IN THE SUPREME COURT FOR THE STATE OF ALASKA

ROSYLYN WETHERHORN, Appellant, v. ALASKA PSYCHIATRIC INSTITUTE, Appellee.	)	Supreme Court No. S-11939

Case Number 3AN-05-459 PR

RESPONSE TO APPLICATION FOR FULL REASONABLE FEES

Appellee Alaska Psychiatric Institute (API) opposes Ms. Wetherhorn's application for full reasonable fees. The $1,000 awarded to Wetherhorn for fees is a proper award given the narrow issue upon which she prevailed. Even if Wetherhorn were considered to be a public interest litigant, she did not prevail on her main constitutional claims and thus is not entitled to any special fee award under AS 09.60.010. If she were entitled to any fees as a public interest litigant, no multiplier should apply and her hourly rate should be reduced to the more reasonable rate of $150 per hour that is routinely awarded to attorneys in full time public service.

I. $1,000 Fee Award is Customary for this Court and Appropriate to the Extent That Any Fees are Granted.

Appellate Rule 508(e) provides that "Attorney's fees may be allowed in an amount determined by the court." The award of attorney's fees on appeal is not required. As this Court has recently explained, it has broad discretion whether to award fees on

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OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

appeal:

> "[A]ttorney's fees need not be awarded as a matter of course under [Appellate Rule 29(d), now Appellate Rule 508(e)]. This differs from Civil Rule 82, which requires that some portion of attorney's fees be awarded to the prevailing party...."[1]

This Court has described its practice in applying Rule 508, noting that "Our [fee] awards ... typically do not exceed $1,000."[2] The Court adhered to its standard practice in this case.

An order that each party was to bear its own fees would have been well within the Court's discretion in this case given the Court's decision on the two major issues, with the Court: (1) upholding the constitutionality of AS 47.30.915(7)(B); and (2) declining to entertain Wetherhorn's ineffective assistance of counsel claim.[3] The first issue merits additional discussion as Ms. Wetherhorn claims to have prevailed on it. But in fact, while the Court disagreed with both parties' positions on appeal,[4] it held that the statute could be construed so as to be constitutional, which suggests that either API was

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1 *Agen v. State, Dept. of Revenue, Child Support Enforcement Div.*, 945 P.2d 1215, 1221 (Alaska 1997) (quoting *Royal Krest Construction, Inc. v. Municipality of Anchorage*, 640 P.2d 133, 134 (Alaska 1981)) (brackets in original).

2 *Stalnaker v. Williams*, 960 P.2d 590, 598 (Alaska 1998).

3 This Court has repeatedly affirmed the trial court's authority to refuse to award attorney's fees to either party where neither party can be characterized as the prevailing party. *See Fernandes v. Portwine*, 56 P. 3d 1, 8 (Alaska 2002); *Shepherd v. State, Dept. of Fish and Game*, 897 P.2d 33, 44 (Alaska 1995); *Oaksmith v. Brusich*, 774 P.2d 191, 202 (Alaska 1989); *Tobeluk v. Lind*, 589 P.2d 873, 877 (Alaska 1979); City *of Valdez v. Valdez Dev. Co.*, 523 P2d 177, 184 (Alaska 1974).

4 *Wetherhorn v. API*, S-11939, Slip Op. 6091 at 11.

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the prevailing party or that neither party prevailed.

The Court identified the "essential" dispute between the parties as "whether API must wait until the danger caused by the person's mental illness rises to the level indicated by AS 47.30.915(7)(A) before a person may be involuntarily committed."[5] Subsection (A) requires that a person be "in danger of physical harm arising from such complete neglect of basic needs for food, clothing, shelter, or personal safety as to render serious accident, illness, or death highly probable if care by another is not taken." The Court concluded that the danger need not reach that threshold.[6] Instead, commitment is permissible under the subsection (B), so long as the person subject to commitment is not able to live safely outside of the controlled environment.[7] The Court's determination that the statute may thus be constitutionally construed is closer to API's position, which the Court characterized to be that "a person need only pose 'some danger' to self or others" in order to justify commitment, than to Wetherhorn's position.[8]

Although the Court disagreed with both parties' arguments,[9] its decision that:

> the plain language of the statute requiring a "substantial deterioration of the person's previous ability to function

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5 *Id.* at 10.

6 *Id.* at 10-11.

7 *Id.* at 13-14.

8 *Id.* at 11 (emphasis in original).

9 *Id.* at 11.

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> independently" appears to respond to *O'Connor's* direction that the State "cannot constitutionally confine without more a nondangerous individual who is capable of surviving safely in freedom," [10]

is not far different than API's position on appeal:

> Where the prong B statutory conditions are met, state action is in response to "some danger" — not simply the presence of a mental illness — and is consistent with the *O'Connor* and *Addington* Courts' admonitions. The legislature has carefully crafted its standard to require a serious showing of harm or danger to the individual (severe and abnormal distress coupled with significant impairment and substantial deterioration) while permitting intervention at a point where it is possible to reduce or avoid the risk of greater tragedy or agony associated with the unfettered progression of the illness.[11]

The *O'Connor* formulation (adopted by the Court in this case) of whether a person is capable of surviving safely in freedom is readily harmonized with the subsection (B) standard the legislature adopted as part of its effort to refine the scope of Alaska's commitment statute. The Court's clarification of that standard does not mark a sea change in values.

Wetherhorn prevailed only on the statutory requirement that a visitor's report must precede a nonemergency involuntary medication order. The Court agreed that the trial court plainly erred in not complying with that statutory requirement and vacated

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[10] *Id.* at 12 (footnotes omitted).

[11] API's appellee's brief, at 16 (footnotes omitted). *See also* API's appellee's brief, at 11-12.

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the medication order as a result.[12] The Court either did not consider or did not find merit in the numerous other issues Ms. Wetherhorn raised.[13]

An award of attorney's fees in the context of Wetherhorn's partial victory is not compelled, but if an award is made, the Court's standard award of $1,000 represents an appropriate amount.

II. AS 09.60.010 Bars Wetherhorn's Request for Full Fees

A. Wetherhorn is not entitled to the fees requested because under AS 09.60.010, she can only claim full fees for constitutional issues upon which she prevailed.

As noted above, Wetherhorn prevailed on the single issue that the trial court's failure to adhere to the statutory requirement for a court visitor's report was plain error. On the main constitutional issues raised, she did not prevail. The Court did not consider her ineffective assistance of counsel claim to have been properly raised, and it declined to find the statute allowing involuntary commitment of "gravely disabled" individuals, as that term is defined in AS 47.30.915(7)(B), unconstitutional. While both API and Wetherhorn claim to have prevailed on this issue, the Court disagreed with both parties' arguments.[14] Under those circumstances, for purposes of awarding attorney's fees

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[12] *Wetherhorn*, Slip Op. 6091 at 22. API did not dispute that it was error to fail to abide by the statute, but did question whether that constituted plain error. API's appellee brief, at 19-20.

[13] *Wetherhorn*, Slip Op. 6091, at 14-19, 23-27.

[14] *Id.* at 11.

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the Court should not consider that either party prevailed on that constitutional issue.[15]

Under AS 09.60.010(c) and (d)(1), as amended, the full reasonable fees awarded to a party are limited to fees for services expended in relation to a constitutional claim upon which that party ultimately prevails:

> the court shall include in the award only that portion of the services of claimant's attorney fees and associated costs that were devoted to claims concerning rights under the United States Constitution or the Constitution of the State of Alaska upon which the claimant ultimately prevailed[.][16]

Wetherhorn's request for full reasonable fees does not conform to AS 09.60.010.[17] She claims her full fees without regard to whether she prevailed on the particular issue and without regard to whether any issue she prevailed on vindicated a statutory or constitutional right.[18]

Ms. Wetherhorn contends that she need not abide by the dictates of AS 09.60.010 because she asserts the statute as amended is unconstitutional. Specifically,

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[15] That both parties claim the Court's construction of subsection (B) supports their position suggests we do not have a win-lose situation.

[16] AS 09.60.010(d)(1).

[17] The quoted section of the attorney's fees statute applies to appeals filed after September 11, 2003, such as this one. *See* Section 4, ch. 86, SLA 2003. The matter of *Myers v. Alaska Psychiatric Institute*, 138 P.3d 238 (Alaska 2006), where full fees were awarded, was decided under the public interest litigant standards in existence before AS 09.60.010 was amended.

[18] API does not contend that the number of hours Mr. Gottstein spent on the case as a whole was excessive. As discussed below, API does object to Wetherhorn's request that a multiplier be applied to her counsel's hourly rate as well as the hourly rate itself. *See infra* subsections II. C and D.

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she contends that section 15 of article IV of the Alaska Constitution is violated because the statute was passed by only a simple majority of votes. Application, at 7. Section 15 of the Alaska Constitution gives the Supreme Court authority to promulgate rules governing practice and procedure in the all cases, and provides that such rules may only be changed by a two-thirds vote of the legislature.[19] As discussed below, section 15 is no bar to the effectiveness of AS 09.60.010.

B. Article IV, Section 15 Does Not Prevent the Changes the Legislature Made to AS 09.60.010 from Taking Effect Because Those Changes are Substantive, not Procedural, in Nature.

Ms. Wetherhorn provides no support for her averment that the changes the legislature made to AS 09.60.010 are in fact subject to section 15's restrictions. Section 15 is implicated only when the legislature acts to change the Supreme Court's rules governing administration, practice and procedure. The Supreme Court's public interest litigant exception, which the legislature altered in amending AS 09.60.010, is not a rule governing administration, practice or procedure, but rather a substantive policy which

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[19] Section 15 of article IV provides:

> **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.

the Supreme Court developed by decision.[20] The legislature is not constrained by section 15 in its adoption of substantive rules defining the special rights to be afforded public interest litigants and what claims may qualify for special treatment.[21]

The Supreme Court has long held that article IV, section 15 does not address legislative changes in substantive law, but only procedural changes that address "the method of enforcing" substantive rights in the courts.[22] A statute does not violate article IV, section 15 when "the main subject of the statute is . . . *substantive* with only an incidental effect on procedure."[23]

"The manner in which the exercise of judicial power may be invoked . . . is a matter directly involved with court . . . procedure, the regulation of which has been

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[20] The Supreme Court first announced a public interest litigant policy in *Gilbert v. State,* where it said as "a matter of sound public policy, we hold that it is an abuse of discretion to award attorney's fees against a losing party who has in good faith raised a question of genuine public interest before the courts." 526 P.2d 1131, 1136 (Alaska 1974) Three years later, in *Anchorage v. McCabe,* the Supreme Court explained that the "*Gilbert* public interest exception to Rule 82 is designed to encourage plaintiffs to bring issues of public interest to the courts." 568 P.2d 986, 990 (Alaska 1977). The Supreme Court reiterated this approach in *Thomas v. Croft*, 614 P.2d 795, 798 (Alaska 1980), and again in *Southeast Alaska Conservation Council, Inc. v. State,* 665 P.2d 544, 553 (Alaska 1983), where the Court repeated that the policy "seeks to encourage the vindication of the public interest." In *Thomas v. Bailey*, the Court applied those same considerations to awards of attorney's fees in cases on appeal. 611 P.2d 536, 539 (Alaska 1980)

[21] This issue is squarely presented, fully briefed, and ripe for decision in *State of Alaska v. Native Village of Nunapitchuk, et al*, Supreme Court No. S-11525. The Court may wish to defer resolution of this motion until the issue is resolved by decision in *Nunapitchuk.*

[22] *Ware v. City of Anchorage*, 439 P.2d 793, 794 (Alaska 1968).

