HB

145

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

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

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

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

(Revised 9/2001 OMB)

Sen. Seekins
Rm 125

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May 18, 2003

By Hand Delivery

Honorable Gene Therriault, President of the Senate
Alaska Legislature
State Capitol Room 111
Juneau, Alaska

Re: Public Interest Litigants: Attorneys fees and costs
CSHB 145 (FIN) – Oppose; CSHB 145 (JUD) – No position

Dear Senator Therriault:

We urge a "no" vote on CSHB 145(FIN). The bill would carve out non-constitutional claims and say court cases that seek to enforce the very laws you make would *not* be in the public interest. The bill does preserve a semblance of the public interest litigant doctrine for claims brought under the Alaska or U.S. Constitution, but I submit that is not good enough. **Most public interest litigation is brought to enforce the very laws you pass.**

It is easy to foresee cases where a citizen may seek to enforce a state statute or local ordinance against the executive or judicial branch that is refusing to implement an enactment of the legislative branch, without raising a constitutional question. I enclose an excerpt from testimony before the House Judiciary Committee on April 30, 2001 on a bill debated in the 22nd Legislature, SB 183, which ultimately did not pass. SB 183 was similarly broad in its abrogation of the public interest litigant doctrine as CSHB 145 (FIN), and so the comment is worth considering. Lauree Hugonin of the Alaska Network on Domestic Violence and Sexual Assault pointed out that the public interest litigant doctrine permitted a suit against the Alaska Court System itself, which was failing to implement a domestic violence law that the Legislature had passed.

An important aspect of the public interest litigant doctrine is that it is designed to provide compensation when a member of the public acts as a "private attorney general" to enforce a law. The doctrine also preserves access to the courts to citizens of modest means when the citizen's financial stake in the litigation is small in comparison to the cost of litigation. The doctrine opens the court system to seek resolution of disputes involving laws on such issues as:

- when human life begins and when it should end
- control and use of human tissues
- access to genetic and other personal medical information
- freedom of religion, speech and association
- discrimination on the basis of age, race, religion or disability
- validity of taxes and excises
- validity of elections and election conduct

We strongly urge you to think twice – no three times – before abrogating the public interest litigant doctrine for all Alaskans and for all statutory and common law issues. CSHB 145 (JUD) is a narrower bill, on which we take no position. CSHB 145 (FIN) is sweeping in its effect, and we oppose it.

I believe the public interest doctrine is a rule of procedure that the Alaska Supreme Court has promulgated[1] through court opinions under the judicial doctrine of "stare decisis," also known as the rule of precedent, and that a two-thirds majority of the Legislature is required to modify the public interest doctrine. Art. IV, § 15, ALASKA CONST. E.g., State v. Smith, 593 P.2d 625 (Alaska 1979)(noting power of the Supreme Court to allocate attorneys fees as a matter of procedure); Leege v. Martin, 379 P.2d 447 (Alaska 1963)(invalidating statute that purported to modify court rule of procedure due to absence of expression of intention to modify court rule in bill title); City of Valdez v. Valdez Dev. Co., 506 P.2d 1279 (Alaska 1973). Each time since 1993 that the Legislature has found as a matter of policy that Rule 82 of the Alaska Rules of Civil Procedure ought to be modified, it has done so by formal court rule change with at least two-thirds of the Legislature voting in favor of the rule change.[2]

In revising Alaska Rule of Civil Procedure 82 in 1993, the Supreme Court expressly preserved this rule of procedure with regard to allocation of attorneys fees and costs in public interest litigation. Alaska Supreme Court Order 1118 am, at ¶ 2. So the Alaska Supreme Court has expressed this rule of procedure regarding the award of attorneys fees and costs in public interest litigation in three ways: (1) as a notation to ARCivP 82; (2) as a paragraph of a Supreme Court Order no. 1118am; and (3) as a doctrine expressed in published judicial decisions.

The Legislature should recognize this, and adopt any revision of the public interest litigant doctrine as a formal rule change, including appropriate reference in the title of the bill. I believe this would implement Articles IV, § 15 and II, §13 of the Alaska Constitution, as well as Uniform Rule 39(e) of the Alaska Legislature.

Section 3 of CSHB 145 (FIN) also purports to limit the factors that trial and appellate courts may consider in issuing stays on appeal, thereby creating **an unnecessary and unwise separation of powers of issue** in an area that is well-settled by Alaska case law. E.g., Powell v. Anchorage, 536 P.2d 1228 (Alaska 1975)(whether stay pending appeal on order granting or dissolving injunction is question directed to sound discretion of the court, applying Alaska Rule

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[1] "Promulgate" is defined as "to declare or announce publicly; to proclaim." Black's Law Dictionary, 2nd Pocket Ed. (West Pub. 2001).

[2] Ch. 94, §5, Session Laws of Alaska (SLA) 1998 (HB 51, amending Alaska Civil Rule 82 in adopting AS 46.03.761); Ch. 26, § 52, Session Laws of Alaska (SLA) 1997 (HB 58, amending AS 09.30.065); Ch. 57, §6, SLA 1995 (SB 115, adopting the Uniform Interstate Family Support Act).

of Civil Procedure 62); Johns v. State of Alaska, 431 P.2d 148 (Alaska 1967)(same, applying Alaska Rule of Appellate Procedure 204).

Addition of Section 3 in the Finance Committee is wholly unsupported by the committee record in the House. There was no testimony of courts running amok, arbitrarily issuing (or failing to issue) stays on appeal. We submit that the case-by-case, open-ended factors that courts are required to apply under existing Civil Rule 62 and Appellate Rule 204 have been working just fine.

