ALASKA STATE LEGISLATURE
SENATE JUDICIARY COMMITTEE
April 13, 2002
3:10 p.m.

MEMBERS PRESENT

Senator Robin Taylor, Chair
Senator John Cowdery
Senator Gene Therriault

MEMBERS ABSENT

Senator Dave Donley, Vice Chair
Senator Johnny Ellis

COMMITTEE CALENDAR

HOUSE BILL NO. 307
"An Act delaying to June 30, 2007, the last date by which hydrocarbon exploration geophysical work must be performed or drilling of a stratigraphic test well or exploratory well must be completed in order for a person to qualify for an exploration incentive credit."
MOVED HB 307 OUT OF COMMITTEE

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

PREVIOUS COMMITTEE ACTION

HB 307 – See Resources minutes dated 3/18/02 and 3/25/02.

SCR 25 – See Judiciary minutes dated 2/20/02.

WITNESS REGISTER

Jay Hardenbrook
Staff to Representative Hugh Fate
State Capitol, Room 416
Juneau, AK 99801-1182
POSITION STATEMENT: Introduced HB 307

Dean Owen, Executive Director
Fairbanks Economic Development Corporation
1397 Ithaca Rd.

Fairbanks, AK 99709
POSITION STATEMENT: Supports HB 307.

Jim Dodson, Executive Vice President
Amdex Resources LLC
No address given
POSITION STATEMENT: Supports HB 307.

Mark Myers, Director
Division of Oil and Gas
550 W 7th Ave Ste 800
Anchorage, AK 99501-3560
POSITION STATEMENT: Neutral on HB 307.

Wayne Heimer
1098 Chena Pump Rd.
Fairbanks, AK 99709
POSITION STATEMENT: Supports SCR 25.

Ralph Seekins, President
Alaska Wildlife Conservation Association
1625 Old Steese Highway
Fairbanks, AK 99712
POSITION STATEMENT: Supports SCR 25.

Tom Scarbourgh
1676 Taroka Dr.
Fairbanks, AK 99709
POSITION STATEMENT: Supports SCR 25.

Lynn Levengood
931 Vide Way
Fairbanks, AK 99712
POSITION STATEMENT: Supports SCR 25.

Dale Bondurant
Alaska Constitution Legal Defense Conservation Fund Inc.
31864 Lawton Dr.
Kenai, AK 99611
POSITION STATEMENT: Supports SCR 25.

Doug Isaccson
1003 Shirley Turnaround
North Pole, AK 99705
POSITION STATEMENT: Supports SCR 25.

Mr. Herman E. Fandel
702 Moonshine Dr.
Soldotna, AK 99669
POSITION STATEMENT: Supports SCR 25.

Don Johnson
P.O. Box 876
Soldotna, AK 99669
POSITION STATEMENT: Supports SCR 25.

Donald Westlund
Ketchikan, AK
POSITION STATEMENT: Supports SCR 25.

ACTION NARRATIVE
TAPE 02-16, SIDE A

CHAIRMAN ROBIN TAYLOR called the Senate Judiciary Committee meeting to order at 3:10 p.m. in Fairbanks, Alaska. Present were Senator Cowdery, Senator Therriault and Chairman Taylor.

#HB 307

HB 307-OIL/GAS EXPLORATION INCENTIVE CREDIT

CHAIRMAN TAYLOR announced the first bill to be heard would be HB 307.

MR. JAY HARDENBROOK, staff to Representative Hugh Fate, thanked Chairman Taylor and the Judiciary Committee for holding the hearing on HB 307 in Fairbanks. Fairbanks is an area that will receive benefits from this legislation.

MR. HARDENBROOK explained HB 307 extends the sunset date for the exploration incentive credit program. This program gives a tax incentive to companies that do exploratory drilling for petroleum in Alaska. The Commissioner of the Department of Natural Resources (DNR) handles each tax credit application on a case-by-case basis before the credit is granted. The judgment on whether or not the credit is given is based on the value of the information to the state. This program, though it has not been used as of yet, has the potential to open up the Interior and several other basins throughout the state to petroleum exploration.

MR. HARDENBROOK said DNR, specifically the Division of Oil and Gas, was neutral in earlier hearings on HB 307. HB 307 had bipartisan support in both the Senate and the House.

MR. DEAN OWEN, Executive Director, Fairbanks Economic Development Corporation, said it supports HB 307 for the following reasons.

- It is good for economic growth in the Interior.

- It encourages responsible resource exploration.
- It helps create a positive environment for oil and gas exploration.

MR. JIM DODSON, Executive Vice President, Amdex Resources LLC, said Amdex filed on an exploration license area west/southwest of Fairbanks in the Nenana Basin. Amdex anticipates its license will be issued in August or September of 2002. It would like to be in the Nenana Basin this winter shooting seismic with the hope of ultimately drilling some wells in the winter of 2003 and 2004. With a successful exploration project Amdex will be able to supply natural gas to the Fairbanks and Interior Alaska markets.

MR. DODSON said HB 307 allows a company to take additional risk when conducting seismic and exploratory drilling activities. If they have an exploration incentive credit attached to a seismic program or an exploratory well they are more willing to shoot more seismic data or drill a well deeper or possibly drill a second or third well they would not otherwise drill. It extends the amount of work they can do in a particular exploration budget. They are highly supportive of HB 307.

CHAIRMAN TAYLOR said they shared the excitement in the possibilities this gas opportunity will bring for Fairbanks and the whole Interior. He wished Amdex the best on their exploration venture.

