HB

168

<TARGET><BILL>HB 168</BILL><SUBJECT>HB 168</SUBJECT><COMM>HJUD27</COMM></TARGET>

REPRESENTATIVE
ERIC FEIGE
House District 12
House Resources Committee Co-Chair
Education Committee
Transportation Committee
Joint Armed Services Committee

Alaska State Legislature

House of Representatives

During Session:
State Capitol Room 126
Juneau, Alaska 99801-1182
(907) 465-4859
Fax (907) 465-3799
1-888-465-4859

TO: Representative Carl Gatto, Chairman

House Judiciary Committee

FROM: Representative Eric Feige

DATE: March 9, 2011

RE: Hearing Request for HB 168 Injunction Security: Industrial Operation

I respectfully request that House Bill 168, Injunction Security: Industrial Operation, be scheduled for a hearing in the House Judiciary Committee. Please feel free to contact me, or my aide, Linda Hay, with questions or thoughts at 465-3715.

Attached you will find the contents as requested by the committee. This includes the current version of the bill, a sponsor statement, sectional analysis, and pertinent background information.

Thank you for your consideration.

Rep. Eric Feige

E-Mail: Representative.Eric.Feige@legis.state.ak.us

Representative
Eric Feige
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Sponsor Statement for HB 168

"An Act requiring the amount of the security given by a party seeking an injunction or order vacating or staying the operation of a permit affecting an industrial operation to include an amount for the payment of wages and benefits for employees and payments to contractors and subcontractors that may be lost if the industrial operation is wrongfully enjoined."

Over the past years there have been several cases where courts have issued injunctions or stays against companies engaged in the development of resource extraction and other construction projects. These court actions have had the effect of delaying worthwhile projects and curtailing employment within the state of Alaska. Thousands of jobs have not come to fruition and economic development of the states resources have been hindered. More often than not, the litigation has failed or had an extremely limited effect in hand with the stated objectives of the original suit. The overall objective is not often what is stated in the suit but merely to delay a project or prevent it from coming to fruition.

HB 168 seeks to impose a penalty on frivolous suits. By requiring a bond to be posted in the event of a stay or injunction, the cost to the party bringing the suit is increased. Under current law the cost to bring a public litigant lawsuit against a project is in effect zero. There is very little risk in bringing a suit. All the risk currently is borne by the defendants. This bill seeks to level the legal playing field without infringing on any parties right to bring a legitimate issue to court.

E-Mail: Representative.Eric.Feige@legis.state.ak.us

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM February 28, 2011

SUBJECT: Security for injunction (HB 168, Work Order No. 27-LS0395\B)

TO: Representative Eric Feige
Co-Chair of the House Resources Committee
Attn: Linda Hay

FROM: Dennis C. Bailey
Legislative Counsel

You have requested a sectional summary of the above-described bill.

As a preliminary matter, note that a sectional summary of a bill should not be considered an authoritative interpretation of the bill and the bill itself is the best statement of its contents.

Section 1. Applies to a court considering the amount of security that must be provided by a person seeking an injunction or order vacating or staying the operation of a permit that affects an industrial operation. The court's consideration of the costs that an industrial operation may incur if the operation is wrongly enjoined must include an amount for payment of wages and benefits for employees, and payment to contractors and subcontractors of the industrial operation.

Defines an industrial operation to include a construction, energy, or timber activity and oil, gas, and mineral exploration, development and production.

Does not prohibit a person who is wrongly enjoined from other relief or otherwise limit the amount that a person may recover in the action.

DCB:ljw
11-144.ljw

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number
Bill Version: **HB 168 \B**
() Publish Date

Identifier (file name) HB 168-DFG-HAB-03-21-11
Title: Injunction Security: Industrial Operation
Sponsor: Representative Eric Feige
Requester: House Judiciary Committee

Dept. Affected: Fish and Game
Appropriation: Habitat
Allocation: Habitat
OMB Component Number: 486

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Travel	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Services	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Commodities	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Capital Outlay	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Grants	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Miscellaneous	0.0	0.0	0.0	0.0	0.0	0.0	0.0
TOTAL OPERATING	**0.0**	**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 (please identify)							
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2011) cost _____

POSITIONS

Full-time							
Part-time							
Temporary							

Why this fiscal note differs from previous version (if initial version, please note as such)

Prepared by: Becky Nelson, Administrative Officer — Phone 465-1852
Division: Habitat — Date/Time 3/21/11 8:49 AM
Approved by: Kevin Brooks, Aministrative Services Director — Date 3/21/2011
Department of Fish & Game

(Revised 1/27/2011 OMB)

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

BILL NO. HB 168 \B

Analysis

HB 168 would amend AS 09.40.230 by adding language that would require that a party seeking a restraining order, preliminary injunction, or order vacating or staying the operation of a permit affecting an industrial operation shall provide security in an amount determined by the court for the industrial operation's costs and damages, including employees wages and benefits to contractors and subcontractors.

The Department of Fish and Game anticipates a zero fiscal impact.

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number
Bill Version **HB168 \B**
() Publish Date

Identifier (file name): HB168-LAW-CIV-03-21-11
Title: An Act requiring injunction security to include an amount for payment lost if the industrial operation is wrongfully enjoined.
Sponsor: Representative(s) Feige
Requester: (H) Judiciary

Dept. Affected: Law
Appropriation: Civil
Allocation: Oil, Gas & Mining
OMB Component Number: 2091

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants							
Miscellaneous							
TOTAL OPERATING	**0.0**	**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 (please identify)							
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2011) cost 0.0

POSITIONS

Full-time							
Part-time							
Temporary							

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, initial version.

Prepared by: Eileen Donahue, Division Operations Manager — Phone 465-5427
Division: Administrative Services — Date/Time 3/21/11 9:30 AM
Approved by: John J. Burns, Attorney General — Date 3/21/2011
Department of Law

(Revised 1/27/2011 OMB)

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

BILL NO. HB168 \B

Analysis

HB 168 would amend existing Statutes to add a requirement that a party seeking a restraining order, preliminary injunction, or order vacating or staying the operation of a permit affecting an industrial operation shall provide security in an amount determined by the court for the industrial operation's costs and damages, including employees wages and benefits and payment to contractors and subcontractors.

The Department of Law anticipates zero fiscal impact.

