ALASKA STATE LEGISLATURE
SENATE JUDICIARY COMMITTEE
February 20, 2002
1:42 p.m.

MEMBERS PRESENT

Senator Robin Taylor, Chair
Senator Dave Donley, Vice Chair
Senator John Cowdery
Senator Gene Therriault
Senator Johnny Ellis

MEMBERS ABSENT

All Members Present

COMMITTEE CALENDAR

SENATE BILL NO. 273
"An Act extending the termination date of the Board of Governors of the Alaska Bar Association."
MOVED SB 273 OUT OF COMMITTEE

CS FOR HOUSE BILL NO. 40(FIN)
"An Act providing for the revocation of driving privileges by a court for a driver convicted of a violation of traffic laws in connection with a fatal motor vehicle or commercial motor vehicle accident; amending Rules 43 and 43.1, Alaska Rules of Administration; and providing for an effective date."
HEARD AND HELD

SENATE CONCURRENT RESOLUTION NO. 25
Relating to the public trust for fish and wildlife in Alaska.
MOVED CSSCR 25 OUT OF COMMITTEE

PREVIOUS COMMITTEE ACTION

No previous action recorded.

WITNESS REGISTER

Pat Davidson, Legislative Auditor
Legislative Audit Legislative Affairs Agency
P.O. Box 113300
Juneau, AK 99801-3300
POSITION STATEMENT: Supports SB 273

Deborah O'Regan, Executive Director
Alaska Bar Association
510 L. St., Suite 602
Anchorage, AK 99501
POSITION STATEMENT: Testified on SB 273

Mauri Long, President
Alaska Bar Association
510 L. St., Suite 602
Anchorage, AK 99501
POSITION STATEMENT: Testified on SB 273

Steve Conn, Executive Director
Alaska Public Interest Research Group
P.O. Box 10-1093
Anchorage, AK 99510
POSITION STATEMENT: Testified on SB 273

Annie Carpeneti, Assistant Attorney General
Criminal Division, Department of Law
P.O. Box 110300
Juneau, AK 99811-0300
POSITION STATEMENT: Supports HB 40

Mark Campbell
P.O. Box 3075
Palmer, AK 99645
POSITION STATEMENT: Supports HB 40

Albert Taylor
No address given
POSITION STATEMENT: Supports HB 40

Mary Marshburn, Director
Division of Motor Vehicles, Department of Administration
3300B Fairbanks St.
Anchorage, AK 99503
POSITION STATEMENT: Testified on HB 40

Dale Bondurant
Alaska Constitution Legal Defense and Conservation Fund
31864 Moonshine Dr.
Soldotna, AK 99669
POSITION STATEMENT: Supports SCR 25

Jesse VanderZanden, Executive Director
Alaska Outdoor Council
P.O. Box 73902
Fairbanks, AK 99707

POSITION STATEMENT: Supports SCR 25

Austin Ahmasuk
Nome, AK
POSITION STATEMENT: Opposes SCR 25

Don Johnson
Soldotna, AK
POSITION STATEMENT: Supports SCR 25

Warren E. Olson
Alaska Constitutional Legal Defense Conservation Fund
No address given
POSITION STATEMENT: Supports SCR 25

Ted Popely, Majority Counsel
Majority Legal Office
State Capitol, Rm. 116
Juneau, AK 99801
POSITION STATEMENT: Testified on SCR 25

ACTION NARRATIVE

TAPE 02-05, SIDE A

CHAIRMAN ROBIN TAYLOR called the Senate Judiciary Committee meeting to order at 1:42 p.m. Present were Senator Cowdery, Senator Therriault and Chairman Taylor. Senator Ellis arrived at 1:45 p.m. and Senator Donley arrived at 2:10 p.m. The first order of business was SB 273.

#SB 273

SB 273-EXTEND BOARD OF GOVERNORS OF AK BAR ASSN

MS. PAT DAVIDSON, Legislative Auditor, said in accordance with statutes Legislative Budget and Audit conducted a sunset audit of the Board of Governors of the Alaska Bar Association (Bar). The conclusion they reached was the Bar is functioning and is providing qualified applicants for licensure to the State of Alaska. They found the Bar is working generally in an efficient and effective manner. Therefore they recommend the legislature extend the termination date of the Bar until June 2006.

MS. DAVIDSON said they made a couple of recommendations. But she did not think they are of import that it would affect the extension date of the Bar at all.

CHAIRMAN TAYLOR said as usual her department had done an

excellent job and he thanked her and her staff for the quality of work he had seen over the last several years.

SENATOR THERRIAULT said a concern had been expressed to him over whether the Bar should conduct itself more like a board and commission. He asked if that was something that she reviewed or heard about.

MS. DAVIDSON said one of the questions that had come up was the fact that the Bar Association does act more independently with regard to its budget than most Executive Branch Boards and Commissions. They did a little research on that. She said she was not an attorney and could not succinctly put the argument. It has to do with the Alaska Constitution providing the court system with certain powers and duties to administer itself. This Bar Association function comes under that. It is by court rule that the fees are paid the way they are. So the Supreme Court is the administering body of the Bar Association. She expected an attorney could give them a more succinct explanation of that but it has to do with it being wrapped up in what the Constitution gives the Supreme Court in terms of ability and then it goes into the court rules.

SENATOR THERRIAULT said the court system is a separate branch of government but the legislature still budget for them. He said he did not believe even in the budget they pass for the court system that the Bar function is a subset in that budget. He believed it appeared nowhere.

MS. DAVIDSON said that was true. While the court system budget itself does go through the legislative process this one does not. It is not included in the court system's budget. For all intents and purposes it is off budget.

SENATOR THERRIAULT said there was some question of whether that is what it should be.