MR. DODSON said they hope to reduce fuel costs to the Interior where people are currently paying just over $10 per million BTU and about $1.30 or $1.35 per gallon for heating fuel delivered to homes. That is an expensive source of energy and Amdex hopes to lower the cost by providing natural gas.

CHAIRMAN TAYLOR hoped Amdex has a successful venture.

MR. MARK MYERS, Director, Division of Oil and Gas, was available to answer questions.

CHAIRMAN TAYLOR asked if the Administration supports the legislation to extend the date.

MR. MYERS said the Administration is neutral on the legislation. It recognizes that the program has value and that the bill gives discretion to the Commissioner of DNR. It is his understanding that the Governor is neutral on the bill.

SENATOR THERRIAULT asked how transferability of the credit would work. According to the fiscal note, the credit may not exceed $5

million per eligible project. He asked how an eligible project would be defined.

MR. MYERS said the credit is good for royalties, rentals, taxes and bonus bids and is transferable to other companies if, for instance, that particular company doesn't have production at that time or doesn't have enough to offset bonuses or rentals. It has not been used with this program but it is almost identical to the Economic Investment Credit (EIC) program. Many of those credits have been transferred with the EIC structure that is attached to leasing. It is an arrangement between the companies. The credit itself is transferable and can be used for royalties, rentals, taxes and bonus bids.

SENATOR THERRIAULT asked for the definition of single project.

MR. MYERS said that is a discretionary call at this point and is not specifically defined in regulations. An eligible project could be a well or a group of wells. The commissioner looks at the value of the information. If the area has three tightly spaced wells, a project will probably consist of all three wells. The strict informational value from each well in close proximity wouldn't be very high so the commissioner would probably type that as one project. Regional seismic data might be another project. There is a cap of $5 million per project and the total for a program can't exceed $30 million. The definition of "project" is not specifically defined in either statute or regulation but passes as a common sense test when they see the company's proposal before them.

SENATOR THERRIAULT asked if the individual applicant would make that pitch to DNR when submitting an application.

MR. MYERS said yes. The EIC would be approved prior to the drilling and is based on so many dollars per foot of well or so many dollars per line mile or square mile of seismic.

CHAIRMAN TAYLOR asked if the entire question of whether or not the credit would be granted is totally discretionary with the commissioner, it would then be up to the commissioner and DNR personnel to provide the parameters or definitions for the project question.

MR. MYERS answered yes.

SENATOR COWDERY asked if there was anyway to tighten up the issue of discretion and whether or not it should be tightened up. He commented that it seems the discretion would be decided by

regulation and they had discussed regulation vs. statute early that day. He asked for Chairman Taylor's or Mr. Myer's thoughts on the matter and said he did not like the idea they could hypothetically tax the companies $10 or $50. He liked to have the things they did be tight.

CHAIRMAN TAYLOR said he was part of the group when that legislation was passed. At that time he was concerned about that discretion but to date no one had taken advantage of it or applied for credit.

He explained the state would receive valuable information it would not have a right to otherwise. Most of that information is seismic, very proprietary and very important to the companies. The companies are willing to exchange that if they receive credit in return for having developed a new project. They left both sides of that issue open. They have not set parameters on what would be adequate information to be conveyed by the company and yet at the same time they haven't set parameters on what would be considered adequate for value of the project for the commissioner to grant the credit.

CHAIRMAN TAYLOR said a lot of this is going to have to proceed on a trust basis until people actually start to work and take advantage of it. If there is a dispute between the commissioner and the company, something that defined it would be in front of the legislature. He thought they should hold off rather than try to define something in a vacuum.

SENATOR COWDERY hoped if there were any problems DNR would come back to the legislature.

CHAIRMAN TAYLOR thought they would have to.

SENATOR THERRIAULT asked Mr. Hardenbrook if Representative Fate had looked at the regulations. AS 41.09.010 section (f), referenced in the legislation, states an "eligible project, as defined by the commissioner by regulation." He asked if Representative Fate or Mr. Hardenbrook looked at that regulatory definition to see if it was overly stringent when drafting the legislation and whether that was the reason they had no takers for this section of the statute.

MR. HARDENBROOK said he had not and that the Division of Oil and Gas would be much better suited to answer the question.

MR. MYERS replied:

Basically, the regulations under 11 AAC 89.015, eligible project, basically describes the project must be described and the plan submitted under the regulations providing sufficient detail to determine whether proposed activity will provide data to enhance the state's resource evaluation program. So, fundamentally, it's turned back to say that again it's the value of the information and the value of the information has to be determined by professionals, in this case either geophysicists or geologists. So there's again a specialized skill there involved in determining what is the value. And I think the level of the credit then would be associated with the value the state sees in that information.

Specifically on state owned lands the state would – does, in fact, receive the seismic data. So it would be primarily on private, privately or federally owned or federal government lands the state would be most interested in seeing – paying for an EIC on seismic data historically because again we get the data. The only exception to that would be if the state determined that showing this data to a third party was very important the state could pay for that even though it was getting the data because there is a provision in that for specifically showing that data, not giving but showing to third parties.

On the well data, fundamentally again, on private lands the state would normally receive that data 25 months after it's drilled. The state would look at it and say it's important for us to get this information earlier than is typical. Or the other thing it does if the state pays for the information, the well cannot be put under extended confidentiality on either private or state lands. Those are released at 25 months from the date of completion [under] normal circumstances. But there are circumstances in which extended confidentiality is granted because of the significance of the information from that well to un-leased acreage nearby. So when credit is granted on this program the companies have to waive their right for extended confidentiality.

So those are kind of the sidebars and issues that go into determining sort of whether or not the value of the information is sufficient the state will want to

pay for it whether it wouldn't otherwise get the information.