[23] *Nolan v. Sea Airmotive, Inc.*, 627 P.2d 1035, 1040 (Alaska 1981) (emphasis added, citations omitted).

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committed to [the Supreme Court] under the constitution."[24] However, the definition of a right — such as the right to an award of full fees to litigants bringing certain kinds of cases — is a matter of substantive law. In *Channel Flying, Inc. v. Bernhardt*,[25] this Court held that article IV, section 15 is not implicated where a statute "creates and defines a right."[26]

While the Supreme Court has acknowledged that the line between substantive and procedural matters (for purposes of section 15) may not always be bright, it has offered useful guidance. In *Nolan*, the Supreme Court imported the concept that primary jurisdiction for decisions should rest with the body most competent to decide them, and concluded that an important part of the inquiry should be an examination of whether the rule or statute under scrutiny is more closely related to the concerns that led to the establishment of judicial rulemaking power, or to matters of public policy properly within the sphere of elected representatives.[27]

The treatment of public interest litigants is a matter of public policy.[28] AS 09.60.010 expresses the legislature's policy choice as to when a litigant may be protected from an award of fees to the prevailing party or may enjoy the extraordinary

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[24] *Silverton v. Marler*, 389 P.2d 3, 5-6 (Alaska 1964) (emphasis added), citing art. IV,§15.

[25] 451 P.2d 570 (Alaska 1969).

[26] *Id.* at 576.

[27] *Nolan*, 627 P.2d at 1040-42.

[28] *See* authorities cited *supra* n.20 .

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benefit of an award of full fees upon success pursuing certain kinds of issues. In departing from the Supreme Court's announced policy in some respects, the legislature has defined substantive rights in its own manner.[29] To paraphrase this Court's decision in *Ware*, "the act creates a new right . . . separate and apart from, and . . . beyond, the procedure"[30] for obtaining an award of fees and is thus a change in substantive law not subject to article IV, section 15.[31] The incidental effect on court rules that this new right may occasion is of no constitutional moment under section 15. Section 15 does not shelter Ms. Wetherhorn from the changes the legislature made to AS 09.60.010.

C. Even if Wetherhorn were entitled to some measure of public interest litigant fees, no multiplier should apply.

As discussed above, because Wetherhorn did not prevail on any constitutional claim she is not entitled to an award of public interest litigant fees. Should the Court disagree and instead find that Ms. Wetherhorn is entitled to some measure of fees as a public interest litigant, Wetherhorn's request for a multiplier of her hourly rate

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[29] In amending AS 09.60.010, the legislature chose to endorse its own policy choices. One significant change the legislature made is aimed at the Supreme Court's 1998 decision that the award of fees to successful public interest litigants is normally not subject to apportionment based on the degree of success. *Compare* AS 09.60.010(d)(1) and *Dansereau v. Ulmer*, 955 P.2d 916, 920 (Alaska 1998). Under the present AS 09.60.010, a court may only award full fees for the services "devoted to claims concerning rights under the United States Constitution or the Constitution of the State of Alaska upon which the claimant ultimately prevailed." AS 09.60.010(d)(1). This provision dramatically affects the fees potentially awardable to Ms. Wetherhorn.

[30] *Ware*, 439 P.2d at 795.

[31] *Ware* held that "substantive law creates, defines and regulates rights, while procedural law prescribes the method of enforcing the rights." *Ware*, 439 P.2d at 794.

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should be denied.[32]

In *Thomas v. Bailey*, the Supreme Court left open the possibility that a fee enhancement could apply to an award of fees to a public interest litigant on appeal.[33] After the amendment of AS 09.60.010, it is highly doubtful that possibility survives. While not passing on the validity of the amended act, in *Simpson v. Murkowski*, this Court noted that AS 09.60.010 as amended

> *expressly abrogat[ed]* the special status given to public interest litigants with respect to the awards of attorney's fees and costs *under this court's precedents* and limit[ed] the circumstances in which public interest litigants would be considered exempt from paying attorney's fees.[34]

Under AS 09.60.010, as amended, the award of fees is strictly limited. The language of AS 09.60.010(d)(1) does not admit an award of fees beyond what was incurred while

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[32] The reasonableness of her proposed hourly rate is itself discussed in the next subsection, II.D. Also, because AS 09.60.010 limits any award to fees devoted to the successful pursuit of a constitutional claim, Ms. Wetherhorn, if she is found to have prevailed on such a claim, would need to submit an amended application limited to the fees incurred on such claim.

[33] 611 P.2d at 540-41, 542.

[34] 129 P.3d 435, 448 (Alaska 2006) (emphasis added). The abrogation is found in AS 09.60.010(b), which provides:

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

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pursuing the successful claim:

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

(Emphasis added). This language is clearly limiting. It limits the award to a select portion of the claimant's fees, not multiples of them.

But even assuming for the sake of argument that AS 09.60.010 did not close the door the Supreme Court opened in *Thomas*, Wetherhorn fails to make a good case for the application of a multiplier to her hourly rate.[35] Her claim is based on the contingency factor described in *Thomas* as well as her general assertion that the Law Project merits added encouragement due to perceived failures on the part of the Public Defender. Neither justifies the application of a multiplier.

To put the issue in context, the only constitutional issue upon which Ms. Wetherhorn claims to have prevailed is her challenge to subsection (B) of the gravely disabled standard. Application, at 3-4. The result Wetherhorn achieved is far less dramatic than she describes. *See* Application, at 10. The decision simply clarifies that AS 47.30.915(7)(B) must be read consistently with existing, controlling precedent from

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[35] *Thomas* also addresses the factors to consider in determining a reasonable rate once the determination has been made to award reasonable fees. 611 P.2d at 541-42. For the sake of argument, it is assumed that Wetherhorn is entitled to some fees as a public interest litigant. The reasonableness of the hourly rate sought is addressed in the next subsection. The focus of contention in this discussion is the propriety of the requested multiplier.

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the United States Supreme Court. This does not substantially restrict API's ability to involuntarily commit someone, as API does not, and never did, dispute that *O'Connor's* admonitions regarding commitment inform the standard.[36] As noted above, the Court rejected Ms. Wetherhorn's far more radical suggestion that only danger reaching the level described in AS 47.30.917(7)(A) could constitutionally support commitment.

The result obtained informs any assessment of whether *Thomas'* contingency factor would justify use of a multiplier to enhance a full fee award.[37] The contingency factor takes into account the odds of success and the likelihood of obtaining compensation based on that success.[38] The *Thomas* Court posited that "a multiplier of two would seem clearly reasonable in a case whose odds might be computed as even."[39] As noted above, the position that prevailed on subsection (B) was that its interpretation must conform to controlling United States Supreme Court precedent. That the Court would make such a finding should not be considered to draw long odds.[40]

Wetherhorn's other justification for a multiplier is based on her sweeping pronouncements indicting commitment proceedings and the Public Defender's allegedly deficient efforts on behalf of its clients. Application, at 11-13. She argues that the Law

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36 *See* text and discussion accompanying n.11.

37 611 P.2d at 542.

38 *Id.*

39 *Id.*

40 Similarly, the Court's conclusion that the statutory scheme requiring a visitor's report must be followed is also not a surprising or controversial outcome. Of course, that statutory claim is outside the scope of AS 09.60.010(c).

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Project is filling a vacuum left by the Pubic Defender and thus merits additional rewards. *Id.* at 11. But as Wetherhorn herself acknowledges, "this Court was unpersuaded that the facts as already adduced demonstrated a systemic and pervasive failure of AS 47.30 respondents to receive adequate representation." *Id.* at 13. All that remains is speculation, which provides no basis to reward Ms. Wetherhorn with a multiplier.

Moreover, *Thomas* itself suggests that a multiplier is not appropriate in this case and that a fee award based on a reasonable hourly rate suffices to serve the public interest and encourage representation. In refusing to employ a multiplier in favor of the Trustees for Alaska, the Court explained that multipliers were used in private anti-trust actions, but that "the considerations applicable when vindicating a plaintiff's commercial rights against a wrongdoing defendant are different from those involved when a plaintiff brings a suit primarily in the public interest."[41] Just as the lieutenant governor was not considered to have committed any wrongdoing in his interpretation of the constitutional question successfully challenged by Trustees, API here has committed no wrongdoing based on its implementation of a properly enacted statute.[42]

In finding no multiplier appropriate, the Court in *Thomas* analogized to *Wyatt v. Stickney*, 344 .Supp. 387 (M.D. Ala 1972), a class action brought to establish the right to treatment of patients involuntarily confined in Alabama institutions, where as in

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41 611 P.2d at 540.

42 *See id.*

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Thomas, "[n]o monetary award was at stake but the public good was vindicated."[43] In typical public interest cases like *Thomas* or *Wyatt*, the Court confirmed that "generally, full compensation at a reasonable rate per hour will prove adequate to encourage appropriate public interest litigation."[44] Limiting fees to a reasonable rate is also consistent with the Court's admonition that counsel satisfying their ethical responsibility to represent clients unable to afford counsel and also to bring suits in the public interest "should be remunerated, [but] their fees should not be exorbitant."[45] Application of the multiplier requested would make the fee exorbitant and should be rejected.

Having established that no multiplier is appropriate, we turn now to the question of the reasonableness of the hourly rate charged by Mr. Gottstein to the Law Project.

D. If Wetherhorn were entitled to some measure of public interest litigant fees, any award should be at a lower hourly rate than proposed.

The hourly rate proposed by the Law Project is $225 per hour. As Wetherhorn notes, the Court approved a fee award at that rate in the *Myers v. API*

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43 *Id.* at 541.

44 *Id.*

45 *Id.* In addition, AS 09.60.010(e) expresses the legislature's policy preference that the award of public interest fees not be wielded in a burdensome manner against public entities. Wetherhorn's request for the application of a multiplier is part of her stated effort to have the state subsidize the Law Project's future strategic litigation initiatives. Fulfilling this request would amount to a judicial invasion of the legislature's domain, place a substantial burden on the state fisc, and exceed the rationale for awarding public interest litigants reasonable attorney's fees.

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litigation. Application, at 9. In that action, API stated that it considered the rate high, but it did not specifically oppose the proposed $225 rate. Ex. 1 at 5-6. In this action, API does. API asserts that should fees be awarded to Wetherhorn as a public interest litigant, the reasonable rate used ought be reduced to one on a par with that routinely claimed and awarded to the state's experienced attorneys, namely $150 per hour.

API's objection to the proposed hourly fee Mr. Gottstein charges the Law Project is not intended as any sort of slight to his professionalism or credentials. Instead, the focus of API's objection is on how to interpret the "fee customarily charged in the locality for similar services"[46] in the context of public interest litigant cases. API proposes that the most apt comparison is to the fee rate routinely awarded to the state's experienced assistant attorneys general.

The fee rate routinely requested and applied to experienced state attorneys reflects a thoughtful assessment of the market and a consideration of the unique features of public practice. *See* Ex. 2 at 23-25; Ex. 3 at 7. The $150 rate generally applied is conservative, but a conservative rate is appropriate when awarding fees for counsel who in fact cost their clients very little or nothing, and whose internal costs are also low.[47] Neither the Law Project nor the state really bills their clients.[48]

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[46] *Thomas*, 611 P.2d at 542 (quoting Alaska Code of Professional Responsibility's factors guiding the reasonableness of a fee.)

