decision. We affirm.

I

In August 1987, Citizens Coalition for Tort Reform, Inc. ("Coalition") filed with Lieutenant Governor **McAlpine** an application for certification of an initiative entitled: "An Act relating to civil liability; and relating to contingency agreements in connection with personal injury actions." n1 Sections 1 and 2 of the initiative proposed to alter the statutory law governing apportionment of damages and contribution among tortfeasors. Section 3 of the initiative proposed to add the following new statute to AS 09.17:

(a) An attorney shall not contract for or collect a contingency fee for representing any person seeking damages in connection with an action for personal injury in excess of the following limits:

(1) Thirty-three and one-third percent of the first one hundred thousand dollars ($ 100,000) recovered;

(2) Twenty-five percent of the next one hundred thousand dollars ($ 100,000) recovered;

(3) Ten percent of any amount on which the recovery exceeds two hundred thousand dollars ($ 200,000).

Such limitations shall apply regardless of whether the recovery is [**3] by settlement, arbitration, or judgment, or whether the person for whom the recovery is made is a responsible adult, an infant, or a person of unsound mind.

(b) For purposes of this section:

(1) "Recovered" means the net sum recovered after deducting any disbursements or costs incurred in connection with prosecution or settlement of the claim. Costs of medical care incurred by the plaintiff and the attorney's office overhead costs or charges shall not be deductible disbursements or costs for such purposes.

----------Footnotes----------

n1 "An initiative is proposed by filing an application with the lieutenant governor." *AS 15.45.020.* "The lieutenant governor shall review the application and shall either certify it or notify the initiative committee of the grounds for denial." *AS 15.45.070.*

----------End Footnotes----------

After reviewing the initiative and a legal opinion on the initiative prepared by the attorney general, the lieutenant governor denied certification on October 11, 1987. [*164] The basis of denial was that the proposed regulation of

attorney's fees in section 3 of the [**4] initiative constituted an attempt to prescribe a rule of court, a subject that both Article XI, section 7 of the Alaska Constitution and *AS 15.45.010* restrict from the people's power to legislate by initiative. n2

----------Footnotes----------

n2 [HN1] "The initiative shall not be used to dedicate revenues, make or repeal appropriations, create courts, define the jurisdiction of courts or prescribe their rules, or enact local or special legislation." Alaska Const. art. XI, § 7. *Alaska Statute 15.45.010* provides that the people may exercise, through the initiative, the law-making powers of the legislature, subject to the same restrictions that appear in article XI, § 7.

----------End Footnotes----------

In November 1987, the Coalition filed a complaint in superior court seeking a temporary restraining order that would direct the lieutenant governor to certify the initiative and to prepare the initiative petitions. The Alaska Academy of Trial Lawyers ("AATL") intervened in the action, and they and the attorney general, appearing on behalf of the lieutenant governor, filed answers to the [**5] Coalition's complaint. After oral argument, the trial court denied the Coalition's motion for a temporary restraining order. We denied the Coalition's petition for review in December 1987.

The Coalition removed section 3 from the initiative and resubmitted it to the lieutenant governor, who certified it in that form. The voters adopted that truncated version of the initiative at the 1988 general election. Soon after the election, in February 1989, the Coalition resumed litigation over the lieutenant governor's refusal to certify the initiative in its original form by filing for summary judgment in the superior court. The Coalition sought a ruling that section 3 of the original initiative did not propose to enact a constitutionally or statutorily restricted court rule. The state and AATL filed cross motions for summary judgment. In August 1989, the superior court, Judge Karen L. Hunt, held that section 3 of the Coalition's original initiative was "an attempt to prescribe a rule of Court, as that phrase is used in Article 11, Section 7, of the Constitution." Accordingly, the court denied the Coalition's motion and granted both cross motions. The superior court also awarded partial attorney's [**6] fees to the state and to AATL. The Coalition appealed.

II

The primary dispute in this case presents two related questions of law. First, we must decide whether a limit on attorney contingent fees is necessarily classifiable as a rule of court. Second, if a contingent-fee limit is a rule of court, we must decide whether article XI, section 7 of the constitution removes such a rule from the scope of the people's power to legislate by initiative. We address each issue in turn. n3

----------Footnotes----------

n3 The superior court granted summary judgment after deciding as a matter of law that section 3 of the proposed initiative included a constitutionally restricted subject. [HN2] We review this appeal from the grant of summary judgment *de novo. Grand v. Municipality of Anchorage, 753 P.2d 141, 143 n.3 (Alaska 1988).* When reviewing questions of law de novo, the court's duty is to adopt the rule of law that is most persuasive in light of precedent, reason and policy. *Williford v. L.J. Carr Investments, Inc., 783 P.2d 235, 236 (Alaska 1989).*

When construing constitutional provisions we are especially sensitive to policy concerns, because -- as we explained in *Thomas v. Bailey, 595 P.2d 1, 4 (Alaska 1979)* -- "a constitution is a document 'unchangeable by ordinary means,' *Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177, 2 L. Ed 60, 73 (1803),* which 'must be considered as a living document adaptable to changing conditions and circumstances unanticipated at the time it was written.' *Warwick v. State ex rel. Chance, 548 P.2d 384, 391 (Alaska 1976).*"

----------End Footnotes---------- [**7]

A

As a threshold matter, the lieutenant governor and the superior court both decided that section 3 of the Coalition's proposed initiative constituted an attempt to prescribe a rule of court. On appeal, the state and AATL argue that the

decisions below on this point were correct. In essence, those decisions and appellees' arguments all rely upon the conclusion that it is within this court's rule-making authority to prescribe a limit on contingent fees.

It is true that this court possesses extensive rule-making authority. The sources of that authority are two separate provisions **[*165]** of the state constitution. [HN3] Article IV, section 15 of the constitution states:

Rule-Making Power. The supreme court shall make and promulgate rules governing administration of all courts. It shall make and promulgate rules governing practice and procedure in civil and criminal cases in all courts. These rules may be changed by the legislature by two-thirds vote of the members elected to each house.

Alaska Const. art. IV, § 15. The court's rule-making power under this section is explicitly broad and very nearly complete. Id.; see also *Channel Flying, Inc. v. Bernhardt, 451 P.2d 570, 575 (Alaska 1969)* **[**8]** (legislature has no power to make rules governing practice and procedure in civil and criminal cases, only power to change court-made rules by two-thirds vote).

This court also obtains rule-making authority from [HN4] article IV, section 1 of the constitution, which states:

Judicial Power and Jurisdiction. The judicial power of the State is vested in a supreme court, a superior court, and the courts established by the legislature. The jurisdiction of courts shall be prescribed by law. The courts shall constitute a unified judicial system for operation and administration. Judicial districts shall be established by law.

Alaska Const. art. IV, § 1. The court's rule-making authority under this section is inherent in the judicial power vested in it, as the supreme court of the state.

One inherent judicial power that we have exercised repeatedly is the power to regulate the practice of law in the state. We have described the scope of this power generally in our decisions by striking down or disapproving statutes that conflict with attorney disciplinary rules we have promulgated. See *In re MacKay, 416 P.2d 823, 829 (Alaska 1964)* (statute in conflict with court rule **[**9]** "was unconstitutional for being an invasion of the inherent power of the court to discipline and disbar members of the Alaska Bar Association"), cert. denied, *384 U.S. 1003, 86 S.Ct. 1907, 16 L.Ed.2d 1016 (1966)*. We also have recognized that the judicial power specifically vests us with authority to determine standards for admission to the practice of law in the state, e.g., *In re Stephenson, 511 P.2d 136 (Alaska 1973)*, n4 and to regulate the professional conduct of attorneys, e.g., *Miller v. Paul, 615 P.2d 615 (Alaska 1980)*. And finally, in exercise of our inherent power, we have adopted rules that govern beyond the "administration . . . practice and procedure" limitations of article IV, section 15, most notably the Alaska Bar Rules and the Code of Professional Responsibility.

----------Footnotes----------

n4 In Stephenson we denied an attorney admission to the bar under a rule we had promulgated that required law school graduation, despite the existence of a contrary statute permitting admission based on length of practice. *Stephenson, 511 P.2d at 140-41*. We explained our action as follows:

We have taken jurisdiction pursuant to that provision of the Alaska Constitution vesting the judicial power of the state in this court and under the rule followed by the great majority of states which holds that the supreme court of a state has the inherent and final authority to determine the standards for admission to the practice of law in that state.

Id. at 140 (quoting *In re Houston, 378 P.2d 644, 645 (Alaska 1963))*; see also *In re Steelman, 448 P.2d 817 (Alaska 1969); In re Brewer, 430 P.2d 150 (Alaska 1967)*.

----------End Footnotes----------**[**10]**

Both the Alaska Bar Rules and the Code of Professional Responsibility already contain court rules that regulate contingent fees. Disciplinary Rule 2-106 of the Code of Professional Responsibility explicitly allows attorney-client contingent fee agreements, but prohibits any fee that is "clearly excessive." n5 Disciplinary Rule 5-103 also permits contingent fees and further explains that a contract for a reasonable contingent fee in a civil case does not violate the rule against acquiring a proprietary interest in a case or in the subject matter of a case. Finally, [HN5] Alaska Bar Rule 35 provides that, except in domestic relations cases and criminal cases, a "fee may be **[*166]** contingent on the

outcome of the matter for which service is rendered," so long as that fee meets the general requirement that an "attorney's fee will be reasonable." n6

----------Footnotes----------

n5 Disciplinary Rule 2-106 establishes eight factors for determining whether a fee is clearly excessive, including "whether the fee is fixed or contingent." Alaska Code Prof. Resp. DR 2-106. The rule also bans contingent fees in criminal cases. Id. Additionally, Ethical Consideration 2-20 provides a thorough set of guidelines for attorneys considering contingent fee agreements. Id. at EC 2-20. [**11]

n6 Bar Rule 35 is essentially equivalent to Model Rules of Professional Conduct Rule 1.5. In addition to the reasonableness limit, the Rule also imposes requirements for the actual form a contingent fee agreement must take.

----------End Footnotes----------

Citing these provisions of the Alaska Rules of Court, appellee AATL argues that section 3 of the Coalition's initiative proposes to alter, or at least to supplement, court rules previously adopted by this court. We find merit in this argument. Certainly bright line, contingent fee ceilings such as those proposed in the Coalition's initiative would constrain any court's analysis of whether a particular contingent fee was "reasonable," or "clearly excessive," under Bar Rule 35 or Disciplinary Rules 2-106 and 5-103.

Authority from other jurisdictions supports the view that the initiative's proposed contingent fee limit is essentially a court rule. High courts in several states have adopted court rules that impose limits on contingent fees, and in some instances these rules have been strikingly similar to the limits proposed in the Coalition's initiative. n7

----------Footnotes----------

n7 See, e.g., Mich. Ct. R. 8.121 (adopted in 1985 but based on 1963 rule limiting allowable contingent fees according to multitiered, graduated scale of percentages; the current rule imposes flat one-third of recovery limit); N.J. Ct. R. 1:21-7 (limiting allowable contingent fees according to multi-tiered, graduated scale of percentages; original rule effective Jan. 31, 1972); Colo. R. Governing Contingent Fees 1-7 (imposing procedures and limits for contingent fee agreements); see also N.Y. Ct. R., Sup. Ct. App. Div. § § 603.7(e) (1st Dept.); 691.20(e) (2d Dept.); 806.13 (3d Dept.); 1022.31 (4th Dept.) (multi-tiered, graduated scale of percentages, or straight one third of recovery; original version adopted by App. Div., 1st and 2d Depts. in 1956, pursuant to intermediate courts' statutory authority to regulate attorneys).

Prior to the 1950s, state courts do not appear to have adopted rules limiting attorneys' contingent fees. As late as 1949 the Utah Supreme Court, in a case the Coalition urges us to follow, stated:

[W]e are not aware of any power in the judiciary to fix or regulate attorney's fees. We do not think it can be inferred from . . . the power to provide for the examination, licensing or regulation of admission to the bar . . . nor from the auxiliary power to discipline attorneys . . . . If there is power in the courts to fix a fee scale or regulate fees, it has not been exercised.

Thatcher v. Industrial Comm'n, 115 Utah 568, 207 P.2d 178, 181 (Utah 1949). Since the Utah court offered this dubious assessment of court powers, of course, many state courts have exercised their powers to fix a scale and to regulate contingent fees. Additionally, the Coalition has not directed our attention to, nor have we found, a single recent case to support the Thatcher dictum.

----------End Footnotes---------- [**12]

In a seminal 1959 decision, the New York Court of Appeals upheld the courts' power to adopt the original version of the New York contingent fee limits. *Gair v. Peck, 6 N.Y.2d 97, 188 N.Y.S.2d 491, 160 N.E.2d 43 (N.Y. 1959),* appeal denied and cert. denied, *361 U.S. 374, 80 S. Ct. 401, 4 L. Ed. 2d 380 (1960).* Such fee limits, wrote the Court of Appeals, were within the judicial power (and responsibility) "to curb the practice of excessive exactions against clients."

Id. at 51. The court expressly rejected the notion that the judiciary should exercise control of the attorney-client contract only in specific cases, and only after disputes as to reasonableness arise. n8

----------Footnotes----------

n8 The court in Gair wrote:

The duty and function of the Appellate Divisions to keep the house of the law in order does not hinge upon whether clients, worn down by injuries, delay, financial need and counsel holding the purse strings of settlement, knowing little about law or lawyers, have had the stamina to resist in court by hiring other lawyers to be paid out of the other half of the recovery for defending against the first lawyer.

Gair, 160 N.E.2d at 51.