SENATOR THERRIAULT thanked Mr. Myers.

SENATOR COWDERY moved HB 307 from committee with accompanying fiscal note and individual recommendations. There being no objection, the motion carried.
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TAPE 02-17, SIDE A

#SCR 25

SCR 25-FISH & WILDLIFE PUBLIC TRUST/ANILCA SUIT

CHAIRMAN TAYLOR announced the next matter before the committee was SCR 25. The Judiciary Committee previously held a hearing on this resolution and moved it from committee. It was returned to the committee for completion of an additional amendment in the Committee Substitute (CS) work draft before them.

MR. WAYNE HEIMER, Fairbanks resident, said he was testifying as a reluctant student of Alaska National Interest Lands Conservation Act (ANILCA) history and federal takeover of fish and wildlife management in Alaska.

MR. HEIMER said during the 25.4 years he worked for the Alaska Department of Fish and Game (ADF&G), 1971-1997, he was primarily a Dall sheep manager and researcher. He was involved in ANILCA when the act was being drafted in the 1970's because Dall sheep were a focus of much of the federal conservation unit land. Classifying Dall sheep habitat as national parks would have excluded Dall ram hunting as a major economic interest to the state. He was asked how any given proposed boundary configuration would affect Dall ram harvests. He wrote several contemporary history papers for professional journals on the subject during those years.

MR. HEIMER explained that after the federal takeover of wildlife management on federal lands, Governor Hickel sued the federal government for return of management to the state. Someone had to justify the harm to the state resulting from federal takeover to establish legal standing in the State of Alaska vs. Babbitt lawsuit. Because of previous experience with ANILCA, he was assigned to work full time in the area of ANILCA history and to document complications resulting from federal management of Alaska's resident wildlife. His primary job was documenting dual management case histories for attachment to the state's legal

briefs.

MR. HEIMER compiled a history of events important to federal management issues in Alaska. This history was published as an annotated chronology of the takeover of fish and wildlife management by the federal government (pages 169-187) in the Transactions of the 2nd North American Wild Sheep Conference in Reno, Nevada, 1999. He presented three copies of that record for the committee.

MR. HEIMER asked the legislature to pass SCR 25 and join the lawsuit against federal takeover of Alaska's common property resources by the federal government. Common private citizens brought the suit because the State of Alaska failed to protect their rights as U.S. citizens and residents of Alaska. Reference to the legislative and legal histories of ANILCA issues in Alaska show they have reached this point of necessity because of the legal actions of two men. One is Federal District Judge H. Russel Holland and the other is Governor Tony Knowles. The arbitrary decisions of these two men require that the legislature involve itself in protection of all Alaskans under state and federal law.

MR. HEIMER said reference to Judge Holland's decision of March 30, 1994 in the Babbitt case provides evidence of his arbitrary decision. Judge Holland, on pages 11 and 17, states arbitrarily that he thought Congress intended to do things of which there is no record. Mr. Heimer said the Judge intuitively assigned intent to Congress that Congress, particularly the Senate, did not voice and, in fact, specifically deleted from the original House bill. Reference to the legislative history shows Congress clearly did not intend for the federal government to take over management. The Senate specifically amended federal takeover language out of the House version of ANILCA when it changed the preference criterion for subsistence from racial to rural. The House did not protest. Mr. Heimer asked how it is possible they have federal takeover and pressure to divide Alaskans on the basis of residence today. It resulted from an esoteric legal point.

MR. HEIMER said legally Judge Holland could do this because of an arcane legal/judicial concept called "reasonable construction," which means how the judge interprets the law. Reasonable construction apparently need not be congruent with history or the text of the law, only legally reasonable.

MR. HEIMER said normally, higher courts, particularly when at odds with legislative history, would be asked to review the reasonable construction by a single judge. Judge Holland's

arbitrary judgment, based on what he thought would have been reasonable thinking by Congress with respect to enforcing a subsistence preference, was appealed. The appeal was within two or three days of being heard by the Ninth Circuit Court when the newly elected Governor Knowles arbitrarily decided to withdraw the suit and end all other appeal options.

MR. HEIMER said Governor Knowles' withdrawal of the Babbitt suit, an election payoff to the Alaskan Federation of Natives for their endorsement of his candidacy, and his failure to appeal the Katie John case were both arbitrary decisions. His decision to drop the Babbitt case was clearly based on partisan political considerations. His withdrawal of the John case was based on a personal feeling, "in his heart." The issues developing from these decisions, who shall manage and where shall they do it, and Governor Knowles' insistence on amendment of the Alaska Constitution to comply with Judge Holland's reasonable construction of ANILCA, brought them to a divisive situation in Alaska.

MR. HEIMER said while most Alaskans were either disinterested in or overwhelmed by the rhetoric regarding whether the state or the federal government should discriminate against the majority of Alaskans in order to provide a subsistence preference, something beautiful happened. More than 20 years ago, a small group of equality minded individual Alaskans began the process of legally challenging the fundamental basis of federal takeover to enforce ANILCA's subsistence preference. That process has now come to fruition.

He said these individuals are real "twill pants and plaid shirt" Alaskans who believe passionately enough in the U.S. and Alaska Constitutions that they will exhaust their personal financial resources to assure equality. These are the same folks who challenged the federal government's decision that would have forced Alaska Natives to include water in their Alaska Native Claims Settlement Act (ANCSA) land selections. They won the case. Not only did this allow Alaska Natives to select millions of acres of more productive land, it also assured the state's title to navigable waters. These folks are not a bunch of self-serving, Native bashing, ideologues. They simply hold that all men are created equal and endowed by their Creator with certain inalienable rights including life, liberty and the pursuit of happiness.

