

**ALASKA STATE LEGISLATURE
HOUSE RESOURCES STANDING COMMITTEE**

March 8, 2004

1:12 p.m.

MEMBERS PRESENT

Representative Nancy Dahlstrom, Co-Chair
Representative Beverly Masek, Co-Chair
Representative Carl Gatto
Representative Bob Lynn
Representative Nick Stepovich
Representative Kelly Wolf
Representative David Guttenberg

MEMBERS ABSENT

Representative Cheryll Heinze, Vice Chair
Representative Beth Kerttula

COMMITTEE CALENDAR

CS FOR SENATE JOINT RESOLUTION NO. 26(RES)
Requesting the United States Department of the Interior and the United States Department of Justice to appeal the decision of the United States Court of Appeals for the Ninth Circuit in The Wilderness Society v. United States Fish and Wildlife Service and to seek an emergency stay of the decision pending an appeal of the decision.

- MOVED CSSJR 26(RES) OUT OF COMMITTEE

HOUSE BILL NO. 478

"An Act relating to the issuance of commercial fishing interim-use permits; and providing for an effective date."

- MOVED HB 478 OUT OF COMMITTEE

HOUSE BILL NO. 444

"An Act relating to direct marketing fisheries businesses, to the fisheries business tax, and to liability for payment of taxes and assessments on the sale or transfer of fishery resources; and providing for an effective date."

- MOVED CSHB 444(FSH) OUT OF COMMITTEE

HOUSE BILL NO. 319

"An Act relating to the disposal of state land by lottery; and relating to the disposal, including sale or lease, of remote recreational cabin sites."

- MOVED CSHB 319(RES) OUT OF COMMITTEE

PREVIOUS COMMITTEE ACTION

BILL: SJR 26

SHORT TITLE: SALMON ENHANCEMENT IN WILDERNESS AREAS

SPONSOR(S): SENATOR(S) WAGONER

02/06/04	(S)	READ THE FIRST TIME - REFERRALS
02/06/04	(S)	RES
02/20/04	(S)	RES AT 3:30 PM BUTROVICH 205
02/20/04	(S)	Moved CSSJR 26(RES) Out of Committee
02/20/04	(S)	MINUTE(RES)
02/23/04	(S)	RES RPT CS FORTHCOMING 5DP
02/23/04	(S)	DP: OGAN, SEEKINS, STEVENS B, WAGONER,
02/23/04	(S)	DYSON
02/25/04	(S)	RES CS RECEIVED NEW TITLE
02/27/04	(S)	TRANSMITTED TO (H)
02/27/04	(S)	VERSION: CSSJR 26(RES)
03/01/04	(H)	READ THE FIRST TIME - REFERRALS
03/01/04	(H)	RES
03/08/04	(H)	RES AT 1:00 PM CAPITOL 124

BILL: HB 478

SHORT TITLE: COMMERCIAL FISHING INTERIM USE PERMITS

SPONSOR(S): REPRESENTATIVE(S) WILSON

02/16/04	(H)	READ THE FIRST TIME - REFERRALS
02/16/04	(H)	FSH, RES
02/27/04	(H)	FSH AT 8:30 AM CAPITOL 124
02/27/04	(H)	Heard & Held
02/27/04	(H)	MINUTE(FSH)
03/01/04	(H)	FSH AT 9:00 AM CAPITOL 124
03/01/04	(H)	Moved CSHB 478(FSH) Out of Committee
03/01/04	(H)	MINUTE(FSH)
03/03/04	(H)	FSH RPT CS(FSH) 5DP 2NR
03/03/04	(H)	DP: OGG, HEINZE, WILSON, SAMUELS,
03/03/04	(H)	SEATON; NR: GARA, GUTTENBERG
03/08/04	(H)	RES AT 1:00 PM CAPITOL 124

BILL: HB 444

SHORT TITLE: DIRECT MARKETING FISHERIES BUSINESS

SPONSOR(S): REPRESENTATIVE(S) WILSON

02/09/04 (H) READ THE FIRST TIME - REFERRALS
02/09/04 (H) FSH, RES, FIN
02/18/04 (H) FSH AT 8:30 AM CAPITOL 124
02/18/04 (H) Heard & Held
02/18/04 (H) MINUTE(FSH)
02/25/04 (H) FSH AT 8:30 AM CAPITOL 124
02/25/04 (H) Moved CSHB 444(FSH) Out of Committee
02/25/04 (H) MINUTE(FSH)
02/26/04 (H) FSH RPT CS(FSH) 2DP 3NR
02/26/04 (H) DP: WILSON, SEATON; NR: OGG, SAMUELS,
02/26/04 (H) GUTTENBERG
03/08/04 (H) RES AT 1:00 PM CAPITOL 124