[47] The state has assumed that its internal costs per billable hour, including overhead, is $95. *See* Ex. 2 at 7.

[48] API is assuming that the Law Project is representing Ms. Wetherhorn pro bono and that she has not in fact been billed for Mr. Gottstein's services.

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Generally speaking, private for profit clients are charged a higher rate than non-profit or public sector entities. *See, e.g.*, Ex. 2 at 8. That public service discount should be reflected in the context of determining a reasonable hourly rate for public interest litigants. The rate that could be charged a private client should not be the measure of a reasonable rate. As noted above, this Court has acknowledged that while counsel should be encouraged to fulfill their ethical responsibilities to clients otherwise unable to pay for representation, they should be remunerated at a reasonable, not exorbitant rate.[49]

At the trial court level, at least one superior court judge has concluded that $150 is the appropriate hourly rate for four attorneys representing public interest litigant clients. *See* Order, Ex. 3 at 6-7.[50] That court found it proper to use the same rate for attorneys acting as private attorneys general as is used for the state's attorneys:

> The state generally seeks ... $150.00 per hour[.] This amount has been selected based on research concerning typical billing patterns and practices across the state. Here, plaintiffs were essentially acting as private attorneys general, seeking to further an important public interest. While there is room for argument that a higher hourly rate might be appropriate, the award of actual, reasonable attorney's fees in the public interest is not intended to be punitive. Rather, such awards are intended to remove the financial burden of attorney's fees and costs from public interest litigants.

Order, Ex. 3 at 7.

API considers this approach to be logically sound and invites this Court to

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[49] *See Thomas*, 611 P.2d at 541, quoted *supra* p. 15, text accompanying n.45.

[50] This trial court decision is clearly not precedential and is not offered as such. It is presented solely for its persuasive value and as evidence of one court's past practice.

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apply a similar rationale in this case. An award based on an hourly rate of $150 suffices to remove the financial burdens shouldered by public interest litigants and their counsel.

CONCLUSION

For the foregoing reasons, API respectfully requests the Court to sustain its original fee award of $1,000. In the alternative, API asks that any award of fees adhere to the dictates of AS 09.60.010 relating to public interest litigant fee awards. And should any public interest litigant fees be awarded, API requests that no multiplier be applied and that the reasonable hourly rate applied be commensurate with that awarded to public sector attorneys.

DATED this 9th day of February, 2007 at Anchorage, Alaska.

TALIS J. COLBERG
ATTORNEY GENERAL

By: Julia B. Bockmon
for Laura C. Bottger
Assistant Attorney General
ABA No. 9509040

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1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

CERTIFICATE OF SERVICE AND TYPEFACE

This is to certify that on this date, a copy of the foregoing is being mailed to:

James B. Gottstein
Law Projects for Psychiatric Rights
406 G Street, Suite 206
Anchorage, AK 99501

I further certify the font used in the aforementioned document is Times New Roman 13 point.

Law Office Assistant — Date: 2/9/07

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

IN THE SUPREME COURT OF THE STATE OF ALASKA

Faith J. Myers, Appellant	
vs.	Supreme Court No. S-11021
Alaska Psychiatric Institute, Appellee.	
Superior Court No. 3AN-03-00277 PR	

RESPONSE TO APPLICATION FOR FULL REASONABLE FEES

Faith Myers has moved for an award of full reasonable attorney's fees in this matter. API does not dispute that Myers is a public interest litigant for the purpose of a fee award, nor does API dispute the reasonableness of the time expended by Myers's counsel or the hourly rate charged. API does, however, disagree with Myers's assertion that her counsel's fees should be enhanced by a multiplier, and API has a concern with the form of the judgment submitted with Myers's Application.

Thomas v. Bailey, 611 P.2d 536 (Alaska 1980), sets out the appropriate analysis to be employed in awarding attorney's fees to a prevailing public interest litigant following an appeal to the Alaska Supreme Court. *Thomas* was an action brought by Trustees for Alaska[1] ("Trustees") which resulted in the invalidation on constitutional grounds of the Alaska Homestead Act, a successful voter initiative. Following the appeal,

[1] Trustees for Alaska is a public interest law firm incorporated as a non-profit corporation. See http://www.trustees.org/about/about_index.html, http://www.trustees.org/donations/donations_index.html. Compare http://psychrights.org/index.htm.

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ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

this Court awarded Trustees its actual reasonable attorney's fees, which the Court determined by multiplying Trustees's attorney's hours by a reasonable hourly rate. The Court lauded Trustees for bringing actions in the public interest, and explained that an award of full reasonable fees in public interest litigation was justified in order to encourage litigation in the public interest. *Id.* at 541.

I. REQUEST FOR ENHANCED FEES

In awarding Trustees its full attorney's fees, the Court rejected Trustees's claim that because of the importance of the litigation to the state its fee award should exceed its attorney's actual reasonable fees, which were based on an hourly rate of $75. This Court should reject Myers's similar claim and base Myers's award on her attorney's hourly rate of $225. In rejecting Trustees's argument that the Court should apply a multiplier to its hourly rate, the Court noted that although enhanced awards are appropriate in private anti-trust actions, "the considerations applicable when vindicating a plaintiff's commercial rights against a wrongdoing defendant are different from those involved when a plaintiff brings a suit primarily in the interest of the public." *Id.* at 540. The Court noted that unlike anti-trust litigation, Trustees' public interest suit did not result in a substantial monetary benefit for private individuals, and it was not aimed at the deterrence of wrongdoing.[2] The Court stated that "[w]hile some of the considerations" applied in anti-trust cases to "enhance a fee above

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[2] The *Thomas* Court specified that "the exercise of a discretionary function by the lieutenant governor on a close constitutional question involves no wrongdoing." *Thomas*, at 540. Similarly, the implementation of a validly enacted statute by the state agency and the judicial system charged with its implementation involves no wrongdoing.

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ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

the basic hourly rate might be appropriate in an *exceptional* public interest case, it is not appropriate here." *Id.* at 541 (emphasis added).

Instead, the court analogized *Thomas* to *Wyatt v. Stickney*, 344 F.Supp. 387 (M.D.Ala.1972), modified, *Wyatt v. Anderholt*, 503 F.2d 1305 (5th Cir. 1974), a class action brought to establish the right to treatment of patients involuntarily confined in Alabama mental institutions, where, as in *Thomas* and in the present case, "[n]o monetary award was at stake, but the public good was vindicated."[3] *Thomas,* at 541. The *Thomas* Court stated that regarding fee awards in typical public interest cases such as *Wyatt* or *Thomas*, "generally, full compensation at a reasonable rate per hour will prove adequate to encourage appropriate public interest litigation." *Id.* The present case is even more similar to *Wyatt* than was *Thomas*, and Myers has cited no precedent indicating that an award in this case should depart from the *Thomas* rule. Indeed, the attorney in *Wyatt* had a better argument for enhanced fees than does Myers's attorney, as the *Wyatt* attorney took on "the added responsibility of representing a class rather than only individual plaintiffs," which the Court approved as a factor to be considered in determining a reasonable fee. *Thomas*, at 541, quoting *Wyatt*, 344 F.Supp at 410.

An enhanced award in the present case would likely run afoul of the *Thomas* Court's pronouncement that "lawyers who satisfy [their] ethical responsibility" to "represent

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[3] The *Thomas* Court disapproved of the amount of the award granted by the federal court in *Wyatt*, opining that $20 to $30 per hour (the rate applicable to court-appointed attorneys for indigent defendants) was "below normal levels of compensation in legal practice," and therefore was too low. *Thomas*, at 541.

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ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

clients who are unable to pay for counsel and also to bring suits in the public interest . . . should be remunerated, [but] their fees should not be exorbitant." *Id.* at 541.

Myers's counsel asserts that the Court should grant him an enhanced award because without such an award the attorney will not be able to expand and staff his nonprofit corporation by "hir[ing] a full time attorney to work on these cases" and paying for incidental expenses, including office space, computers, supplies, and a secretary or assistant for the attorney. Application at 13. Myers's counsel misunderstands or misrepresents the rationale behind awarding public interest litigants full fees. The rationale is to encourage private attorneys to fulfill their *ethical responsibility* to participate in *pro bono* and public interest litigation. It is not to establish and staff, at the state's expense, a law firm to prosecute cases against the state (and concomitantly to exempt private attorneys from pursuing their ethical responsibility to pursue *pro bono* and public interest litigation).

Myers does not disguise that the motivation behind her request for an enhanced fee is exactly this effect. Her application states:

> Full reasonable attorney's fees in this case based on the amount of time expended times the local rate does not realistically enable the Law Project for Psychiatric Rights to hire a full time attorney to work on these cases,* but a mulitplier of two probably does. This would free the Law Project from Psychiatric Rights [sic] from having to rely on the limited availability of *pro bono* attorney representation to pursue these public interest cases.

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* In addition to the attorney's salary, there is an unavoidable administrative overhead burden, such as office space, computer, supplies, etc., including possibly a secretary/assistant that goes along with hiring an attorney.

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ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

Application at 13. Awarding Myers a full reasonable fee would satisfy the goal of compensating and encouraging attorneys to participate in public interest litigation, but enhancing that award with a multiplier would go far beyond that goal. Myers's request for an enhanced fee should be denied.

II. DETERMINATION OF A REASONABLE FEE

Other than the question of whether enhanced fees are appropriate to award to public interest litigants, the bulk of the *Thomas* decision involves considerations to be taken into account in determining the reasonableness of the fees to be awarded, once the determination has been made to award full reasonable fees. Because API does not contest Myers' application of the *Thomas* factors to arrive at her attorney's hourly rate or the hours billed, the *Thomas* considerations do not need to be examined in great detail. However, it should be noted that in regard to the reasonableness of the rate charged, Myers avers that $225 per hour is "on the low end" of fees customarily charged in Anchorage for similar services.[4] While $225 per hour is not out of line for the services rendered, API believes that that figure in fact represents the high end of fees charged for similar services. Review of attorneys' fees awards to private attorneys prevailing in public interest litigation against the state in fiscal year 2006 reveals fees ranging from $150 per hour to $225 per hour, with most clustered around $200 per hour.[5] The attorneys billing these rates were mostly

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[4] Myers's conclusion is based on a phone call her attorney made to another attorney and her attorney's "general knowledge of rates in the Anchorage area for private counsel in comparable positions." Application at 7, n.13.

[5] A single fee stands out; the attorney requested $595 per hour, which the court reduced to $300.

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1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

shareholders or sole practitioners who have been practicing in Alaska since before 1990. It should also be noted that when the state Department of Law receives an award of fees it bills its attorneys' services at the rate of $150 per hour.

Finally, the Court in *Thomas* addressed the question of whether, in determining the reasonableness of an attorney's fee, the contingency of securing compensation by being successful in the litigation should be considered. The Court determined that the contingency factor was not relevant in that case, as the award of $75 per hour "substantially offset any contingency factor involved in the likelihood of being successful in the litigation." *Id.* at 543. Similarly, in the present case, the claimed fee of $82,240, itemized as actual fees at the rate of $225 per hour, is sufficient to offset any contingency factor relating to the likelihood of success in the litigation. However, should the Court decide to consider the contingency factor in determining whether to enhance the award made to Myers, it is instructive to note that while the question decided in Myers's favor was one of first impression in Alaska and was dependent solely on the Alaska Constitution, the vast majority of state appellate courts to have considered similar issues have ruled in accord with the Alaska Court's ruling in this case. Given this circumstance, it seems clear that this case was not a long-shot for Myers's attorney, or even "a case whose odds might be computed as even." *Id.* at 542. There is, therefore, no call to award an enhanced fee based on the contingency factor in this case.