MR. HEIMER said presently these Alaskans call themselves the Alaska Constitutional Legal Defense Conservation Fund and they are at law with the federal government over its abuses of the U.S. Constitution because of issues stemming from federal takeover of fish and wildlife management in Alaska. Plaintiffs

in their suit include four Alaskans and three nonresidents.

He said on February 4th, 2002, their suit to determine whether discrimination should be allowed at all received an encouraging ruling from Judge H. Russel Holland, the same Federal District Court Judge who ruled on the Babbitt and Katie John cases. Judge Holland denied federal motions to simply dismiss the case on technical grounds. The surviving case argues the unconstitutionality of discrimination and is based on the 14th Amendment to the U.S. Constitution.

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

MR. HEIMER said many Alaskans now understand that is exactly what the Alaska Legislature did when, at Senator Stevens' urging, they finalized the state subsistence law in 1978. Senator Stevens told the legislature that passing a state subsistence preference law would preempt federal subsistence law in ANILCA. It did not, and shortly thereafter Congress itself seems to have violated the 5th Amendment of the U.S. Constitution, which the U.S. Supreme Court considers equivalent to the 14th Amendment where state and federal matters are concerned, when it passed ANILCA's subsistence preference provision.

He said oddly the most basic question, whether discrimination is allowable under the U.S. Constitution, was never an issue for the state. The federal government and the Knowles' Administration have opposed even asking this question. Paradoxically, the state's lawsuits over who should manage (the Babbitt suit), and where they should do it (the Katie John suit), if they hadn't been dropped by the Governor to appease Native political interests, would have eliminated the need to ask this most basic question.

MR. HEIMER said Governor Knowles forfeited the polite opportunities for dignified legal closure by dropping the Babbitt and John suits. These arbitrary choices extended this problem by at least ten years and raised the issue to much more divisive levels. Because Alaska's governor represents the state in court and because Governor Knowles chose to withdraw both the Babbitt and John cases from final litigation, the course of the subsistence issue remains directed by Judge Holland's presumably reasonable construction of what ANILCA should have said, even though it contains no provisions for federal takeover. Hence it has come down to a handful of individual Alaskan patriots to

protect themselves from discrimination because their government or governments would not.

He said thankfully the basic question of discrimination was not included in the state's arguments so it is still valid before the Court. Under Judge Holland's February 4th ruling, the Court will proceed to recognition of the requests for summary judgment against the federal government and perhaps to injunctive relief. The outcome is uncertain but clearly the most obvious legal solution remains untested. Whatever the outcome, the decision is certain to be appealed. This is where the legislature should be involved.

MR. HEIMER said just as the governor is the state's representative in legal matters, the legislature is ultimately responsible for publicly owned trust resources like fish, wildlife, timber and water. Hence the legislature, which has been frustrated by the governor's management of the state's lawsuits against the federal government, should join this suit immediately.

MR. HEIMER concluded the very real prospect of a successful suit brought by individuals apart from political interference should embolden the legislature to resist the Governor's present political pressure to amend the Alaska Constitution before final legal judicial resolution is reached.

SENATOR COWDERY said it cost a tremendous amount of money to prepare the cases up to the point when they were dropped. He asked if anybody knew how much money had been spent up to that date and was thrown away when the cases were dropped.

CHAIRMAN TAYLOR did not know but said it was a good question for the Department of Law and the Attorney General's Office to answer.

SENATOR THERRIAULT asked where the federal motions to dismiss stood in the case Mr. Heimer talked about.

MR. HEIMER said, as he understood it, that case is called Bondurant Olsen vs. The Federal Government. Judge Holland will hear that case in Federal District Court whenever it is scheduled. Recently, the federal side and its friends were directed to respond. He did not know where their arguments to the case stood.

CHAIRMAN TAYLOR said the issue first litigated on summary judgment was whether or not Bondurant Olsen had any standing to suit on that subject and they prevailed. That had been a critical hurdle the legislature had never been able to surmount in the past when it attempted to intervene in suits brought by

the state because only the governor had standing to represent the state.

SENATOR THERRIAULT asked if it was the legal argument that they had not yet been disadvantaged.

CHAIRMAN TAYLOR said yes, that was part of it. Now they can certainly show the subsistence panels have acted and passed regulations and in fact people are participating in activities on a discriminatory basis.

He asked if Mr. Heimer had a copy of his testimony.

MR. HEIMER said he submitted copies of what he intended to read but his presentation was slightly different.

CHAIRMAN TAYLOR appreciated the copy and made it part of the record.

SENATOR THERRIAULT appreciated the testimony. As they move into special session he would receive emails and public opinion messages (POMs) from people that only understood the emotional arguments being made and really did not understand the background. He thought Mr. Heimer's presentation was a concise summary of the background.

MR. HEIMER was hopeful the additional long paper he presented to them would be of assistance.

MR. RALPH SEEKINS, President, Alaska Wildlife Conservation Association (AWCA), said the AWCA is a group of hunters and fishers, all of whom are residents of the State of Alaska.

MR. SEEKINS gave the following testimony. A number of years earlier they had produced a couple of white papers for the legislature to use in debates during special sessions. They looked at the legal arguments involved in how the State of Alaska should proceed in trying to defend itself in the area of sovereign rights. The first thing they did was to bifurcate the issue. The issue was not subsistence because most of the hunters and fishers they knew in the State of Alaska do not argue with providing fish and game for subsistence for those people who need it. What they did not think was kosher was the fact the federal government was stepping into areas of sovereign power belonging to the people of the State of Alaska; that is the area of authority of the legislature of the State of Alaska.