MS. DEBORAH O'REGAN, Executive Director, Alaska Bar Association, said it is correct that the Bar is under the judicial branch of the government. It is correct that they do not find them in the court system budget because the Bar Association receives no state funding whatsoever. All the funding for the Bar Association comes from bar member dues, admission fees, seminar fees and that kind of thing. All the money is privately raised. They have not received any money from the state since 1986 when the legislature last gave them some funding for the public members on the board. There are three public members on the board that are appointed by the governor and the Bar Association does pay for the travel and

per diem for those public members.

SENATOR THERRIAULT said in the current statute all boards and commissions have to be self-funding basically and they do that by raising licensing fees. Those monies do come into the state and they have to be appropriated back out for that function. In addition, boards and licensing commissions have to make sure they are not overcharging. There is a function so that if they raise more money than it takes to perform the function then the fees go down the next year. Part of the question he had heard was whether that same mechanism is available to attorneys that pay the Bar fee and if not why not.

MS. O'REGAN said the Alaska Bar Act Statute does give the board the power and the duties to set the budget for the Bar Association and to expend money. She thought because they are not a state agency but rather an instrumentality of the state they don't have the same requirements as all of the state agencies because they are not a state agency they are an instrumentality of the state under Alaska Statute.

MS. MAURI LONG, President, Alaska Bar Association, apologized for her late arrival. She said she heard a good part and thought Ms. O'Regan had answered well. She said they are not responsible for setting themselves up but did not hear the question initially so was not sure if there was anything she could add. She said if they had specific questions she would be happy to answer them.

MR. STEVE CONN, Executive Director, Alaska Public Interest Research Group (AKPIRG), said the testimony he would share with the committee was created and is being communicated to them by a subset of their operation, Barbara Williams, who is the President of Alaska Injured Workers Alliance. She provides representation of a voluntary and lay nature to injured workers engaged in workers compensation hearings in both administrative and court hearings. He said he would be speaking as if he were her.

MR. CONN explained these hundreds of workers, including one that she was working with at that minute, cannot find representation because only a handful of attorneys take workers compensation cases. Some of these people suffer not only from the physical disability but also from mental illness. Almost all these injured workers confront licensed Alaskan attorneys on the other side. She asked the Bar repeatedly to spot check hearings where attorneys represent one side but not the other to see if ethical violations or other unusual or overbearing conduct occurs. She did not seek attendance at every hearing but spot-checking. The Bar refuses saying that its budget is insufficient and people

like these should file ethics complaints. These clients cannot tell when ethical violations occur.

He said the Legislative Audit encourages the Bar to make sure lawyers on the referral list are qualified. But what it doesn't mention is that many of the people who call the lawyers on the list to whom they are referred are turned down. He said Ms. Williams knows this is the case with workers compensation cases. There is really only one attorney on the list. All the private attorneys refer injured workers to her. He noted that on page 21 where they have the statistics, 320 people, and something close to that each and every year, sought referrals for workers compensation in 2001. He asked where they went and who helped them. The Bar does not follow up to discover how many referrals actually took place and what service was received. In other words there is no quality or consumer evaluation except when it comes in the form of an ethics complaint. The referral process becomes mere window dressing.

MR. CONN said Ms. Williams concluded by urging them to mandate evaluation from the consumer perspective of the referral process. She urged them to mandate spot checks by the ethics staff of the board the administrative and judicial hearings where licensed attorneys come up against un-represented working people. He urged them to seek an amendment to the composition of the Bar Association to include not just any public member but one who is familiar with the masses of people who must either be un-represented or helped by a volunteer. She thanked the committee.

CHAIRMAN TAYLOR asked Mr. Conn to carry his words back to Ms. Williams. He said the bill is before them and it is probably because it is a target of opportunity to criticize the Bar who at least tries to have some level of referrals. The true villain in this process is the legislature. The last time they did one of those group grope operations where they brought in the employers and all the unions, they sat down and cut a deal that basically sold the injured workers of our state right down the river. Sadly what happened is an attorney cannot charge an attorney's fee to a workers compensation client. That fee can only be paid by the Workers Compensation Board. The Workers Compensation Board has been set up with a schedule of payments and fees and so on that makes it almost impossible for anyone to represent folks in the workers compensation field and make money doing it. What they probably ought to do in the legislature is mandate that all doctors in the state have to do appendectomies for free and we will see how many appendectomies get done too. They won't do it either.

CHAIRMAN TAYLOR said the real problem is right here in Juneau and he would be happy to work with anyone who wishes to address that problem and take it on. But the forces allied against them come both from the private sector and the union sector. They felt they made the best deal they could and they don't want to open that can of worms without recreating that entire task force and spending a couple of years to do it.

He said Ms. Williams is absolutely correct in her frustration. He said as an attorney who has not done workers compensation work for many years, he continually finds himself referring people to Chancy Crofts office in Anchorage in the hope he may be able to find time to help them. He is one of the only ones Chairman Taylor knew of doing the work. It is a very frustrating thing and he believes the Bar probably shares the level of frustration that Ms. Williams talked about. If somebody can find a third party negligence growing out of a workers compensation case they will usually find somebody that will take the case in the hopes they can then seek subrogation against the third party defendant and actually get some level of compensation for the amount of work they have done. In Alaska today very few people are willing to work for nothing and that is about what it amounts to when you take on a workers compensation case. He said he appreciated Ms. Williams' comments very much and Mr. Conn taking the time to bring them before the committee.

MR. CONN said he would return to the office and share Chairman Taylor's thoughts with her.

CHAIRMAN TAYLOR said if Mr. Conn can find support for that effort he pledged to him that he would help lead that attack because it desperately needs to be done. The injured workers of Alaska are not being taken care of. He said he guaranteed when workers go into a court room the insurance industry has the best attorneys money can buy standing there beating the heck out of them and doing video tapes of them and all kinds of other things and they have a whole cadre of doctors that in his opinion are little more than prostitutes for the insurance industry. There is legislation pending for that because of the notorious reputation that many of these doctors have. They always seem to show up at workers compensation hearings and they can never find that the worker was ever injured and they just happen to be making thousands and thousands of dollars every year off the insurance industry. Chairman Taylor said it is a major problem and one he would be happy to work on. He believed many others around the legislature felt as he does and would be willing to work with them on it. He told Mr. Conn if he wants to take this one on it is an 800-pound gorilla.