BILL: HB 319

SHORT TITLE: REMOTE REC.CABIN SITE SALES/LOTTERY SALE
SPONSOR(s): REPRESENTATIVE(s) FATE

05/14/03 (H) READ THE FIRST TIME - REFERRALS
05/14/03 (H) STA, RES, FIN
01/13/04 (H) STA AT 8:00 AM CAPITOL 102
01/13/04 (H) Heard & Held
01/13/04 (H) MINUTE(STA)
02/03/04 (H) STA AT 8:00 AM CAPITOL 102
02/03/04 (H) Heard & Held
02/03/04 (H) MINUTE(STA)
02/10/04 (H) STA AT 8:00 AM CAPITOL 102
02/10/04 (H) Heard & Held
02/10/04 (H) MINUTE(STA)
02/19/04 (H) STA AT 8:00 AM CAPITOL 102
02/19/04 (H) Moved CSHB 319(STA) Out of Committee
02/19/04 (H) MINUTE(STA)
02/23/04 (H) STA RPT CS(STA) 2DP 4NR 1AM
02/23/04 (H) DP: GRUENBERG, LYNN; NR: SEATON, HOLM,
02/23/04 (H) COGHILL, WEYHRAUCH; AM: BERKOWITZ
03/01/04 (H) RES AT 1:00 PM CAPITOL 124
03/01/04 (H) Heard & Held
03/01/04 (H) MINUTE(RES)
03/08/04 (H) RES AT 1:00 PM CAPITOL 124

WITNESS REGISTER

SENATOR THOMAS WAGONER
Alaska State Legislature
Juneau, Alaska

POSITION STATEMENT: Testified as sponsor of SJR 26.

DON JOHNSON, Member
Kenai River Professional Guide Association (KRPGA)
Soldotna, Alaska
POSITION STATEMENT: Testified in opposition to SJR 26.

REPRESENTATIVE PEGGY WILSON
Alaska State Legislature
Juneau, Alaska
POSITION STATEMENT: Testified as sponsor of HB 478 and HB 444.

JON GOLTZ, Assistant Attorney General
Natural Resources Section
Civil Division
Department of Law
Anchorage, Alaska
POSITION STATEMENT: During hearing on HB 478, presented information and answered questions.

IAN FISK, Staff
to Senator Bert Stedman
Alaska State Legislature
Juneau, Alaska
POSITION STATEMENT: As staff to the sponsor of the Senate companion bill, testified to the changes made to CSHB 444(FSH).

KATHY HANSEN, Executive Director
Southeast Alaska Fishermen's Alliance (SEAFA)
Juneau, Alaska
POSITION STATEMENT: Testified in support of HB 444.

CHERYL SUTTON, Staff
to the Joint Legislative Salmon Industry Task Force
Alaska State Legislature
Juneau, Alaska
POSITION STATEMENT: During hearing on HB 444, provided information and answered questions.

KENNETH DUCKETT, Executive Director
United Southeast Alaska Gillnetters (USAG)
Ketchikan, Alaska
POSITION STATEMENT: Testified in support of HB 444.

JIM POUND, Staff
to Representative Hugh Fate
Alaska State Legislature
Juneau, Alaska

POSITION STATEMENT: During hearing on HB 319, answered questions on behalf of the bill sponsor, Representative Fate.

NANCY WELCH, Special Assistant
Office of the Commissioner
Department of Natural Resources (DNR)
Anchorage, Alaska

POSITION STATEMENT: During hearing on HB 319, answered questions.

ACTION NARRATIVE

TAPE 04-13, SIDE A

Number 0001

CO-CHAIR BEVERLY MASEK called the House Resources Standing Committee meeting to order at 1:12 p.m. Representatives Masek, Dahlstrom, Gatto, Lynn, Stepovich, Wolf, and Guttenberg were present at the call to order.