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III. FORM OF PROPOSED JUDGMENT

Myers submitted a proposed judgment with her application for fees. Myers's

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1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

proposed judgment states that "The Law Project for Psychiatric Rights, Inc., an Alaskan non-profit corporation, shall recover from and have judgment against Appellee State of Alaska . . . ." However, Faith Myers, not The Law Project for Psychiatric Rights, Inc. is the named party in this action. The state's practice when paying court-awarded attorney's fees is to make the check payable to the attorney, in trust for the named party. In the absence of a contrary directive by the Court the state will follow this practice in paying an award of fees in the present case.

Dated: July 21, 2006.

DAVID W. MÀRQUEZ
ATTORNEY GENERAL

By: Michael G. Hotchkin

Michael G. Hotchkin
Assistant Attorney General
AK Bar No. 8408072

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FIRST JUDICIAL DISTRICT AT JUNEAU

NATIVE VILLAGE OF NUNAPITCHUK, ASSOCIATION OF VILLAGE COUNCIL PRESIDENTS, ALASKA CENTER FOR THE ENVIRONMENT, NORTHERN ALASKA ENVIRONMENTAL CENTER, SOUTHEAST ALASKA CONSERVATION COUNCIL, and THE REPUBLICAN MODERATE PARTY, INC.,

Plaintiffs,

v.

STATE OF ALASKA,

Defendant.

Case No. 1JU-03-700 CI

CONSOLIDATED PARTIAL OPPOSITION TO MOTIONS FOR ATTORNEY FEES AND COSTS

In this pleading the state opposes, in part, the attorney fee motions of (1) Earthjustice on behalf of Alaska Center for the Environment, Northern Alaska Environmental Center, and Southeast Alaska Conservation Council (collectively, the "Earthjustice Plaintiffs") and (2) the Association of Village Council Presidents on behalf of itself and its member village of Nunapitchuk (collectively, the "AVCP Plaintiffs"). The state opposes in its entirety the motion for fees and costs submitted by attorney Nancy Wainwright on behalf of the Republican Moderate Party. The state does not oppose the separate cost bill of the Earthjustice Plaintiffs.

ATTORNEY GENERAL, STATE OF ALASKA
DIMOND COURTHOUSE
P.O. BOX 110300, JUNEAU, ALASKA 99811
PHONE: 465-3600

A. The Plaintiffs Are Not Public Interest Litigants on this Occasion

The four criteria of the public interest litigant policy are well known to the court. All must be met to achieve public interest litigant status. The one of interest with respect to this fee claim is the fourth: the requirement that the plaintiffs would have lacked sufficient economic incentive to bring the lawsuit, even if it had involved only narrow issues lacking in general importance. *See Valley Hospital Ass'n v. Mat-Su Coalition for Choice,* 948 P.2d 963, 972 n.21 (Alaska 1997).

It is certainly obvious that the fourth criterion is an important issue in any case that, like this one, is about an entitlement to money. Most of the plaintiffs, however, elected to include no argument on the issue in their briefs. Only the Republican Moderate Party addressed it at all. RMP Memorandum at 4.

The plaintiffs in this case had an enormous financial interest in the invalidation of HB 145. That interest took two forms: the interest in awards of fees when they prevail in future litigation, and the interest in avoiding liability for fees should they not succeed.

Let us turn first to the interest in receiving fees. At paragraphs 11-16 of the Complaint, each of the plaintiffs pled that it expected or desired to bring public interest litigation in the future. At the same time, the record shows that the plaintiffs have received substantial payments of public interest attorney fees in the past, and are in the process of obtaining further such awards. Exhibit 18 to plaintiffs' motion for preliminary injunction, for example, details the receipt of $37,894 in *Kuitsarak v. Swope*, to which

ATTORNEY GENERAL, STATE OF ALASKA
DIMOND COURTHOUSE
P.O. BOX 110300, JUNEAU, ALASKA 99811
PHONE: 465-3600

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AVCP was a party;[1] $44,705 in *Southeast Alaska Conservation Council v. State*; $99,102 in *Northern Alaska Environmental Center v. State*; and $20,260 in *Lynn Canal Conservation, Inc. v. State,* to which Alaska Center for the Environment was a party.[2] The Republican Moderate Party is apparently awaiting a fee award after prevailing in *Green Party v. State.* Ex. 35, ¶ 9 to Plaintiffs' Motion for Preliminary Injunction. Nunapitchuk and AVCP have filed a fee motion in *AVCP v. State,* 4BE-00-263 CI. Ex. A to this opposition. Additional examples can be found in the affidavits at Exhibits 30ff. to Plaintiffs' Motion for Preliminary Injunction, and at Exhibits 24ff. to Plaintiffs' Motion for Summary Judgment on Count 1.

Financial interests of this size are easily sufficient to disqualify a party from public interest litigant status. *See Eldridge v. State,* 988 P.2d 101, 104 (Alaska 1999) (interest in six $990 PFDs was "sufficient economic incentive" to disqualify plaintiffs from public interest litigant status in constitutional challenge to PFD exclusion); *McCarter v. Alaska National Insurance Co.,* 883 P.2d 986, 991 (Alaska 1994) (disqualification due to interest in avoiding loss of $13,500); *Fairbanks Fire Fighters Association v. City of Fairbanks,* 934 P.2d 759, 763 (Alaska 1997) (disqualification where "would-be public interest litigant's attempt to serve the public interest directly furthered that party's financial interests" by leading to higher overtime payments).

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[1] See Ex. 25, ¶ 3 to Plaintiffs' Motion for Summary Judgment on Count 1.

[2] See Ex. 32, ¶ 8 to Plaintiffs' Motion for Preliminary Injunction.

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DIMOND COURTHOUSE
P.O. BOX 110300, JUNEAU, ALASKA 99811
PHONE: 465-3600

Plaintiffs have a second financial interest providing incentive to bring this case: the interest in avoiding fee liability in unsuccessful public interest cases. Plaintiffs made much of the exposure to this liability in arguing the merits of this case. AVCP, for example, argued extensively that the threat to its $3 million general fund posed by adverse fee awards would have an enormous impact, reducing the number of cases it would pursue. Affidavit of Myron Naneng, Ex. 25 to Plaintiffs' Motion for Summary Judgment on Count 1. Likewise, Southeast Alaska Conservation Council feared that a single attorney fee award could wipe out its unrestricted reserve of $146,000. Affidavit of Katya Kirsch, Ex. 27 to Plaintiffs' Motion for Summary Judgment on Count 1. Avoidance of financial loss—even much more modest financial loss—is a financial interest sufficient to disqualify a party from public interest litigant status. *McCarter, supra.*

The sole argument that has been made on this key criterion is at page 4 of the Republican Moderate Party memorandum on fees: there, RMP contends that its suit was not motivated by financial interest because, since it receives free legal representation, RMP gains nothing from public interest fee awards. There are several defects in this argument.

First, it ignores RMP's and the other plaintiffs' interest in avoiding adverse fee awards, which they could not pass on to their legal counsel.

Second, it ignores the fact that fee awards in favor of a public interest litigant are made to, and are the property of, the prevailing litigant. How those awards

ATTORNEY GENERAL, STATE OF ALASKA
DIMOND COURTHOUSE
P.O. BOX 110300, JUNEAU, ALASKA 99811
PHONE: 465-3600

are disbursed after they are received is a matter of private contracting, not the business of the courts.

Third, it ignores the fact that one of the lead plaintiffs in this action, AVCP, uses in-house counsel and therefore has the most direct of financial interests in continuing to receive large fee awards.

Fourth, it ignores the economic reality in instances where public interest groups obtain legal counsel in exchange for an advance assignment of potential public interest fee recovery. By making such assignments, litigants such as RMP and Northern Center receive something of great economic value: "free" legal representation by law firms such as Earthjustice. But the representation is not free, of course; it has been paid for by assignment of a valuable right. Continuing to be eligible to receive enhanced fee awards is a valuable asset to public interest litigants because they can purchase valuable services with that eligibility.

It would not be intellectually honest to hold that the financial consequences of HB 145 are potentially devastating to the plaintiffs, and yet to hold that the plaintiffs are financially disinterested in the outcome of this litigation. Plaintiffs gambit to be treated as public interest litigants in this case cannot succeed under the public interest litigant doctrine as defined by the Supreme Court.

Because they are not public interest litigants, the plaintiffs are limited to ordinary fee recovery under Rule 82(b)(2). In this case, which did not go to trial, the

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DIMOND COURTHOUSE
P.O. BOX 110300, JUNEAU, ALASKA 99811
PHONE: 465-3600

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standard award to a plaintiff who submitted a proper, timely fee motion would be 20% of "reasonable actual" fees that were "necessarily incurred."[3] *Id.*

B. The Fees Must Be Adjusted for Reasonableness

Fee awards, whether they be full fee awards under the public interest litigant policy or partial fee awards under Rule 82, should be based on a reasonable number of hours, necessarily spent, and charged at an appropriate billing rate. *See, e.g., Dansereau v. Ulmer,* 955 P.2d 916, 918-9 (Alaska 1998).

The various attorneys working for the plaintiffs are seeking just under $200,000 in state funds as payment for attorney services. By way of overall comparison, the state's counsel recorded approximately 818 hours on this case at a cost of about $78,000. Ex. B to this opposition. To be fair, this figure should probably be translated to the $150-per-hour billing rate courts generally use in awarding fees to the state: at that rate, the state's "fees" for defense would have been approximately $123,000.

The state believes that plaintiffs' fees are too high. While an argument could be made that plaintiffs' fees should have been lower than the state's,[4] the state

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[3] Rule 82(b)(3) lists factors under which the presumptive fee award can be varied. None of the plaintiffs has submitted an argument based on any of these factors.

[4] Plaintiffs spent about 100 hours on a motion for preliminary injunction that simply did not make sense procedurally in a case of this nature. Once briefing was joined on the merits, moreover, the state's task was in many respects more difficult than that of plaintiffs; the surface appeal of some of plaintiffs' arguments required much deeper and more far-reaching research to refute. *See, e.g.*, Reply to Plaintiffs' Opposition to Defendant's Cross-Motion for Summary Judgment on Count 1, at 9-16.

ATTORNEY GENERAL, STATE OF ALASKA
DIMOND COURTHOUSE
P.O. BOX 110300, JUNEAU, ALASKA 99811
PHONE: 465-3600

seeks only to reduce the base fee for plaintiffs' counsel to a total of $128,295, which is still higher than the state's defense fees. The basis for this reduction is (1) a too-generous billing rate for the Earthjustice and AVCP counsel, and (2) extraordinary overbilling and other defects in the submission of the Republican Moderate Party counsel.

1. The Earthjustice Plaintiffs

Earthjustice attorneys, like state attorneys, do not really bill their clients. Waldo Affidavit, ¶ 9. The firm suggests a reasonable rate for Mr. Waldo of $200 per hour and for Ms. Hughes of $140 per hour.