SENATOR COWDERY made a motion to move SB 273 to the next committee of referral with individual recommendations. He asked for unanimous consent. There being no objection, the motion carried.
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#HB 40

HB 40-REVOKE DRIVER'S LIC. FOR FATAL ACCIDENT

MS. ANNE CARPENETI, Assistant Attorney General, Criminal Division, Department of Law (DOL), said HB 40 addresses a problem that does not arise very often but when it does it creates a serious public safety problem. It also can create a lot of anguish in the family of victims who are killed in automobile accidents.

She described the situation when a motor vehicle accident is caused by a person who violates a traffic law but does not commit a crime but non-the less a death is caused. HB 40 addresses this situation by requiring the court to revoke the driving privileges for one year of a person who is convicted of violating a traffic law and the violation was a significant contributing cause of an accident resulting in the death of another person.

MS. CARPENETI explained that specifically before this license revocation can occur:

- First a judge must find beyond a reasonable doubt that the person committed the traffic violation.
- Then by clear and convincing evidence the court must find;
  - The person was operating the motor vehicle that was involved in the accident.
  - The accident caused the death of another person.
  - The violation of the traffic law was a significant contributing factor in causing the accident and death.

She said the bill does allow a court to consider a request by the driver for limited driving privileges. If the person can establish that his or her ability to earn a living would be severally impaired by loss of driving privileges the court can issue a limited license for that purpose. In the House Judiciary Committee they added another possibility for a limited license. If the person can establish that his or her ability would be severely impaired to give assistance as a primary care giver to another person who is disabled the court could entertain a request for a limited license.

MS. CARPENETI said when people drive in an unsafe way even if they do not commit a crime but cause the death of another person their privilege to drive should be revoked to protect other drivers on the road, their passengers and people walking on roads.

CHAIRMAN TAYLOR explained he did not have a problem with the thrust of the bill. It was again a mandatory minimum, which he always opposed in the court system, because he thought mandatory minimums become the sentence. For example they have a three-day mandatory minimum on drunk driving so what does every single drunk driver get, three days. He said it is called mandatory minimum but judges never seem to read the word minimum. They do not give longer sentences because they get scared as soon as they pop somebody for ten or fifteen days on a first offense every public defender is going to make certain that they are disqualified from ever doing a drunk driver case. Public defenders probably should act on the behalf of their client. He said these things sound like they are somewhat discretionary within the law but once they establish these parameters of mandatory revocation they become the only revocation. He said he was concerned about that aspect of it.

CHAIRMAN TAYLOR gave an example of the other aspect that concerned him. A single mom commuting home from work has picked both her kids up. She slides on the ice and has a one-car accident. She doesn't impact anyone else. The car flips around a couple of times and one of the children is killed. Now she just lost one of her children and on top of that somebody is going to say she had been driving to fast for road conditions or whatever because every officer that shows up at a wreck site feels compelled to find some violation for the wreck having occurred. Accidents don't happen anymore it was because you violated something. He asked if they would suspend her driver's license for one year when she has already lost a child in this process. He said he was not talking about some drunk driver or someone that is negligently driving and killing some stranger.

MS. CARPENETI said that was correct, if she was driving drunk they could revoke her license for that reason. She said she did share his frustration about mandatory minimums. She thought it was shocking that everybody who is convicted goes to jail for three days because drunk driving cases can be really varied. She said in a sense this was not a mandatory minimum because there is no range. It is a mandatory one-year. They don't range from one to five years it's a one-year revocation.

MS. CARPENETI said the person Chairman Taylor was talking about

would have to be convicted and proven to have violated the traffic ordinance beyond a reasonable doubt by a court. She would be given a court appointed council and a jury trial in the endeavor to determine whether or not she was guilty of the traffic violation. Then the court would have to find by clear and convincing evidence that whatever violation she was convicted of was a significant contributing factor to the death of her child. Ms. Carpeneti understood that would be a terrible situation for any person to be in but maybe she should not be driving her other child who is still alive.

CHAIRMAN TAYLOR said you are going to keep her off the road for one year. That is what you are going to do.

MS. CARPENETI said under the circumstances but the court has to jump through many hoops before it can come to that determination. By the possibility of a driver's license loss she would have the right to court appointed counsel and a trial by jury and some of the other guarantees attended on a criminal case.

CHAIRMAN TAYLOR said he did not think the committee had any concerns or objections to the 25 year old doing a 100 mph down the Glen Highway and crossing the meridian or something. In those instances the prosecutors office, our district attorney would normally be charging negligent homicide, seeking a felony charge and some serious time in jail. He said as far as he knew our people are not reluctant to do that. This person is distracted for a moment and instead of stopping on the yellow light has gone on through it and t-boned somebody in the middle of an intersection. Accidents do happen and yes there may have been a violation but in this instance all you need prove is any violation of any traffic law.

MS. CARPENETI said it would have to be a moving violation.

CHAIRMAN TAYLOR said those are his concerns it is not that he does not support the concept, he does. He thought it was probably another tool in the toolbox that they may need but he had those concerns and appreciated her answers.

SENATOR THERRIAULT said he appreciated Chairman Taylor's stated concerns because he had a lot of the same ones. Accidents do happen but the person who puts the pedal to the metal, that is not an accident, that is a choice. The person that drinks too much has made a choice. The person that is spinning his wheels and doing the brodies, that is a choice. He said the scenario that Chairman Taylor laid out is one, and there are others, where this is just going too far.