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number
Bill Version **HB168**
() Publish Date

Identifier (file name) HB168-DNR-MLD-03-18-11
Title INJUNCTION SECURITY: INDUSTRIAL OPERATION
Sponsor Rep. Feige
Requester HJUD

Dept. Affected Natural Resources
Appropriation Resource Development
Allocation Mining and Land Development
OMB Component Number 2460

Expenditures/Revenues (Thousands of Dollars)

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

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2012**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Personal Services	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Travel	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Services	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Commodities	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Capital Outlay	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Grants	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Miscellaneous	0.0	0.0	0.0	0.0	0.0	0.0	0.0
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CHANGE IN REVENUES	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts	0.0	0.0	0.0	0.0	0.0	0.0	0.0
1003 GF Match	0.0	0.0	0.0	0.0	0.0	0.0	0.0
1004 GF	0.0	0.0	0.0	0.0	0.0	0.0	0.0
1005 GF/Program Receipts	0.0	0.0	0.0	0.0	0.0	0.0	0.0
1037 GF/Mental Health	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Other (please identify)	0.0	0.0	0.0	0.0	0.0	0.0	0.0
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2011) cost _____

POSITIONS

Full-time	0	0	0	0	0	0	0
Part-time	0	0	0	0	0	0	0
Temporary	0	0	0	0	0	0	0

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, initial version

Prepared by Wyn Menefee, Acting Director
Division Mining, Land & Water
Approved by Daniel S. Sullivan
Department of Natural Resources

Phone 269-8501
Date/Time 3/18/11 1:00 PM
Date 3/18/2011

(Revised 1/27/2011 OMB)

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

BILL NO. HB168

Analysis

HB 168 requires a party seeking a restraining order, preliminary injunction, or order vacating or staying the operation of a permit that affects an industrial operation to give security in an amount determined by the court for costs that may be incurred and damages that may be suffered by an industrial operation that has been wrongfully enjoined or restrained. This security would include an amount for the payment of wages and benefits for employees and payment to contractors and subcontractors of the industrial operation.

There will be no anticipated fiscal impact to the Department of Natural Resources.

High Country News
For people who care about the West

Return to this article

'Firebrand ways'

by Tony Davis 12/21/2009 Issue

Twenty years ago, they were Earth Firsters, living in tepees, trying to save spotted owls and grafting together a shoestring budget from their unemployment checks. Today, the Center for Biological Diversity has a budget of $7 million, 62 full-time staffers and 15 offices nationally, in locations from Washington, D.C., to Silver City, N.M. By filing 600 lawsuits and countless petitions against the federal government, the center has won the listing of 380 species as threatened or endangered. It also says it has secured 110 million acres of critical habitat and proposed another 130 million acres. CBD has won a reputation as the country's most militant large environmental group, one that seldom shrinks from controversy.

From its Tucson headquarters, it's expanded its species-saving tactics to protect rivers, stop sprawl, battle overgrazing and even tackle climate change. Last year, the group helped get the polar bear listed as a threatened species. Here, one of CBD's founders, 45-year-old director Kieran (pronounced Keer-Onh) Suckling, looks back at how the group got where it is and explains how it differs from the "Big 10" green groups.

HIGH COUNTRY NEWS How did your group get its start? What were your roots?

KIERAN SUCKLING I was in grad school at SUNY Stonybrook, working on a Ph.D. in philosophy, with my dissertation on the relationship between species extinction and language extinction. I came out West for the 1989 Earth First! Rendezvous in northern New Mexico.

There, I chained myself across a road, blocking access to a timber sale. The timber industry in the Southwest was about to make a radical change in its practices. It had logged off the mesas and now they planned to go in and log steep slope canyons.

I got arrested in the process, along with a woman named Sherie. We fell in love while in jail, and she said, "I'm working for this guy, Peter Galvin, doing Mexican spotted owl surveys on the Gila National Forest (in southwest New Mexico) for the Forest Service. Why don't I see if I can get you a job?" Peter hired me, out of a VW van. One day, one of our survey crew got lost and wandered into Water Canyon, where a timber sale was going on, and found a spotted owl.

HCN The Mexican spotted owl at that point was on the Forest Service's "sensitive species" list. (It was federally listed as threatened in 1993.) What happened after your surveyor found the owl?

SUCKLING First, the Forest Service stopped the sale, then let it resume, saying the company had a contract. We had signed contracts saying we wouldn't divulge owl locations, but we went the next day to the *Silver City Daily Press*, with a map that told our story. We were fired within seconds. That was the start of us becoming full-time activists, starting as the Greater Gila Biodiversity Project.

HCN What made you decide to found your own group?

SUCKLING We were riled up. The government wasn't playing by the rules. The best way to save endangered species wasn't going to work inside the government. I was studying endangered species as part of my Ph.D. research. I realized, Oh my God, this owl species is going extinct. I couldn't keep studying patterns of extinction while letting extinction go on.

HCN What was your first major victory?

SUCKLING A Mexican wolf reintroduction lawsuit in 1990, our first. The Fish and Wildlife Service had formally declared the Mexican wolf unrecoverable. The Audubon Society and the Defenders of Wildlife had formed a wolf coalition to fight this. But they had no legal strategy beyond telling the government, "Pretty please." A study had been done showing a viable wolf recovery population could be introduced at White Sands Missile Range. They spoke to the general in charge of the range and he had no interest in wolves -- he shut them down. The strategy of the wolf coalition was to wait for the general to retire. We decided, let's just sue instead. It got settled with the Service agreeing to do a wolf study, which led to reintroduction.

That was the moment when we looked at it and said, "Wow." The environmental movement spent a decade going to meetings and demanding action and getting nothing done. They were asking powerful people for something from a position of no power. We realized that we can bypass the officials and sue, and that we can get things done in court.

HCN What role do lawsuits play in your strategy to list endangered species?

SUCKLING They are one tool in a larger campaign, but we use lawsuits to help shift the balance of power from industry and government agencies, toward protecting endangered species. That plays out on many levels. At its simplest, by obtaining an injunction to shut down logging or prevent the filling of a dam, the power shifts to our hands. The Forest Service needs our agreement to get back to work, and we are in the position of being able to powerfully negotiate the terms of releasing the injunction.

New injunctions, new species listings and new bad press take a terrible toll on agency morale. When we stop the same timber sale three or four times running, the timber planners want to tear their hair out. They feel like their careers are being mocked and destroyed -- and they are. So they become much more willing to play by our rules and at least get something done. Psychological warfare is a very underappreciated aspect of environmental campaigning.

HCN Were you hindered by not having science degrees?

SUCKLING No. It was a key to our success. I think the professionalization of the environmental movement has injured it greatly. These kids get degrees in environmental conservation and wildlife management and come looking for jobs in the environmental movement. They've bought into resource management values and multiple use by the time they graduate. I'm more interested in hiring philosophers, linguists and poets. The core talent of a successful environmental activist is not science and law. It's campaigning instinct. That's not only not taught in the universities, it's discouraged.

HCN How democratic is your group? Does the buck stop with you or is there a collective?