SJR 26-SALMON ENHANCEMENT IN WILDERNESS AREAS

CO-CHAIR MASEK announced that the first order of business would be CS FOR SENATE JOINT RESOLUTION NO. 26(RES), Requesting the United States Department of the Interior and the United States Department of Justice to appeal the decision of the United States Court of Appeals for the Ninth Circuit in *The Wilderness Society v. United States Fish and Wildlife Service* and to seek an emergency stay of the decision pending an appeal of the decision.

CO-CHAIR MASEK turned the gavel over to Co-Chair Dahlstrom.

SENATOR THOMAS WAGONER, Alaska State Legislature, speaking as sponsor, explained that SJR 26 involves the salmon enhancement project in Tustumena Lake. On December 30, 2003, the Ninth Circuit Court of Appeals made the decision that the Tustumena Lake salmon enhancement project violates the Wilderness Act in two ways. First, he said the court considered [the Tustumena Lake salmon enhancement project] to be a commercial enterprise because commercial fishermen benefit from the project. He said that's true in a way, but commercial fishermen do not benefit from this project within the wilderness area. He said the salmon are planted in Tustumena Lake, "out-migrate," and return four to five years later.

SENATOR WAGONER said there are three or four different [groups] of people that benefit because of the fish that are planted, which are: Commercial fishermen, personal use fishermen, sports fisherman, and sometimes subsistence fishermen. Noting that there is a large personal use fishery at the mouth of the Kasilof River, he said commercial fishermen that benefit are generally the setnetters who fish on the shore-based nets, mainly below the Kasilof River. He noted that about 100,000 fish come back from this project. He said the second objection the court had is that [the enhancement project] might not be consistent with preserving the natural conditions of the area. He maintained that [the enhancement project] is consistent, and said all that would be done through the aquaculture association is enhance the ability of the [salmon] fry to survive and return.

Number 0295

SENATOR WAGONER said SJR 26 is requesting that the decision be appealed and that an emergency stay of the decision be ordered. He said if the court does not stay the decision, 5 to 6 million salmon fry are going to be destroyed and disposed of because the fry cannot be put into another [water] system without going through the Alaska Department of Fish and Game (ADF&G) and receiving the [necessary] permits. He said it's just about too late to do that process, and it is very critical to get a stay if possible. Noting that this project has been in operation for close to 30 years, he said it started out as a state project and when the state eliminated FRED [Fisheries Rehabilitation, Enhancement and Development], it was turned over to the Cook Inlet Aquaculture Association (CIAA), which has maintained the project ever since. He said it's a long-term project.

SENATOR WAGONER explained that the reason for requesting the appeal is backed up by an email contained in the bill packets from Martin Bushman, Legal Counsel, Utah Division of Wildlife Resources, who points out the same problems with the court decision that the State of Alaska does. He said there is a possibility that with this decision other activities in these wilderness areas are at risk. He said [activities] such as taking guided people [into the area] for kayaking or horseback riding excursions or transporting people into these areas may be forbidden. He remarked, "We think this is where they're going with this ... decision."

SENATOR WAGONER said the reason [SJR 26] is being rushed through is that the keynote speaker at the energy council is going to be

Gail Norton, Secretary of the Interior, and "we would like to hand her a copy of this resolution while we're back there and go over it with her," because there's some hesitancy on the Solicitor General's part to proceed with this suit and the State of Alaska can't proceed with it.

Number 0492

REPRESENTATIVE LYNN stated support for the resolution. He remarked, "To me, it's just another in a series of outrages by the Ninth Circuit Court of Appeals." He suggested that there is a history of outrageous decisions from the Ninth Circuit Court of Appeals. Representative Lynn said he thought this should bolster "our attempts" to get Alaska removed from the Ninth Circuit, so "we don't have outrages like this, and other outrages from that district." He said he can't understand why the [salmon] fry can't be put into the lake, because as he understands it that would not be introducing a new species [of salmon]. He remarked, "It's just enhancing what God put there to begin with."

SENATOR WAGONER said CIAA's director, a representative of the Wilderness Society, and another conservation group had a meeting in Anchorage and realized that this was a problem, and asked that this be allowed. However, he said since the court decision has already been made, there is no way that this can be done without a stay of the court decision. He said it is not that simple to say a mistake was made, ask for it to be rectified, and have the enhancement [project] continue for at least this one cycle. That's kind of where it stands right now, he noted.