----------End Footnotes----------**[**13]**

The decision in Gair prepared the foundation for later decisions upholding court-made contingent fee rules, perhaps most importantly *American Trial Lawyers Ass'n v. New Jersey Supreme Court, 126 N.J. Super. 577, 316 A.2d 19 (N.J. Super. Ct. App. Div. 1974).* In American Trial Lawyers, a New Jersey intermediate appellate court upheld against constitutional challenge the contingent fee limit adopted by the state supreme court. The intermediate court reasoned that the **[*167]** supreme court's constitutional power to regulate the practice of law necessarily included the power to adopt rules governing the conduct of attorneys, both in and out of court. Id. at 23-24. The court then concluded that the supreme court's power to regulate the practice of law "includes the power to adopt a reasonable rule establishing the outer limits of permissible contingent fees in tort litigation." Id. at 24. The New Jersey Supreme Court subsequently adopted the lower court's American Trial Lawyers Ass'n opinion in toto. *American Trial Lawyers Ass'n v. New Jersey Supreme Court, 66 N.J. 258, 330 A.2d 350, 352 (N.J. 1974).* In its opinion, the supreme court described **[**14]** its contingent fee limit as one of many rules it had adopted "of general application regulating the professional conduct of attorneys and their relationships to their clients and to the courts." *Id. at 353.*

In contrast to the New Jersey and New York experiences, at least one state court with the power to adopt a rule limiting maximum permissible contingent fees has refused to do so. *In re Florida Bar, 349 So. 2d 630 (Fla. 1977).* In Florida Bar, the court considered a petition for amendment of the Code of Responsibility, submitted to the court by the state bar association. *Id. at 630.* The amendment proposed, inter alia, to add to Disciplinary Rule 2-106 a detailed, graduated scale of maximum allowable contingent fees. *Id. at 630-33 & n.2.* The state supreme court rejected the bar association's specific scale because the court found no evidence of "remarkable or substantial abuse of the contingent fee system in Florida." *Id. at 633.* The Florida court noted that a finding of urgent need for regulation of contingent fees had been a crucial element of the decisions in Gair and American **[**15]** Trial Lawyers. Id.; see also *Gair, 160 N.E.2d at 52-53; American Trial Lawyers, 330 A.2d at 354.* Absent such urgency, the Florida court preferred to leave contingent fee regulation to the bar, which was charged with the responsibility of prosecuting those who violate the rules of ethics. n9 *Florida Bar, 349 So. 2d at 635.*

----------Footnotes----------

n9 The Florida court, however, did agree with the bar association that the state suffered from problems related to disclosure and division of contingent fees. *Florida Bar, 349 So. 2d at 636.* Accordingly, the court amended the rules of ethics to include new regulation in those areas. *Id. at 636-37.*

----------End Footnotes----------

The foregoing authorities persuade us that a limit on attorneys' contingent fees is properly classifiable as a rule of court. We note that our decision on this point in no way implies that we either endorse or condemn the idea of imposing specific limits on attorney contingent fees. We also note that we in no **[**16]** way mean to imply that our powers to regulate the practice of law in the state are identical to the comparable powers vested in the supreme courts of any other states. Nevertheless, the resemblance of inherent powers among the state courts is strong enough in this instance to convince us that, pursuant to our inherent powers, n10 we might promulgate or reject a rule limiting contingent fees to

maximum permissible amounts, just as other state courts have rejected or promulgated like rules pursuant to like authority. n11

----------Footnotes----------

n10 Appellants argue that a limit on contingent fees cannot be a rule of court because such a limit is a matter of "substance" and not "procedure." This argument would carry more force if the rule at issue here were one we might adopt under authority of article IV, section 15 of the Alaska Constitution, which vests in the court the power to adopt rules of administration, practice, and procedure. We have found, however, that a limit on contingent fees invokes our powers under article IV, section 1. Consequently, the distinction between procedural and substantive rules, while still important, is not dispositive, because our judicial power includes the authority to regulate with greater substantive effect inside the limited ambit of the judicial system, than we could under our article IV, section 15 powers. *Thomas v. State, 566 P.2d 630, 636-38 (Alaska 1977);* cf. *State v. Williams, 681 P.2d 313, 316 (Alaska 1984); Nolan v. Sea Airmotive, Inc., 627 P.2d 1035, 1042-43 (Alaska 1981).* [**17]

n11 Accord *Florida Bar, 349 So. 2d at 630; Carmichael v. Iowa State Highway Comm'n, 219 N.W.2d 658, 662 (Iowa 1974); American Trial Lawyers, 330 A.2d at 353; American Trial Lawyers, 316 A.2d at 23-25;* cf. *Gair, 160 N.E.2d at 47; Collins v. Godfrey, 324 Mass. 574, 87 N.E.2d 838 (Mass. 1949).*

----------End Footnotes---------- [*168]

B

Article XI of the Alaska Constitution grants broad powers of direct legislation to the people and provides a detailed scheme for the exercise of those powers. n12 Section seven of article XI, however, imposes the following limits on the people's power to enact legislation directly:

Restrictions. The initiative shall not be used to dedicate revenues, make or repeal appropriations, create courts, define the jurisdiction of courts or prescribe their rules, or enact local or special legislation.

Alaska Const. art. XI, § 7. The question before us is whether a limit on contingent fees, which we have found to be a court rule in one sense of the term, is also a court rule within the meaning of this section [**18] of the constitution.

----------Footnotes----------

n12 Article XI, section 1 establishes the right "to propose and enact laws by the initiative." Alaska Const. art. XI, § 1. Additional sections of article XI establish procedures for exercising the initiative power. See Alaska Const. art. XI, § § 2-4 & 6.

----------End Footnotes----------

Appellant Coalition maintains that the term "[court] rules" in article XI, section 7 refers only to court rules that we might promulgate pursuant to the explicit rule-making authority in article IV, section 15. See Alaska Const. art. IV, § 15 (granting supreme court power to make and promulgate rules governing court administration and rules governing practice and procedure in civil and criminal cases in all courts). According to appellant, the restriction against prescribing court rules in article XI, section 7 does not apply to rules, such as limits on contingent fees, that we might promulgate pursuant to our inherent power to regulate the practice of law and conduct of attorneys under article IV, section 1. In effect, the Coalition [**19] asks us to imply the terms "administration . . . practice and procedure" into the restriction of article XI, section 7. We decline to do so.

Certainly, as the Coalition insists, [HN6] the people's broad constitutional right to legislate by initiative "should be liberally construed to permit exercise of that right." *Thomas v. Bailey, 595 P.2d 1, 3 & n.13 (Alaska 1979).* The constitution itself urges liberal construction of the initiative right when it states:

Unless clearly inapplicable, the law-making powers assigned to the legislature may be exercised by the people through the initiative, subject to the limitations of Article XI.

Alaska Const. art. XII, para. 11. As forceful a mandate for liberal construction as this section may be, however, it includes an explicit limit. Only the law-making powers assigned to the legislature are to be liberally construed as within the people's right to legislate by initiative. As we have noted, the constitution, in article IV, section 1, does not assign the rule-making power at issue here to the legislature, but rather to the courts.

Similarly, it does not necessarily follow that a liberal construction of the people's initiative **[**20]** power requires a narrow construction of the limits that define the power. On the contrary, the mandate for liberal construction of the initiative right in article XII, section 11 concludes with a qualifying, cautionary clause: "subject to the limitations of Article XI." This reiterative warning n13 underscores the importance of the restrictions. Additionally, we must never lose sight of another important right of the people implicated in all cases of constitutional construction, namely the right to have the constitution upheld as the people ratified it. See *Thomas, 595 P.2d at 3-4.* [HN7] We must interpret all constitutional provisions -- grants of power and restrictions on power alike -- as broadly as the people intended them to be interpreted. **[*169]** Id.; cf. *Boucher v. Engstrom, 528 P.2d 456, 460 (Alaska 1974)* ("The people for their own protection have provided that the initiative shall not be employed with respect to certain matters.") (quoting *Bowe v. Secretary of the Commonwealth, 320 Mass. 230, 69 N.E.2d 115, 128 (Mass. 1946)),* overruled on other grounds, *McAlpine v. University of Alaska, 762 P.2d 81 (Alaska 1988).*

----------Footnotes----------

n13 The concluding reference in article XII, section 11 to the "limitations of Article XI' simply repeats what is already explicit in the provision that establishes the limitations. Alaska Const. art. XI, § 7. Significantly enough, there is no similar cross reference in the constitution to connect the term "court rules" in article XI, section 7 with the more limited term "rules governing administration . . . practice and procedure" in article IV, section 15. **[**21]**

n14 This tension between the power granted versus the restriction imposed is common in cases involving interpretation of constitutional provisions governing direct legislation. Compare 1 C. Sands, Sutherland Statutory Construction § 4.09, at 135 (Rev. 4th ed. 1985) ("It has been held that provisions authorizing direct popular participation in law-making should be liberally construed so as not to restrict its use.") with id. ("On the other hand, strict compliance is required with conditions and procedures prescribed for making law by [initiative]."). Plainly, the restrictions of article XI, section 7 are important conditions on the initiative right that require strict compliance.

----------End Footnotes----------

[HN8] Because of our concern for interpreting the constitution as the people ratified it, we generally are reluctant to construe abstrusely any constitutional term that has a plain ordinary meaning. *Thomas, 595 P.2d at 3-7; Division of Elections v. Johnstone, 669 P.2d 537, 539-40 (Alaska 1983).* Rather, absent some signs that the term at issue has acquired a peculiar meaning **[**22]** by statutory definition or judicial construction, we defer to the meaning the people themselves probably placed on the provision. *Thomas, 595 P.2d at 3-4 & n.15; Johnstone, 669 P.2d at 539.* Normally, such deference to the intent of the people requires "adherence to the common understanding of words." *Johnstone, 669 P.2d at 539.*

Here, the task of isolating a readily identifiable, commonly understood meaning for the term "court rules" in article XI, section 7 is complicated by the profusion of ordinary meanings that attach to the word "rule." For example, Webster's Third New International Dictionary (Unabridged) (1966) lists some twenty-five common, current definitions. The first definition listed, and the most general, is:

a prescribed, suggested, or self-imposed guide for conduct or action: a regulation or principle.

Id. at 1986. Additionally, Webster's offers several more specific definitions pertinent here:

d (1): a usu. written order or direction made by a court regulating court practice or the action of parties but not making a final judgment on the merits of a controversy (2): a legal precept applied to **[**23]** a given set of facts as stating the law applicable to a case (3): a statement or doctrine accepted as part of the common law . . . *e*: a regulation or by-law governing procedure in a public or private body (as a legislature or club) or controlling the conduct of its members . . . ([e.g.,] a [rule] for admission of new members).

Id. The first three definitions in this series focus on the purely legal uses of the term "rule." Indeed the first in the series faintly invokes the term "rules governing administration . . . practice and procedure" in article IV, section 15. The final definition in the series, however, reengages the preeminent general meaning of "rule" -- "a self imposed guide for conduct." Importantly, then, two of the most general, common meanings of the word "rule" coincide almost exactly with our own description above of the article IV, section 1 inherent powers under which we might promulgate a rule limiting attorney contingent fees. Thus, it appears that the commonly understood meaning, or plain meaning, of the term "court rules" logically may encompass rules, like fee limits, that control the conduct of the members of the bar. Cf. *Johnstone, 669 P.2d at 539;* **[**24]** *Thomas, 595 P.2d at 4-7.*

Apparently aware that a plain meaning construction tends to contradict its position, the Coalition relies upon an alternative argument. Both the text of the constitution and the record of the Constitutional Convention, claims the Coalition, reveal an intent to impose a special or peculiar meaning upon the term "court rules" in article XI, section 7. We disagree.

[HN9] The basic principles of statutory interpretation apply to constitutions. *Thomas, 595 P.2d at 4.* One settled principle of interpretation provides that when words used in a prior statute or constitutional provision are omitted in a subsequent statute or provision, we presume that a change of meaning **[*170]** was intended. 2A C. Sands, Sutherland Statutory Construction § 51.02, at 454 (Rev. 4th ed. 1984). The words "administration . . . practice and procedure," of course, qualify the term "rules" in article IV, section 15, but do not qualify the term "court rules" in the subsequent provision, article XI, section 7. n15 This omission strongly suggests that the framers intended a change in meaning, i.e., that they intended to refer to different sets of rules in the **[**25]** two provisions.

----------Footnotes----------

n15 Article XI, section 7 is "subsequent" to article IV, section 15 in the text of the constitution itself, and in time of adoption at the constitutional convention. See, e.g., 4 Proceedings of the Constitutional Convention 2983 (Jan. 24, 1956) (remarks of Delegate Johnson) (referring, during debate over article XI, to the adoption of the Judiciary Article -- article IV -- on the previous day, Jan. 23, 1956).

----------End Footnotes----------

[HN10] Another settled principle of statutory construction holds that we should interpret the language of a constitutional provision in light of its purpose. *Thomas, 595 P.2d at 4.* As we explained in Thomas:

The restrictions on permissible subjects for direct legislation represent 'a recognition . . . that certain particularly sensitive or sophisticated areas of legislation should not be exposed to emotional electoral dialogue and impulsive enactment by the general public.'

Id. at 8 (quoting Stewart, The Law of Initiative Referendum in Massachusetts, **[**26]** *12 New Eng. L. Rev. 455, 461 (1977)).* There is no doubt that the framers of the Alaska Constitution enacted the restrictions on initiative use for the purpose of removing certain "sensitive or sophisticated areas of legislation" from the sphere of the electorate. See, e.g., V. Fischer, Alaska's Constitutional Convention 80-81 (1975) (restrictions on direct legislation were meant to protect "critical areas" like the judicial system "against rash, discriminatory, and irresponsible acts").