SUCKLING The buck stops with our leadership team: Me, Peter Galvin, our conservation director, and Sarah Bergman, our assistant director. Over our 20 years, we have gone through agonizing debates and battles over consensus decision-making and about a hierarchical organization and social structure. Ten years ago, it settled into this structure of strong leadership, where we give tremendous deference and

latitude to our activists to pick battles, tactics and strategy. It's extremely non-hierarchical, but not consensus-based.

HCN Did you plan all along to become a national group?

SUCKLING Not at all. Our initial vision was to protect the Greater Gila Ecosystem -- the Gila, Apache and part of the Cibola national forests, about 10 million acres. We got dragged onto the national stage against our will. It didn't take us long to realize that power politics that determine species protection do not occur in the Gila: They happen in Phoenix, Albuquerque and Washington, D.C. We decided first to be the Southwest Center for Biological Diversity, and deal with the whole Southwest. Then, other, grassroots environmental groups started calling us from around the country and asking, "How do I replicate this?" At their request, we started opening offices around the country.

HCN Has your mission changed since you went national?

SUCKLING It's still the same. Our national status came to clarify what drove us. Before, we focused on that 10 million acres, and we were doing that through timber sales, listing petitions, etc., all based in these species. As we've grown, the species focus continues to be the case. Our attachment is to species, not to the particular place.

HCN What about your global warming campaign -- what does that have to do with species protection?

SUCKLING It's driven by the need to protect plants and animals. Our global warming goals must be enough to save the polar bear. We need to cut emissions to 40 to 50 percent of 1990 levels by 2020. We need a net negative emissions policy by 2050 -- less than zero.

HCN How would you deal with conflicts between renewable energy projects and endangered species? After all, solar panels in the desert can harm sensitive species like the desert tortoise.

SUCKLING We strongly support a rapid ramp-up of solar energy and have mapped out 100,000 acres of degraded public and private lands in the Mojave Desert where solar development would not conflict with endangered species or wilderness. We've also advocated placing solar developments in burned-out state, private and federal lands along Interstate 10 between Tucson and Phoenix. With so many highly degraded, biologically fragmented lands available, good planning should be able to avoid conflicts between solar energy and endangered species. It's a no-brainer. But unfortunately, many developers have proven to have less than no brain.

HCN Contrast yourself with the "Big 10" environmental groups. What do you see as their strengths and weaknesses?

SUCKLING The environmental movement is strongest when it has a clear vision and is willing to be way out in front of political leaders, and is willing to cause controversy, which is absolutely necessary to change the status quo. I think it's weakest when it too closely follows the Democratic party instead of playing an aggressive nonpartisan position.

Climate change is a really great example. The national environmental movement has articulated no bottom line on climate reductions. It has let the Democratic leadership completely define climate solutions, so every climate bill has been weak. That's why Copenhagen collapsed. National environmental groups did not ask Congress to do anything creative. They waited for Pelosi and Reid to take the lead.

HCN In 10 years, would you like the Center for Biological Diversity to be as big as the Natural Resources Defense Council (NRDC) and other mainstream national groups?

SUCKLING Yes. At one point we thought we could do our jobs here in the West at a moderate size and rely on the big nationals' political muscle to carry our message in D.C. Now, after years of seeing the built-up political power of so many groups being squandered in D.C., we decided we need to have that political power ourselves.

Plus, there are endangered species in all 50 states, and we feel a responsibility to keep growing and reaching out until all of them are fully protected. We are in the midst of the sixth and possibly the greatest mass extinction crisis in the planet's 4 billion-year history. We have to do everything in our power, and increase our power, to stop it.

HCN Can you do that without growing corpulent?

SUCKLING I'm more than aware of the risks, but I do have confidence that we can be as big as big nationals and retain our firebrand ways. We have to. Otherwise, what's the point? There already is an NRDC. There's no need for another one.

Tony Davis reports for the Arizona Daily Star in Tucson.

27-LS0395\B.2
Bailey
3/29/11

AMENDMENT

OFFERED IN THE HOUSE

TO: HB 168

Page 1, line 10:

Delete "determined by the court"

Insert "the court considers proper"

Montana Code Annotated 1995

MCA Contents **Search** **Part Contents**

27-19-306. Security for damages. (1) Subject to 25-1-402, on granting an injunction or restraining order, the judge shall require a written undertaking to be given by the applicant for the payment of the costs and damages that may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. Except as provided in subsection (2), the undertaking:

(a) must be fixed at a sum that the judge considers proper; and

(b) may be waived:

(i) in domestic disputes; or

(ii) in the interest of justice.

(2) (a) If a party seeks an injunction or restraining order against an industrial operation or activity, the judge shall require a written undertaking to be filed by the applicant. The amount of the written undertaking must be set in an amount that includes all of the wages, salaries, and benefits of the employees of the party enjoined or restrained during the anticipated time that the injunction or restraining order will be in effect. The amount of the written undertaking may not exceed $50,000 unless the interests of justice require. The written undertaking must be conditioned to indemnify the employees of the party enjoined or restrained against lost wages, salaries, and benefits sustained by reason of the injunction or restraining order.

(b) As used in subsection (2)(a), "industrial operation or activity" includes but is not limited to construction, mining, timber, and grazing operations.

(3) Within 30 days after the service of the injunction, the party enjoined may object to the sufficiency of the sureties. If the party enjoined fails to object, all objections to the sufficiency of the sureties are waived. When objected to, the applicant's sureties, upon notice to the party enjoined of not less than 2 or more than 5 days, shall justify before a judge or clerk in the same manner as upon bail on arrest. If the sureties fail to justify or if others in their place fail to justify at the time and place appointed, the order granting the injunction must be dissolved.

(4) This section does not prohibit a person who is wrongfully enjoined from filing an action for any claim for relief otherwise available to that person in law or equity and does not limit the recovery that may be obtained in that action.

History: En. Sec. 86, p. 59, Bannack Stat.; re-en. Sec. 115, p. 154, L. 1867; re-en. Sec. 132, p. 52, Cod. Stat. 1871; re-en. Sec. 174, p. 79, L. 1877; re-en. Sec. 174, 1st Div. Rev. Stat. 1879; re-en. Sec. 176, 1st Div. Comp. Stat. 1887; en. Sec. 874, C. Civ. Proc. 1895; re-en. Sec. 6646, Rev. C. 1907; re-en. Sec. 9246, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 529; re-en. Sec. 9246, R.C.M. 1935; amd. Sec. 53, Ch. 535, L. 1975; R.C.M. 1947, 93-4207; amd. Sec. 48, Ch. 12, L. 1979; amd. Sec. 8, Ch. 399, L. 1979; amd. Sec. 1, Ch. 575, L. 1995.