MR. SEEKINS said they were talking about the public trust. He gave a hypothetical situation where he was the trustee and the three legislators had a common ancestor who had left them a trust. That ancestor had instructed Mr. Seekins to divide the

trust income equally among the beneficiaries on an annual basis. In this scenario Mr. Seekins explained to Senator Therriault that his business was doing well but it had been a little slim for Senator Taylor this last year. Mr. Seekins was going take part of the earnings of this trust that would normally go to Senator Therriault and give it to Senator Taylor instead. Were that to occur, Mr. Seekins would go to jail. The cornerstone of trust law says all beneficiaries have to be treated equally. The people who established this public trust doctrine long before this nation started understood that. It was enshrined in the U.S. Constitution that people had to be treated equally.

MR. SEEKINS said prior to Statehood, the federal government held all of the assets of the State of Alaska in trust for the people of the future state. When Alaska became a state the corpus of that trust came to the people of the State of Alaska and the legislature became the trustee rather than the federal government. The governor and the administration were not trustees but help administer the trust even though the legislature was the trustee. The federal government is not a factor in that trust.

They found a lot of U.S. Supreme Court cases on the issue of public trust. For example, in Baldwin vs. Montana Fish and Game Commission, 75% of all the Elk killed in Montana are killed on federal property yet it is the state legislature responsible for managing that asset because that asset belongs to the people of the State of Montana. They found in the Public Trust Doctrine every Alaskan shared equally as a beneficiary. It violates the very cornerstone of trust law to say because a person lives in a particular zip code they get a greater share of the corpus or earnings or benefits from the trust than another.

MR. SEEKINS said when the Alaska Wildlife Conservation Association looked at SCR 25 they said the legislature is on the right track along with Mr. Bondurant and Mr. Olsen. The governor, for admitted political reasons, dismissed these lawsuits. The beneficiaries of the trust look to the legislature to manage the assets fairly and equally and the legislature has that responsibility. Their lawyers told them the legislature has some liability if they do not manage the trust on that basis. The legislature can be brought to court on the grounds it failed to protect the assets of the trust owned by the people of the State of Alaska. They urged the legislature to take a look at that advice from attorneys who deal primarily in trust law.

MR. SEEKINS said the document the Alaska Wildlife Conservation Association produced contains summaries of U.S. Supreme Court cases and the 1976 Montana case. That case came after Kleppe vs. New Mexico, the case the federal government used for its authority to manage subsistence in Alaska. He asked the

committee to read Kleppe vs. New Mexico and stated:

> It says the states are the ones who determine who harvests wild game and how they are harvested. So, their own, their own cornerstone crumbles under careful scrutiny. We think that the governor may have known this and didn't want these cases to go farther because it may, he may have lost and the people of the State of Alaska may have won.

MR. SEEKINS said Alaska already won in the U.S. Supreme Court in 1997. He read the following section out of a U.S. Supreme Court decision, United States of America vs. Alaska, June 19, 1997.

> Justice O'Conner delivered the opinion of the court and in here she wrote that several general principles govern our analysis of the party's claims. Ownership of submerged lands, which carries with it the power to control navigation, fishing and other public uses of water, is an essential attribute of sovereignty. And then she goes on to write the majority opinion on how Alaska got that sovereignty. And, according to the United States Supreme Court, one of the issues that's there is the Public Trust Doctrine. And the United States Supreme Court has already ruled in effect that Alaska, as part of its sovereign rights as a sovereign entity, has the power to control fishing in its navigable waters. Yet the governor fails to defend that and the federal government continues to assert that. So we would also urge you to join in this lawsuit with Mr. Bondurant and Mr. Olsen and protect the public trust assets of the people of the State of Alaska.

CHAIRMAN TAYLOR thanked him on behalf of the committee for the great effort he and others in that community had made to assist the legislature.

MR. TOM SCARBOURGH, Fairbanks resident, said he had been involved with this issue for a long time. He read through the packet and found an interesting question. A dissenting opinion had asked what might this cost. He said that was a good question. The question was not what the litigation might cost but what it might cost if they do not litigate. That may cost the state billions plus a whole lot of its rights. That needs to be considered as they go forward.

Alaska was singled out as no other state had been. Its sovereign rights were removed and federal management had taken over.

Alaska is one of 37 western states that were brought into the Union under the Equal Footing Doctrine. With that came the sovereign right to manage their natural resources.

MR. SCARBOURGH submitted a letter he had written to the editor of the Fairbanks Daily News Minor concerning deception by Governor Knowles dated November 17th, 1997 for the record. He read the following.

> On October 31, 1997, Governor Knowles filed an appeal with the U.S. Supreme Court charging the federal government with breaking the oil royalty provision of the Alaska Statehood Act.
>
> But how valid is such a claim, when the same state Administration is willing to choose which of the public trust responsibilities it wishes to ignore or support?
>
> The Administration uses some high sounding, but very true, rhetoric. Attorney General Bruce Botelho wrote in his appeal: 'Fewer agreements are of greater moment in the annals of the Nation than the compact by which a State gains admission to the Union. This case presents basic questions concerning the constitution and enforceability of Statehood Compacts and whether they are equally binding on the United States.'
>
> That issue is before us, right?
>
> Because the Governor's intent so politically focused on just the oil resources value, he purposely ignores the most important constitutional equal footing provision as it applies to the Submerged Lands Act, which is also provision of the Statehood Compact.