When it seeks fee awards, the State of Alaska asks for reimbursement for attorney services at a rate of $150 per hour. The courts have generally adopted that rate of reimbursement. *E.g.*, Ex. C to this opposition. There is no question that $150 per hour is a conservative billing rate, but we feel it is appropriate to use a conservative billing rate when giving fee awards for counsel who, in fact, cost their clients little or nothing and whose internal cost, including overhead, is also very low.[5]

Mr. Waldo has impressive credentials, though no more so than those of many state attorneys. It may be that if he went into private practice he could sometimes charge and collect $200 per hour, but the reality of the Juneau marketplace is that even

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[5] When office rent and staff support are included, state attorneys cost the public fisc about $95 for each hour of productive, billable time; we suspect Earthjustice has a similar level of efficiency.

If the court disagrees that a conservative billing rate is appropriate for such counsel, we ask that it set out its view explicitly. The court's holding could provide the basis for a change in state policy, so that higher fee awards would be requested by the state in the future.

ATTORNEY GENERAL, STATE OF ALASKA
DIMOND COURTHOUSE
P.O. BOX 110300, JUNEAU, ALASKA 99811
PHONE: 465-3600

highly skilled, senior attorneys must regularly settle for less than that, particularly when they represent institutional clients. *See, e.g.,* Thurbon Affidavit (Ex. D to this opposition). Earthjustice has submitted no market data that would suggest that Mr. Waldo could expect average, collectable billings of $200 per hour in Juneau. Many real clients, particularly if they were not-for-profit organizations similar to the ones he represents here, would likely negotiate a more modest billing rate with him. *Id.*

We suggest that the appropriate rate to apply to Earthjustice is a blended rate of $150 per hour, just as would be applied to the services of state attorneys in similar cases. This rate would be a slight increase for Ms. Hughes and a decrease for Mr. Waldo. It would result in a fee amount of $89,537, to which the Rule 82 percentages could then be applied.

2. The AVCP Plaintiffs

The AVCP plaintiffs are served by Eric Johnson, a salaried attorney for AVCP. Like Earthjustice and state attorneys, he has no real billing rate. He suggests, based on conversations he has had with other attorneys, that his time should be reimbursed at $175 per hour.

For the same reasons discussed in relation to the Earthjustice billings, the state suggests that a conservative billing rate of $150 per hour is appropriate for an attorney such as Mr. Johnson where he represents quasi-governmental clients. This would yield a base fee amount of $38,760.

ATTORNEY GENERAL, STATE OF ALASKA
DIMOND COURTHOUSE
P.O. BOX 110300, JUNEAU, ALASKA 99811
PHONE: 465-3600

The state does not quarrel with the number of hours recorded by Mr. Johnson, who appears to have been an important member of the briefing team for the plaintiffs' collective effort.

3. Nancy Wainwright/Republican Moderate Party

Ms. Wainwright seeks $47,115 in state funds for her role in this case, using a billing rate of $250 that is much higher than the rates claimed by her three co-counsel. Ms. Wainwright wrote none of the briefs in the case and participated in none of the arguments, but seeks more in total fees than AVCP's Eric Johnson.

First, the state objects to the billing rate Ms. Wainwright has proposed. Ms. Wainwright is in the same position as state, Earthjustice, and AVCP attorneys: she has a low-overhead practice[6] that does not ordinarily produce real bills to clients. For the same reasons explored above, we believe a conservative billing rate is appropriate in awards to such attorneys, the same rate that we apply to ourselves.[7]

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[6] She works from her home on Back Road in Anchorage. The "Suite 555" in her address is apparently a room in the house.

[7] The state objects to consideration of the selected pages from an Altman Weil survey of law firm economics that Ms. Wainwright has attached to her motion. The excerpt purports to provide national billing rate averages, but all that has been provided is raw numbers. It is impossible to tell the statistical methodology used, to determine whether the survey used a truly representative sample, or even to tell whether the rates provided are asking prices or average negotiated rates with real clients. Moreover, the parts of the survey that might shed light on regional differences or differences relating to the population size of the market have been omitted from the excerpt. In addition, the survey does not purport to provide billing rates for counsel whose only role is to monitor a case that is being briefed and argued by others. In the real world, clients often will not stand for being billed for such time and the time is commonly written off, yielding a billing rate of zero.

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DIMOND COURTHOUSE
P.O. BOX 110300, JUNEAU, ALASKA 99811
PHONE: 465-3600

More fundamentally, the charges on Ms. Wainwright's time records are not allowable because they appear duplicative of the work of others, and in no instance has their necessity been demonstrated. A large part of what Ms. Wainwright has done is painstakingly to log every e-mail she received from any of her co-counsel, and to bill $12.50, $25.00, $50.00, $125.00, or $250.00 for reading each one. In October, for example, she read thirty e-mails, for which she asks to receive public funds of $1062.50. Also during that month, she recorded little bits of procedural research and editing (the need for which is unexplained in a case where the heavy lifting was being done by three experienced co-counsel), and she sat in on some phone conferences. The only tangible work product from the month appears to have been an affidavit that she billed $275.00 to "review and draft;" however, one cannot tell what affidavit this was. This billing pattern continues; in January, counsel meticulously recorded reading 78 e-mails, claiming to earn $2062.50 for the exercise.

What is missing from this remarkable catalogue of minutiae is any hint of how it added $47,115 in value to the efforts of the lawyers who collectively drafted all of the briefs and handled all of the oral argument in the case and who, at the same time, were reviewing and editing one another's work. The cost of counsel to monitor an action for a nominal party that does not play a large role in the briefing or argument of the case should not be as high as that of the active counsel; it should be far lower.

The bill from the Republican Moderate Party's counsel is primarily a sterile exercise of cataloguing every communication that passed in cyberspace and recording the

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DIMOND COURTHOUSE
P.O. BOX 110300, JUNEAU, ALASKA 99811
PHONE: 465-3600

review of a large number of documents prepared by others. No fee claim so vastly out of proportion to the real services that could have been provided to the Republican Moderate Party should be allowed.

Disallowance of Ms. Wainwright's fee claim will not cause the Republican Moderate Party to incur liability to Ms. Wainwright. Declaration of Nancy Wainwright in Support [of] Motion for Costs and Attorney's Fees, ¶ 10.

C. One of the Cost Bills is Inflated

Taxation of costs in this case is governed by Rule 79 and the related Administrative Rules. While the Alaska Supreme Court has extended the public interest litigant policy to prevent cost awards *against* a public interest litigant, *Matanuska-Susistna Borough School District v. State,* 931 P.2d 391, 405 (Alaska 1997), it has declined to use the policy to override the standard rules for awarding costs where the award would be *in favor* of a public interest litigant. *Hickel v. Southeast Conference,* 868 P.2d 919, 931-2 (Alaska 1994). Hence, even if the court should find that these plaintiffs were public interest litigants in this case, the normal rules apply.

The cost bill submitted by the Earthjustice Plaintiffs is scrupulous in staying within the boundaries of what is allowable. The state does not oppose it. The AVCP Plaintiffs have not sought costs at all.

In contrast, Ms. Wainwright's cost bill based on her representation of the Republican Moderate Party is overstated approximately eighty-fold. It includes the

ATTORNEY GENERAL, STATE OF ALASKA
DIMOND COURTHOUSE
P.O. BOX 110300, JUNEAU, ALASKA 99811
PHONE: 465-3600

following items for which there is no provision in Rule 79(f)'s list of "the only items that will be allowed:"

> --Phone charges for internal discussions among counsel on the same side (not within the limited phone charges allowed under Rule 79(f)(10))
> --Fax charges for internal faxes among counsel for the same side (Rule 79 does not mention fax charges)
> --Courier charges for an unidentified delivery to Earthjustice (Rule 79 does not cover courier charges)
> --Postage charges for the late-mailed fee motion (only postage for service of process is allowed; see Rule 79(f)(2))
> --Travel costs not within Rule 79(g), *viz*, for an attorney to attend an oral argument as a spectator (Rule 79(g)(1)(A) allows reimbursement for travel by one attorney where no local attorney is present; in this case, the argument was handled by the local attorney)

The only item on Ms. Wainwright's statement of costs that is not either completely unallowable or an unallocated mix of allowable and unallowable costs is the fifth line item, $6.75 for photocopying cases. Accordingly, if any costs are allowed on the Republican Moderate Party's cost bill, the amount should be $6.75, not the $507.53 counsel has claimed.

D. Fees and Costs to the Republican Moderate Party Have Been Waived

The motion for fees and costs filed on behalf of the Republican Moderate Party suffers from an additional defect, not shared by the other two motions. It was not filed or served within the time limit set by Rule 82.

Counsel for the state raises this issue reluctantly. Certainly, the state does not pretend to have suffered prejudice, beyond temporary inconvenience, from the

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DIMOND COURTHOUSE
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PHONE: 465-3600

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untimeliness.[8] It is our practice to be generous with extensions (if they are requested) and to overlook most inadvertent problems with meeting deadlines. We are not, however, in a position to waive a defense to a claim on state funds that is as large, and as inappropriately inflated, as the one submitted by RMP's counsel. This circumstance, combined with the submission of a false certificate of service, has made us unable to waive an issue that, in other circumstances, we would cheerfully overlook.

In this instance, motions for fees were due on May 27, 2004, ten days after the date of distribution of the judgment. A.R. Civ. P. 82(c). Under Rule 82(c), "[f]ailure to move for attorney's fees within 10 days, or such additional time as the court may allow, shall be construed as a waiver of the party's right to recover attorney's fees." The rule explicitly states that the 10-day window for a fee motion is counted from the distribution date under Rule 58.1. Rule 6(c) is equally explicit in stating that dates so calculated are not extended on account of distribution by mail. The ten day period for filing a fee motion is a fixed one, similar to an appeal deadline, unless extended by court order under Rule 6(b).

Counsel for the Republican Moderate Party—as her affidavit establishes—is an experienced attorney. She apparently knew her motion was due on May 27, because she put that date on the motion, even though the document was still in her possession a

---

[8] Because the late-served motion did not reach us until the following week, it contributed to the need to ask for an extension in order to respond to all of the fee and cost motions together. The state requested, and was granted, an extension prior to the deadline for its own submission.

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DIMOND COURTHOUSE
P.O. BOX 110300, JUNEAU, ALASKA 99811
PHONE: 465-3600

day later. She also represented to the court in her Certificate of Service that she served opposing counsel on that date. However, the postage was not affixed to the motion until May 28 (see Ex. E to this opposition), and therefore it cannot possibly have been mailed it on the 27th. Moreover, counsel did not file the motion with the court until June 1.

Since no extension was requested "before the expiration of the period originally prescribed," A.R. Civ. P. 6(b)(1), any extension granted now would have to be granted "upon motion" from Ms. Wainwright accompanied by a showing "that the failure to act was a result of excusable neglect." A.R. Civ. P. 6(b)(2). If Ms. Wainwright chooses to make such a motion, the state will consider whether to oppose it, depending on the circumstances described and whether the description accords with other information available to the state. If no such motion is filed, Rule 6(b)(2) suggests that extension is unavailable, and the request for fees and costs would have to be denied as untimely.