SENATOR THERRIAULT said last year Representative Fate and Representative Coghill and himself met with a group of constituents in his district that live out on Chena Hot Springs Road. They expressed a lot of concern with the fact that the privilege on our highways was so often used as a club to try and shape the actions of the public. It is little consolation to them when you say, we have not taken away your right to travel about the community when it is 40 below zero and you live out at 40-mile Chena Hot Springs Road. If they cannot drive their car you have taken away their access, their ability, because many times they can not even go to a neighbor next door because the neighbor is maybe a mile away. He had concerns over the need for the legislation.

MS. CARPENETI said it was brought to their attention by people who have lost loved ones under these circumstances. For example where the driver of a car had fallen asleep. This is a really common problem not only in Alaska but throughout the country. It is a common driving problem to fall asleep and then cross over the centerline and kill somebody. They may only have a small fine for doing so. It seemed to her for the safety of the driving public it would be worthwhile for that person to take some time off driving and maybe jump through the hoops necessary to get a drivers license back after it had been revoked before he or she thinks about driving when he or she is to tired or takes their eyes off the road and causes such serious damage. She said there were people on the teleconference that might help inform the committee of the concerns that they brought to DOL.

SENATOR ELLIS asked about the language “contributing factor, significant factor” and asked her to talk them through that.

MS. CARPENETI explained it is on page 2 of the bill. These terms are terms judges use and apply all the time. The court must find a person guilty of violating the traffic law by proof “beyond a reasonable doubt” and the person must have a lawyer and the right to a jury trial if he or she chooses. If a person is convicted of a traffic law the court will revoke the privilege to drive if the court finds by “clear and convincing evidence”. “Clear and convincing evidence” is a higher standard than “beyond a reasonable doubt”. You have to clearly show that the individual was driving the motor vehicle in a car that was involved in an accident. The accident caused another person’s death and the violation of the traffic law was a significant contributing cause of the accident. So the court would have to make a finding by clear and convincing evidence, the real crux of it is, that the violation of the traffic law was the significant contributing

cause of the accident that resulted in the death of another person in order to loose their license under this bill. These are term that courts use all the time; significant, contributing cause. She did not think there would be a problem with definitions.

SENATOR DONLEY asked what happened to these people after they lost their license and they go ahead and drive without it.

MS. CARPENETI said they would hope they did not but if they did then they would be committing a crime.

SENATOR DONLEY asked what was the punishment for that crime.

MS. CARPENETI said she thought that was a maximum of one year in jail.

SENATOR DONLEY said that was the maximum but was there any minimum.

MS. CARPENETI said she did not believe so.

CHAIRMAN TAYLOR said he thought there was additional revocation of license.

MS. CARPENETI said for conviction there could a revocation of license and she thought for the first one it was only 60 days.

CHAIRMAN TAYLOR said they used to have a mandatory minimum on that. It was like five or ten years and we had people caught driving that couldn't get their license for 30 some years.

MS. CARPENETI said yes that used to be the most serious mandatory penalty in the state in the 70's.

CHAIRMAN TAYLOR asked if she thought right now, in answer to Senator Donley's question, it was probably 60 days for the first violation.

MS. CARPENETI said that was right. For conviction of the first offense and then one year for the second and three years for the third.

SENATOR DONLEY asked when you are saying 60 days are you saying the maximum allowable.

MS. CARPENETI said additional revocation of license for conviction.

SENATOR DONLEY said he remembered voting against a piece of legislation about ten years ago that revoked an existing law where it was a mandatory ten days in jail if you drove on a suspended license.

MS. CARPENETI said that was a time before they had mandatory terms. That was the most serious mandatory sentence in the State of Alaska in the 70's.

SENATOR DONLEY said now we don't have any minimum for a first time violation for driving without a license.

MS. CARPENETI said she was looking at the revocation. Under AS 28.15.181 the first offense would be 60 days revocation of license.

SENATOR DONLEY said and no mandatory jail time. Of course they have already lost their license for a year then we take the license for another 60 days.

CHAIRMAN TAYLOR said Senator Donley brought up a major issue, directly related to this. They have set up a lot of laws so they are going to result, especially with Driving While Intoxicated (DWI), in revocation of a driving privilege or the opportunity to get one for some term of years. They just keep driving; they just go use somebody else's car and they just keep driving. It is kind of like this hoop thing; you are always trying to catch up with the end of it. From his discussions with state troopers and city police officers it is a continuing and expanding problem. They are not insured, they don't have a drivers license but they are out there driving to and from work and they may be legally driving down the road but they are illegal and should not be there. He thought it is a concern many of them shared.

MS. CARPENETI said they shared that concern. This bill doesn't necessarily address repeat drivers driving with their license suspended or revoked but that is a concern because we all drive.

SENATOR THERRIAULT said along that line just look at the police blotter in the newspaper. They get caught for drunk driving time after time and also for a suspended license. That group of people, because of the drinking, seems to get caught more often. But the person who just ran through a red light or slipped off the road and had a roll over not because they were hot roding or anything, they are not necessarily going right back into the system because they had a perfect driving record for 30 years and just hit the slick spot the one time. They are going to be out

there driving with no license anyway. If we have learned one thing from the DWI situation it is that they are going to drive anyway. He said he understood the frustration of family members seeing somebody who has caused the loss of a loved one being able to continue to drive. But he thought this sort of a solution really did not get them anywhere.

SENATOR COWDERY said if you get pulled over for a DWI and refuse to do the breathalyzer that was an automatic loss of license but it was not proven they were really under the influence. They can't take breath samples without a search warrant unless there is an accident involved and somebody is killed. He thought the penalties that exist now did not solve anything. He thought they should have far more stringent penalties.

MS. CARPENETI said there are a lot of problems with DWI and refusing a breathalyzer. This legislation really is just focused on maybe six to ten accidents that happen a year that result in a death to a person by another person who was not committing a crime. They were not committing reckless driving but may have been driving negligently. For that reason they are not safe enough drivers. They caused a death because of their careless driving even though it did not arise to reckless driving or criminal negligent homicide or a crime. But they were driving in a careless manner and for that reason it seems reasonable to take their license away for a period of time so maybe next time they won't drive negligently.