MR. SCARBOURGH said elected legislators are the trustees. It is spelled out very clearly in the written record excerpts from Putting the Public Trust Doctrine to Work. (Prepared by: Coastal States Organization, Inc.) They took an oath of office to uphold the Constitution of the State of Alaska, which includes their responsibilities as trustees. He thought they could be held responsible and derelict in their duties if they were to do anything other than file the proper action in federal court, whether they join the Bondurant Olsen suit or take separate action.

CHAIRMAN TAYLOR commended him on the years of effort he had put forward on this issue.

SENATOR THERRIAULT said Mr. Scarbourgh mentioned an information

statement in the packet. There is a quote with no name on it and there is a name attached to all the other public opinion messages. He asked if Chairman Taylor or his staff knew who it came from.

CHAIRMAN TAYLOR said at the top it said Alaska House Minority Committee Report. He said it should have a name on it.

MR. LYNN LEVENGOOD, Fairbanks resident, supported SCR 25. It is the closest piece of legislation to frame the issue needing to be addressed by the State of Alaska the boundary in the sovereign relationship between the state and the federal government.

MR. LEVENGOOD said the U. S. Supreme Court decision, U.S. vs. State of California, 1947, held that the federal government had the paramount rights in and sole dominion and power over navigable waters, submerged lands and the resources therein seaward of the ordinary low water mark. That is how the federal government is currently interpreting ANILCA. In 1953 Congress, overwhelmed by the state's reaction to that Supreme Court decision, passed the Submerged Lands Act. The Submerged Lands Act undid what the U.S. Supreme Court had done in 1947. The states retained ownership and title to the submerged lands, the water column and the natural resources therein.

MR. LEVENGOOD said lands were held in trust by the federal government for future Alaskans prior to state ownership. Alaska became a state after the Submerged Lands Act was passed. Alaska's Statehood Act expressly provides that the Submerged Lands Act applied to the State of Alaska. That was litigated in the Dinkum Sands case (United States v. Alaska, No. 84 Original) when Supreme Court Justice O'Connor held that the Alaska Statehood Act does expressly provide that the Submerged Lands Act applies to Alaska providing state sovereignty over submerged lands. An essential attribute of the sovereignty of the State of Alaska is the power to control navigation, fishing and other public uses of water.

MR. LEVENGOOD explained the following.

> A 1992 case, New York vs. United States, another recent U.S. Supreme Court case, said very importantly that if a power is an attribute in state sovereignty it is necessarily a power that the U.S. Constitution has not conferred on Congress. And the constitutional authority of Congress cannot be expanded - expanded or contracted by the consent of a governmental unit whose domain is thereby narrow, whether the unit is executive branch or the state. What that says in layman's terms is that no state can by a vote of the people, by a vote

> of its legislature or by a consent of the administrative branch expand or contract the sovereignty of that state vis-à-vis the sovereignty of the federal government.
>
> Why is that important in this time in this state in this place? And the answer is there's people that are spending hundreds of thousands of dollars trying to pull the wool over the citizens of the State of Alaska to say we need to vote whether to change our Constitution. Senators, whether we vote is absolutely immaterial. Alaskans cannot expand or contract their sovereign authority. This is an issue that is a constitutional issue of divide between the sovereignty of the State of Alaska and the sovereignty of the U.S. federal government and it can only be decided by the U.S. Supreme Court.

MR. LEVENGOOD said the trust relationship is where the legislature gets its standing to raise this issue. The political issue, the powers of state government vs. the powers of the federal government, only the Attorney General of the state can bring that issue up to the Supreme Court. However the trustees have standing to bring trust issues before the Supreme Court and challenge the usurpation of Alaskan trust resources by the federal government.

Two things have happened since the last suit was filed.

- Previous suit was brought by individual legislators as individual citizens. They were named as plaintiffs. They were not named as trustees. The Public Trust Doctrine was not plead for standing in that case.
- Very importantly the final regulations of the federal government had not been implemented, so there was not a usurpation by the federal government over the sovereign trust resources. Now there are federal regulations for both hunting and in marine waters allocating the trust resources of the State of Alaska.

MR. LEVENGOOD said the federal government has no title to these assets. It is clear in the Submerged Lands Act and the Statehood Compact that Alaska holds title to the wildlife. Only the trustees of that resource can allocate it. Kleppe vs. New Mexico does give the power to the federal government to protect endangered resources. They can use the power of the federal government to protect resources. There is not and has not been a case that allows the federal government to allocate a resource for which they do not have title.

He said the federal government does not have title to Alaska's

wildlife, therefore under trust law they can't allocate it. The legislature is the trustee for all the people in common. The Alaska Constitution makes that resource a trust asset and makes the legislature the trustee of that trust.

MR. LEVENGOOD urged them to pass SCR 25 and do everything they can to join the Bondurant Olsen suit or file another original suit directly to the U.S. Supreme Court. If they choose not to join the current suit in District Court, an original action can be filed in the U.S. Supreme Court based on the sovereignty between the United States and State rights.

CHAIRMAN TAYLOR asked if as trustees they could file direct action to the U.S. Supreme Court.

MR. LEVENGOOD said he had not researched that. The cause of action can be brought. He did not know whether the legislature could bring suit without going through the Attorney General's Office because that is the government of the State of Alaska.

CHAIRMAN TAYLOR said at least they could file an original action in the District Court or join with the Bondurant Olsen case already on trial with the District Court.

MR. LEVENGOOD said absolutely.