E. Conclusion

For the reasons described above, the court should:

(1) award fees of $17,907.00 to the Earthjustice Plaintiffs (representing standard 20% Rule 82 attorney fees, after reducing the fee claim to a blended rate of $150 per hour);

(2) award costs of $5,967.88 to the Earthjustice Plaintiffs (representing standard Rule 79 costs, as requested);

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DIMOND COURTHOUSE
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PHONE: 465-3600

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(3) award fees of $7,752.00 to the AVCP Plaintiffs (representing standard 20% Rule 82 attorney fees, after reducing the fee claim to $150 per hour); and

(4) deny the motion for costs and fees of the Republican Moderate Party.

Respectfully submitted this 14th day of June, 2004.

GREGG D. RENKES
ATTORNEY GENERAL

By: [signature]
Christopher Kennedy
Assistant Attorney General
Alaska Bar No. 8606054

Terry L. Thurbon
Assistant Attorney General
Alaska Bar No. 9011125

ATTORNEY GENERAL, STATE OF ALASKA
DIMOND COURTHOUSE
P.O. BOX 110300, JUNEAU, ALASKA 99811
PHONE: 465-3600

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Eric D. Johnson
Association of Village Council Presidents
P.O. Box 219
Bethel, Alaska 99559
(907) 543-7309

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FOURTH JUDICIAL DISTRICT AT BETHEL

ASSOCIATION OF VILLAGE COUNCIL PRESIDENTS, *et. al.*, Appellants, vs. STATE OF ALASKA, Office of Management and Budget, Division of Governmental Coordination, Appellee.	Superior Court Case No: 4BE-00-263 CI Agency File: AK 0003-10AA

MEMORANDUM IN SUPPORT OF MOTION FOR AN AWARD OF ATTORNEYS' FEES, INCLUDING COSTS, AGAINST THE STATE, AND FOR PREMIUM OF COST BOND

Appellants Association of Village Council Presidents, *et. al.*, (AVCP) are indisputably public interest litigants: (1) this administrative appeal effectuated strong public policies in protecting Alaska's coastal zone and its management in accordance with law; (2) numerous people in communities across the lower Kuskokwim will benefit from the remand and further consideration that has been ordered as a result of this administrative appeal; (3) private parties could have been expected to bear the burden of bringing this appeal, if it were to be brought at all; and (4) AVCP had no economic incentive to bring this lawsuit. *See, e.g., Eyak Elders Council v. Sherstone, Inc.*, 904

P.2d 420, 423-26 (Alaska 1995).

Under Civil Rule 82, public interest litigants are normally entitled to an award of full reasonable attorneys' fees, with apportionment by success on each issue only in exceptional circumstances.[1] *Dansereau v. Ulmer*, 955 P.2d 916, 918-20 (Alaska 1998). This case is an administrative appeal, and as such, is governed by Appellate Rule 508, rather than Civil Rule 82. *See, Kodiak Western Alaska Airlines v. Bob Harris Flying Services*, 592 P.2d 1200, 1204-05 (Alaska 1979). Despite this distinction, however:

> In determining the amounts of attorney's fees on appeal in public interest litigation . . . the same considerations are applicable as at the trial level. When a sufficient public interest is involved, it is therefore appropriate to award full attorney's fees on appeal to a successful public interest litigant.

Thomas v. Bailey, 611 P.2d 536, 539 (Alaska 1980).

As set forth in the attached affidavit and declaration, four attorneys have rendered legal services to AVCP over the course of this administrative appeal. The following table summarizes the hours these attorneys have spent working on this case, and the appropriate market rate for each of them, for which AVCP seeks attorneys' fees:

Attorney	**Hours**	**Hourly Rate**	**Amount**
Johnson	232.25	$ 175	$ 40,643
Randall	100.2	$ 175	$ 17,535
Frank	3.9	$ 250	$ 975
Van Tuyn	4.8	$ 225	$ 1,080
TOTAL:	**349.65**		**$ 60,233**

[1] The Alaska Legislature, just this past session, passed legislation purporting to do away with public interest litigant protections here in Alaska. House Bill 145. But this bill, by its own terms, only applies to cases and appeals filed after September 11, 2003, the effective date of this Act. HB 145, section 4.

Exhibit 2
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Exhibit A
Page 2 of 3

Eric D. Johnson
1110 W. 6th Avenue # 404
Anchorage, AK 99501
(907) 258-1792

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FOURTH JUDICIAL DISTRICT AT BETHEL

THE ASSOCIATION OF VILLAGE COUNCIL PRESIDENTS, Inc., a nonprofit corporation, AKIAK NATIVE COMMUNITY; NATIVE VILLAGE OF ATMAUTLUAK; KASIGLUK TRADITIONAL COUNCIL; ORGANIZED VILLAGE OF KWETHLUK; NATIVE VILLAGE OF NAPAKIAK; NAPASKIAK TRIBAL COUNCIL; NATIVE VILLAGE OF NUNAPITCHUK; AND AKIACHAK NATIVE COMMUNITY

v.

STATE OF ALASKA, Office of Management and Budget, Division of Governmental Coordination.

Superior Court Case No. 4BE-00-263 CI
Agency File No. AK 0003-10AA

NOTICE OF FULL SUBSTITUTION OF COUNSEL AND ENTRY OF APPEARANCE OF CO-COUNSEL

PLEASE TAKE NOTICE that Eric D. Johnson, Attorney with the Association of Village Council Presidents, hereby enters a full substitution for Scott Sidell as counsel of record in the above-captioned matter on behalf of the Appellants.

Mr. Johnson has served as Appellants' Counsel in this matter for shortly over a year now, having entered an appearance of counsel in this matter on January 10, 2001. However, Mr. Sidell has never been formally substituted for as Counsel, or technically

Exhibit 2
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Exhibit A
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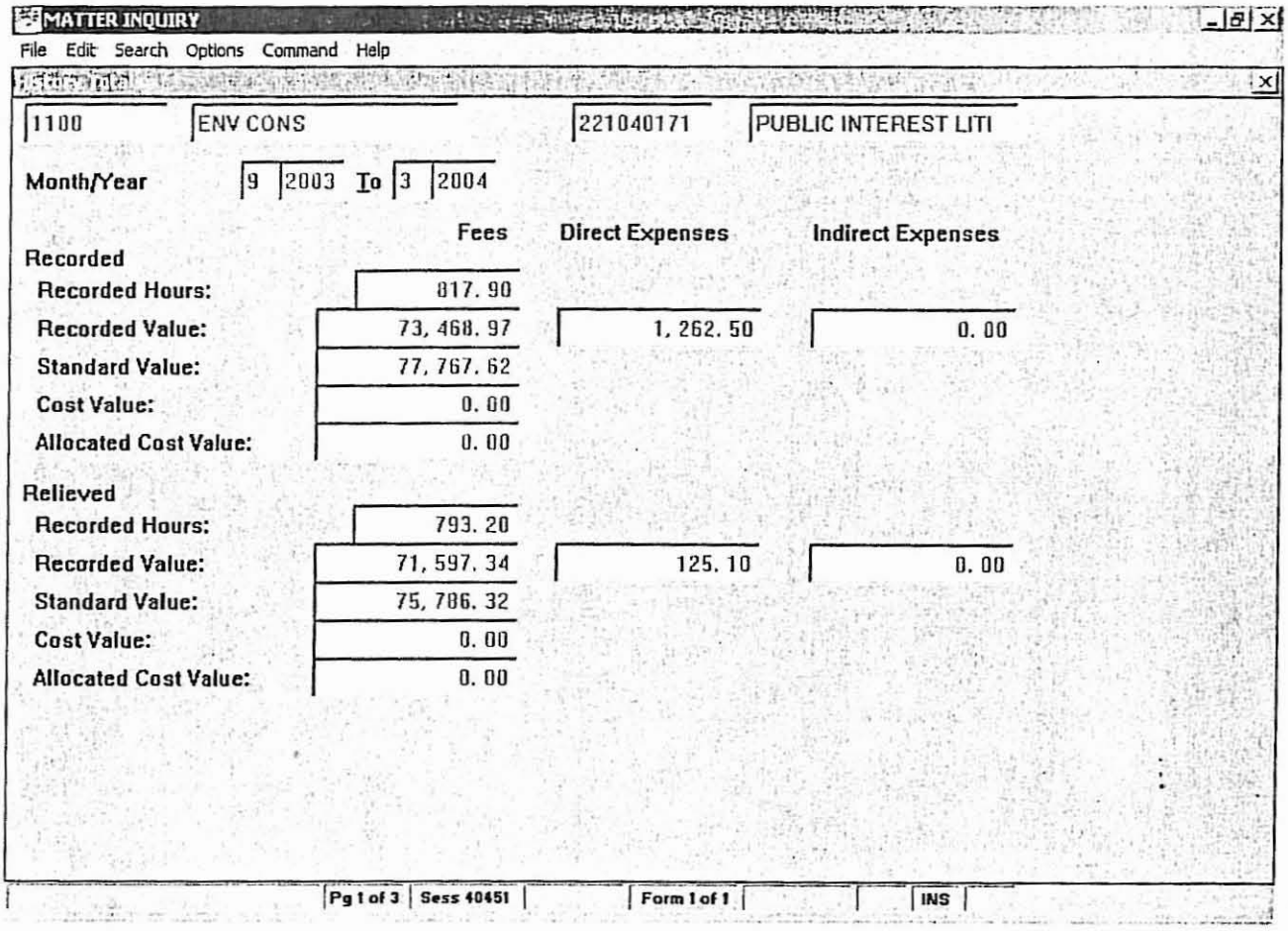

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Exhibit B
Page 1 of 1

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

DANIEL DENARDO, Plaintiff, v. BEVERLY CUTLER, SHARON L. GLEASON, MARLA GREENSTEIN, ALASKA COMMISSION ON JUDICIAL CONDUCT, ALASKA STATE COURT SYSTEM, Defendants.	)	Case No. 3AN-03-13613 CI

ORDER GRANTING ATTORNEY'S FEES

THE COURT, having considered the Motion for Award of Attorney's Fees filed by defendant Sharon Gleason, supporting documents, and any response thereto, and being fully advised in the premises,

HEREBY ORDERS that the motion is GRANTED. The court finds that Judge Sharon Gleason is a prevailing party in this case, and her attorney's and paralegal fees are reasonable and were necessarily incurred. Under Civil Rule 82(b)(3), the court further finds that plaintiff's litigation against Judge Gleason in this case was vexatious and in bad faith, and an enhanced award of full reasonable fees is justified. Therefore, the state

ATTORNEY GENERAL, STATE OF ALASKA
DIMOND COURTHOUSE
P.O. BOX 110300, JUNEAU, ALASKA 99811
PHONE: 465-3600

Attorney General's Office shall be awarded $3,057.70 in attorney's fees for its defense o

Judge Gleason.

DATED: 28 April 2004

Judge William F. Morse
Superior Court

This is to certify that on _____, 2004,
a copy of the foregoing was mailed to the attorneys
and party of record:

DATED:

I certify that on 4/30/04 a copy of the above was mailed to each of the following at their address of record. (List names if not an agency)

☐ ESED ☐ AG ☐ PO ☐ DA

Leonardo
Box 100582
A/C 995-10

Deputy Clerk / Secretary

AG Moore
CA
Mosel

ATTORNEY GENERAL, STATE OF ALASKA
DIMOND COURTHOUSE
P.O. BOX 110300, JUNEAU, ALASKA 99811
PHONE: 465-3600

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

DANIEL DENARDO,

Plaintiff,

v.