There is also no doubt that the framers included the term "[court] rules" in article XI, section 7 precisely because they considered such rules far too sophisticated and sensitive to be left vulnerable to the reach of the popular initiative. Delegate Robertson, whose amendment added the restriction against use of the initiative for prescribing court rules to article XI, section 7, explained his purpose as he spoke in favor of his amendment:

Mr. President, my proposed amendment is calculated to simply except from the initiative the creation of courts, the defining of their jurisdiction, and the prescribing of the rules, which I believe is self-evident. It is a good thing and **[**27]** shouldn't be left, as I stated on the floor Saturday, to a mass vote because those things are all highly technical.

4 Proceedings of the Alaska Constitutional Convention 2978 (Jan. 24, 1956) (remarks of Delegate Robertson). During floor debate over the Robertson amendment, some delegates specifically demanded to hear argument as to why article

XI, section 7 should restrict rules of court from the reach of the initiative. See id. at 2982-83. Delegate Taylor responded:

The rules are a very important part of our . . . system of jurisprudence and I don't believe that anybody should have the right to change them unless it is the bar, the judicial commission, or the courts [, who] had a chance to explain to the persons who are going to change them what the importance is[.] So I don't believe you could do it under the initiative and referendum process. I think all parts of the amendment as proposed by Mr. Robertson should be retained as it is for the protection of the people and the protection of the courts.

Id. at 2983 (remarks of Delegate Taylor).

In our view, rules regulating the practice of law often are equally as sophisticated, technical, or sensitive as rules governing **[**28]** the administration, practice, and procedure in the courts. Thus, the purpose of the restriction against prescribing court rules in article XI, section 7 logically extends to rules we may adopt under our article IV, section 1 power to regulate the practice of law and the conduct of attorneys in the state.

In sum, the plain meaning of the relevant constitutional provisions, the proper interpretation **[*171]** of those provisions in context, and the pertinent legislative history, taken together, convince us that an attempt to limit contingent fees is an attempt to prescribe a rule of court, within the meaning of article XI, section 7. We conclude that the lieutenant governor correctly denied certification of the Coalition's original initiative.

III

The Coalition also has appealed the superior court's decision to award partial attorney's fees of $ 1,440 to the state and of $ 9,348 to AATL. The trial court determined that the Coalition is not a public interest litigant in this matter and, therefore, assessed attorney's fees against the Coalition, pursuant to Civil Rule 82. The Coalition asserts that it is a public interest litigant and that it should be exempt from paying attorney's fees. [HN11] We review **[**29]** the trial court's determination of the Coalition's status under the abuse of discretion standard. *Johnson v. Tait, 774 P.2d 185, 190 (Alaska 1989).*

We have named [HN12] four criteria for identifying a public interest litigant:

(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?

Anchorage Daily News v. Anchorage School District, 803 P.2d 402, 404 (Alaska 1990). We also have held that a litigant must satisfy all four criteria to be deemed a public interest litigant. Id.; *Murphy v. City of Wrangell, 763 P.2d 229, 233 (Alaska 1988).* Here, as in Anchorage Daily News and Murphy, the only question in dispute is whether the trial court erred in finding that appellant did not satisfy the fourth criterion. See *Anchorage Daily News, 803 P.2d at 404; Murphy, 763 P.2d at 233.* **[**30]**

The Coalition's position on its own financial interest is contradictory. On the one hand it suggests that it might have gained some indirect economic benefit from a successful outcome of the litigation. On the other hand, it asserts that "there is simply no financial gain for the Coalition in this lawsuit." In any event, the Coalition argues that merely minimal economic interest cannot destroy a litigant's capacity to satisfy the fourth criterion. Indeed, we previously have held so. See, e.g., *Alaska Survival v. State, Dep't of Natural Resources, 723 P.2d 1281, 1292 (Alaska 1986)* (litigants' interest in natural source of firewood and building logs not substantial enough to preclude public interest status).

Yet, oddly enough, the Coalition fails to explain why it will gain no direct profit from the litigation. The Coalition also fails to explain why, or how, or in what minimal amount it might gain indirect profit. In fact, our review of the record shows that the Coalition simply has failed to explain who or what it is. Instead, it has maintained near anonymity throughout the course of its lawsuit. All we really know about the Coalition is that it is a "nonprofit **[**31]**

corporation." In this regard, the state of the record contrasts sharply with other cases in which we have determined a party's economic motives. In those cases, we were able to review specific facts about the character of the professed public interest litigant and the nature of that litigant's real financial stake in the lawsuit. E.g., *Oceanview Homeowners Ass'n v. Quadrant Construction & Engineering, 680 P.2d 793, 799 (Alaska 1984)* (litigant consistently had shown health and safety concerns to be at the heart of its motive to litigate); *Kenai Lumber Co. v. LeResche, 646 P.2d 215, 223 (Alaska 1982)* (court was able to determine likely economic motive from commercial setting of the litigation).

In the present case, the Coalition offers only its own pursuit of its lawsuit as proof that its true motive was to benefit the electorate of the state by providing an opportunity to vote on an important initiative. **[*172]** The Coalition thus tends to show that its lawsuit was, in some sense, in the public interest. The Coalition, however, fails to show anything at all about the lawsuit's relationship to the Coalition's own interests. The superior court committed **[**32]** no abuse of discretion in finding that the Coalition was not a public interest litigant.

IV

We hold that section 3 of the Coalition's proposed initiative was an attempt to prescribe a rule of court. We hold that article XI, section 7 of the Alaska Constitution precludes use of the initiative to prescribe such a rule of court. And we find no abuse of discretion in the superior court's award of partial attorney's fees to appellees. Accordingly, the decision of the superior court is AFFIRMED.

STATE OF ALASKA

Frank H. Murkowski, Governor

DEPARTMENT OF LAW

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April 24, 2003

Representative Lesil McGuire
House Judiciary Committee
Alaska State Legislature
State Capitol
Juneau, AK 99801

Re: HB 145 - "Attorneys fees: Public Interest Litigants"

Dear Representative McGuire:

Attached are the Sectional Analysis and the Governor's transmittal letter for House Bill 145 for the packet for your committee members for the hearing on the bill scheduled for tomorrow.

On April 21, 2003, we transmitted to you a proposed amendment for the bill. A copy of which is also attached for your convenience.

If you have any questions, please feel free to contact me.

Sincerely,

GREGG D. RENKES
Attorney General

By: David W. Marquez
David W. Marquez
Assistant Attorney General

DWM:lb

Cc: Mike Tibbles, Legislative Director, Office of the Governor
Deborah Behr, Legislation and Regulations Attorney, Department of Law

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 09.60.010 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

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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;

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 to attorneys fees; and amending Rule 82, ...Civil Procedure."
BRU Civil Division
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						
CHANGE IN REVENUES ( )						

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 Daughhetee for Gregg D. Renkes, Attorney General
Date 1/27/2003
Agency Department of Law

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: 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 interest litigants.....
BRU: Risk Management
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						
CHANGE IN REVENUES ( )						

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

(Revised 9/2001 OMB)

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 interest litigants.....
BRU: Risk Management
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						
CHANGE IN REVENUES ( )						

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) c 0.0
Check this box (X) if funding for this bi s 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

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	83.3	
	AK for Efficient Gov't v. State (ballot measure	03	24.0	
	#2 - capitol move)			
				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 offshore 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	98	24.0	
	Inlet platforms)			
	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	03	22.2	
	Fairbanks Gold Mining)			
	Lynn Canal Consv v. State (reg uses state land)	03	20.2	
				569.3
Local Gov't	Ekwok/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

based on Leg Research Report 4/21/03

APR 2 1 '03

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.

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Alaska Legislature
Legislative Research Services
w3.legis.state.ak.us/Research/research_home.htm

State Capitol
Juneau, AK 99801

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
Kwethluk 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	
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**
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 Daughhetee, 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 Commision	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
Laverty 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 Emples. 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.

Wayne Anthony Ross

Law Office of

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Wayne Anthony Ross
Edward L. Miner
Michael Graper
Timothy Peters
Vince Curry

Curtis W. Patteson, Paralegal

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

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 destruction[1], 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

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

HB 145 – Public Interest Litigants Questionable Impacts

1. Question: The Administration is claiming that the bill has limited scope, but it looks like the bill would impact a wide variety of interests. Which of these cases, to the best of your knowledge, would not be granted Public Interest Litigant status if this bill passes?

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.

- **More information-** The attorney for this case, Wayne Anthony Ross, has written a letter citing this case, among others in his opposition to SB 97 and HB 145. 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.

Kodiak Seafood Processors Ass'n v. State, 900 P.2d 1191 (Alaska 1995): **Seafood processors association** challenged DNR's decision to issue a permit to a private fisherman for exploratory scallop fishing in closed waters.

- More Information: The association lost the case but **was protected by the public interest litigant rule** from paying the State's attorneys' fees. If SB 97 had been law, the seafood processors association would have had to shoulder the cost of the State's attorneys' fees.

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.

2. Question: These don't sound like well-funded environmental groups. Don't we still risk limiting legitimate claims against bad state decisions under this bill?

3. Question: Would these folks been able to challenge the state if they weren't granted the Rule 82 exemption?

4. Question: What about cases where citizens are challenging the constitutionality of a decision. Don't we want to protect those citizens from state attorney fees? What about **McDowell v. State**, 785 P.2d 1 (Alaska 1989)? The McDowell case is the basis for the current subsistence priority/equal protection controversy.

5. Question: Haven't there been other cases where public interest litigants challenged state decisions and forced good public policy?

6. Question: Is the purpose of the law to stop environmental groups from suing the state?

7. Question: Are there other ways to achieve this goal without hurting the rights of other citizens?

8. Question: The cost to the state of these cases has been cited as the reason for the bill. Why aren't we limiting rule 82 exemption in other cases that cost the state lots of money? Redistricting for example.

Unintended Consequences

Closing the Door on Public Interest Litigants (HB 145)

Two bills currently under consideration in the Alaska State Legislature would severely limit Alaskans' ability to challenge poor government decisions. **SB 97** and **HB 145** change the 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 bad decisions by state agencies can be challenged by citizens of the state.

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 allowed only the rich to challenge bad government decisions.

While it has been argued that the bills target suits by environmentalists, SB 97 and HB 145 do not single out these plaintiffs, but rather impact all citizens' ability to challenge decisions by DNR, ADF&G, and DEC. As the Alaska Supreme Court once said "the policy of awarding full attorney's fees to public interest litigants was designed to encourage plaintiffs to raise issues of public interest as private attorneys general."

All Sides Impacted

Public interest litigants represent 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. This would deter other multiple use advocacy groups from going to court to protect their access rights against overzealous regulators in the state agencies.

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.

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

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.

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.

HB 145 and the 2/3rds Vote Requirement

SB 97 would abolish the Public Interest Litigation rule adopted by the Alaska Supreme Court over 25 years ago. Apparently, the bill's sponsors may have been advised that this rule can be change by a simple majority vote. This is incorrect.

- The Alaska Constitution vests the Supreme Court with the authority to adopt rules of procedure. It states that the Legislature may only change these rules by a 2/3 vote of each house. Alaska Const. art. IV, § 15.

- The Public Interest Litigation exception to Civil Rule 82 is a rule of procedure adopted and reaffirmed repeatedly in the Supreme Court's published opinions and by a Supreme Court Order. *City of Anchorage v. McCabe*, 568 P.2d 986 (Alaska 1977); Supreme Court Order 1118. In fact, one of Civil Rules expressly states that, "These rules are promulgated pursuant to constitutional authority granting rule making power to the supreme court...." Civil Rule 93.

- The framers of the Alaska Constitution based the Court's rulemaking power on the example of New Jersey, whose Constitution also vests rulemaking authority with its Supreme Court. Report of the Committee on Judiciary Branch, Alaska Constitutional Convention (Dec. 5, 1955). New Jersey and other states that vest their Supreme Courts with rulemaking authority have held that attorneys' fees are matters of procedure assigned to the courts for rule-making. This case law holding was long-established at the time of the adoption of Alaska's Constitution. *See, e.g. Westervelt's Sons v. Regency*, 3 N.J. 472 (1950).

- From Statehood to the present, the Legislature has consistently recognized the Alaska Supreme Court's authority in this area:

    - In 1960, the Alaska Legislative Council confirmed that the taxation of costs and the allowance of attorneys' fees as costs are considered a matter of procedure. Alaska Legislative Council Memo, "The Coordination of Legislative Bill Drafting and Statutory Revision with Judicial Rule Making in Alaska." July 1, 1960, pp. 35-36.

    - In 1962, the Alaska Supreme Court worked in cooperation with the Alaska Legislative Council to separate all procedural law from existing statutes. At that time, all procedural laws were codified into court rules, including the provision for attorneys' fees in Civil Rule 82. *See Silverton v. Marler*, 389 P.2d 3 (Alaska 1964). The Legislature recognized and acceded to the Supreme Court's authority by adopting AS 09.60.010.

    - A House Report accompanying the Legislature's adoption of the 1962 Code of Civil Procedure distinguished between substance and procedure, explaining that "The Code of Civil Procedure includes ... the basic law dealing with judgments, but not all matters as to their contents, such as costs, ... attorneys' fees, and the like because this matter is the proper subject of the many court Rules of Civil Procedure treating of it, include Rules 54, 73, 78, 79 and 82." *See* House Journal, Report of House Judiciary Committee, Code of Civil Procedure (CS SB 105), March 6, 1962, p. 390.