SENATOR COWDERY said taking their drivers license away really does something. Does that mean they are going to take a cab or have somebody else drive them or does this mean if you don't catch them they are going to drive, if you do catch them then what.

MS. CARPENETI said if they did drive they are committing a crime. We hope this would have some effect on drivers who loose their license. She said she was sure there are a lot of people who don't pay attention to court orders and revocation of license but there are people who do.

MR. MARK CAMPBELL, Palmer resident, testified in support of HB 40. He shared from their own experience having lost their son in an accident. In their circumstances they had a 19-year-old son and he had a car full of kids with him. Another vehicle was speeding in the opposite direction and that driver lost control of their vehicle and collided with their son's car killing two kids and injuring four others.

They found there was no recourse whatsoever. Within one year the same young man that caused that accident had another accident killing two other young men. They feel there needs to be something if you are not under the influence of alcohol or drugs but yet you are acting irresponsible with a vehicle. The courts need to determine whether it is acting outside of a reasonable manner. They lost a son, their good friends lost their son, and four other children were hurt. The young man was speeding, lost control of his vehicle and got a ticket for speeding. That was it, a ticket for speeding. As a family of a victim he wanted to see that there was something that would cause an individual to take some time away from the privilege of driving.

MR. CAMPBELL said there needs to be something for the victim's family from the person causing the loss. Sharing from his experience they found there was nothing they could do. Then they were terribly grieved over the fact that within a year another two lives were lost in that situation.

CHAIRMAN TAYLOR said he did not understand on the first accident why he was not charged with negligent homicide. Speeding alone resulting in death should have been sufficient grounds for negligent homicide and that is a felony. He asked if he was charged for negligent homicide on the second incident.

MR. CAMPBELL said on the second incident he was driving the vehicle and lost control. The other two boys that were killed were not able to testify so there was no witness.

In the first situation the only eyewitnesses were in a vehicle that was in front of him. They viewed his speed coming from behind so rapidly that driver pulled over. The only way they could testify that they felt he was speeding was through a rearview mirror so again no eyewitness. Of course no one was there to actually clock that he was speeding so they could only judge it by the fact there were no skid marks on the highway. He just simply lost control of his pickup.

CHAIRMAN TAYLOR said that was a terrible situation and was sorry that Mr. Campbell had to come in and testify. He said he thought Mr. Campbell understood the concerns the committee had raised. He asked if the family contemplated any form of civil liability.

MR. CAMPBELL said they did go to court not as a civil suit but simply on his driving ticket. They asked that rather than he being able to just pay the ticket they felt the court should have him serve community service in the area of hospice care or something like that. Given the special circumstances the court

did that and the young man did not argue.

He was a young man also, 19 years old, and they did not want to plague his life trying to pursue some sort of payment for their loss. But Mr. Campbell felt in this type of situation the loss of license for a year would have been excellent and could have saved two other lives and possibly cause some growing up.

MR. ALBERT TAYLOR said his son was killed by the driver of a motor vehicle. That driver chose to operate his vehicle in a careless, irresponsible and unsafe manner. He felt strongly that a person operating a vehicle carelessly, breaking traffic laws and killing others should have their privileges to drive revoked. He urged the committee to pass HB 40. It would help make our roads safer.

CHAIRMAN TAYLOR said he was sorry for his loss and thanked him for testifying.

MS. MARY MARSHBURN, Director, Division of Motor Vehicles (DMV), said Ms. Carpeneti adequately covered the history or reasons behind the bill as well as the specifications of the bill itself and what it intends to do. She addressed two items.

- The fiscal note reflects there are a very small number of these incidences each year. Obviously very painful for the people who loose family members in these crashes.
- In answer to Senator Donley's question about driving without a license. Driving without a license carries an additional ten days in jail and a minimum of 90 days additional revocation, which does not run concurrent to any existing revocation.

SENATOR DONLEY said he did not think there was any mandatory jail time for a first time conviction while license is suspended.

MS. MARSHBURN said she would be happy to look it up but that information came from DMV staff.

CHAIRMAN TAYLOR said the committee would look into that also. He said there may be some misunderstanding about how the law is either applied or how it is currently written.

TAPE 02-05, SIDE B

SENATOR DONLEY asked Ms. Carpeneti if it a mandatory one-year suspension no matter what the nature of the traffic violation was if there is clear and convincing evidence that the elements are here.

MS. CARPENETI said that was correct but they have to have a conviction and then clear and convincing evidence that the traffic violation was a significant contributing factor.

SENATOR DONLEY said this could be an improper lane change or a failure to signal and there is no discretion on the part of the judiciary. He said in the eight years he had been in the legislature they had tried a lot of mandatory sentencing proposals. He thought the executive branch had opposed every mandatory sentence. The executive branch wanted to go in the opposite direction and have less mandatory sentencing.

MS. CARPENETI said this was a license revocation not a result of a conviction of a crime. It is a license action and the purpose is to make our roads safer. It is not necessarily completely to get this particular person off the road but to make our roads safer.

SENATOR COWDERY asked in her mind what would happen if in fact the one-year revocation was imposed but during that year period he was caught driving again.

MS. CARPENETI answered he could be charged with driving with a license suspended. If he was driving and he had a limited license that would be another issue. It depended on the circumstances. This revocation would be concurrent with any other revocation in law.

SENATOR DONLEY said he noticed the CS bill had been referred to the Rules Committee. He asked if that was accurate. It was originally a Rules Committee bill and he didn't understand why it said it was referred to the Rules Committee. He had some question about the fiscal note and wanted to know if it was coming to the Finance Committee and he could not tell that from the bill document. He thought there was something inaccurate about the referral section. It did not say judiciary but they were there hearing it.