I urge your support of public access to the courts and public enforcement of the laws that you pass by voting "no" on CSHB 145 (FIN). I take no position on CSHB 145 (JUD), other than to say that it should be amended to clearly state that it is a revision of a court rule of procedure, and Uniform Rule 39(e) should be followed.

Very truly yours,

Bob Briggs

Robert B. Briggs, staff attorney

Encl.

Cc (w/ encl.):
Members of the Senate
Dave Fleurant, exec. dir., DLC Anchorage

Excerpt from minutes of the House Judiciary Committee on SB 183
2nd Legis., 1st Sess. (April 30, 2001)*

From TAPE 01-79, SIDE B**
Number 2465

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.

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*http://www.legis.state.ak.us/basis/get_single_minute.asp?session=22&beg_line=00144&end_line=01121&time=1425&date=20010430&comm=JUD&house=H

** Ellipses (...) in original.

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.

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INTERNAL: DS, KLOP, DJH
EXTERNAL: Forest Oil
ORIGINAL: LT

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ne Court of the State of Alaska

Cook Inlet Keeper, Appellant, v. **State of Alaska, Office of Management & Budget, Division of Governmental Coordination,** Appellee, **Forest Oil Corporation,** Intervenor-Appellee.	Supreme Court No. **S-09730** **ORDER ON EMERGENCY MOTION FOR INJUNCTIVE RELIEF** Date of Order: **4/19/02**

Trial Court Case # **3AN-99-03482CI**

As a single justice I have reviewed the motion of Cook Inlet Keeper for Emergency Injunctive Relief, seeking an order requiring Forest Oil Corporation to stop drilling a fifth well as part of the Osprey Oil and Gas Exploration Project. On short notice the State of Alaska and Forest Oil have filed memoranda in opposition to the motion and oral arguments were heard.

The final consistency determination described the Osprey project as involving drilling of "up to four exploration and delineation wells . . . ." The validity of the Osprey consistency determination is currently under submission to this court. Oral arguments were held on this issue on October 15, 2001. The court was then advised that drilling was nearing completion. It appears that without notice to Cook Inlet Keeper, Forest Oil on December 18, 2001, requested the State Department of Natural Resources (DNR) to approve a fifth exploration well from the Osprey platform. On December 27, 2001, DNR responded, granting approval, stating that "the proposed change is a minor

amendment that does not raise any concerns not already addressed in the existing approval," meaning the final consistency determination currently under review before this court. It does not appear that notice of this approval was given to Cook Inlet Keeper. On April 11, 2002, it appears that AOGCC issued a drilling permit for the fifth well. Although no advance notice concerning this permit was given, Cook Inlet Keeper learned of this permit soon after it was issued. After a period of negotiations Cook Inlet Keeper filed this motion for injunctive relief.

I have concluded that injunctive relief is appropriate. The reason is that Cook Inlet Keeper has made a clear showing of probable success on the merits. I believe that Cook Inlet Keeper has presented a very strong case that the consistency determination on which all of the Osprey drilling permits depend is legally deficient. Before a project such as the Osprey project may go forward there must be a valid consistency determination. Since a clear showing has been made that there has not been a valid consistency determination, proceeding with the drilling now is probably illegal.

Forest Oil argues that there is a little likelihood of irreparable injury to the environment if it is allowed to proceed to complete the fifth well because drilling wastes are not being discharged into the water; instead they are being disposed of in an approved alternative fashion. Cook Inlet Keeper responds that there are nonetheless environmental risks involved in drilling. Forest Oil argues that it will suffer significant economic loss if it is forced to suspend drilling. Further, both Forest Oil and the State point out that there are safety issues that may be present with a sudden suspension of drilling.

Our cases indicate that where a party seeking a preliminary injunction makes a clear showing of probable success on the merits, an injunction may issue even though the party enjoined suffers injury and the injury to the party seeking the injunction is primarily legal in nature. Thus we have stated: "The party seeking a preliminary injunction is required to make a clear showing of probable success on the merits when they do 'not stand to suffer irreparable harm, or where the party against whom the injunction is sought will suffer injury if the injunction is issued.' " *State v. Kluti Kaah*

Native Village, 831 P.2d 1270, 1274 (Alaska 1992) (quoting *A.J. Industries, Inc. v. Alaska Public Service Comm'n*, 470 P.2d 537, 540 (*Alaska 1970*)). *See also Anchorage Education Association v. Anchorage School District*, 648 P.2d 993, 998 (Alaska 1982) (vindication of legislatively established requirements is a sufficient interest to justify injunctive relief). Similarly, I do not believe that public interest groups of limited financial resources should be required to post bonds of the magnitude that would be required here to be fully protective once they make a clear showing of probable success on the merits. *See, e.g., Friends of the Earth, Inc. v. Brinegar*, 518 F.2d 322 (9th Cir. 1975); *California v. Tahoe Regional Planning Agency*, 766 F.2d 1319, 1325 (9th Cir. 1985). But the fact that a sudden cessation of drilling might be unsafe is obviously of great concern. Therefore the injunction that will issue will require Forest Oil to terminate drilling as soon as it can do so consistently with reasonable safety. In addition, in light of this injunction, I will recommend to the full court that the decision on the appeal on the merits of this case be expedited. Accordingly,

IT IS ORDERED that the emergency motion is **GRANTED.** Forest Oil is ordered to terminate drilling of the fifth well at the earliest time that it can do so that is consistent with reasonable safety.

Entered at the direction of Justice Matthews.

Clerk of the Appellate Courts

Deputy Clerk

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