BEVERLY CUTLER, SHARON L. GLEASON, MARLA GREENSTEIN, ALASKA COMMISSION ON JUDICIAL CONDUCT, ALASKA STATE COURT SYSTEM,

Defendants.

Case No. 3AN-03-13613 CI

MEMORANDUM OF LAW IN SUPPORT OF JUDGE SHARON GLEASON'S MOTION FOR AWARD OF ATTORNEY'S FEES

On February 27, 2004, this court granted a Motion for Summary Judgment in favor of defendant Judge Sharon Gleason. Final judgment was entered, dismissing all of plaintiff's claims against all defendants with prejudice, on April 2, 2004. The defendants are therefore prevailing parties in this action and entitled to an award of attorney's fees. Because plaintiff's complaint against Judge Gleason was vexatious and in bad faith, an award of full attorney's fees incurred in her defense is requested, pursuant to Civil Rule 82(b)(3).

Exhibit D
pp. 22 of 33

I. AN AWARD OF FULL ACTUAL ATTORNEY'S FEES FOR JUDGE GLEASON'S DEFENSE IS APPROPRIATE AND EQUITABLE

Alaska Civil Rule 82 provides that defendants who are prevailing parties are automatically entitled to an award of 20 percent of their actual reasonable fees for judgment

ATTORNEY GENERAL, STATE OF ALASKA
DIMOND COURTHOUSE
P.O. BOX 110300, JUNEAU, ALASKA 99811
PHONE: 465-3600

Exhibit C

without trial, 30 percent with a trial.[1] However, in some circumstances, prevailing parties are entitled to an enhanced award, up to and including full actual fees. Civ. R. 82(b)(3).

> The court may vary an attorney's fee award calculated under subparagraph (b)(1) or (2) of this rule if, upon consideration of the factors listed below, the court determines a variation is warranted:
> ....
> (G) vexatious or bad faith conduct;
> ....
> (K) other equitable factors deemed relevant.

Civ. R. 82(b)(3). Because the filing of the instant action against Judge Gleason, which merely recycled claims that had been dismissed with prejudice, was vexatious and in bad faith, an award of full attorney's fees for Judge Gleason's defense is both equitable and appropriate.

A. Fees should be awarded at the market rate of $150 per hour

Although the Attorney General, as counsel for the state and state officials, bills client agencies at a rate far below the market rate of attorneys in private practice, it is well settled that when the state is the prevailing party, it may request reimbursement of attorney's fees at a reasonable market rate. The Attorney General is not limited to

---

[1] In cases in which the prevailing party recovers no money judgment, the court shall award the prevailing party in a case . . . resolved without trial 20 percent of its actual attorney's fees which were necessarily incurred. The actual fees shall include fees for legal work customarily performed by an attorney but which was delegated to and performed by an investigator, paralegal or law clerk. Civ. R. 82(b)(2).

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DIMOND COURTHOUSE
P.O. BOX 110300, JUNEAU, ALASKA 99811
PHONE: 465-3600

recovering fees based on the Department of Law's inter-agency billing rate.[2] There is clear authority for awarding attorney's fees under Civil Rule 82 based on market rates instead of the department's overhead rate. *Atlantic Richfield Co. v. State*, 723 P.2d 1249, 1251-52 (Alaska 1996) (Alaska Supreme Court ruled it appropriate to use average of hourly billing rates charged by private attorneys to calculate fee award for legal work performed by assistant attorneys general); *Amfac Hotels v. State, Dept. of Transportation*, 659 P.2d 1189, 1194 (Alaska 1983) (approved fee award based on "the average private billing rate" — $75 per hour, 21 years ago); *Morrison-Knudsen Co., Inc. v. State*, 519 P.2d 834, 844 (Alaska 1974) (argument rejected that state could not recover attorney's fees at a rate higher than hourly salary of highest paid assistant attorney general who worked on case).

The Attorney General has worked to identify a uniform reasonable market rate upon which to base attorney fee requests that will more fairly reimburse the State of Alaska and state represented officials for their fees as a prevailing party. See Affidavit of Counsel. This was necessary because the department's historic rate formulae and the newer universal blended rate formula all produce figures far below the market rate and value of the services rendered, and because Civil Rule 82 provides for only 20 percent reimbursement of actual fees where there is no trial or money judgment and 30 percent

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[2] The Department of Law has formulated a blended attorney "overhead rate" for any assistant attorney general (regardless of years of practice), which is $98.62 per hour for Fiscal Year 2004. This is a uniform rate used to bill client agencies for legal services, regardless of the experience level or salary range of the individual assistant attorney general who actually handled the legal matter.

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DIMOND COURTHOUSE
P.O. BOX 110300, JUNEAU, ALASKA 99811
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where the case goes to trial. Based on the recommendations of a working group tasked with assessing the Department of Law's policy on attorney fee requests, the Attorney General established in 1997 a policy to request $150 per hour as the market rate for journey level attorneys (Attorneys III and above). *Id.* This decision was based on the working group's review of attorney billing rates statewide, a similar policy in the U.S. Attorney's Office, and the fact that the average rate (typically reflecting a discount for the state) that the Department pays experienced private practitioners to provide legal services to the state under contract exceeds $150 per hour. *Id.* The rate of $125 per hour was approved for less experienced attorneys. *Id.*

In the case at bar, the court granted Judge Gleason summary judgment, and dismissed all claims against her with prejudice. The total attorney's fees for Judge Gleason's defense, calculated using the market rate of $150 for counsel Susan Cox, amount to $3,057.70. Affid. of Counsel. A copy of the billing print-out detailing the work done and time spent relative to Judge Gleason's defense in this case is attached as Exhibit A. The state's counsel of record in this case, Susan Cox, holds an Attorney V position, and has been practicing law over 20 years. The attorney hours expended in defending Judge Gleason in this action total 19.8 hours.

Included as Exhibit B are the hours billed by a paralegal assistant who worked on this case at the request of AAG Cox, for work which would customarily be done

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DIMOND COURTHOUSE
P.O. BOX 110300, JUNEAU, ALASKA 99811
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by an attorney. The paralegal's 1.2 hours performing legal work necessary to this case amounted to a cost of $87.70, at the overhead billing (non-market) rate of $73.08 per hour.

B. An award of full fees is warranted

Ordinarily, under Civil Rule 82(b)(2), defendants who do not recover a money judgment and prevail without trial are entitled to 20 percent of their reasonable attorney's fees, including fees for legal work delegated to a paralegal. However, this formula for attorney fee recovery may be altered if the court determines a variation is warranted, after considering a number of factors, including vexatious or bad faith conduct or other equitable factors deemed relevant. Civ. R. 82(b)(3). In this case, plaintiff's assertion of claims against Judge Sharon Gleason was so frivolous and vexatious that an award of full fees is appropriate.

As was demonstrated in the summary judgment motion and supporting documents, plaintiff's claims against Judge Gleason in this case are nearly identical to those he raised in his first lawsuit against her, *DeNardo v. Gleason*, case no. 3AN-03-6025 CI. In response to a motion to dismiss Judge Gleason from that first case, plaintiff conceded that judicial immunity foreclosed his claims against her. See Exh. D to Judge Gleason's Motion for Summary Judgment in this case. Yet, despite his acknowledgement that under the common law he could not sue the judge regarding rulings she had made in his cases, he filed another lawsuit against her! The only difference in the allegations against Judge Gleason in his new complaint was the completely baseless contention that the judge had

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DIMOND COURTHOUSE
P.O. BOX 110300, JUNEAU, ALASKA 99811
PHONE: 465-3600

acted "without jurisdiction" in handling his cases. After a summary judgment motion was filed in this case, demonstrating that plaintiff's attempt to circumvent the judicial immunity doctrine was frivolous and not supported by the record, plaintiff conceded that he could not show that the judge lacked jurisdiction. See Plaintiff's Response to Ms. Gleason's Motion for Summary Judgment. He thereby acknowledged for the second time that judicial immunity barred his claims against Judge Gleason. This court concurred by granting summary judgment in Judge Gleason's favor.

Under these circumstances, plaintiff's pursuit of claims against Judge Gleason in the instant case can only be characterized as vexatious and in bad faith. His filing of a redundant action against Judge Gleason, on the heels of dismissal of his first case with prejudice, was clearly vexatious. But in light of his concession for a second time that he had no viable legal grounds for suing the judge, the litigation must be deemed frivolous and in bad faith. Considering plaintiff's abuse of the civil justice system and repeated filing of unfounded claims against Judge Gleason, equity requires an award of full fees.

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Exhibit 2
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ATTORNEY GENERAL, STATE OF ALASKA
DIMOND COURTHOUSE
P.O. BOX 110300, JUNEAU, ALASKA 99811
PHONE: 465-3600

II. CONCLUSION

For the reasons set out above, it is respectfully requested that this court award full actual attorney's fees for the defense of Judge Sharon Gleason in this case, in the amount of $3,057.70.

DATED this 9th day of April 2004.

GREGG D. RENKES
ATTORNEY GENERAL

By: Susan D. Cox
Susan D. Cox
Assistant Attorney General
Alaska Bar No. 8304007

Exhibit 2
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Exhibit C
Page 9 of 9

ATTORNEY GENERAL, STATE OF ALASKA
DIMOND COURTHOUSE
P.O. BOX 110300, JUNEAU, ALASKA 99811
PHONE: 465-3600

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FIRST JUDICIAL DISTRICT AT JUNEAU

NATIVE VILLAGE OF NUNAPITCHUK, ASSOCIATION OF VILLAGE COUNCIL PRESIDENTS, ALASKA CENTER FOR THE ENVIRONMENT, NORTHERN ALASKA ENVIRONMENTAL CENTER, SOUTHEAST ALASKA CONSERVATION COUNCIL, and THE REPUBLICAN MODERATE PARTY, INC.,	)	
Plaintiffs,	)	Case No. 1JU-03-700 CI
v.	)	
STATE OF ALASKA,	)	
Defendant.	)	

AFFIDAVIT OF TERRY L. THURBON

STATE OF ALASKA)
) ss.
FIRST JUDICIAL DISTRICT)

I, Terry L. Thurbon, being first duly sworn upon oath, deposes and states as follows:

1. I have been an attorney for 17 years. I am licensed to practice in Alaska and California. Currently, I am an assistant attorney general for the State of Alaska, a position I have held since October 7, 2003. For more than twelve years immediately prior to taking that position, I was in private practice in Alaska. I was based in Juneau

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DIMOND COURTHOUSE
P.O. BOX 110300, JUNEAU, ALASKA 99811
PHONE: 465-3600

but also did work in other areas of the state, including litigation in Anchorage and Fairbanks, in addition to Southeast Alaska.

2. My private practice experience includes representing not-for-profit institutional entities such as trade associations and state and local government entities, as well as representing other, private clients ranging from large corporations to individual persons. The work was primarily related to natural resources and environmental law. It included constitutional issues, complex regulatory problems and occasional complex litigation such as multiparty and class action suits.

3. As a result of my 12-plus years working in private practice in Alaska, most of which was with a medium-size firm having offices in Juneau, Anchorage and Arlington, Virginia, I became familiar with typical attorneys fees rates for Alaska counsel. My familiarity with those rates comes not just from knowledge of what my own former firm was able to recover from various types of clients, but also from information about how Alaska rates compare to what firms in lower-48 cities such as Washington, D.C., Seattle, Washington, Portland, Oregon, and San Francisco, California, were able to charge affiliates or co-parties of my clients for litigation and transactional work.