MR. DALE BONDURANT, Alaska Constitution Legal Defense Conservation Fund Inc., appreciated the committees concern over the issue and stated:

> I fully support SCR 25 as a responsible resolution to protect the public trust common properties of fish and wildlife and water resources for all beneficiaries, both now and in the future. I'm a 75 year citizen of the United States and only a 55 year resident of the State of Alaska.
>
> I've been involved in several very important cases. I started in 1977 and sued the federal government over reasonable access over all waters of the state. The legislature then passed a law that said all waters in the State of Alaska were public waters.
>
> We also fought in the Gulkana Case (Alaska vs. United States, 1986). We had to drag the state into that and we figure we won several hundred thousand miles of navigable waters and we got, under the Submerged Lands Act, title to them and management authority of all the resources on the Submerged Lands Act and on the submerged lands themselves. We got title to the gas,

oil and mineral resources in the navigable waters themselves. We got management authority over all the fish. They don't stop and say just fish, they say clams, crabs, shrimp and so forth and all marine plant and animal life.

We have had a hard time of getting the state to back that up but we won it by showing that Alaska did not have a history of navigability like the United States did so we got a change in which they said susceptibility to navigability. So we won that case.

We fought in the McDowell case - McDowell vs. State 1989 - which says that there's several jurisdictions that were struck down when they tried to make the regulations that governed fishing and hunting and that you couldn't base it on where you lived.

The first and only adoption of a public individual rights in our Constitution was adopted in the first Constitutional Convention and it was called the Privilege and Immunity Clause. And that Privilege and Immunity Clause has been expanded to several amendments to show that the privilege and immunity from one state, the people of one state have the same privileges and immunities as the people of the other states.

Another thing that I think we should realize that Alaska is unique in the fact that they not only own and have title to the navigable waters but they also have management authority and title to all ground and surface waters. There is a part of the Submerged Lands Act that a lot people [tape change]...

TAPE 02-17, SIDE B

MR. BONDURANT continued:

... and it says all states west of the 96th meridian have these special rights.

So there's a lot of things that I could bring up. I appreciate the testimony that you received from Fairbanks people. And there is one thing; that we're not going to give up this right. We're going to fight this battle and they might as well admit to it.

One of them quoted the fact that we can't do this by popular vote. Well Judge Robert Bork, who is up for appointment in the U.S. Supreme Court stated, and he referred to the Privilege and Immunity Clause, he said that is one Constitutional Doctrine which states that you cannot take an individual's rights and put it up for a popular vote. So this vote that the governor wants to have and all this propaganda that they've been further pushing along is a waste of time. Because if they do this and there's any attempt to do it, and joined by the legislature or whatever, we're going to file a restraining order against it and get it stopped.

I made a broad analysis of the Alaska and U.S. Constitution Doctrines that are affected by the application of a discriminatory prescribed subsistence users. Results are as follow.

- The Alaska Constitution: 22 sections are violated and 57 points are corrupted.
- The U.S. Constitution: 8 sections are violated and 40 points are corrupted.

MR. BONDURANT concluded that there would be a total of 30 sections of the Alaska and U.S. Constitutions that would be violated by this and 97 points that would be corrupted. He said he sent copies of this to Judiciary Committee members.

CHAIRMAN TAYLOR thanked Mr. Bondurant for his great service to the state over the years in protecting and preserving the rights of all Alaskans.

MR. DOUG ISACCSON said he was a North Pole City Councilman but was not speaking on behalf of the council. He said this is a concern to many individuals in the North Pole area. It appeared they are coming to a critical time in our state and in our global communities.

It seems to be that we are approaching a time where there are three Alaskas. There's Alaska for the federal government and perhaps that's the lion's share. Then there's the Alaska owned by the Native Corporations and such and that is a much larger share. Then the rest of Alaska, which belongs to the remainder of us. Perhaps people are feeling that it's coming to a head and perhaps to a war. We are at a war of words right now but, never the less, emotions are tight.

MR. ISACCSON encouraged them to pursue SCR 25. They need to establish the Constitutional basis for state sovereignty and in

the process establish one state and one people. They have one legislature, one governor, one Constitution but they don't have just one defining legal way to address issues relating to state sovereignty and the management of its resources. Perhaps by pursuing this action they will be closer to that and it might lessen the tensions between people because they will have something to interpret laws and manage resources in a unified way.

SENATOR COWDERY said the people in Anchorage had recently voted in favor of placing a constitutional amendment on the ballot for a vote of the people on rural preference for subsistence. He had been interviewed by his newspaper in Anchorage and had said something similar to what Mr. Isaccson had said. Senator Cowdery thought that vote had said people want a legal definition. It didn't say they want unequal treatment. Some people had interpreted it to mean they want a rural preference. He asked Mr. Isaccson if he thought the vote in Anchorage meant the majority of the people want a legal definition.

MR. ISACCSON said the people just want to have one basis for interpreting rather than the federal interpretation of the State Constitution, which seems to be at odds. "And who then has priority? At this moment it seems that the federal government has priority and so all those who can go to the main power source, as it were, are migrating in that direction and in the process dividing the state and ripping it up in a way that doesn't need to be there."

SENATOR THERRIAULT asked if there had been discussion at the North Pole City Council level on whether the council should weigh in on this issue. He believed the forces could stampede them into a quick political decision.

MR. ISACCSON answered no.

SENATOR THERRIAULT said he did not know how to interpret the vote in Anchorage. It did not mean should they deal with the issue; it was always what was the best way to deal with the issue. Many people wanted it dealt with only as they saw it. He thought people could have gone to the ballot and voted yes meaning they wanted it solved their way. Now it was being portrayed as the voters wanting it solved it a particular way.

SENATOR COWDERY said people want a legal definition, not a bias definition.

MR. HERMAN E. FANDEL, Soldotna resident, thanked the committee for its time. He was a 35 year resident of Alaska and he and his family are some of the majority of Alaskans being discriminated against by allowing their fish and game to be taken away. That

was where it looked like they were headed.