    - In subsequent legislative Sessions, all bills addressing the Public Interest Litigation rule have recognized that 2/3 vote was required. *See* SB 182 (22nd Leg.); HB 176 & SB 123 (21st Leg.); HB 512 & SB 172 (18th Leg.).

HB 145

QUESTIONS REGARDING THE REQUIREMENT FOR 2/3 VOTE

1. Is the Public Interest Litigant Rule a rule within the meaning of Alaska Const. art. IV, § 15 ?

Background: The Alaska Constitution vests the Supreme Court with the authority to "make and promulgate" rules of procedure. The Constitution does not limit the manner in which the Supreme Court may "make and promulgate" its rules. This may suggest that the Court has the authority to promulgate its rules through a number of means, including not only the Rules of Civil Procedure, but also the Rules of Professional Responsibility, Court Orders, and published Court Opinions. The Alaska Supreme Court has adopted the Public Interest Litigant Rule through case law and court order.

2. If the Public Interest Litigant Rule is a rule within the meaning of Alaska Const. art. IV, § 15, does the "except as otherwise provided by law" language in Rule 82 establish a basis for the Legislature to modify the Public Interest Litigant Rule by simple majority?

Background: Rule 82 provides that "except as otherwise provided by law or agreed to by the parties, the prevailing party in a civil case shall be awarded attorney's fees calculated under this rule." However, the Public Interest Litigant Rule is not part of Rule 82.[1]

3. Did the framers of the Alaska Constitution view the issue of fees and costs as generally procedural or substantive in nature?

Background: The framers of the Alaska Constitution based the Court's rulemaking power on the example of New Jersey, whose Constitution also vests rulemaking authority with its Supreme Court. Report of the Committee on Judiciary Branch, Alaska Constitutional Convention (Dec. 5, 1955). New Jersey and other states that vest their Supreme Courts with rulemaking authority have held that attorneys' fees are matters of procedure assigned to the courts for rule-making. This was well established in New Jersey at the time of the adoption of Alaska's Constitution. *See, e.g., Westervelt's Sons v. Regency*, 3 N.J. 472 (1950).

4. In previous sessions where the Legislature has considered bills limiting the public interest litigant rule, has the Legislature found that such bills require a 2/3 vote?

Background: The legislature has introduced bills in previous sessions addressing the public interest litigant rule. *See* SB 182 (22nd Leg.); HB 176 & SB 123 (21st Leg.); HB 512 & SB 172 (18th Leg.). Each of these bills required a 2/3 vote.

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[1] Referring to a Supreme Court Order that is referenced in Rule 82, Craig Tillery from the Department of Law stated: "In the Order, the Court makes clear that the changes to Civil Rule 82 have no effect on existing Alaska law regarding public interest litigant attorney's fees. Implicit in its brief mention of the public interest exception is that Civil Rule 82 does not govern or inform the public interest litigant doctrine." Response by Craig Tillary to Inquiry of Office of Senator Elton, April 8, 2003.

DISABILITY LAW CENTER OF ALASKA

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April 24, 2003

By Hand Delivery

Honorable Lesil McGuire, chairwoman
House Judiciary Committee
Alaska State Capitol, Room 118
Juneau, Alaska

Re: **HB 145: Public Interest Litigants, attorneys fees, Rule 82, Alaska R. Civil Proc. and Rule 508 Alaska R. Appellate Proc.**

Dear Representative McGuire:

Enclosed is a copy our comments on CSSB 97, a work draft of SB 97, the Senate companion bill to HB 145. The bill passed out of the Senate Resources Committee without adopting the amended version, to which these comments were addressed. With the colloquy that took place, both in Senate Resources and in Senate Judiciary, it appears that the bill is not intended to adversely affect access to the court system by Alaskans with disabilities. The bill appears to be limited and focused on disputes arising out of actions by the Alaska Departments of Environmental Conservation, Fish and Game, or Natural Resources regarding natural resource decisions.

However, HB 145 as currently before your committee contains ambiguity. The structure of the revision of AS 09.60.010 and new rule 82(g) [see sections 1 and 3 of the bill] could be construed to apply more broadly to any dispute involving any "agency" action to adopt a regulation or to appeal any administrative adjudicative proceeding. The problem is the intended effect of the phrase that follows "determination" on page 1, line 14: does the phrase that follows modify the preceding phrase, or is it a separate category of civil action that is governed? Also, the term "agency" is undefined in the bill, and so it is unclear whether the effect of the bill is limited to just the three agencies listed, to all state agencies, or whether it applies to all levels of government (municipal, borough, or other public agencies).

Alaskans with disabilities may be involved in disability-related disputes with DEC, Fish and Game, or DNR. The Disability Law Center of Alaska has represented individuals who, because of their disability, were unable to access hunting and fishing areas. Based upon our advocacy, modifications to regulation were provided, enabling our clients equal access to the hunting and fishing programs of the State. The disability laws apply to all aspects of state function, including regulation of fish, game and other natural resources. See, e.g., *Applicability of the Americans with Disabilities Act to Regulations of the Boards of Fish and Game*, Inf. Op. Atty. Gen. Alaska (Oct. 23, 1992)(copy enclosed).

We have previously opposed bills that have been more broadly worded than the current version of HB 145, now before your committee. For your benefit, I enclose a copy of the minutes from a hearing before the Alaska House Judiciary Committee from 2001 on former Senate Bill 183. The testimony given then is still relevant today. We urge reconsideration of the idea that elimination of the public interest litigant exception is the best approach.

We have reviewed another proposed amendment to SB 97 which was discussed in Senate Judiciary, which would more emphatically limit the bills' effect to matters arising from the resource-related activity of the Departments of Resources, Environmental Conservation, and Fish & Game. Although we can envision matters where a person with a disability might seek access to the courts as a public interest litigant, the revisions discussed in Senate Judiciary, based on Assistant Attorney General David Marquez' letter of April 17, 2003 to Senator Seekins, does appear to clarify and narrow the scope of the bill.

There will remain the question whether the amendments as proposed by AAG Marquez will leave the bill as a modification of the Alaska Court Rules, or not. If asked I will express my views on that question during tomorrow's hearing. However, with the revisions proposed by Mr. Marquez, we cannot say that the bill as amended is bad for all Alaskans with disabilities, although the bill would limit the ability of an Alaskan with a disability-related claim against one of the three identified department.

We look forward to working with your committee, staff, and the Administration to ensure that Alaskans with disabilities continue to have access to the court system -- as public interest litigants when appropriate -- to redress grievances. We urge that the ambiguities of HB 145 be clarified, and if not clarified, that the bill should not become law as it would create more problems than it would solve.

Very truly yours,

Robert B. Briggs

Robert B. Briggs

Cc: (w/ encls.)

Members of House Judiciary Committee
David Marquez, Assistant Attorney General

CSSB 97
Testimony of Janel Wright
Disability Law Center of Alaska
April 7, 2003

The "public interest litigants" rule currently protects the public's ability to challenge State decisions on matters of broad public interest without subjecting themselves to the financial hardship of paying the State's attorney fees if litigation is not successful. CSSB 97 eliminates this protection by prohibiting courts from taking into consideration the public interest nature of the case when a court determines whether to award attorney fees to the prevailing party.

The Disability Law Center of Alaska is the Protection and Advocacy System designated to advocate on behalf of Alaskans with disabilities. An important component of our ability to effectively advocate on behalf of Alaskans with disabilities is judicious pursuit of state court remedies. To eliminate public interest litigant status will effectively eliminate individuals with disabilities' opportunity to access the judicial branch of their government to enforce their rights. Individuals with disabilities have the highest rate of unemployment of any group in our country and, as a group, have the highest number living in poverty. If faced with the prospect of liability for the defense's attorney fees, individuals with disabilities will be unable to protect their rights.

Eliminating the current body of case law regarding allocation of attorney fees is unnecessary. The "public interest litigant exception" does not foster frivolous lawsuits. The Alaska Supreme Court has clearly stated that ***any*** lawsuit brought frivolously or vexatiously exposes both the attorney and the client to payment of the defense's attorney fees, including an award of full fees in egregious cases. As such, there is no real need for this bill.

It was the wise decision of the framers of both the Alaska and the U.S. Constitutions that citizens have not one, but three avenues to access their government and redress their grievances. The executive, the legislative and judicial branches of the government each serve an important role in providing checks and balances against unwarranted government action against individuals. Alaska Civil Rule 82's public interest litigant exception is designed to recognize and enable access by individuals to the judicial branch of their government to resolve legal disputes. The effect of CSSB 97 is to deter citizens from participating in good faith actions to protect their rights when government agencies overstep their authority, violate their rights and make arbitrary decisions.

I urge you to vote against this bill.

House JUDICIARY Minute

Apr 30, 2001

SB 183-ATTY FEES:APPORTIONMT/PUBLIC INT.LITIGANT

CHAIR ROKEBERG announced the first order of business, SENATE BILL NO. 183, "An Act relating to public interest litigants and to attorney fees; and amending Rule 82, Alaska Rules of Civil Procedure."

Number 0052

BILL CHURCH, Staff to Senator Dave Donley, Alaska State Legislature, came forth on behalf of the Senate Finance Committee, sponsor of SB 183. He stated:

> Senate Bill [183] makes public interest litigants subject to Alaska Court Rule 82 regarding judgments for attorney fees, thus adopting a uniform standard for all litigants. Courts would still continue to have the ability to award higher fees or full attorney fees whenever the court felt that exceptional circumstances justified the higher award.
>
> Through Alaska Supreme Court decisions, the doctrine known as Public Interest Litigant Doctrine [PILD] has been established. The doctrine isn't codified in law or set out in any court procedure. The courts apparently felt that the Public Interest Litigant Doctrine created a social policy to encourage plaintiffs to advocate for issues that are deemed by the court to be in the public interest.
>
> Civil Rule 82 sets out the formula for the reimbursement of attorney fees to be collected by a prevailing party in a legal action. Court Civil Rule 82 limits attorneys' fees recovered by prevailing litigants to 20 percent of the litigants' reasonable actual attorneys' fees incurred on a case resolved without trial and 30 percent in a case that does go to trial.
>
> The PILD does create an exception to Civil Rule 82 by allowing the courts to classify a party as a public interest litigant, thus allowing the party to collect full or reasonable attorney fees if they prevail. And if they lose, the public interest litigant pays none of the prevailing party's attorney fees. And it's not a good public policy when not even innocent victims of violent crime who bring subsequent civil suit against criminals are allowed such generous attorney fees.
>
> Additionally, Senate Bill 183 prevents legal fees from being awarded to a litigant for claims on which they did not prevail. Such awards serve to promote spurious lawsuits, since plaintiffs know they will receive compensation for all costs even if they only win on one or several of the points that they brought

up at suit.

This problem was created recently in an Alaska Supreme Court decision titled Dansereau v. Ulmer in 1998. Prior to Dansereau v. Ulmer, lawyer fees for public interest litigants were only awarded for issues on which they prevailed. Dansereau v. Ulmer set a precedent that allows courts to award lawyer fees for all contested points even if the public interest litigant only prevailed on one.

Senate Bill 183 also includes a provision that gives courts the flexibility to continue to follow the Dansereau case or award higher or full attorney fees when the court finds exceptional circumstances to justify the higher reward. Senate Bill 183 was introduces to make public interest litigants equally accountable for their lawsuits and to protect the state from having to pay excessive lawyer fees for frivolous public litigant cases. Based on the claims paid in recent years this legislation could save the state hundreds or thousands of dollars annually. ...

Finally, what this does is it promotes a uniform standard of attorney fee payments under Rule 82 to all litigants [and] it creates a disincentive to promote spurious lawsuits. ... It does not diminish the ability of the court to award higher or full attorney fees. In other words, a court can still award the full fee in a public interest litigant case, but it does set the standard for the court as a baseline that they are subject to Rule 82 unless they wish to go beyond that.

So, anyone that's going to say that this takes away their right to collect attorney fees, I don't believe has really read the bill, because it does not do that. In each situation, it allows the court to award the attorney fees. And lastly, it's just good public policy to treat all litigants alike.

Number 0418

CHAIR ROKEBERG asked Mr. Church whether the change in policy in the Dansereau case is the primary rationale for bringing forth this particular bill.

MR. CHURCH responded that this bill was brought forth in the 21st legislature. It made it through the Senate, but it was too late in the session to receive a hearing in the House.

Number 0491

DALE BONDURANT, Alaska Constitutional Legal Defense Conservation Fund, testified via teleconference in opposition to SB 183. He stated that he thinks this effectively eliminates the ability of an ordinary "John Doe" to legally defend the public's constitutional right under the national law.

MR. BONDURANT said he is a 54-year resident of Alaska and has been active in the fish, wildlife, and water resources of the state. In 1977, he was one of three named plaintiffs in the case in which the Alaska Constitutional Legal Defense Fund sued

the Secretary of the Interior. They won that all Alaskan waters had reasonable access in Alaska.

MR. BONDURANT remarked that Alaska even adopted a change in statute to ensure that these waters were available for the use by all people. In 1987, he said, they dragged the state into another case and won for the treatment of 30 million acres of submerged land and over 100,000 miles of waters. Also under that case, the state won the right to manage all the resources within those waters.

MR. BONDURANT said [the Alaska Constitutional Legal Defense Fund] has consistently defended the privilege and immunity clauses, the constitution, equal protection rights, and having no discrimination because of race. He said he thinks [the Alaska Constitutional Legal Defense Fund] has proven its point; however, [SB 183] will eliminate them from the deal, because there is no guarantee that they will get their funding back. If they lost a big case, they would have to pay out of their own pockets.