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Montana Code Annotated 1995

MCA Contents **Search** **Part Contents**

25-1-402. Governmental entities not required to give security. In any civil action or proceeding wherein the state, a county, or a municipal corporation or any officer in his official capacity on behalf of the state or a county, city, or town is a party plaintiff or defendant, no bond, undertaking, or security can be required of the state, county, municipal corporation, or town or any officer thereof; but on complying with the other provisions of this code, the state, county, municipal corporation, or town or any officer thereof acting in his official capacity has the same rights, remedies, and benefits as if the bond, undertaking, or security were given and approved as required by this code. The board of trustees of any school district is entitled to the benefit of this section.

History: En. Sec. 1902, C. Civ. Proc. 1895; re-en. Sec. 7196, Rev. C. 1907; re-en. Sec. 9829, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1058; re-en. Sec. 9829, R.C.M. 1935; R.C.M. 1947, 93-8714.

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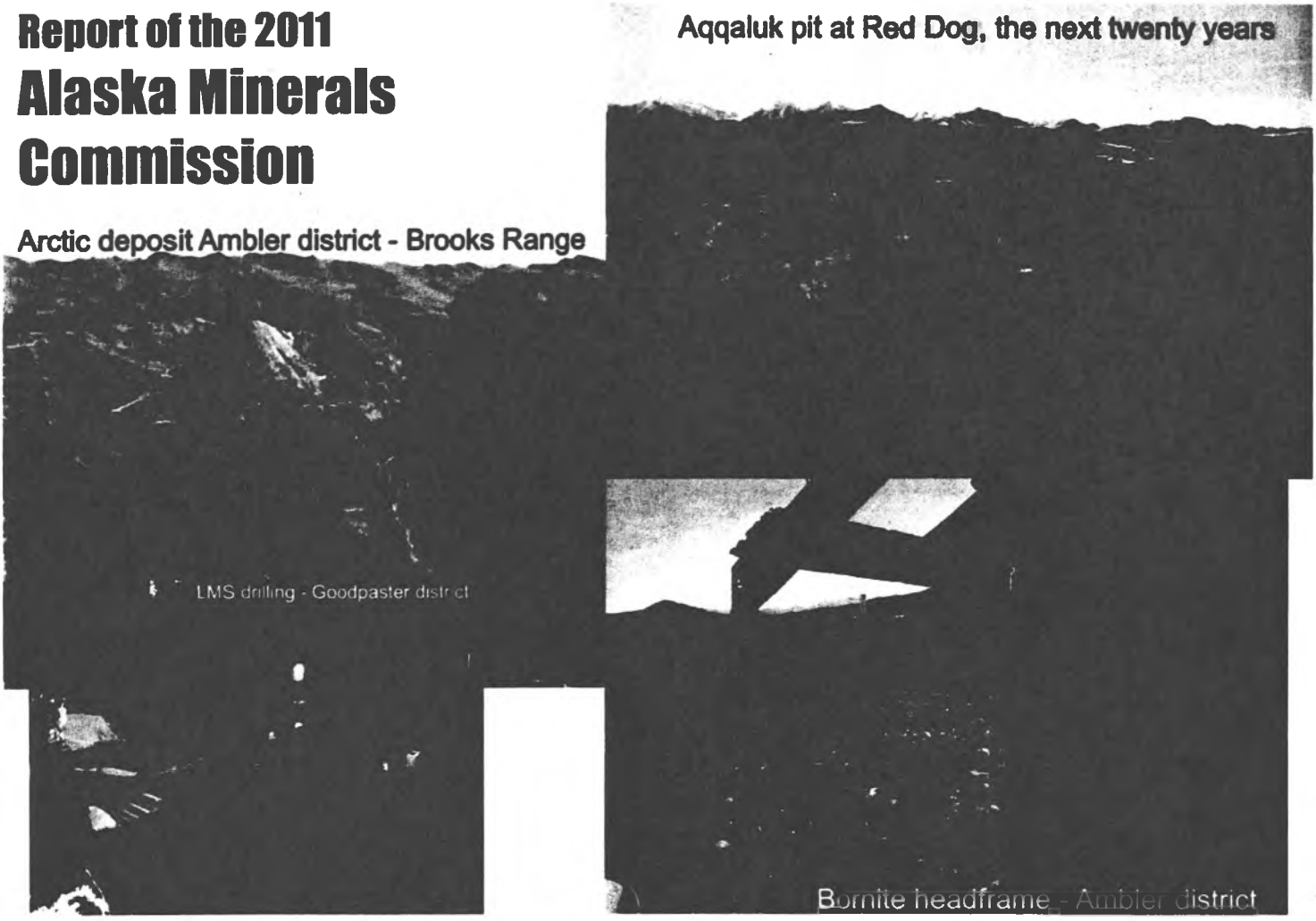
Report of the 2011 Alaska Minerals Commission



ACTION ITEMS

1. **Provide support for permitting agencies instead of wasting state resources on an ill-timed Pebble study.**
2. **Implement reforms to prevent public litigant and third-party lawsuits from stifling development.**
3. **Build a road to Western Alaska that includes access to Brooks Range mineral deposits.**
4. **Support efforts to communicate the benefits that mining brings to Alaska and its communities.**
5. **Bring energy infrastructure to western Alaska to support communities and mining projects in the region.**

Mining provides the necessary building blocks of our society. The mining industry has demonstrated its ability to help diversify Alaska's economy and to provide wide-ranging employment opportunities in both rural and urban areas, all while operating to the highest environmental standards. In an industry controlled by global economic conditions, Alaska mineral development must be competitive while developing a sustainable industry. To this end, there are actions that the Governor and Legislature should take now in order for the mining industry to be able to grow and to continue to contribute to our society in the future for the prosperity of Alaska.

The Alaska Minerals Commission presents this 2011 report with the 5 specific action items identified above, thereby fulfilling the Commission's statutory mandate to make recommendations annually to the Governor and Legislature on ways to mitigate constraints on the development of minerals in Alaska.

CRITICAL SUPPORT FOR PERMITTING AGENCIES

Spending $750,000 on a poorly timed and misguided "study" aimed at Pebble is a waste of State resources. Alaska's interest would be better served by spending the money to augment the State's technical review of the project if and when one is proposed.

Funding a study of Pebble now would be a waste of State resources because there is no specific project to evaluate and the study lacks a specific scope or objective. Such a study could only be a sham, with the appearance of a predetermined outcome, as it would have no choice but to conjecture about potential project configurations and would have no way to evaluate what actually might be proposed by the company, including any mitigative measures that might be included. Such a small sum of money could never hope to improve upon the years of field work and the over one hundred million dollars that have been spent to understand the environment in the region. With no specific project to review and no way to better understand the local environment, such a study is doomed to irrelevancy compared to the multi-year, multi-million dollar environmental review process that surely awaits the actual project.

