

HB

132

Subject: [Fwd: hb 132]

Date: Tue, 30 Mar 2004 07:26:06 -0900

From: Bruce Weyhrauch <Representative_Bruce_Weyhrauch@Legis.state.ak.us>

Organization: Alaska State Legislature

To: Ginny Austerman <Ginny_Austerman@legis.state.ak.us>

for the committee

Subject: hb 132

Date: Mon, 29 Mar 2004 15:11:51 -0900

From: "David Marquez" <David_Marquez@law.state.ak.us>

To: <representative_bruce_veyhrauch@legis.state.ak.us>

Rep. Weyhrauch - thanks for faxing over the draft proposed CS. Department of Law wouldn't object to this CS. Dave

Subject: [Fwd: CS for House Bill No. 132(STA)]
Date: Fri, 26 Mar 2004 11:11:45 -0900
From: Bruce Weyhrauch <Representative_Bruce_Weyhrauch@Legis.state.ak.us>
Organization: Alaska State Legislature
To: Ginny Austerman <Ginny_Austerman@legis.state.ak.us>

print for the committee for this bill

Subject: RE: CS for House Bill No. 132(STA)
Date: Fri, 26 Mar 2004 11:11:00 -0900
From: "Steve Van Goor" <vangoor@Alaskabar.org>
To: "Bruce Weyhrauch" <Representative_Bruce_Weyhrauch@Legis.state.ak.us>

Bruce: Thanks for the opportunity to review CS for House Bill No. 132 (STA). I don't see any ethics issues raised by requiring the AG to make a public report to the legislature about public judicial proceedings involving the state's management or jurisdiction of natural resources. Similarly, I don't see any ethics issues raised by requiring the court or a party in a public judicial proceeding from notifying the AG of cases concerning these matters. Steve

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TESTIMONY ON HOUSE BILL NO. 132

AAG Lance Nelson, March 24, 2004

House State Affairs Committee

House Bill No. 132 requires the attorney general to "participate as a party in a judicial proceeding that affects the management and jurisdiction of the natural resources of the state," and to "ensure by that participation that the management and jurisdiction of the natural resources ... are not diminished or ceded to another government or sovereign." The bill amends the rules of Civil Procedure and the Rules of Appellate Procedure to require the court to notify the attorney general when a case arises that may fall within this category.

We are concerned that it will harm Alaska's interest to take away the attorney general's discretion to decide whether to participate as a party in particular litigation. Although the bill is clearly intended to protect the state's jurisdiction, it may hinder the attorney general's ability to preserve state authority over natural resources, because it is very broad and it applies indiscriminately. It takes from the attorney general the ability to assure that important issues are presented to a court in the manner most advantageous to the state. While the attorney general may well determine that intervention in an existing case is the best way to protect state interests, under HB 132 he cannot consider other options. With no ability to make strategic decisions, the attorney general may be forced to litigate an important issue under less than ideal circumstance with negative precedential consequences.

For example, cases that "affect the management and jurisdiction of natural resources" frequently raise state sovereignty issues. Strategically, the state is ill-advised to litigate these issues before the Court of Appeals for the Ninth Circuit, because in Alaska's experience, this court seems to apply a presumption against state sovereignty. In a reactive mode, however, forced to intervene in a case brought by others, the state may have no choice. In a proactive mode, the State can raise the issue itself by filing suit in a court more likely to give serious consideration to Alaska's interests.

Other strategic decisions are also important to the state's chance of success in litigation. Often cases will turn on the underlying facts, and good legal strategy dictates that an important issue be based on a factual situation that highlights the justice of the state's position. Facts that invoke sympathy for the state's opponent, on the other hand, will harm the state's chance of success, even if the state is correct on the law. Under HB 132, the state will be forced to litigate an issue regardless of whether the underlying facts support the wisdom of the state's position. And once the state litigates a legal issue, it generally will be bound to the outcome in future cases involving that issue.

Timing is also a consideration in litigating state sovereignty issues. Some say the United States Supreme court is gradually increasing its recognition

of the inherent authority that states have under the United States Constitution. It is a gradual increase, however; the Supreme Court does not completely reverse years of caselaw at once. The state is careful in all cases it brings, trying to gauge how far it can push certain issues, and how best to raise them. If the state tries to make huge gains in a single case, it may lose on everything. Yet the state may be forced into that position if the attorney general cannot choose the litigation in which he participates.

The bill also raises concerns about the best use of Department of Law resources. The department often declines to intervene in private litigation because, although the state's interest in natural resources jurisdiction is arguably involved, the financial resources required to participate do not justify the potential benefit to the public. For example, private landowners or leaseholders sometimes bring trespass actions against guides or fishermen for fishing on their property. The fishermen answer that they were fishing below ordinary high water on a navigable waterway, and therefore they were on state land, not private land. The state may have an interest, because the outcome may depend on whether the waterway is navigable, or on precisely where ordinary high water ends and private upland begins. The state generally declines to participate in this type of case, however. While the private defendants want the state's help in preparing their defense, the cost to the state can be enormous. Determining navigability or the limits of ordinary high water requires historians, hydrologists, and other experts,

and lots of attorney time. The cases rarely raise a purely legal issue; generally the cases are the culmination of long-running disputes that turn on the facts, that are personal and raise messy credibility issues. The overall payoff for state participation can be insignificant – at best a case might establish that at one particular place, the public has a right to stand and fish, provided they don't wander above ordinary high water onto the plaintiff's property. If the state does not participate, it is not bound by the decision and can litigate the issue in the future.

When a case raises this type of management or jurisdictional issue, the attorney general needs the discretion to decline participation. The attorney general must be able to decide how to use scarce litigation resources to maximize the return to Alaska's citizens. And we do have scarce resources. The AGO Natural Resources Section is about ½ the size it was in the early 90's because of budget cuts over the years. We are not sufficiently staffed to handle this level of mandatory litigation burden. We believe we are doing a good job of protecting the state's interest in intervening in lawsuits when appropriate. We have filed in a number of timber sale cases, the Bristol Bay antitrust lawsuit, the Tustumena Lake case, and the NPRA litigation. We are taking an active role in many important natural resource cases.

In short, the legislative branch may not agree with every litigation decision the attorney general makes, but it should not take away his ability to make them. The attorney general needs the discretion to determine the best litigation strategy to advance important sovereignty issues, and to decline to participate in cases where the cost is not justified by the potential benefit. HB 132 makes an all-encompassing decision that the state must always participate in litigation in a broad category of cases, but we do not see at this point, looking into the future, that this will turn out to be a good decision.

FISCAL NOTE

MAR 25 2004

STATE OF ALASKA
2004 LEGISLATIVE SESSION

Fiscal Note Number: _____
Bill Version: HB132-ACS-TC-3-25-04
() Publish Date: _____

Revision Date/Time (Note if correction): _____ Dept. Affected: _____
Title AG Intervene in Nat. Res. Actions BRU Alaska Court System
Component Trial Courts
Sponsor Representative Weyhrauch
Requester _____ Component No. _____

Expenditures/Revenues (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

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

FUND SOURCE	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010
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 (FY2004) cost: 0.0
Mark this box (X) if funding for this bill is included in the Governor's FY 2005 budget proposal:

POSITIONS

POSITIONS	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010
Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)
The court system does not anticipate any fiscal impact from the passage of HB 132.

Prepared by: Doug Wooliver Administrative Attorney Phone 463-4750
Divisic. Alaska Court System Date/Time 3/25/04 3:43 PM
Approved by: Stephanie Cole Administrative Director by Doug Wooliver Date 3/25/2004
Agency Alaska Court System