MR. BONDURANT asked the committee to kill the bill because he thinks it denies the average citizen the right to protect the public from "big money."

Number 0756

REPRESENTATIVE OGAN stated that SB 183 is aimed at the organizations that continually bring public interest lawsuits against the state over wildlife issues. He said he understands that it is a "two-edged sword." He asked Mr. Bondurant whether those groups would be able to continue with lawsuits if this were to be eliminated. He said it seems that some groups use these issues to raise a tremendous amount of money. One example would be Greenpeace's using the ANWR (Arctic National Wildlife Refuge) issue as one of its greatest fundraisers. He emphasized that it seems $100,000 is a "drop in the bucket" for [organizations] that have the national fundraising capacity of raising tens of millions of dollars.

MR. BONDURANT responded that he thinks Representative Ogan is right on those cases. He said this, however, is going to eliminate guys like him who are defending the rights of the general public, not those [large organizations]. If [the large organizations] lose a case, there are people willing to write them a $.5 million check .

REPRESENTATIVE OGAN asked whether there is a way to tighten [the bill] for people who are truly suing on behalf of the public's interest and don't have the resources to otherwise sue. He said he thinks anybody with deep pockets and millions of dollars in the bank who is funding a lawsuit with state money is abusing the system. He noted a letter in his bill packet about people with disabilities who can't sue and said he is looking for a way to accommodate that, with the bill sponsor.

MR. BONDURANT replied that he doesn't know how Representative Ogan could do that. He said it is hard to separate people into classes, and he thinks [the legislature] is responsible for making sure the public is heard. He added that he thinks his organization is well known in Alaska for fighting for the equal rights of everybody.

Number 1090

AL SUNDQUIST, President, Alaska Chapter, Americans United for Separation of Church and State, testified via teleconference in opposition to SB 183. He stated:

> Americans United is based in Washington, D.C., and is a national, nonpartisan, nonsectarian organization committed to preserving the constitution and principle of religious liberty and separation of church and state. Founded in 1947, the organization represents 60,000 members and (indisc.) houses of worship in all 50 states.
>
> Although only six months old, the Alaska chapter is growing rapidly, and in response to results, we established (indisc.) the First Amendment by far-right religious organizations. I oppose the placement of economic obstacles to the use of the courts by the Alaskan citizens. I am concerned about the loss of redress and grievances and actions regarding religious liberties threatened by this bill, as it is [a] denial of access by individuals to the courts to resolve these disputes. Please vote no on SB 183.

REPRESENTATIVE OGAN asked Mr. Sundquist whether he is part of the group that advocates removing "In God We Trust" from [U.S.] money.

REPRESENTATIVE BERKOWITZ suggested sticking to the subject.

MR. SUNDQUIST responded no [to Representative Ogan's question] and pointed out that [his organization] has been in defense of both the establishment clause and freedom of choice.

Number 1234

ROBIN SMITH testified via teleconference on behalf of herself in opposition to SB 183. She stated that she thinks this bill will effectively eliminate public interest lawsuits, except those by large or wealthy organizations. One reason lawsuits occur in Alaska, she said, is because several laws have passed that are unconstitutional. She suggested that one way to eliminate some lawsuits is to require that new laws pass a constitutionality requirement prior to enactment. This bill, she added, will have an impact on conservative and liberal interests.

MS. SMITH went on to say that Wev Shea spoke last year against a similar bill and again this year against this bill in the Senate Finance Committee indicating that this wrongly eliminates the public's voice. She stated that she does not believe the bill has sufficient public input. The notification online, she said, was inaccurate, saying that the Senate Finance Committee was not going to take any testimony and that [the bill] is only going to be heard in the House once. She expressed that she doesn't think that is a good public process and asked, if this bill is such an excellent bill, why it is being rushed.

CHAIR ROKEBERG asked whether she had anything in mind for a constitutional test.

MS. SMITH responded that she didn't. She remarked that she has noticed several bills that have been challenged and put down

based on their unconstitutionality. If all laws enacted by the legislature passed a constitutionality review, "we" wouldn't be setting ourselves up for lawsuits.

CHAIR ROKEBERG remarked that he is not so sure that most lawsuits emanate from laws passed by the legislature. He suggested that legislators are responsible for passing only constitutional laws.

MS. SMITH remarked that several times there have been attorneys tied to the state who don't think a particular law is constitutional, yet the legislature has passed bills like this in the past. In some ways, she said, the legislature sets itself up for lawsuits.

Number 1450

APRIL FERGUSON testified via teleconference in opposition to SB 183. She said she believes it is bad law and bad public policy. She stated:

> I believe that this bill places a hurdle in front of citizens who wish to complain about government or seek redress from harm allegedly done by government. And I do not believe that all litigants are alike. I think that public [interest] advocates come (indisc.) on behalf of the general public and that this bill is really going to kill their ability to do so, or people are just not going to be able to afford to come before the court.
>
> ... I would like to bring your attention to a letter by Mr. Robert Briggs, a staff attorney for the Disability Law Center. ... Mr. Briggs talks about some of the unintended consequences of SB 183 and how ... this particular bill may affect land use regulations, redistricting decisions, illegal taxes, unlawful election (indisc.), [and] school district actions. Virtually any type of challenged government action would be possibly impacted by this bill. ...
>
> I also think that this is being rushed. I don't think that a lot of people know that it is out there, and I think it takes a much more careful, thoughtful scrutiny than being addressed in the last stage of the legislative session. And if the purpose of this bill is aimed at natural resource litigation or the environmental community, then we all know those particular groups have access to quite a bit more sums of money than a number of these other smaller groups such as the Disability Law Center.

Number 1612

ROBERT BRIGGS, Staff Attorney, Disability Law Center of Alaska, came forth in opposition of SB 183. He stated that if the purpose of the bill is to prevent frivolous litigation, it's unnecessary. Existing doctrine in the public interest litigant exception clearly states that people who bring cases in bad faith and for vexatious purposes are liable for full attorney fees and costs. That doctrine applies to public interest litigants as well as anybody who brings a case because of a direct financial interest.

MR. BRIGGS remarked that he thinks the bill will have little effect on some of the cases it is intended to prevent in the future. Most cases involving the permitting of infrastructure for research development in Alaska will be brought in federal court and won't be affected by this bill.

MR. BRIGGS said it is unlikely the bill will stop out-of-state moneyed interests; in fact, he thinks the bill will fuel their fundraising efforts. It will give them an example of how the Alaska State Legislature is so adverse to their interests that they need more money to fund their lawsuits.

MR. BRIGGS said the important point, brought up by Mr. Bondurant, is that there will be unintended victims of this bill - Alaskan victims. Mr. Briggs suggested that even ordinary litigants with public interest cases will be victims, because it encourages focusing on who is a prevailing litigant based on issue, and it will cause two trials: one over the merits of the case, and one over who won by a greater margin and which issues they prevailed upon.

Number 1760

MR. BRIGGS went on to say that there is an insightful opinion by Justice Jay Rabinowitz against the revisions to Civil Rule 82 as it applies to regular litigants. Mr. Briggs stated that he had participated as part of the Civil Rule 82 revision committee around 1992. Justice Rabinowitz opposed Civil Rule 82 and argued that all of the factors would actually cause attorneys to fight more over the attorney fees after the litigation itself had been decided. Mr. Briggs said he thinks the supreme court wisely decided that that these factors should be fought about in public interest cases as well.

MR. BRIGGS stated that he thinks other victims of this bill would be those who seek court resolution of disputes involving something other than money. Some examples would be those who litigate over the question of when human life should be recognized; the parameters of religious practice and belief; or the limits of science and medicine and dealing with human cells or tissue, genetic, or health information.

MR. BRIGGS said if he has to tell a family that they should expect to pay 20 percent of the other side's fees, should they lose in a dispute, they will definitely be "chilled" from bringing a lawsuit, simply because they are poor.

MR. BRIGGS urged the committee to not pass the bill. However, if it should pass, he asked the committee to substantially revise it to eliminate its practical effect: taking away from the courts the discretion of when to exempt, from the penalty for losing, the cost of attorney fees.

Number 1869

CHAIR ROKEBERG asked Mr. Briggs whether the federal courts have the same [public interest litigant doctrine].

MR. BRIGGS responded that it has been awhile since he has brought a federal case. Generally, the Equal Access to Justice Act governs. He believes it to be somewhat similar to the public interest litigant exception; under that, people who bring

a case against the federal government for reasons that don't involve direct financial interests have a low risk of paying attorney fees, should they lose.

CHAIR ROKEBERG asked whether Rule 11 has ever been used in the State of Alaska.

MR. BRIGGS answered that he has never been involved in a case where it has been used; however, he hasn't been in state court very much. He believes a good civil litigator should never be in court, because he or she should convince the other side of the merits of the case before getting to the courthouse door.

CHAIR ROKEBERG asked Mr. Briggs what the National Association of Protection and Advocacy Systems is.

MR. BRIGGS responded that it is an association of nonprofit and state agencies in each of the 50 states. As a condition of receiving federal grants to serve people with disabilities, the state is required under federal law to set up a protection and advocacy system. The Disability Law Center, he said, was designated by Governor Hickel to be the protection and advocacy system of Alaska. As that system, [the Disability Law Center] receives some state and federal grants to advocate for people with disabilities. He stated, "It is our view that as part of the tools in our tool chest we need to bring lawsuits against the state."

MR. BRIGGS noted that currently he is litigating a series of administrative appeals about the administration of the Medicaid program on behalf of several families with disabled children. He said it is his belief that the state is not adequately managing the Medicaid system with regard to the benefits that should be made available to those families. He said, "If we lose the tool of seeking courts to redress how the state administers those benefits, it will be a significant tool we will have lost in advocating for people with disabilities."

CHAIR ROKEBERG asked whether in that case this has a general applicability to the individual or the group of clients.

Number 2053

MR. BRIGGS stated that he has five clients.

CHAIR ROKEBERG asked how that makes up the public interest.

MR. BRIGGS responded that [his organization] believes behavior the state exhibits is systemwide, at least in the Southeast region.

CHAIR ROKEBERG asked Mr. Briggs whether the courts have accepted their case as a public interest litigant case.

MR. BRIGGS answered that they are still in administrative proceedings and have prevailed in two of them; therefore, they will not need court action. He noted that they had moved to have the administrative proceedings joined as one proceeding, but the hearing officer declined.

CHAIR ROKEBERG asked whether it is in Mr. Briggs's best interest to try to group those cases together so they can qualify for a public interest litigant case.

MR. BRIGGS answered in the affirmative.

CHAIR ROKEBERG stated that he thinks the system is being corrupted.

Number 2117

MR. BRIGGS remarked that he would have to respectfully disagree with Chair Rokeberg about whether the system is being abused. In his experience, he said, there has not been a lot of public interest litigation that has been brought frivolously or abusively. The Dansereau case involved Wev Shea's challenge to the election practices of the current administration. The original request of fees involved about $170,000 and the trial court awarded about $20,000 in fees. He stated that perhaps it is abusive if the supreme court is saying, "You should not look into the factors in deciding whether to award attorney fees." However, he doesn't think the case itself was abusive; the issue was of fundamental importance to society, which is whether the city administration properly followed election law when deciding how to administer the election.

CHAIR ROKEBERG asked what the result of that case was and whether it had an effect on the state.

MR. BRIGGS answered that it is a larger question than he could answer.

CHAIR ROKEBERG stated that he figures it had almost no [effect] other than embarrassing the governor.

Number 2178

REPRESENTATIVE BERKOWITZ pointed out that there are four threshold questions that need to be answered affirmatively before someone can qualify as a public interest litigant. These are not easy thresholds to cross. He acknowledged that the public interest litigant serves another function besides advocating for the client and pursuing public policies. There is also a check and balance on governmental power. He stated that it is the only way he can think of whereby an individual can take on the weight of government. "If we retreat from that concept, we're retreating from one of the most fundamental notions of how a democracy should work," he added.

REPRESENTATIVE KOOKESH asked Mr. Briggs how long it will be after this bill passes before he would bring a suit.

MR. BRIGGS responded that he is not sure that [the Disability Law Center of Alaska] would challenge the bill if it were passed. He stated that it doesn't raise constitutional questions, except the right of access to the courts. The people who will be affected by this bill are going to be "mom and pop" people who can't afford the risk of loss. He explained that this would put those people "in the same pot" as all of the people who are subject to Rule 82. In most states, each side bears its attorney fees and costs, whether they win or lose; however, it is unusual that in Alaska if a person loses, he or she pays 20 percent of the defense's fees. He added that he thinks the Alaska Supreme Court wisely decided that public interest litigants should not be subject to that losing penalty the way the general litigant population is.