CHAIRMAN TAYLOR said the referrals are judiciary and then finance. That was on the referral sheet that came with it.

He said he would entertain a motion. No motion was made.

SENATOR ELLIS asked for an at ease.

TAPE 02-06, SIDE A
[Recorded from the net]

CHAIRMAN TAYLOR called an at ease.

CHAIRMAN TAYLOR reconvened the meeting and announced he would hold the bill for a week to try to resolve some of the concerns. He stated it was his intention to move the bill from committee.
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#SCR 25

SCR 25-FISH & WILDLIFE PUBLIC TRUST/ANILCA SUIT

CHAIRMAN TAYLOR, prime sponsor SCR 25, said it was a resolution relating to public trust doctrine as it concerns the allocation of fish and wildlife resources in the State of Alaska. He prepared a work draft which was before them entitled Utermohle 2/18/02 J. In comparing the work draft and the original document most of the changes are more stylistic to improve the wording of the document as opposed to major substance changes.

SENATOR COWDERY moved to adopt the CSSCR 25 (JUD) J version as the working document.

CHAIRMAN TAYLOR said there being no objection the document before the committee is now CSSCR 25. He believed it had been distributed to each of the committee members.

MR. DALE BONDURANT, Alaska Constitutional Legal Defense Conservation Fund Incorporated, said we as individuals and united public interest litigants unanimously support SCR 25. The Alaska Constitutional Legal Defense Conservation Fund Incorporated's purpose is to protect the rights of equal access to Alaska's common property, fish, wildlife and water held in public trust for all citizens. These equal access rights are in jeopardy by those who seek discriminatory preference by a prescribed group based on where they live. Both the Alaska and U.S. Constitutions are explicit in their doctrines of equal protection under the law. He said they must be definite in their struggle to protect that right of equal access for all personal consumptive users as in hunting and fishing of Alaska's common property fish and wildlife resources as managed under the constitutional responsibility within the sustained yield management.

MR. BONDURANT said the public trust doctrine recognizes that our sovereign nation has a judiciary responsibility for our elective legislative and administrative government acting as trustees of the public trust for fish, wildlife and waters within Alaska and acting in respect for beneficiaries for all people as a whole. This beneficiary must demand that these trusts be managed for the

present and future generations. The king and a dictatorial monarch had absolute sovereign power over the people and could abrogate the common law intent of protecting the people's rights of life, liberty and property as within a free society. Our forefathers wrestled this absolute sovereignty and returned the sovereignty responsibility to the people themselves. Governor Tony Knowles wants the people to vote away the fundamental equal protection rights of equal access to our public fish, wildlife and water renewable resources.

(Due to transmission difficulties, this portion of Mr. Bondurant's testimony indiscernible)

He concluded that Congress is without power to omit the state's cooperation in joint federal/state programs by legislation, which authorizes a state to file under the equal protection clause. He said he could sight several cases that way. He appreciated the fact SCR 25 had been sponsored and they totally support the bill.

CHAIRMAN TAYLOR thanked Mr. Bondurant. He said Mr. Bondurant was involved with Mr. Olson and others in litigation currently pending before the Federal District Court in Anchorage and there was a recent decision on that. He asked if that decision in any talked to or discussed the public trust doctrine as described.

MR. BONDURANT answered yes. He explained that Judge Helms' court mentioned that their claim had been as a public trust claim. Judge Helms further said they have the right to pursue the equal protection clause of the U.S. Constitution and file against as applied by the Alaska National Interest Lands Conservation Act (ANILCA) Title 8. But Judge Helms said that public trust is a state right and as such they cannot show that they have the ability or the right to take this up. He said they were contesting several of Judge Helms' dismissals along with the equal footing rights, the submerged lands act right and the public trust right. They intend to further pursue this in the other courts of the federal government.

JESSE VANDERZANDEN, Executive Director, Alaska Outdoor Council (AOC), said AOC is comprised of about 50 member clubs, primarily outdoor oriented. They also have individual memberships and when added up they have about 10,000 collective members that are hunters, fishermen, trappers and outdoor enthusiasts.

MR. VANDERZANDEN said the CS looked to have made just some minor changes none of which shifted the intent or the principal of the bill. They do support it and he thought Mr. Bondurant had said it very well. They have been in communication with Mr. Bondurant

on this issue and also on his lawsuit. He said generally speaking CSSCR 25 is a good expression of the legislature's support for their states rights. Given what they have seen over the past few years with regard to the increasing intervention of the federal government into the management of fish and game the timing is good, the intent is good and the principal is good.

In conclusion AOC wanted to thank Senator Taylor for sponsoring the bill, for moving it through and for keeping an eye on this issue. It is a good statement of the legislatures support for trying to retain management of fish and game by the State of Alaska.

AUSTIN AHMASUK, Nome resident, said he received the latest working draft of SCR 25 about four minutes before his testimony. He was not pleased that they had just received it.

He said he was an Inupiaq Eskimo born and raised in Nome, Alaska. He is married and has four children. Hunting and fishing around Nome is important to his culture and important in raising his children. He wanted to testify in opposition to SCR 25, which would destroy many aspects of subsistence livelihood. He lived there himself and would likely nurture his children into responsible and hard working adults.

MR. AHMASUK said challenging the actions of the United States Congress in enacting Title 8 of ANILCA would do great harm to the Alaska Native and rural people of the state in terms of subsistence use. The Alaska Statehood Act and implementing laws were subject to Aboriginal Title but were outright ignored until the Alaska Native Claims Settlement Act (ANCSA). He said SCR 25 ignores and wishes to destroy subsistence use. Alaska Statute 16.05.258 clearly indicates that subsistence shall be afforded for in times of plenty and certainly in times of shortage. It appears that nothing in the Alaska Statehood Act impaired the ability of Alaska Natives to compensation for extinguishment of aboriginal claims, including subsistence use. ANCSA Section 12 (b) clearly indicates that native land selections where to take into account historic uses and subsistence needs of Alaska Natives and they are not subject to traditional review.