4. Based on my experience, the market rate for experienced attorneys working in Alaska on litigation similar to that in *Native Village of Nunapitchuk v. State* typically is significantly less than what lower-48 attorneys may be able to charge. In my experience, the market rate for Alaska attorneys representing not-for-profit institutional entities (whether a municipality or the state as contract counsel, or a trade

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DIMOND COURTHOUSE
P.O. BOX 110300, JUNEAU, ALASKA 99811
PHONE: 465-3600

association or similar entity) is less than that charged a for-profit entity, even for matters of similar complexity or importance. For instance, in my experience, to be competitive in securing representation of not-for-profit entities, it was necessary to discount rates normally sought from for-profit clients by 20% or more, and even then it was not always possible to collect 100% of the fees charged at the discounted rate.

5. Prior to my October 2003 departure from private practice, my experience was that only the most senior, experienced counsel in Alaska were able to charge rates approaching or in excess of $200 per hour for work on behalf of for-profit corporations such as insurance companies and resource developers, and these generally were not the attorneys handling the bulk of the day-to-day work. In the last few years of my private practice, it was commonplace for experienced attorneys handling day-to-day work such as litigation strategy, brief writing and similar matters to collect something in the range of $160-$175 from private, for-profit business clients. During the same period, the discounted rates charged not-for-profit entities for substantially similar work, by similarly qualified attorneys tended to run in the $120-$165 range.

Further your affiant sayeth naught.

DATED this 14th day of June, 2004

Terry L. Thurbon

Exhibit 2
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ATTORNEY GENERAL, STATE OF ALASKA
DIMOND COURTHOUSE
P.O. BOX 110300, JUNEAU, ALASKA 99811
PHONE: 465-3600

SUBSCRIBED AND SWORN to before me this 14th day of June, 2004.

Patricia L. Yeaple
Notary Public/State of Alaska
My commission expires: 9-27-07

STATE OF ALASKA
OFFICIAL SEAL
Patricia L. Yeaple
NOTARY PUBLIC
My Commission Expires 9-27-07

ATTORNEY GENERAL, STATE OF ALASKA
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Exhibit D
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3. ATTACH LABEL (If provided)
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Exhibit E Page 1 of 1

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1031 W 4TH AVE
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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FIRST JUDICIAL DISTRICT AT JUNEAU

NATIVE VILLAGE OF NUNAPITCHUK, ASSOCIATION OF VILLAGE COUNCIL PRESIDENTS, ALASKA CENTER FOR THE ENVIRONMENT, NORTHERN ALASKA ENVIRONMENTAL CENTER, SOUTHEAST ALASKA CONSERVATION COUNCIL, and THE REPUBLICAN MODERATE PARTY, INC.,

Plaintiffs,

vs.

STATE OF ALASKA,

Defendant.

FILED IN CHAMBERS
STATE OF ALASKA
FIRST JUDICIAL DISTRICT
AT JUNEAU
8-3-04
BY: dh

1JU-03-700 CI

ORDER ON MOTIONS FOR FEES AND COSTS

Plaintiffs seek an award of costs and full reasonable attorney's fees. The state opposes, in part or in whole, as to various arguments advanced.

Public Interest Litigant Status

Plaintiffs contend that they are public interest litigants because the case effectuates strong public policies involving court access, numerous people receive benefit from the suit, only a private party would be expected to bring the action, and the plaintiffs did not have a sufficient economic incentive to bring the suit without being granted public interest litigant

Exhibit 5
1 of 8

status. The court agrees, for the reasons advanced by the plaintiffs.

The state does not dispute that this case fits the first three public interest litigation criteria. It argues that the financial interest in avoiding liability for fees in the event of loss and recouping full reasonable fees in the event of success precludes designation of this case as public interest litigation.

The typical member of the various non-profit groups and village that brought this action will not reap substantial economic benefits from this or other public interest litigation. No damages were sought in this case. No argument was advanced that there is a constitutional right to attorney fee awards in public interest cases. Rather, free access to the courts by public interest litigants appears to have driven this lawsuit. A potential fee award does not create a sufficient economic incentive to sue to negate public interest status.

Costs and Attorney's Fees

Plaintiffs Alaska Center for the Environment, Northern Alaska Environmental Center and Southeast Alaska Conservation Council (collectively "ACE") seek $101,986 as full reasonable attorney's fees and $5,967.88 as allowable costs. The fee award sought is based on 307 hours of work by staff attorney

Exhibit 3
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Tom Waldo at $200.00 per hour and 289.9 hours of work by associate attorney Layla Hughes at $140.00 per hour.

The Village of Nunapitchuk and Association of Village Council Presidents seek attorney's fees of $45,220. This requested fee award is based on 258.4 hours of work by attorney Eric Johnson at a rate of $175.00 per hour.

The Republican Moderate Party seeks attorney fees of $47,115 and costs of $507.53. The fee award requested is based on 186.46 hours of work by attorney Nancy Wainwright at $250.00 per hour.

The state does not oppose ACE's cost request. The state also does not oppose an award based on the number of hours expended by attorneys Waldo, Hughes and Johnson, although it notes that the state's attorneys spent less time on this litigation than counsel for the plaintiffs. The state opposes the billing rates employed, ranging from $140/hour to $250/hour, contending that they are generally too high. The state also opposes most, if not all, of the costs and fees sought by attorney Wainwright for the Republican Moderate Party.

Hours Expended

The court has carefully examined the billing records of counsel for the various plaintiffs, taking into account the complexity of the constitutional issues presented and the time and labor required to properly address the issues. As noted at

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oral argument, briefing by both sides was of exceptional quality.

The billing hours submitted by attorneys Waldo and Hughes are detailed and conservative. Also, as set forth in the Waldo affidavit, time spent in research and cite-checking by summer law clerks and paralegals was not billed. Time spent talking to the media and responding to inquiries by other non-party public interest groups was not billed. Time spent in pursuing the preliminary injunction was not billed. "Case management" time was reasonably limited and the vast majority of billable time is directly and clearly tied to legal research and writing.

The billing hours submitted by attorney Johnson are also reasonably detailed. The vast majority of his billings are directly tied to legal research and writing of the briefs, or portions of the briefs, submitted in this case.

Attorney Wainwright submitted billings notable for detail in some respects. There are hundreds of billing entries by Ms. Wainwright between August 2003 and May 2004. The court has carefully reviewed each entry, at least in part because the state does not particularly object to the number of hours expended by attorneys Waldo, Hughes and Johnson but strenuously objects to attorney Wainwright's billings.

Ms. Wainwright primarily reviewed briefing by other counsel and provided suggested revisions. However, in some

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instances, she conducted legal research and drafted or assisted in drafting pleadings, particularly including the unopposed motion regarding severability submitted following the court's entry of summary declaratory judgment.

The court has excluded time spent on apparent media contact or discussion.[1] Billings for time apparently spent deciding whether to take the case, i.e., a conflicts review, and drafting the representation agreement were also excluded.[2] Billings for apparent administrative activities, such as scheduling teleconferences or making airline reservations, were excluded.[3] Billings for activities where the court could not determine substantive content/nature of the work were excluded.[4] Various billings and cross-references to the billings of co-counsel were also considered in assessing the overall reasonableness of the fee request.[5] The court concludes that

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[1] E.g., September 3,4,5,9,10,12,2003 billings.

[2] E.g., August 9,16, September 1, 2003 billings.

[3] E.g., September 3 ("Is it Tuesday?"; September 5 ("Lawyer call Tuesday"); September 10 ("4:30 instead"); December 16 (e-mail re "call"); February 16 ("airline reservations").

[4] E.g., November 28/30 (e-mail re "Kotzebue"); January 11 ("my contact info"), January 17 ("review RFP").

[5] By example, Ms. Wainwright billed .02 hours (slightly over one minute) on December 3 for reading the state's unopposed motion for extension of time. She billed .05 hours (three minutes) to read the order granting the unopposed motion for extension of time on December 5. She apparently read the order granting the unopposed motion for extension of time again (or a similar unopposed time extension order) on December 8, 2003 billing for .01 hour (one minute).

Ms. Wainwright billed 1.6 hours for an attorney teleconference on September 10. Mr. Johnson billed 1.2 hours

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Ms. Wainwright should be compensated for 100 hours of legal work reasonably expended in pursuing this action.

The state argues that its attorneys put somewhat fewer hours (818) into the case than attorneys Waldo, Hughes and Johnson (854) and significantly fewer hours than if attorney Wainwright's hours are added to the collective total. Although the time spent by the state is relevant, it is not conclusive as to the reasonableness of the amount of time spent on the case.

The same counsel who took the lead in briefing the issues surrounding HB 145 in this case also testified at length about the legislative history and constitutionality of HB 145 when the bill was introduced to the legislature. It is thus reasonable to assume that these or other state attorneys expended significant research time on the bill before this litigation began.

Hourly Rate

The court finds that the appropriate hourly rate for attorney's fees in this case by each of the four attorneys

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for this teleconference. Earthjustice attorneys did not bill at all for this teleconference as they chose not to seek fees associated with the preliminary injunction request. Ms. Wainwright seeks fees for an attorney teleconference on December 1 for .9 hours. No other lawyer billing references this teleconference. While each of the above entries likely reflect actual minutes engaged in activity involving this case, it is more difficult to determine the reasonableness or necessity of that time in determining an appropriate fee award.

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representing the plaintiffs is $150.00 per hour. Neither the Earthjustice nor Nunapitchuk/AVCP attorneys actually bill and collect fees from their clients. Ms. Wainwright does not bill the Republican Moderate Party for fees incurred in cases of this type. Thus, determination of a "reasonable" hourly rate is rather difficult. All lawyers in this case, plaintiff and defense, are, based on the work product submitted in this case, highly skilled and knowledgeable. While experience levels differ, that is not necessarily a decisive factor in determining a reasonable fee.

The state generally seeks a "blended" attorney fee award for cases where it is entitled to an award of $150.00 per hour, across the state. This amount has been selected based on research concerning typical billing patterns and practices across the state. Here, the plaintiffs were essentially acting as private attorneys general, seeking to further an important public interest. While there is room for argument that a higher hourly attorney rate might be appropriate, the award of actual, reasonable attorney's fees in public interest litigation is not intended to be punitive. Rather, such awards are intended to remove the financial burden of attorney's fees and costs from public interest litigants.

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Costs

ACE's unopposed motion for an award of costs is appropriate and granted. The Republican Moderate Party's motion for costs is granted in part. Costs for copies ($19.20) are allowed. The courier fee to transport an exhibit to Juneau is not allowed. Travel costs to attend oral argument on the cross-motions for summary judgment are allowed pursuant to Rule 79(g)(3). Counsel for plaintiffs shall submit a proposed final judgment that incorporates the above awards within ten (10) days of this order.

DATED at Juneau, Alaska this 3rd day of ~~July~~ August, 2004.

Patricia Collins
Superior Court Judge

CERTIFICATE OF SERVICE

The undersigned certifies that on the 3rd day of August, 2004 a true copy of this document was served via US mail on Tom Waldo, Nancy Wainwright, Eric Johnson Christopher Kennedy and Craig Tillery.

Donna Hahnlen
Assistant to Judge Collins

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