Number 2311

LAUREE HUGONIN, Alaska Network on Domestic Violence and Sexual Assault, came forth in opposition to SB 183. She stated:

> We have the unfortunate circumstance of being a public interest litigant. In 1996, after the Domestic Violence Act passed, the court was refusing to implement all three forms of protective orders that the legislature had, in statute, allowed.
>
> So, we didn't litigate against the executive branch or the legislative branch; we actually went to court against the court system and wanted a result to be that they would conform to the statutory provisions that allowed a victim of domestic violence to be able to get one two or three protective orders, the way that the legislature had set it out.
>
> We prevailed in that case. We did not get all of our attorneys' fees; we probably got about 75 or 80 percent. ... Since we did prevail, we didn't have to face the issue of - if we had lost - having to pay the court system's fees. I think that's an important concept in the public interest litigant venue. It's not as if we were going against someone, maybe, of an equal kind of circumstance.
>
> We were litigating against the court system. ... They have almost unlimited resources available to them and ... [are] able to continue that litigation, whereas we don't accept any state money. The federal money we get, of course, is for projects; it's not available for any kind of litigation.
>
> ... So we were fundraising for private donations to be able to carry forward the litigation. And it was fortunate that I had had experience in the legislative process ... so I could do a lot of legwork for the attorney. I could get legislative records, and I knew how to look up and research statutes. And we put a lot of our own effort into the case.
>
> We also didn't just enter the case frivolously. ... We approached the court forms committee in trying to talk to them about how to resolve the situation. We approached the court system's [administration] in trying to resolve the situation. We tried to get an attorney general's opinion about the statutes so that the court could feel more comfortable in relying on that to resolve the situation. All of the steps that we had taken were to no avail. The court system was firm in its position, and they were not accurate, and they did have to change to allow for these three forms of protection.
>
> We entered the lawsuit on behalf of a Jane Doe, who currently had a threatening situation with the protective orders. And then we entered it on behalf of victims who had come after that to be able to take up this protection that the legislature had afforded them. So, I think when you are determining whether or

not to move forward with the legislation, it is important to keep in mind that it's not just the million-dollar environmental cases that come forward that take advantage ....

TAPE 01-79, SIDE B
Number 2465

MS. HUGONIN continued:

... [They are] not after money, but they're going to try and clarify statutes, trying to uphold public policy, trying to be able to have the institution of government correct its misbehavior, and I think that's an important avenue to allow to continue.

So, while I understand that this bill would preclude - if for some reason we would have to be in the position of being a public interest litigant again - for us requesting attorneys' fees, I think it would be very difficult for us to go forward against an entity with unlimited resources if we were going to have to pay their costs in the end. ...

There might be some area for compromise if you're looking at prevailing issues. I can see some merit to the fact that if I brought a case and I lost, ... maybe I shouldn't get all of the money back, if it was something that I didn't have much of a hope of winning in the first place. ... I think it's very important that that's deliberatively thought through, and ... this isn't the best way to get to the people that you're really having a problem with.

REPRESENTATIVE KOOKESH asked Ms. Hugonin to define the people with whom [the legislature] is having a problem.

MS. HUGONIN responded that she understood last year from testimony that it was the major environmental groups that were coming forward that made people feel they were taking advantage of the public interest litigant's status.

Number 2382

PAM LaBOLLE, President, Alaska State Chamber of Commerce, came forth in support of SB 183. She stated:

Some groups routinely challenge state resource development decisions and our granted public interest litigant status by the courts. And these groups are often special-interest groups posing as public interest groups and public trusts. And their challenges typically allege as many as 15 or 20 specific deficiencies in state's administrative finding. ... When they're challenging the resource development decisions and they prevail, they generally prevail ... on one or two issues; however, they are awarded the attorneys' fees on all, as if they had won the whole case. That is one of the problems.

The other problem is, we're in a case right now and we were unable to achieve ... public interest litigant status. We had to raise money; I think the meter is

running at just a t... in excess of $200,000 right no... This is in defense of the tort reform ... law that was passed in '97. And we feel that the ... unfair part about those who are public interest litigants [is] if they win, they win it all, and if they lose, they still win it all. ... The donations that we've collected for our case have been $25 here, $50 there, and $100 someplace else. ... It is just a very one-sided situation. The state chamber was one of the leading groups [that] fought long and hard to achieve Rule 82, and the exception is not fair to those of us who have to abide by Rule 82.

CHAIR ROKEBERG remarked that he is astounded that the state chamber almost has to go to the "bake sale" level to acquire funding. He said he thought big business was the monolith of this state in terms of its deep pockets and its ability to generate money to influence the public process.

MS. LaBOLLE said that is a misconception.

CHAIR ROKEBERG asked Ms. LaBolle whether the environmental community has greater access to funding than the business community does in Alaska for public policy formation.

MS. LaBOLLE answered that that is the perception; however, she would have no way of knowing if there is proof to that.

Number 2215

REPRESENTATIVE BERKOWITZ asked Ms. LaBolle why their effort to achieve public interest litigant status was rejected.

MS. LaBOLLE responded that she doesn't know.

REPRESENTATIVE BERKOWITZ asked whether they tried to get in as an amicus.

MS. LaBOLLE responded that [the Alaska State Chamber of Commerce] is an amicus.

REPRESENTATIVE BERKOWITZ stated that on the face of what it takes to be a public interest litigant, that doesn't qualify. Only a private party can be expected to bring a suit. He stated that if the state were already involved, the public interest litigant would be the plaintiff, not the defendant.

CHAIR ROKEBERG remarked that it doesn't seem fair; with the $3 million-plus cost, it could be put in the court budget.

Number 2144

REPRESENTATIVE BERKOWITZ noted that these are areas in which folks have won.

CHAIR ROKEBERG stated that perhaps it was only a portion of the claims.

REPRESENTATIVE BERKOWITZ stated that perhaps the payment only cost a portion of the cost.

REPRESENTATIVE KOOKESH stated that he doesn't think those suits would have gone away even if there hadn't been this exception to

Rule 82. He said he th... as a lot of those people coul... afford to bring those cases.

Number 2116

MS. LaBOLLE remarked that [the Alaska State Chamber of Commerce] had found that some groups make a good living on these public interest litigant groups by suing on all sorts of issues within a case, knowing they can't prevail on much. However, if they prevail on one [issue], they've gained enough money to have six more cases.

REPRESENTATIVE BERKOWITZ asked who the groups are that are getting rich off of public interest litigant status.

MS. LaBOLLE answered that the perception is that they are mostly the environmental groups who are opposing resource development.

REPRESENTATIVE BERKOWITZ asked for the names of the groups.

CHAIR ROKEBERG asked Ms. LaBolle whether they would be Trustees for Alaska, Earth Justice, and the Sierra Club.

MS. LaBOLLE responded that "at the risk of being sued for alleging anything in this committee," it is generally believed that those are the sorts of groups that gather funding through the success of their lawsuits.

REPRESENTATIVE BERKOWITZ stated that he understands about perceptions, but he also understands one objective in court is to arrive at some form of truth. If the perception is incorrect, he thinks one way to correct reality is by putting real groups out there that are actually benefiting.

Number 2008

REPRESENTATIVE KOOKESH asked, when balancing what's in the best interest of the public, whether it is in [the state's] best interest to get rid of some of these conservation groups at the expense of the mom and pops.

MS. LaBOLLE responded that it is a difficult situation; however, if the commitment to a principle is there, then everyone should be willing to "pony up" the cost of the litigation. It will provide more basis if [a group] shows that it has gathered support to even bring the litigation.

REPRESENTATIVE KOOKESH asked what would happen to an individual who sees that he or she may owe somebody money down the line.

MS. LaBOLLE noted that court policy establishes public interest litigant status. What is being sought through legislation such as this is legislative intent, as well as having the elected representatives making the decisions as to what the public policy is.

CHAIR ROKEBERG asked, if this is court policy, whether the courts should pay, or whether the members of the bar should go pro bono so that there wouldn't be a discussion of legal fees.

Number 1811

JUDY ERICKSON, Owner, Capital Information Group, came forth to

share a personal story. She stated that she and her husband brought a suit against the state for failure to disclose records that had been public for years. She said they were granted public interest litigant status and prevailed on most of their [claims]. Their attorneys got minimal fees; they negotiated with the state over the fees.

MS. ERICKSON remarked that her concern is that they could never have brought a suit against the state if they had thought they would have had to pay. The state could drag it out for years. She pointed out that it is the "small guy" [who is affected].

CHAIR ROKEBERG asked Ms. Erickson whether she understands the frustration exhibited by many of the members over this. In addition, he asked whether there is abuse of this.

MS. ERICKSON responded that she can see their frustration when [the legislature] promotes resource development and someone tries to stop it. She said she thinks in most cases people bring [suits] because they truly believe they're right. She stated:

> You're throwing out the baby with the bath water. You're saying, ... "OK, we're going to get rid of the whole." And then what happens to the Dale Bondurants and the Judy Ericksons ... who are fighting for something? ... Pam [LaBolle] said that we should ... get a group going. ... I'm a sole proprietor ... and I don't have a lot of time to go soliciting to get contributions so that I can sue the state.

Number 1649

REPRESENTATIVE COGHILL stated that if a well-funded group had come [to Ms. Erickson] at the time when she was interested in pursuing her interest, it would have given her a lot of publicity. He said he thinks that is what [the legislature] is struggling about - how to filter. If there were people in Alaska who oppose getting information, they would only have the voice of the system. He asked Ms. Erickson whether she sees that as an unfairness.

MS. ERICKSON responded that she brought her case not knowing she had public interest litigant status. She said she first sued against the Hickel Administration, which opposed the status. When the Knowles Administration came in, they continued the case, but they backed down on the opposition. Most people bring these cases not knowing if they are going to get the status or not. She added that if she had been denied the status, she would have had to reconsider the cost.

CHAIR ROKEBERG stated that he thinks the committee's interest is in the legal factors.

REPRESENTATIVE BERKOWITZ asked which [factor]. He said he keeps hearing about this great legal factor.

REPRESENTATIVE COGHILL responded that they have talked about environmental communities.

REPRESENTATIVE BERKOWITZ stressed that he has to hear names, because the environmental community is "this big nebulous thing." He asked which environmental law firms are doing this.

CHAIR ROKEBERG offered Trustees for Alaska.

REPRESENTATIVE BERKOWITZ agreed that that is an Alaskan-based organization.

CHAIR ROKEBERG offered Earth Justice.

REPRESENTATIVE BERKOWITZ indicated that Earth Justice is not an Alaskan-based organization. Therefore, he said, there is one case that [the environmental] community has had. He said he hardly sees evidence of rampant Alaskan environmental [lawsuits].

Number 1536

REPRESENTATIVE COGHILL remarked:

> I think that if you look down through this list ... up through 1993, ... the case could be made. ... And I agree with ... Ms. Erickson - it's a tool that's being used, and sometimes it's not being used the way I personally would the public policy. Looking for the court to use Rule 82 is a way that they could use some discretionary powers.

REPRESENTATIVE OGAN stated that he supports the concept of what the bill is trying to do, but doesn't want to eliminate the Scott Ogans, Judy Ericksons, and Dale Bondurants, the "little people" that this was designed for, to be able to sue and get some coverage. He said he would like to work on this a little more. He added that he doesn't think there are enough votes to amend the court rules the way the bill is written.

Number 1390

MR. CHURCH responded that he believes Senator Donley would be willing to work on the points that were raised. He said he thinks part of it is addressed within subsection (b)(3), subparagraph (K) of Rule 82. It says that the court can, in awarding attorney fees, consider other equitable factors deemed relative to the court.

MR. CHURCH said he thinks there is a lot of latitude given to the court to look at situations in which an individual versus a large corporation is bringing a public interest litigant case. Almost exclusively, he pointed out, the testimony has been that this will take away public interest litigant cases. He said he wonders if that means people don't trust the courts to make reasonable decisions in evaluating these cases.

MR. CHURCH clarified that the law establishes that Rule 82 applies to all cases, regardless of whether it is a public interest litigant or a victim of a horrendous crime trying to bring a civil suit against a perpetrator. This only gives the courts a baseline to look at an attorney fee award, and it in no way prevents the court from doing what it has done in the past: award full attorney fees.

MR. CHURCH offered some history. When [PILD] was established in 1974, the court said the exception to Rule 82 was designed to encourage plaintiffs to bring issues of public interest before the courts. There was no differentiation between individuals

like [Ms. Erickson] and any large organization. Later, in the Anchorage v. McCabe opinion in 1977, Chief Justice Boochever submitted an opinion in opposition. His comments were:

> The opinion [regarding the Gilbert v. State on the encouragement issue] seems to take the position that such litigation should be actively encouraged. In my view, our function is not to encourage litigation of any sort.
>
> On the other hand I believe that we should strive to prevent our courts from becoming inaccessible as a practical matter to those who seek to vindicate rights shared by the public.

MR. CHURCH explained that the chief justice at that time was looking for a balance in the cases. At the same time, a plaintiff shouldn't be encouraged to bring a case because of any perceived award. Certainly, he said, in this cases the only monetary award is to the attorneys.

Number 1151

MR. CHURCH stated that this would still allow the courts to disregard apportionment as in the Dansereau case. In that case, they were public interest litigants who only prevailed on one of three issues. The lower court apportioned the attorney fees, but the supreme court, on an appeal, awarded full attorney fees and said the lower court did not have the right to apportion fees.

CHAIR ROKEBERG asked Mr. Church whether he had looked at the federal Equal Access to Justice Act.

MR. CHURCH answered that he hadn't. The only thing he'd researched was what goes on in other states. Essentially, the other 49 states don't make a differentiation as to public interest litigants. They award attorney fees based on a set percentage or a set dollar value per hour.

CHAIR ROKEBERG asked whether [other states] recognize [PILD].

MR. CHURCH responded that they don't specifically. For example, cases that he reviewed on the West Coast do not.

REPRESENTATIVE BERKOWITZ clarified that the antecedents of public interest litigants is known in common law as qui tan suits. In other states, they are also known as private attorney general suits. This is not a uniquely Alaskan feature.

Number 0991

REPRESENTATIVE OGAN stated that he had talked with Gerald Luckhaupt [drafting attorney of Legislative Legal and Research Services], who said, "Alaska is the only state when you lose, you pay attorneys' fees." He asked Mr. Church whether that is correct.

MR. CHURCH answered that he has also heard that statement.