MR. FANDEL felt that Governor Knowles had betrayed the majority of Alaskans by disbanding the lawsuit. He agreed with Mr. Seekins and Mr. Bondurant and encouraged the committee to give serious thought to supporting the lawsuit Mr. Bondurant and the Alaska Constitution Legal Defense Conservation Fund Inc. had on the table. The suit was a winner and he wanted to see it carried through the U.S. Supreme Court. It is the only way all Alaskans can win.

MR. DON JOHNSON, Soldotna resident, thanked the Senate Judiciary Committee for addressing the subject. He was 100% in favor of the Legislative Council joining this lawsuit. If it had been done ten or twenty years earlier it would have kept them from the mess they are in now.

MR. JOHNSON thought the vote in Anchorage was people acting out of frustration on the issue because they really did not know exactly what is going on. They are not privy to a lot of information.

It is not an issue that can be voted on. The issue is like trying to vote away somebody's right to vote. They can't go into a state and say you have a right to vote if you are rural and you don't have a right to vote if you're not rural. It is an issue that should have been taken up a long time ago by the legislature because they have the trust duty of the resources in Alaska. He did not believe a vote would settle anything because, as Mr. Bondurant had stated, it would just initiate another lawsuit that would prevent the vote from happening and then it would just go into the courts again.

MR. JOHNSON requested the legislature fund money for Mr. Bondurant's lawsuit, 100% of which is being carried by the public. He and a lot of local organizations had donated money to that suit. It is nothing compared to the amount of money the state will lose if this litigation isn't successfully carried out in favor of Alaska.

MR. JOHNSON estimated the subsistence environment the federal government envisioned would devastate a billion dollar sport and commercial fishery economy in Cook Inlet alone. The limits on the areas of access coming up will never support themselves. The subsistence goals of the federal government are not realistic. They will probably cause the same types of results that occurred in the lower 48 when implemented. Most of the places the federal government starts managing end up with the natural resources being depleted to levels no one could survive on.

MR. JOHNSON supported the legislature initiating a lawsuit or

joining Mr. Bondurant. He asked any legislator that voted against SCR 25 to explain how they are defining Alaska's Constitution. The legislature swore to support the Common Use Clause in the Constitution, which specifically states each resident in the state is to receive an equal share of the resources. Were they to vote against this type of action it would say they really did not believe in what they said they did believe in. He thought that would open the legislature up for possible litigation in the future.

With statehood, the federal government gave up its authority to manage any fish and wildlife resource within the state. The problem began in the 70's and is coming to a head because the federal government is coming in and attempting to force Alaska to change its Constitution. The federal government has to change its approach or the State of Alaska has to amend its Constitution in more than one location. Both the federal and the state Constitutions are wrapped up together on this issue. To inflict a rural priority is a rather simplistic solution and would initiate one lawsuit after the next and cost millions of dollars for litigation.

MR. JOHNSON said they might lose a billion dollars a year in Cook Inlet and possibly tens of billions of dollars annually in the State of Alaska and maybe, in the future, hundreds of billions of dollars. The legislature could not overspend in resolving this issue because the long term effect is unbelievable.

MR. DONALD WESTLUND, Ketchikan resident, agreed with the previous speakers. He suggested the legislature look at joining the lawsuit.

MR. WESTLUND said according to the Alaska statistics in the 2000 census there were approximately 100,000 Alaska Natives. He said he was not bashing anybody but wanted to show what was wrong and why the Alaska Federation of Natives should join the legislature in trying to get this resolved instead of trying to be as greedy as they are showing themselves to be. Natives received 44 million square acres of land. Dividing that by the 100,000 Natives results in approximately 440 square acres per Alaska Native of private land they can go out and hunt on. If they have an average household of three that is 1320 square acres, approximately 2.2 sections of land, per household. A section of land equals 640 acres.

MR. WESTLUND said the largest section of state land in Southeast Alaska is around Haines. There is very little around Ketchikan or Juneau. He lived about 15 miles north of Ketchikan and was considered an urbanite. The town of Saxton, which is approximately three miles outside the city limits of Ketchikan, is considered a rural community. He had nowhere to go hunting

and they will have it all.

MR. WESTLUND said the only way to solve this was a ruling by the highest court. He was not in favor of changing the state Constitution. He asked Chairman Taylor for copies of the written testimony from the speakers.

CHAIRMAN TAYLOR said that would not be a problem.

MR. WESTLUND was trying to show the inequity of how much actual land certain people have the express privilege of hunting on because they own it and everybody else is dependent on the federal lands around them.

MR. SEEKINS interpreted the vote in Anchorage as people wanting finality. He and Senator Cowdery had been carpenters and carpenters always start at the foundation and build up. They had tried to build this issue from the roof down. The foundation was whose laws apply.

He was one of seven children and they didn't have a bed for everybody. He and his older brother shared a bed and there was a line right down the middle with sovereign territory on both sides. Occasionally someone tried to intrude into another's sovereign territory and expand their area. They had to call in their Supreme Court. Their mom had to come in and redefine that boundary. That is where they are with this issue. That is what people see without understanding exactly what they see. They want finality and the quickest way to get there is through the U.S. Supreme Court. The U.S. Supreme Court had said this is a very delicate sovereignty question and they are the ones who provide the answers. They need to know whose rule they must play by and then play by that rule and get rid of the issue.

SENATOR COWDERY moved CSSCR 25 (JUD) out of committee with individual recommendations. There being no objection the resolution was so moved.
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The meeting was adjourned at 4:35 p.m.