He said he strongly challenged the sponsor of the bill to prove the action being sought will not harm a long standing legal mandate that has been through many trials and tribulations for the benefit of Alaska's first people and those that have learned subsistence and live it hand and hand in remote and rural parts of Alaska. Section 804 of ANILCA clearly indicates a mandate for a rural subsistence priority. That legal mandate and

implementing laws should not be infringed upon in times of plenty and most definitely in times of shortage. As legal history clearly indicates Alaska Native people have been reliant on the resources of the land and water. It is clear competing uses can have devastating affects on animal and fish populations. Only by limiting uses among users can animal and fish populations exist for the benefit of future users and fulfill the immediate needs of customary and traditional users of the resource. He thanked Chairman Taylor for his time and consideration.

MR. DON JOHNSON, Soldotna resident, wanted to congratulate Chairman Taylor for sponsoring SCR 25 and said it had been a long time coming. He said they tried a lot of avenues to correct this problem and he completely agreed with the intent behind SCR 25.

He said the real shame was the Governor of the great State of Alaska dismissed the case they had before the federal government, which put them in a position where they have to do something else. He agreed the Alaska Constitution binds the Alaska Legislature in that it must perform its duty as Alaska's trustee to protect the citizens of this state who are the beneficiaries of the public trust for fish and wildlife. He believed that Title 8 of ANILCA attempts to usurp the authority of the legislature in an attempt to manage Alaska's fish and wildlife in a different way other than sustained yield. In his opinion that way would end up destroying the fish and wildlife in the State of Alaska within a matter of time.

He said the earlier statement of aboriginal claims was an incorrect statement in that there was a two billion dollar payoff for aboriginal claims not many years ago to take care of those claims. Basically all the people who were sighting aboriginal claims find often it is just maybe one percent of the natives of the state. He did not believe that really applied at all to this situation. He said Title 8 was particularly offensive to him in that it reversed Alaska's majority use position and reformed it into a federal minority use position. The majority of residents resides outside the rural areas of Alaska and would be totally excluded from participating in this subsistence preference established by ANILCA. He said he did not believe anybody in Alaska wanted that to happen, maybe the federal government did but nobody around there did. He could not believe anybody who really understands the intent behind ANILCA would agree with that. He firmly believed the U.S. Government signed off on the management issue when statehood went through. They actually signed off giving Alaska the authority to manage its own fish and wildlife. Once that statehood contract had been established it was not a severable commodity to be rescindable on

and off with time according to whether or not the federal government thinks they are behaving as far as a state goes.

MR. WARREN E. OLSON, Alaska Constitutional Legal Defense Conservation Fund Incorporated, said he was a 45-year resident. For 25 of those years he had been involved in opposing and or trying to modify state law and federal law working within state courts and federal courts towards the subject of discrimination caused by Title 8 of ANILCA. He supports SCR 25 but did not have a copy of the CS.

MR. OLSON said he has a very strong reason for supporting this action and that is called finality. When Governor Knowles failed to move forward on Katie John v. State of Alaska he abandoned three quarters of the residents of Alaska and he avoided finality on this question of Title 8 and ANILCA. The people who need finality are the legislators, the administration, the Board of Game, the Board of Fisheries, the advisory boards and most of all the resources. He said he was absolutely convinced, as the committee had received strong communications from him, the folks that normally would be participating in the process of the Fishery Board and Game Board and the advisory committees have abandoned the process.

He had one suggestion for the bill on page 3. He suggested strengthening this resolution on page 3, line 6 and 7 where he would introduce or include and describe police powers of the State of Alaska. He said the licensing, the seasons and bag limits, responsibility, means and methods and protection are the sole responsibility of the State of Alaska.

CHAIRMAN TAYLOR said the main thrust of this legislation is to address the issue from a perspective that has not yet been taken up. That is every citizen of Alaska wherever they live is a beneficiary of the inherent public trust that is given to the assets of the state that were conveyed to them at statehood and every citizen is the beneficiary of those assets. So if the asset is a caribou or a deer or a moose or a bear every citizen in the state is the beneficiary of those fish and wildlife assets.

For example when they in the state decide to sell a piece of state land the public trust doctrine comes into play. You cannot give that away. You cannot just hand it to someone and say here is a big piece of Alaska. They are required to make certain the public’s interest in that land is protected. You would not sell off all of your coastal waterways because no one would be able to land a ship. There would be no public dock or wharf. You do not

give away or sell your entire resource base or the public would have no opportunity to dig clams or to go get a crab when they wanted one on the shore. They would have no opportunity to harvest a deer or a bear for food supply or for the hide. All these things would then be excluded.

CHAIRMAN TAYLOR said this public trust doctrine goes clear back to before Magna Carta in England. The rights of the people to access their resources had to be protected. He said interestingly, throughout history every court has looked to the legislative body to protect the public trust. The legislative body in this instance, the House and Senate of the State of Alaska, are trustees. They are not just sitting there as representatives of the people to vote on various things they actually have a fiduciary responsibility. Each of these animals and fish has some value and the House and Senate are the guardians of that public trust.

He gave the example of the Permanent Fund as a public trust. For all intents and purposes, it is a trust they may use for state purposes it is a trust to provide for the beneficiaries of the trust, every man, woman and child of the State of Alaska. He asked if they could imagine the outcry that would occur in the State of Alaska and how fast they would find each of themselves impeached if they attempted to say only people living in a rural area would receive a permanent fund check. He said the roof would come off that place and it should because they would not be distributing the public trust asset in an equal fashion. They would be discriminating in the way they distributed that public trust asset. The very same thing is happening through this federal law.