REPRESENTATIVE OGAN remarked that people who are interested in suing are afraid because of that, which is already a disincentive to litigate. This public interest law basically

exempts them from that provision.

MR. CHURCH stated that when the state loses or wins a public interest litigant case, it pays the attorney fees.

CHAIR ROKEBERG stated that in the bill packet there is a list of at least 70 public interest litigant cases. He asked Mr. Church whether his office broke those down to see who they were by parties, and what type of representation they had.

MR. CHURCH responded that he has the information that the list was based on, which provides the case name and a description of the case; however, it does not give who the representing attorney was.

Number 0860

REPRESENTATIVE BERKOWITZ pointed out that there were 70 cases in the past ten years; the high year was 1995, with twenty [cases], and the low year was last year, with three. He said it hardly seems a rampant problem.

CHAIR ROKEBERG responded that the committee takes up a lot of issues that only affect a small number of people. They try to avoid the constitutional constraints about special-interest legislation, but many times try to "cure the evils" that may befall a small number of people.

REPRESENTATIVE BERKOWITZ remarked that he is trying to prevent the committee from creating a huge injustice. He said, "Let's move the bill and kill it."

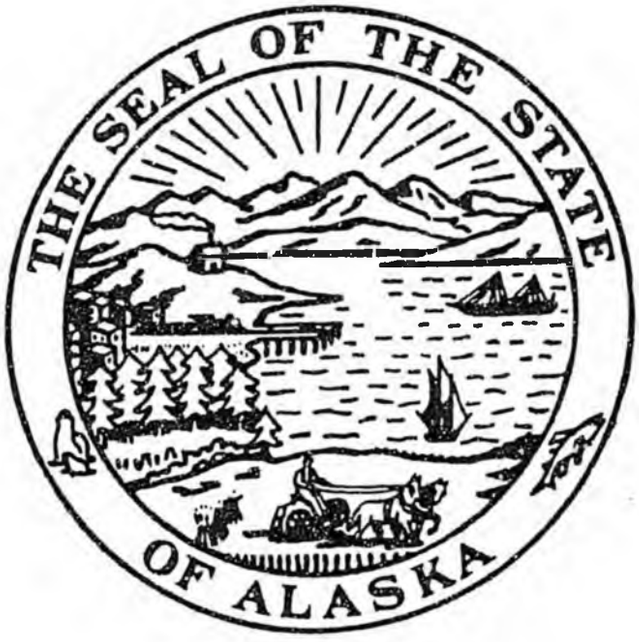
CHAIR ROKEBERG stated that he would like to first see what research has been done, and that Representative Ogan has already agreed to work on the bill.

REPRESENTATIVE BERKOWITZ and CHAIR ROKEBERG spoke simultaneously: Representative Berkowitz moved to report SB 183 out of committee, while Chair Rokeberg announced that he would recess the meeting. [No action was taken on the motion. SB 183 was held over.]

INFORMAL OPINIONS

OFFICE OF THE ATTORNEY GENERAL

1992 Vol.II



DEPARTMENT OF LAW
STATE OF ALASKA

MEMORANDUM

State of Alaska
Department of Law

TO: Hon. Carl L. Rosier
Commissioner
Dep't of Fish and Game

DATE: October 23, 1992

FILE NO.: 663-93-0088

TEL. NO.: 465-3600

SUBJECT: Applicability of the Americans with Disabilities Act to regulations of the Boards of Fish and Game

FROM: Jack Griffin/s/
Assistant Attorney General
Natural Resources Section

You have asked several questions about what the Joint Boards of Fisheries and Game and the Department of Fish and Game can do to ensure that hunting and fishing regulations in Alaska comply with the Americans with Disabilities Act (ADA). This memorandum will explore the general requirements of the ADA, address whether the boards may delegate to the commissioner the authority to accommodate persons with disabilities (they can), and suggest procedures that the boards may adopt to enable hunters and fishers with disabilities to request reasonable modifications to policies they feel are discriminatory.[1]

I. GENERAL REQUIREMENTS OF TITLE II OF THE AMERICANS WITH DISABILITIES ACT AND THE IMPLEMENTING REGULATIONS

Congress enacted the Americans with Disabilities Act (ADA), 42 U.S.C.A. § 12101 *et seq.* (Supp. 1992), because among other things "discrimination against individuals with disabilities continue[s] to be a serious and pervasive social problem; . . . individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion . . . [and the] failure to make modifications to existing facilities and practices . . . ; [and] the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity . . . to pursue those opportunities for which our free society is justifiably famous . . . ." 42 U.S.C.A. § 12101(2), (5), and (9). To ensure its provisions are

[1] This memorandum does not try to address the full impact of the ADA upon the boards and the department. For example, the potential need for wheelchair access to board meetings or sign language interpreters for informational programs of the department is not addressed. The scope of this memorandum is limited to the potential impact of the ADA upon hunting and fishing regulations in Alaska, and the procedures the boards and department may adopt to insure that those regulations do not discriminate against the disabled.

complied with, the Act provides persons who have suffered discrimination because of their disabilities the same remedies, procedures, and rights that are available under the Civil Rights laws. *See* 42 U.S.C.A. § 12132. As with those laws, the Department of Justice has broad enforcement authority.

Title II of the ADA, 42 U.S.C.A. § 12131 *et seq.* (Supp. 1992), prohibits public entities from discriminating against individuals with disabilities when providing public services:

> Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C.A. § 12132.

A "qualified" individual with a disability is an individual with a disability who meets the "essential eligibility requirements" of the agency's program, service, or activity.[2] Generally, there are no "essential eligibility requirements" to sport hunt or fish in Alaska other than the possession of a valid sport hunting or fishing license. Thus, virtually anyone with a disability may be qualified to hunt or fish in Alaska. "Disability" means, with respect to an individual, "a physical or

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[2] A "qualified individual with a disability" is defined as one who,

> with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

42 U.S.C.A. § 12131(2) (Supp. 1992).

mental impairment that substantially limits one or more of the major life activities of such individual . . . ."[3]

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[3] The definition of disability found in the Department of Justice's title II regulations provides in full:

> Disability means, with respect to an individual, a physical or mental impairment that substantially limits one or more of the major life activities of such individual; a record of such an impairment; or being regarded as having such an impairment.
>
> (1)(i) The phrase physical or mental impairment means--(A) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine;
>
> (B) Any mental or psychological disorder such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.
>
> (ii) The phrase physical or mental impairment includes, but is not limited to, such contagious and noncontagious diseases and conditions as orthopedic, visual, speech and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, specific learning disabilities, HIV disease (whether symptomatic or asymptomatic), tuberculosis, drug addiction, and alcoholism.
>
> (iii) The phrase physical or mental impairment does not include homosexuality or bisexuality.
>
> (2) The phrase major life activities means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.
>
> (3) The phrase has a record of such an impairment means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits

(continued...)

The antidiscrimination provisions of title II of the ADA clearly apply to the Department of Fish and Game and the Boards of Fisheries and Game. For purposes of title II, a "public entity" includes any state or local government, and any department, agency, or other instrumentality of a state or local government. 42 U.S.C. § 12131(1)(A) & (B) (Supp. 1992). It is also likely a court would find that the regulations promulgated by the boards, such as those identifying the areas and the methods and means for taking fish and game, are part of a "service," "program," or "activity," since

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[3](...continued)
one or more major life activities.

(4) The phrase is regarded as having an impairment means--

(i) Has a physical or mental impairment that does not substantially limit major life activities but that is treated by a public entity as constituting such a limitation;

(ii) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

(iii) Has none of the impairments defined in paragraph (1) of this definition but is treated by a public entity as having such an impairment.

(5) The term disability does not include--

(i) Transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders;

(ii) Compulsive gambling, kleptomania, or pyromania; or

(iii) Psychoactive substance use disorders resulting from current illegal use f drugs.

28 C.F.R. § 35.104, 56 Fed. Reg. 35717 (1991).

sport hunting and fishing must take place in conformance with those regulations.[4]

Congress directed the Department of Justice to adopt regulations implementing title II of the ADA, *see* 42 U.S.C. § 12134(a) (Supp. 1992), and those regulations have been codified at 28 C.F.R. part 35. Section 35.130 sets forth the general prohibition against discrimination, and provides, in part, as follows:

> (a) No qualified individual with a disability shall, on the basis of disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any public entity.
>
> (b)(1) A public entity, in providing any aid, benefit, or service, may not . . . on the basis of disability-(i) Deny a qualified individual with a disability the opportunity to participate in or benefit from the aid, benefit, or service; [or] (ii) Afford a qualified individual with a disability an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others . . .; [or]. . . (vii) Otherwise limit a qualified individual with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit, or service.

These regulations also provide that an agency may not employ "methods of administration" that have the effect of denying persons with disabilities the ability to enjoy the benefits of an agency's programs:

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[4] While neither the ADA nor the regulations promulgated pursuant to the ADA define these terms, the 1988 amendments to the Rehabilitation Act of 1973 define "program or activity" to mean "all of the operations of . . . a department, agency, special purpose district, or other instrumentality of a state or of a local government . . . ." 29 U.S.C.A. § 794(b) (Supp. 1992). Because of the close relationship between the Rehabilitation Act of 1973 and the ADA, courts may look to this definition when interpreting the ADA.

> A public entity may not . . . utilize criteria or methods of administration:
>
> (i) That have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability; [or]
>
> (ii) That have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the public entity's program with respect to individuals with disabilities . . . .

28 C.F.R. § 35.130(b)(3).

There is a dearth of case law interpreting the ADA, due of course to its recent enactment. Nevertheless, it is possible to obtain substantial insight into the scope and meaning of Title II by examining case law interpreting its precursor, section 504 of the Rehabilitation Act of 1973, Pub. L. 93-112, 87 Stat. 394, 29 U.S.C.A. § 794 (1985 and Supp. 1992). Section 504 is virtually identical to section 202 of the ADA, 42 U.S.C.A. § 12132, except that section 504 applies only to state agencies receiving "Federal financial assistance." The Department of Justice, in the comments preceding the regulations implementing title II of the ADA, describes title II as "essentially extend[ing] the nondiscrimination mandate of section 504 to those State and local governments that do not receive Federal financial assistance . . . ."[5]

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[5] 56 Fed. Reg. 35694 (1991). As a result, the Department of Justice's regulations implementing title II of the ADA "[hew] closely to the provisions of existing section 504 regulations." *Id.* This approach is in fact mandated by section 204 of the ADA, which provides that the regulations implementing Title II must be consistent with the Department of Health, Education, and Welfare's coordination regulation for section 504, now codified at 28 C.F.R. Part 41, and, with respect to "program accessibility, existing facilities," and "communications," with the Department of Justice's section 504 regulations for its federally conducted programs and activities, codified at 28 C.F.R. Part 39. 42 U.S.C.A. 12134(b) (Supp. 1992). *See* 56 Fed. Reg. 35694 (1991). In addition, section 203 of the ADA, 42 U.S.C.A. 12133 (Supp. 1992), provides that the remedies, procedures, and rights available under section 504, set forth in section 794a of Title 29, shall be the remedies, procedures, and rights for any person alleging discrimination on the basis of disability in violation of 42 U.S.C.A. § 12132.

In determining whether a particular regulation is consistent with the ADA, the primary issue will be whether the person with a disability has been given "meaningful access" to the benefit or service at issue. *See Alexander v. Choate*, 469 U.S. 287, 301 (1985). In *Choate*, the United States Supreme Court, interpreting § 504 of the Rehabilitation Act, held that the balance between the rights of the handicapped to be integrated into society and the legitimate interests of agencies in preserving the integrity of their programs is met where "an otherwise qualified individual [is] provided with meaningful access to the benefit the [agency] offers." 469 U.S. at 301.

> The benefit itself, of course, cannot be defined in a way that effectively denies otherwise qualified handicapped individuals the meaningful access to which they are entitled; to assure meaningful access, reasonable accommodations in the [agency's] program or benefit may have to be made.

Id. See Southeastern Community College v. Davis, 442 U.S. 397, 410-13 (1979). In determining the appropriate scope of the benefit at issue, and whether it is "readily accessible to and usable by individuals with disabilities," the regulations implementing title II provide that the service, program, or activity must be "viewed in its entirety."[6]

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[6] 28 C.F.R. § 35.150(a) provides:

> General. A public entity shall operate each service, program, or activity so that the service, program, or activity, *when viewed in its entirety*, is readily accessible to and usable by individuals with disabilities. The paragraph does not--
>
> (1) Necessarily require a public entity to make each of its existing facilities accessible to and usable by individuals with disabilities;
>
> (2) Require a public entity to take any action that would threaten or destroy the historic significance of an historic property; or
>
> (3) Require a public entity to take any action that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative

(continued...)

The principle of meaningful access is illustrated in *Baker v. Department of Environmental Conservation* 634 F. Supp. 1460, 1464-66 (N.D.N.Y. 1986), where a number of handicapped individuals alleged that a regulation prohibiting the use of "mechanically propelled vessels and aircraft" on certain bodies of water within the Adirondack State Park discriminated against them in violation of § 504 of the Rehabilitation Act. The court rejected the handicapped individuals' arguments on the grounds that "over fifty-one percent of the Park land is classified . . . [to] allow the use of motorized vehicles and float planes . . . [and e]ighty-three percent of the publicly usable Adirondack lake/pond surface water is open to motors . . . ." 634 F. Supp. at 1465. As a result, "it is clear the handicapped do have *meaningful access to the Adirondack Park as a whole*." *Id.* (emphasis added). The analysis employed by the court in *Baker* illustrates the analysis the boards and the department should use to determine whether a particular hunting or fishing regulation denies persons with disabilities a meaningful opportunity to hunt or fish.