Spending this sum now would also impair the investment climate for the entire mining industry in Alaska, as unfortunately it would demonstrate that the project review process in Alaska is political rather than science based.

RECOMMENDATION

A better use of limited public funds would be to invest in technical support for the State Large Mine Permitting team. These funds could augment the team with experienced staff and third party technical experts to critically evaluate the project once a definitive proposal that warrants review is received. In fact, the State should critically review its financial support for all regulatory agencies to ensure that a core of competent staff are available to timely review all development projects in Alaska, not just at Pebble.

An alternative use of the funds would be for the legislature to study the entire permitting process to see if there are ways to make the process more efficient while still maintaining Alaska's high environmental standards.

LITIGATION REFORM

Resource development in Alaska must comply with one of the most stringent environmental jurisdictions in North America, yet public litigant and third-party lawsuits are further delaying and stifling development. Beyond the adverse impact on industries and investment in Alaska, the information requests for "discovery purposes" are further paralyzing the agencies by consuming their budgets and diverting limited staff from completing their constitutionally and legislatively assigned tasks. The following administrative and legislative support is required to limit the negative impact from this obstructionist legal maneuvering:

RECOMMENDATION

- Require bonds from organizations initiating legal actions;
- Continue to enjoin suits as an affected party in other states if an adverse decision in that case will become a precedent that may be applied in Alaska;
- Continue to enjoin suits filed in Alaska if an adverse decision in that case will adversely affect the state's ability to financially benefit from its natural resources;
- Support budgets to hire legal expertise needed in natural resource development cases;
- Require plaintiffs to pay legal fees for all portions of the rulings against their position;
- Support budgets that will enable the Attorney General to evaluate previous litigation reform in court rulings to develop a game plan for meaningful reform; and Work with other states to petition U.S. Congress to remove the "Tax Exempt" status from these litigious organizations.

TRANSPORTATION INFRASTRUCTURE

The Commission would like to thank the Governor's office and the legislature for support for the Western Alaska Access Project and for the Ambler Mining District Access studies. We encourage ongoing support to complete these critical projects.

RECOMMENDATION

- Build a road from Fairbanks to Nome that includes access to the Brooks Range mineral deposits in the Ambler Mining District through the Roads to Resources program.
- Investigate transportation corridors in southwest Alaska that would facilitate mineral development and also lower the cost of living and provide more affordable energy.

FINDINGS

- Transportation infrastructure related to mineral development has played a critical role in rural areas of the state, supporting lower cost energy and a lower cost of living. With the current upswing in commodity prices and interest in minerals development, Alaska can capitalize on leveraging private sector development with statewide goals and rural needs in public-private partnerships.
- The increase in activity in the Arctic for shipping, energy, and mineral development is necessitating an increased presence by the U.S. Coast Guard in the Arctic. The need for deep water ports in the Arctic associated with this increased presence provides an opportunity to coordinate roads to potential ports with mineral development projects.
- We also recommend that any transportation plan grow from the regional and project need in concert with statewide planning. Local support will be key for any projects to advance, hence the need for local support. Again a good example is the growing interest in roads in Northwest Alaska from the local levels and the coordination of the Department of Transportation working with industry and the communities for viable projects with local support.

MARKETING AND EDUCATION

The State of Alaska must very actively market itself to the rest of the world and demonstrate that it is open for business in resource development. Legislators and Alaskans in general need to understand the great benefits that mining brings to the State and its communities.

RECOMMENDATION

- Expand budget for marketing presence domestically and in foreign countries
- Encourage elected officials to participate in mine tours provided through the Council of Alaska Producers
- Increase funding for Alaska Resource Education (ARE) to $150,000 annually
- Provide funding for a statewide Minerals Education & Promotion Program
- Provide funding to make the UAF College of Engineering and Mines the premier mining and geology program in the United States
- Support state and federal programs to train and educate workers for the mining industry

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ENERGY

Invest in low-cost energy capacity on the existing grid. On a regional basis, expand energy distribution infrastructure and generation capacity using the least costly, most available resource whether that is coal, wind, solar, hydro, geothermal, or small scale nuclear.

RECOMMENDATION

- Bring energy infrastructure to western and southwestern Alaska to support communities and mining projects in the region.
- Expand low-cost base load energy on the existing electrical grid.

The Alaska Minerals Commission was created by the 14th Legislature and signed into law on June 6, 1986. The enabling legislation instructs the Commission to make recommendations to the Governor and Legislature on ways to mitigate constraints, including governmental constraints, on the development of minerals, including coal, in the state.

This publication was released by the Department of Commerce, Community, and Economic Development. Its purpose is to report the findings and recommendations of the Alaska Minerals Commission to the Governor and to the Legislature of Alaska. It was produced at a cost of $1.13 per copy and printed in Anchorage, Alaska. This publication is required by Chapter 98, Session Laws of Alaska, as amended by Chapter 4, Session Laws of Alaska, 1993.

rules after the trial or hearing of the action has commenced, then any other judge of the court, assigned by the presiding judge of the judicial district where the action is pending or by the chief justice of the supreme court, may perform those duties, as if such other judge had been present and presiding from the commencement of such trial or hearing; provided, however, that from the beginning of the taking of testimony at such trial or hearing a stenographic or electronic recording of the proceedings shall have been made so that the judge so continuing may become familiar with the previous proceedings.

(c) **After Verdict, etc.** If by reason of death, sickness or other disability, a judge before whom an action has been tried is unable to perform the duties to be performed by the court under these rules after a verdict is returned or findings of fact and conclusions of law are filed, then any other judge of the court, assigned by the presiding judge of the judicial district where the action has been tried or by the chief justice of the supreme court, may perform those duties; but if that judge is satisfied that that judge cannot perform those duties because the judge did not preside at the trial or for any other reason, that judge may grant a new trial.

(Adopted by SCO 5 October 9, 1959; amended by SCO 1153 effective July 15, 1994)

Annotations

Cases

The termination of an interim U.S. District Court for the District (Territory) of Alaska and the trial judge's office there under is a "disability." **Pollastrine v. Severance,** Op. No. 108, 375 P2d 528 (Alaska 1962).

A successor judge held not to have authority to file findings of fact. **Pollastrine v. Severance,** Op. No. 108, 375 P2d 528 (Alaska 1962).