CHAIRMAN TAYLOR said if that law is not tested and challenged by the legislature then they have abrogated their responsibilities as trustees. He said the issue is not one of whether or not you believe in subsistence or you believe in sustenance, which is the utilization of these things for food that is not the question. The question is are they as a legislature in violation of the public trust doctrine that requires them to treat every citizen in Alaska equally no matter what their race, color, creed, national origin, religion and probably most importantly no matter where they live and will they be treated as an Alaskan citizen and an equal beneficiary. That is the reason SCR 25 is there.

He wanted to say that because Mr. Olson had worked so long on that and had submitted so many different treatises to the legislature on the public trust doctrine. It is a doctrine that has not been tested in the courts yet.

CHAIRMAN TAYLOR asked Ted Popely how many years he had worked for the House and Senate Majority.

MR. TED POPELY, Majority Legal Counsel, answered seven years.

CHAIRMAN TAYLOR asked if during that time a major percentage of his time has been spent on issues revolving around state sovereignty and Title 8 ANILCA.

MR. POPELY, answered yes.

CHAIRMAN TAYLOR asked if he could give the committee his impression of the public trust doctrine and whether or not this litigation, should it be brought by the Alaska Legislative Council would lie and have jurisdiction.

MR. POPELY answered the public trust doctrine itself is certainly a viable claim in a case like this revolving around the allocation of state resources. It is a substantial doctrine steeped in lots of history and case law around the country. Chairman Taylor was right; it has not been litigated within this context of subsistence and Title 8. So it is a viable claim.

He said the second part of his question as to whether or not a claim would lie with the Legislative Council is a more difficult question. It is a lot harder to answer. They obviously faced a lot of difficulty in pursuing litigation as a legislative body as opposed to the Department of Law because of the separation of powers doctrine. He thought their chief concern in this case is procedural rather than substantive. Substantive arguments can be made, they are valid, they are strong arguments and the court would certainly rule on those. They would hope that it would be in their favor. He said “Procedurally, I think, the bigger hurtle is getting the legislature as the party in question before the court on this question.”

CHAIRMAN TAYLOR asked if he had the chance yet to do research on the issue of who represents the people under public trust litigation.

MR. POPELY said he had done some work in that area. He said it is general legislative bodies like Chairman Taylor had said, who are referred to in the public trust analysis as protectors of the resource and that makes sense. Logically it is the legislative bodies who are the policy-making bodies of states. They are in charge of course of passing laws that govern the use of the resources. Public trust doctrine mandates that those decisions

be made in a fair and equitable and reasonable manner and is of course what the public trust doctrine stands for.

CHAIRMAN TAYLOR said the legislature was generally the appropriate body to bring the litigation. In fact there are several cases where legislatures have been found to have standing, which is the critical question. They had been frustrated in the attempts of the past brought by the legislature to join in suits or to maintain suits after the governor dismissed them.

MR. POPELY said courts have analyzed the situation in Alaska with the separation of powers that we have in our constitution and have read that generally to mean the administration is the body that brings litigation on behalf of the state. That is where they have run into difficulty trying to litigate some of these issues as a legislature or a subunit of the legislature through legislative council.

CHAIRMAN TAYLOR said that was why he referred to those other list of cases where state legislatures themselves have been found to have standing even if the executive chose not to sue because of the unique responsibility that the legislature has as trustee of those public trust assets.

MR. POPELY said yes that has occurred. It certainly has.

SENATOR ELLIS said let us say this went forward and the legislature were to pursue this. He asked Mr. Popely if he could give him a dollar figure, high dollar of low dollar figure, for this being pursued to finality.

MR. POPELY said he did not know if he could. That is a tough question and he had not thought about it in terms of dollars bringing a case like this. He said he supposed that the realm of possibility is quite wide. It could be done in house in which case there would be very little expenditure all the way through hiring outside counsel which of course this legislature has done in the past, which could prove to be quite expensive. That is probably more of a policy question for their colleagues than for him. He said he really did not know.

SENATOR ELLIS said he posed the same question to Chairman Taylor as an attorney and as someone familiar with this and probably envisions how he would like to see all this unfold with the best and the brightest. He asked how many years and how much money.

CHAIRMAN TAYLOR said he did not think it would cost all that much

if in fact they kept it in house and joined in the litigation already pending. The Alaska Constitutional Defense Fund case was referred to by Mr. Bondurant and Mr. Olson is already pending. It already survived several challenges through summary judgment and all the state would have to do would be to interplead in that as an additional plaintiff and advocate on the public trust doctrine on behave of the people of Alaska. That was the aspect of the case they were told they could not bring individually. They are advocating on their own behalf at this point and so the court has allowed them to move forward on the equal protection argument. A major portion of that case from the time it was filed was on the public trust doctrine itself and the court found that they did not have standing to represent the people of the State of Alaska. He thought tacitly what the court was saying was the legislature itself is the true trustees and responsible for the people on these issues. The case law they have seen would indicate that the legislature itself can intervene on that suit on behalf of all the people of Alaska and then have that portion of that case litigated.

He said it would probably go to the Ninth Circuit Court and from the Ninth Circuit on to the Supreme Court. They were probably looking at period of time of at least five to six years but that would be a quicker finality than anything he knew of right then. With the dismissal of the Katie John case they lost their last chance at some absolute finality from the Supreme Court on this very contentious issue.

CHAIRMAN TAYLOR said if it is kept in house they are probably not looking at anything more than the salaries of the people they are currently hiring and paying to do some of the very same stuff. At some juncture they may have to go beyond that.

SENATOR DONLEY moved SCR 25 the CS (JUD) as adopted the J version from committee with individual recommendations.

SENATOR ELLIS objected.

CHAIRMAN TAYLOR called for a roll call vote.

The motion to move CSSCR 25 from committee carried with Senator Donley, Senator Therriault, and Chairman Taylor voting “yea,” and Senator Ellis voting “nay.”
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The meeting was adjourned at 3:10 p.m.