If there is no meaningful access to the service or benefit at issue, federal regulations require the agency to "make *reasonable* modifications in policies, practices, or procedures when the modifications are *necessary* to avoid discrimination on the basis of disability . . . ." 28 C.F.R. § 35.130(b)(7), 56 Fed. Reg. 35718-19 (1991) (emphasis added). *See Choate*, 469 U.S. at 300. Modifications do not have to be made, however, if the agency "can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity," 28 C.F.R. § 35.130(b)(7), or would result in "undue financial and administrative burdens."[7] These regulations mirror the *Choate* and

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[6](...continued)
burdens . . . .

(Emphasis added.)

[7] 28 C.F.R. 35.150(a)(3). When a public entity believes that complying with the ADA will fundamentally alter the nature of its program or result in undue administrative burden or expense, it has the burden of proof and must make specific findings that support its conclusion:

> In those circumstances where personnel of the public entity believe that the proposed action would fundamentally alter the service, program, or activity or would result in undue financial and
>
> (continued...)

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[7](...continued)

> administrative burdens, a public entity has the burden of proving that compliance with § 35.150(a) of this part would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the head of a public entity or his or her designee after considering all resources available for use in the funding and operation of the service, program, or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action would result in such an alteration or such burdens, a public entity shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that individuals with disabilities receive the benefits or services provided by the public entity.

28 C.F.R. 35.150(a)(3). The Department of Justice's regulations further suggest methods a public agency may use to comply with the regulations:

> A public entity may comply with the requirements of this section through such means as redesign of equipment, reassignment of services to accessible buildings, assignment of aides to beneficiaries, home visits, delivery of services at alternate accessible sites, alteration of existing facilities and construction of new facilities, use of accessible rolling stock or other conveyances, or any other methods that result in making its services, programs, or activities readily accessible to and usable by individuals with disabilities. A public entity is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with this section. A public entity, in making alterations to existing buildings, shall meet the accessibility requirements of §35.151. In choosing among available methods for meeting the requirements of this section, a public entity shall give priority to those methods that offer services, programs, and activities to qualified individuals with disabilities in the most integrated setting

(continued...)

Davis decisions, where the Supreme Court held that "while a[n agency] need not be required to make 'fundamental' or 'substantial' modifications to accommodate the handicapped, it may be required to make 'reasonable' ones." *Choate*, 469 U.S. at 300.

While it is impossible to predict with certainty the effect these principles will have upon fish and game management in Alaska, it is more likely than not that few, if any, modifications to existing regulations will be required. To illustrate a circumstance where modification of a regulation might be required, imagine the Board of Game permitted but a single moose hunt in Alaska, in an area traversed by roads and trails, but limited access exclusively to access by foot. Modification of the hunt to permit a hunter with a disability to use pack animals or an off-road vehicle would probably be required by the ADA, since a meaningful opportunity for persons with disabilities to take moose would not otherwise exist, and allowing one or more persons with disabilities to use pack animals or an off-road vehicle probably would not fundamentally alter the hunt or cause undue administrative burdens or expense. Notice, however, that the modification relates to a barrier created by the Board, *i.e.*, the prohibition of access except by foot. Let us assume that in this hypothetical hunt any form of access was permissible, but that because of rugged terrain and thick brush, *i.e.*, barriers created by nature, access by persons with disabilities was as a practical matter precluded. In our view the ADA would not require modification of the hunt, since there is nothing in that Act to indicate an intent that public entities cure the disparate impact natural barriers have upon persons with disabilities.[8]

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[7](...continued)
appropriate.

28 C.F.R. 35.150(B)(1).

[8] This is evidenced in part by § 507(c)(1) of the ADA, which deals with access to federal wilderness areas:

> Congress reaffirms that nothing in the Wilderness Act is to be construed as prohibiting the use of a wheelchair in a wilderness area by an individual whose disability requires use of a wheelchair, and consistent with the Wilderness Act *no agency is required to provide any form of special treatment or accommodation, or to construct any facilities or modify any conditions of lands within a wilderness*

(continued...)

II. THE BOARDS MAY DELEGATE TO THE COMMISSIONER THE AUTHORITY TO ACCOMMODATE REQUESTS FROM PERSONS WITH DISABILITEES FOR MODIFICATIONS TO EXISTING HUNTING AND FISHING REGULATIONS AND POLICIES

You have asked whether "the boards [can] establish eligibility criteria and delegate to the commissioner the authority to accommodate disabled persons." If by "establish[ing] eligibility criteria" you are referring to a process to determine who does or does not have a disability, the answer is yes, as long as the boards do not establish criteria that are any more rigorous or less comprehensive than required by the ADA's definition of "disability." The boards also can empower the commissioner to determine whether a particular hunter or fisher fits within the ADA's definition, and may further delegate to the commissioner the authority to make reasonable accommodations for persons with disabilities. This should not, however, discourage the boards from addressing the concerns of persons with disabilities in the first instance, when proposals for particular hunting or fishing regulations are initially considered.

The Boards of Fisheries and Game were created for purposes of conservation and development of the fishery and game resources of the state. AS 16.05.22(a)(b). Pursuant to AS 16.05.251, the Board of Fisheries may adopt regulations it considers advisable for "establishing open and closed seasons and areas for the taking of fish," AS 16.05.251(a)(2); "establishing the means and methods employed in the pursuit, capture and transport of fish," AS 16.05.251(4); and "regulating commercial, sport, subsistence, and personal use fishing as needed for the conservation, development, and utilization of fisheries," AS 16.05.251(a)(12). The Board of Game has similar powers with respect to the state's game resources. *See* AS 16.05.255(2), (3), and (10). For the purpose of administering AS 16.05.251 and 16.05.255, each board has been given specific authority to "delegate authority to the commissioner to act in its behalf." AS 16.05.270.

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[8](...continued)
area in order to facilitate such use.

42 U.S.C.A. § 12207(c)(1) (emphasis added).

However, if the Board of Game chose to establish a hunt in a particular area simply because that area was inaccessible to the disabled, that would be an act of purposeful discrimination prohibited by the ADA.

Requests for accommodation from hunters and fishers with disabilities will necessarily affect the boards' regulations governing, among other things, the methods and means of taking the state's fish and game resources. Since it is possible the boards will not be able to address every request for accommodation -- because of the limits imposed by the boards' schedules, or because the impacts of a particular regulation were not obvious at the time it was adopted, or for other reasons -- procedures should be in place that enable the department to address requests for accommodation as they arise. Because neither the department nor the boards have the discretion to ignore the ADA's requirements, the boards' failure to adopt adequate procedures probably will not be a defense to a lawsuit alleging the state failed to make a reasonable accommodation. AS 16.05.270 provides the necessary authority for the boards to adopt such procedures. So long as these procedures are consistent with the ADA and reasonably necessary to carry out that statute's purpose, the boards' approach will be upheld. *See Trustees for Alaska v. State, Department of Natural Resources*, 795 P.2d 805, 812 (Alaska 1990) (regulations delegating a statutory determination to another agency will be upheld where they are consistent with and reasonably necessary to carry out the purposes of the statute).

III. SUGGESTED PROCEDURES FOR ENABLING THE DEPARTMENT TO HANDLE REQUESTS FOR ACCOMMODATION UNDER TITLE II OF THE ADA

A number of states have grappled with the issue of how to effectively accommodate the concerns of persons with disabilities in their desire to hunt and fish. For our present purposes, the approach adopted by the Missouri Conservation Commission (the rough equivalent of Alaska's Boards of Fisheries and Game) is probably the most helpful. The relevant provision of the Missouri Wildlife Code provides as follows:

3 CSR 10-7.411 Special Methods for Handicapped Persons.

> (1) The director may issue special authorization to physically handicapped persons to allow them to hunt and take wildlife by methods not prescribed in hunting rules in accordance with the following:
>
> > (A) Any handicapped person may make application to the director for a special exemption using a form provided by the department which describes the physical handicap and the type of exemption desired and is signed by a licensed physician. If

> granted, the authorization will be in writing and describe in detail the handicap and the type of special method authorized. This written authorization shall be carried by the person at all times while hunting.
>
> (B) The person must have the physical disability described in the special authorization and the disability must be to such an extent that hunting by prescribed methods is impossible.

Under this approach, the person with a disability submits an application for an exemption from the requirements of a specific hunting restriction (a typical example might be the general rule against hunting from a motorized vehicle), and includes with the application a physician's verification of the disability. If the exemption is granted, the person with a disability carries written authorization for the exemption while hunting.[9] A copy of the form developed by the Director of the Missouri Department of Conservation is attached to this memorandum.

The Department of Law believes that the approach adopted by Missouri is essentially sound, and provides a useful starting point for the development of a similar approach by the Boards of Fisheries and Game under the ADA. We would recommend slightly modifying Missouri's approach, as follows:

1. The boards and the department should take all necessary steps to ensure that the regulations and policies they adopt or propose to adopt comply with the ADA. A person with a disability (or personal representative of the person with a disability) who believes a proposed or existing regulation or policy is inconsistent with the ADA should, if possible, submit an alternate proposal (under the normal schedule for

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[9] Under the Missouri regulation, the applicant must carry at all times a "detailed description" of the applicant's disability. We believe such a requirement would raise serious concerns under Alaska's constitutional right of privacy, Alaska Const., art. I, § 22. The written authorization should therefore omit any description of the applicant's disability or should limit the description to the minimum necessary to allow enforcement in the field; the description of the exemption or modification can be as detailed as the circumstances require. The Missouri regulation also refers only to physical disabilities. The ADA applies to both physical and mental disabilities.

submitting proposals or by petition) to the relevant board that (a) explains why the regulation or policy prohibits meaningful access to a program, service, or benefit; and (b) suggests modifications to the regulation or policy that will reasonably accommodate the needs of persons with disabilities. The boards should use the standards set forth in paragraphs 5, 6, and 7, below, to evaluate their regulations, policies and proposals.

2. A person with a disability (or personal representative of the person with a disability) who believes an existing regulation or policy prohibits meaningful access to a program, service, or benefit, should submit an application, on a form developed and made available by the commissioner, that contains:

(a) the statement of a physician or other competent documentary evidence sufficient to enable the commissioner to ascertain the nature and extent of the individual's disability;

(b) a statement by the person with a disability that identifies the regulation or policy at issue and explains why the individual feels the regulation or policy prohibits meaningful access to a program, service, or benefit; and

(c) a statement by the person with a disability requesting an exemption from the regulation or policy, or suggesting one or more modifications to the regulation or policy that the individual feels are necessary to reasonably accommodate the individual's disability.

3. An application requesting an exemption from or modification to an existing regulation or policy should be submitted to the commissioner at least 30 days prior to the date the person with a disability wants to hunt, fish, or participate in the activity that is the subject of the application. This deadline will enable the commissioner to evaluate the application and the effects, if any, that granting the exemption or modification may have upon the conservation, development, or utilization of the fish and game resources of the state. The commissioner should be given the discretion to accept applications that are submitted after the deadline where there is a legitimate reason for not complying. An obvious example would be a hunt that has been modified by an emergency regulation.

4. The commissioner should determine whether to grant an exemption or modification as soon as practicable after

receiving an application, and where possible at least two weeks prior to the date the applicant wishes to hunt, fish, or participate in the activity that is the subject of the application.

5. The commissioner need not grant an exemption or modification where the regulation or policy does not, when viewing the relevant program, service or benefit as a whole, prohibit the person with a disability from obtaining meaningful access to the program, service, or benefit.

6. In deciding whether to grant the relief requested, the commissioner is not limited to the form of the exemption or modification requested by the person with a disability. The commissioner may, when necessary to avoid discrimination, adopt any exemption or modification that provides the person with a disability meaningful access to the program, service, or benefit at issue.

7. If an existing regulation or policy prohibits a person with a disability from meaningful access to a program, service, or benefit, but the commissioner finds that the person cannot be accommodated without (a) fundamentally altering the program, service, or benefit; or (b) incurring undue administrative burdens and expense, the commissioner should set forth, in writing, all facts that support the decision. The decision must be made after considering all resources available for use in the funding and operation of the service, program, or benefit. The commissioner should take any other action that would not result in such an alteration or burdens but that nevertheless provides persons with disabilities the benefits or services at issue.

8. If the commissioner decides to grant all or part of the relief requested in the application, the commissioner should provide a written description of the authorized exemption or modification to the handicapped individual. The written authorization should be carried by the person at all times while hunting or fishing.

The procedure outlined above attempts to incorporate many of the terms and specific requirements of the ADA. The procedure is illustrative only, and we do not suggest this procedure is the only possible means of carrying out the ADA's obligations. Nevertheless, the approach ultimately adopted by the boards should be adopted as regulations and should contain the substance of the procedure described above. Finally, please note that this memorandum, by setting forth the minimum requirements of the ADA,

should not be construed as discouraging the boards or the department from doing *more* than the ADA requires to provide persons with disabilities opportunities to hunt and fish in Alaska.

IV. CONCLUSION

The Boards of Fisheries and Game and the Department of Fish and Game must ensure that their regulations and policies do not preclude persons with disabilities from a meaningful opportunity to hunt and fish in Alaska. The boards may delegate to the commissioner the authority to grant reasonable exemptions from or modifications to existing regulations or policies when those exemptions or modifications are necessary to accommodate persons with disabilities and avoid discrimination. No exemptions or modifications are necessary where existing regulations or policies do not impose artificial barriers upon hunters and fishers with disabilities, or where such exemptions would fundamentally alter the program, service, or benefit at issue, or cause undue administrative burdens or expense.

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