Filing of transcript of the trial judge's oral opinion satisfied the requirements of filed findings of fact and conclusions of law under Civ. R. 63(c), and a successor judge had authority to enter a final decree. **Pollastrine v. Severance,** Op. No. 108, 375 P2d 528 (Alaska 1962).

Record did not disclose that trial judge who had disqualified himself, notified his presiding superior court judge of his disability to hear the cause. **Nelson v. Fitzgerald,** Op. No. 293, 403 P2d 677 (Alaska 1965).

Although a judge should do so only for the most compelling reasons, a superior court judge may sua sponte disqualify himself from hearing any matter that may come before him. **Nelson v. Fitzgerald,** Op. No. 293, 403 P2d 677 (Alaska 1965).

Unless the trial judge becomes disabled, he should be the person who makes all fact based rulings concerning the case that he tried. **United Bank Alaska v. Dischner,** Op. No. 2835, 685 P2d 90 (Alaska 1984).

Absent compelling circumstances, a case should normally be assigned on remand to the same judge who conducted the original trial. **United Bank Alaska v. Dischner,** Op. No. 2835, 685 P2d 90 (Alaska 1984).

If a party acquiesces to the authority of a successor judge by failing to make a timely objection to that judge's authority, the party has waived any objection he or she may have to challenge that authority. **Moffitt v. Moffitt,** Op. No. 3261, 749 P2d 343 (Alaska 1988).

The record clearly established that husband in divorce action waived any objection to successor judge's authority to enter new findings of fact and conclusions of law which differed from those initially entered but not finalized by the preceding judge. **Moffitt v. Moffitt,** Op. No. 3261, 749 P2d 343 (Alaska 1988).

Successor judge's vacation of orders and judgment that had been signed by her was not abuse of discretion since she erred in signing them when judge who heard case on merits was still available. **Gallagher v. Gallagher,** Op. No. 4041, 866 P2d 123 (Alaska 1994).

PART X. PROVISIONAL AND FINAL REMEDIES AND SPECIAL PROCEEDINGS

Rule 64. Seizure of Person or Property.

At the commencement of and during the course of an action, all remedies providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner provided by law existing at the time the remedy is sought. The remedies thus available include arrest, attachment, garnishment, replevin, sequestration, and other corresponding or equivalent remedies, however designated and regardless of whether by law the remedy is ancillary to an action or must be obtained by an independent action.

(Adopted by SCO 5 October 9, 1959)

Annotations

Cases

This rule does not create any remedy. **Aleut Corp. v. Arctic Slope Regional Corp.,** 424 FS 397 (USDC Alaska 1976).

Rule 65. Injunctions.

(a) **Preliminary Injunction.**

(1) *Notice.* No preliminary injunction shall be issued without notice to the adverse party.

(2) *Consolidation of Hearing with Trial on Merits.* Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial. This subdivision (a) (2) shall be so construed and applied as to save the parties any rights they may have to trial by jury.

(b) **Temporary Restraining Order—Notice—Hearing—Duration.** A temporary restraining order may be granted without written or oral notice to the adverse party or that party's attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or that party's attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting the claim that notice should not be required. Every temporary restraining order granted without notice shall be endorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes,

the method for obtaining, and the timing of, temporary restraining orders.

Cross References

CROSS REFERENCE: AS 09.40.230

Annotations

Cases

Consent of a party to an extension of a temporary restraining order does not deprive the consenting party of his right to seek review of the issuance of the restraining order in the first instance. **Miller v. Atkinson,** Op. No. 49, 365 P2d 550 (Alaska 1961).

Where the state had already appropriated private property for a public purpose in mistaken reliance on an invalid patent reservation and property owner had brought an action inaccurately framed as "trespass action" for damages whereupon the state counterclaimed on the ground of "inverse condemnation," the issue then remaining before the court was the award of a just compensation, and a permanent injunction prohibiting the state from entering upon or appropriating the property, meaning that the state must first initiate a condemnation before utilizing the property, was unrealistic and unnecessary and was dissolved. **State v. Crosby,** Op. No. 322, 410 P2d 724 (Alaska 1966).

This rule, dealing with injunctions, is inapplicable to proceedings before the district judge court, but where in connection with a garnishee proceeding the district judge restrained an employer from applying wages to other obligations, the district judge did not proceed under Rule 65 but exercised an authority conferred to him by Civil Rule 89 (f)(6). **Anchorage Helicop. Serv., Inc. v. Anchorage W. Hotel,** Op. No. 361, 417 P2d 903 (Alaska 1966).

The requirement of this rule that an order granting an injunction set forth reasons for its issuance applies to every type of preliminary injunction. **Department of Fish & Game v. Pinnell,** Op. No. 586, 461 P2d 429 (Alaska 1969).

A preliminary injunction which is granted without setting forth the reasons for the issuance of the injunction and without findings of fact and conclusions of law which articulate grounds for the issuance of the preliminary injunction as required by this rule is procedurally defective and will be vacated. **Department of Fish & Game v. Pinnell,** Op. No. 586, 461 P2d 429 (Alaska 1969).

Strict compliance with provisions of this rule requiring findings of fact and conclusions of law and setting out reasons for the issuance of a preliminary injunction is required particularly in circumstances where the trial court is enjoining enforcement of an administrative regulation or statute. **Department of Fish & Game v. Pinnell,** Op. No. 586, 461 P2d 429 (Alaska 1969).

The supreme court will vacate rather than remand where a preliminary injunction is procedurally defective and where a hearing has been held in a motion for permanent injunction and where a decision on the merits of the permanent injunction is anticipated in the near future. **Department of Fish & Game v. Pinnell,** Op. No. 586, 461 P2d 429 (Alaska 1969).

In considering whether to grant a stay pending appeal, the lower court must consider criteria much the same as it would in determining whether to grant a preliminary injunction. **Powell v. Anchorage,** Op. No. 1167, 536 P2d 1228 (Alaska 1975).

Where precise information as to time and courtroom for hearing on motion for restraining order was unavailable, notice to opposing counsel that the motion would be made in Fairbanks Superior Court at "approximately 3:00" on November 3rd complied with this rule when the motion was actually filed at 3:17 p.m. on November 3rd. **Knaebel v. Heiner,** Op. No. 2513, 645 P2d 201 (Alaska 1982).

A party who initially obtains a temporary restraining order is not entitled to receive its benefits indefinitely by not proceeding to request a preliminary injunction hearing. **Ostrow v. Higgins,** Op. No. 3085, 722 P2d 936 (Alaska 1986).

Issuance of a temporary restraining order pending determination of a for preliminary injunction did not have the effect of a preli injunction, thus the temporary restraining order expired within 10 da issuance. **Ostrow v. Higgins,** Op. No. 3085, 722 P2d 936 (Alaska 19

Any extension of a temporary restraining order must be approved court. **Ostrow v. Higgins,** Op. No. 3085, 722 P2d 936 (Alaska 1986).

A temporary restraining order automatically expires within 10 under this rule and the party against whom it is served is und obligation to take any further legal action to verify its expiration. **Ostr Higgins,** Op. No. 3085, 722 P2d 936 (Alaska 1986).

Where a court intends to supplant a temporary restraining order a preliminary injunction of unlimited duration pending a final de on the merits or further order of the court, it should issue an order saying so; and where it has not done so, a party against whom a temp restraining order has issued may reasonably assume that the order has ex within the time limits imposed by this rule. **Ostrow v. Higgins,** Op. 3085, 722 P2d 936 (Alaska 1986).

Where deed of trust issued to secure promissory note for purcha property required the purchaser to maintain fire insurance on the prop the sellers were the sole beneficiaries of all insurance proceeds payable the deed of trust and automatically deserved those proceeds, thus conti acceptance of the insurance payments, by the sellers after issuance temporary restraining order against foreclosure did not constitute an im agreement on the part of the sellers to an extension of the tempo restraining order. **Ostrow v. Higgins,** Op. No. 3085, 722 P2d 936 (Al 1986).

As a general rule, when the court's findings of fact and conclusions of are sufficient to warrant injunctive relief under CR 52(a), they, almos necessity, also state reasons for the injunction's issuance that are sufficien satisfy this rule. **Dunlap v. Bavarian Village Condominium Ass'n,** No. 3511, 780 P2d 1012 (Alaska 1989).

Civil Rule 65, rather than Civil Rule 4, determines when pe becomes bound by domestic violence protective order. **MacDonald v. St** Op. No. 1665, 997 P2d 1187 (Alaska 2000).

Defendant, who had actual knowledge of domestic violence protec order, was bound by order even though he was not formally served w written copy of order. **MacDonald v. State,** Op. No. 1665, 997 P2d 1 (Alaska 2000).

Conviction of defendant for violation of ex parte domestic viole protective order did not violate his constitutional right to due proc where defendant had not been served with written copy of order but have actual knowledge that order had been issued against him. **MacDon v. State,** Op. No. 1665, 997 P2d 1187 (Alaska 2000).

The decision to consolidate a preliminary injunction hearing with a on the merits per Subsection (a)(2) of this rule is reviewed for abus discretion. **Haggblom v. City of Dillingham,** Op. No. 12358, 191 P 991 (Alaska 2008).

Courts will uphold consolidation of proceedings under Subsection (a) of this rule when the preliminary injunction hearing was sufficie thorough to remove any risk of prejudice, and sufficiency of proceedings is determined on a case by case basis. **Haggblom v. Cit Dillingham,** Op. No. 12358, 191 P.3d 991 (Alaska 2008).

Superior court did not err in consolidating a hearing on prelimi injunctive relief with trial on the merits under Subsection (a)(2) of this where superior court heard arguments from both parties, ruled on all of issues before it, and litigant filed to show that she suffered preju because she was denied a chance to present evidence that would allow to prevail at trial. **Haggblom v. City of Dillingham,** Op. No. 12358, P.3d 991 (Alaska 2008).

LEGAL SERVICES

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MEMORANDUM March 21, 2011

SUBJECT: Constitutionality of HB 168 relating to security for injunction (Work Order No. 27-LS0395\B)

TO: Representative Max Gruenberg
Attn: Gretchen Staft

FROM: Dennis C. Bailey DCB
Legislative Counsel

You have asked me to review constitutional considerations with respect to HB 168 in light of two decisions, Patrick v. Lynden Transport., 765 P.2d 1375 (Alaska 1988) and Ware v. City of Anchorage, 439 P.2d 793 (Alaska 1968).

HB 168 amends AS 09.40.230 by adding a new subsection that requires a party seeking a restraining order, preliminary injunction, or order vacating or staying the operation of a permit that affects an industrial operation to give security in an amount determined by a court for costs and damages that may be incurred by an industrial operation that has been wrongfully enjoined or restrained. It also requires that the amount determined by the court "must include an amount for the payment of wages and benefits for the employees of an industrial operation and the contractors and subcontractors of the operation."

The new subsection added by HB 168 parallels the requirements of Alaska Civil Rule 65(c), which requires a court to require a person seeking an injunction to provide security to protect a person who may be wrongfully restrained or enjoined. Civil Rule 65(c) reads:

> (c) **Security.** No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the state or a municipality or of an officer or agency thereof, or unless otherwise ordered by the court, in domestic relations actions or proceedings. A surety upon a bond or undertaking under this rule submits to the jurisdiction of the court and irrevocably appoints the clerk of the court as the surety's agent upon whom any papers affecting the surety's liability on the bond or undertaking may be served. The surety's liability may be enforced on motion without the necessity of an independent action. The

> motion and such notice of the motion as the court prescribes may be served on the clerk of the court who shall forthwith mail copies to the persons giving the security if their addresses are known.

Civil Rule 65(c) exists to protect the interests of a party who is the subject of a temporary restraining order or a preliminary injunction. The analysis used by a court issuing a preliminary injunction is set out as follows:

> The showing required to obtain a preliminary injunction depends on the nature of the threatened injury. If the plaintiff faces the danger of "irreparable harm" and if the opposing party is adequately protected, then we apply a "balance of hardships" approach in which the plaintiff "must raise 'serious' and substantial questions going to the merits of the case; that is, the issues raised cannot be 'frivolous or obviously without merit.'" [State v. Kluti Kaah Native Vill. of Copper Ctr., 831 P.2d 1270, 1273 (Alaska 1992) (citations omitted).] If, however, the plaintiff's threatened harm is less than irreparable or if the opposing party cannot be adequately protected, then we demand of the plaintiff the heightened standard of a "clear showing of probable success on the merits." [Id. at 1272 (quoting A.J. Indus., Inc. v. Alaska Pub. Serv. Comm'n, 470 P.2d 537, 540 (Alaska 1970)), modified in other respects, 483 P.2d 198 (Alaska 1971).]

HB 168 differs from Civil Rule 65(c) because under HB 168, (1) the security requirement applies not only to a temporary restraining order or a preliminary injunction, but also includes "an order vacating or staying the operation of a permit that affects an industrial operation"; and (2) requires that the amount of the security determined by the court must include "an amount for the payment of wages and benefits for employees and payment to contractors and subcontractors of the industrial operation."

Arguably, the change proposed by HB 168 applying the security requirement to a stay of the operation of a permit, could be in the form of an injunction, although the issue is less clear with an order vacating the operation of a permit, which seems more likely to be the result of litigation rather than the subject of a preliminary injunction. On the other hand, application for injunctive relief and the associated security under Civil Rule 65(c) may be interpreted not to apply to an "order" that is not in the form of an injunction.

With respect to the requirement that the court include an amount for wages and contract payments, the bill does not specify an amount that is required, and does not affect the discretion of the judge to determine the amount. The bill does not explicitly say that the amount of security is the amount of the payments for wages and contract payments. However, an argument could be made that HB 168 was intended to impose a requirement that the full amount of the wages and contracts must be included in the amount of the security.

Whether HB 168 actually changes the application of Civil Rule 65(c) may determine whether a two-thirds vote is required. An argument can be made that the court has the same authority both before and after enactment of HB 168. Under this argument, the court could apply the new provisions under HB 168 and require security for a preliminary injunction relating to the vacation or stay of a permit using existing law, and, also under existing law, the court could consider and include an amount for wages, benefits and contract payments. Under this interpretation, the bill does not enact a change to a court rule. If, however, HB 168 is interpreted to require wages, benefits, and contract payments to be covered by security, then HB 168 may be interpreted to change a court rule.

In Ware v. City of Anchorage, 439 P.2d 793 (Alaska 1968), the court addressed the issue of whether the statute that required a nonresident to post security for litigation costs and attorney fees was invalid based on the argument that the legislature may not make a court rule relating to practice and procedure, it may only change a court rule under art. IV, sec. 15 of the Alaska Constitution. Article IV, sec. 15 provides:

> **Section 15. Rule-Making Power.** The supreme court shall make and promulgate rules governing the 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.

Rule 39(e) of the Uniform Rules requires:

> (e) If a bill or portion of a bill contains matter changing a supreme court rule governing practice and procedure in civil or criminal cases, the bill must contain a section expressly citing the rule and noting what change is being proposed. The section containing the change in a court rule must be approved by an affirmative vote of two-thirds of the full membership of each house. If the section effecting a change in the court rule fails to receive the required two-thirds vote, the section is void and without effect and is deleted from the bill. The fact that a bill contains a section which changes a court rule shall also be noted in the title of the bill.

In order to decide whether a court rule change requires a two-thirds vote, a determination must be made whether the change to the court rules is

(1) a substantive change to court rules, e.g., limitations of actions, burden of proof, presumption, creation of courts, and matters of jurisdiction, which may be changed without special voting requirements;

(2) a matter of practice or procedure of the courts, e.g., forms of action, how an action is commenced, the manner of notice, pleading and motion practice, joinder, pre-trial practice, discovery, the conduct of trial, stay of proceedings, enforcement

procedures, post-trial procedures, appeal, venue evidence and special proceedings such as adoption and probate; or

(3) a rule of administration which is protected from legislative modification based on principles of separation of power.[1]

Whether the measure creates a substantive court rule change requiring no special voting requirements or a change to a matter of practice and procedures, which would require a two-thirds vote, is a close question. The problems created by this distinction are readily acknowledged by the court.

> We then turned to the definitions of the terms "procedural" and "substantive." . . . But while this distinction claims venerable origins, it has been recognized that the definition falls far short of drawing an unequivocal line. Decisions on the method of enforcing a right often affect substantive rights, and the regulation of substantive rights may have an impact upon judicial procedure.

State v. Native Village of Nunapitchuk, 156 P.3d 389, 397 (Alaska 2007) (citations omitted).

An argument could be made that the proposed change offered by HB 168, even if it limits the court's discretion in determining the amount of security required, would be considered a matter of procedure. The Alaska Supreme Court found that AS 09.60.060, which allowed the Court to require security for costs and attorneys fees, to be a substantive matter. Ware v. Anchorage, 439 P.2d 793, 794 (Alaska 1968). The Court said, "The authorities generally agree that substantive law creates, defines and regulates rights, while procedural law prescribes the method of enforcing the rights." The Court acknowledged differing decisions on similar facts in both state and federal courts, but concluded that AS 09.60.060 enacted a substantive change to the court rules. The Court reasoned that the act created a new right in the resident defendant and a new liability in the nonresident plaintiff which are separate and apart from, and go beyond, the procedure of computing and assessing costs and attorney's fees. Ware, at 795.

In the more recent case, Nunapitchuk, supra, the court concluded that changes to Civil Rule 82, which relates to attorneys fees, is a rule of practice and procedure that would require a two-thirds vote, but the change to the public interest litigant exception to the attorney fees rules was a rule of substantive law which could be changed by the legislature without a two-thirds vote. Further, the court concluded that when deciding whether the changes to the public interest litigant attorney fees provisions impede access

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[1] See, Manual of Legislative Drafting, p. 48 - 51 for a general discussion of these categories.

to the courts, the court would not strike the statute down entirely but would determine whether application of the statute would impede access to the courts on a case-by-case basis.

A court considering whether a court rule change and a two-thirds vote is required for HB 168 could take a position similar to Ware and conclude that the changes relating to posting security creates a new liability and is, therefore, a substantive change. Or, a court could conclude that the changes are a procedural change which would require a two-thirds vote. How the issue would be decided cannot be predicted with any certainty.

The current bill draft takes the approach that the change is a substantive change. Taking this approach presumes that a two-thirds vote is not required but runs the risk that a court could conclude that the measure makes a procedural change so a court rule change had actually occurred, and because a two-thirds vote was required, but not obtained, the change is invalid. With respect to the voting requirement, the safest procedure would be to treat the measure as requiring a rule change and obtain the two-thirds vote required to approve a rule change.

You also asked about the constitutionality of HB 168 in light of the holding in Patrick v. Lynden Transport., 765 P.2d 1375 (Alaska 1988). That case involved a statute that required payment of security for court costs and attorney fees when the plaintiff is a nonresident as a condition for maintaining the lawsuit in Alaska. The court found that access to the courts is a fundamental right, analyzed the case on equal protection grounds under the Alaska Constitution, and relied heavily on the residency versus non-residency issues presented by the case to reach the conclusion that the statute was unconstitutional.

HB 168 differs from the issue present in Patrick v. Lynden. In Patrick v. Lynden the plaintiff could not maintain the action without filing security for costs and fees. In contrast, HB 168 does not explicitly deny access to the courts, although, arguably it may have the same effect by denying access to restraining order or preliminary injunction. Another important difference is that HB 168 does not involve residency issues comparable to those in Patrick v. Lynden Transport and that were used by the court as the basis for the court's decision.

In short, the precedent established in Patrick v. Lynden does not determine whether HB 168 is constitutional, although it does establish that access to the courts is a fundamental right. Whether the requirements of HB 168 infringe on that right is an open question.

If I may be of further assistance, please advise.

DCB:med
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