Number 0668

REPRESENTATIVE GATTO asked if there was someone from ACV [Alaska Conservation Voters] or the Wilderness Society available to testify.

CO-CHAIR DAHLSTROM indicated that there was not.

Number 0684

REPRESENTATIVE STEPOVICH asked if the state's [federal] delegation supports this resolution.

SENATOR WAGONER replied yes.

REPRESENTATIVE STEPOVICH asked who is going to present the resolution.

SENATOR WAGONER said he and Senator Scott Ogan would present it to [Gail Norton].

Number 0733

REPRESENTATIVE WOLF asked if CIAA has quantified an impact of the damage that was caused two years ago when the [flood] occurred at Tustumena [Lake]. He asked how it has impacted the natural [salmon] run.

SENATOR WAGONER said it may have, but he had not been given that information. He explained that there was a tremendous amount of damage done to the spawning area on the upper end of the Tustumena system. Senator Wagoner remarked, "Generally, that's what the people would argue; ... that's nature's way, and let happen whatever happen." He suggested that the Ninth Circuit Court of Appeals is generally overruled about 85 percent of the time. Senator Wagoner said if "we" can get this appealed to the U.S. Supreme Court, then "we'll" have a good record.

Number 0831

REPRESENTATIVE GUTTENBERG said [language] on page 2 "talks about" the contribution to the lives and activities of the residents on the Kenai River and of the hardships. He asked if there is quantitative number on the loss of economic opportunity, such as how many fish are lost.

SENATOR WAGONER remarked:

It's about 100,000 red salmon These are early ... return fish; they're primarily a beach caught fish. ... At fifty cents a pound, times four or five pounds, ... let's say they're a five-pound average, that 's two and a half dollars times 100,000. It just depends on where you want to stop on the economic chain. ... You can say that turns over four times into the community or two times.

SENATOR WAGONER said it's an indeterminable number, but it's part of the overall economic part of the fishery. He said a substantial number of those [fish] are caught in the personal use fishery, which takes place for several days at the mouth of

the Kasilof River. He said a lot of people take part in that fishery.

Number 0921

REPRESENTATIVE GUTTENBERG asked how long the stay would have to be in order to release the fish from the hatchery into the lake.

SENATOR WAGONER said any stay would have to run past the end of June. He said the [salmon fry] are loaded into a float plane near Seward and flown directly over and deposited into the Tustumena Lake, which probably happens in June.

Number 0980

DON JOHNSON, Member, Kenai River Professional Guide Association (KRPGA), testified. He said KRPGA is opposed to SJR 26, and although [KRPGA] is basically against most of the Ninth Circuit Court of Appeals decisions, it tends to go along with this decision. He said there have been a lot of general problems with stocking in Tustumena Lake. Mr. Johnson said there are a few parts of the [resolution] that appear to be pure misinformation, for example, he said the part about commercial activities. He said he went through the Wilderness Act and didn't see that kind of thing in it, in fact, there are a few clauses in there that specifically exempt that stuff. He said the actual statements that are coming out and saying this attempt of the Ninth Circuit Court of Appeals is aimed at going after tourism, kayaking, guiding, outfitting, and that kind of thing is not seen in the Wilderness Act.

MR. JOHNSON said apparently there are a bunch of people that want these fish to go into the [Tustumena Lake] and are trying to use misinformation "in order to keep it there." Mr. Johnson said if those people want to keep it there on their own merits, but are trying to drag a bunch of other things into it to somehow justify getting this case appealed again, is not what "we're really looking to do." He said [the resolution] makes it look like there is 100 percent agreement to get the case appealed, but "we don't see it." Mr. Johnson said there have been a lot of problems up there with the planning of fish, and it is not particularly in the same area as the "wilderness people are going with this thing." He suggested that a lot of the people who are trying to keep that project going are using what he sees as misinformation to dilute what is going on in the Wilderness Act "to say that it's doing something and it's not." Mr. Johnson said unless someone is going to come up with

specifics and point it out and say exactly what it is going to do, he can't see it "doing that." He said he was referencing sections "4(d)(1) and 4(d)(6)" of the Wilderness Act, which both specifically allow aircraft, motorboats, kayaking, recreational commercial activities, and so forth.

REPRESENTATIVE WOLF said he believes the entire Kenai Peninsula delegation understands the impacts that have taken place with the flood and the slide, which impacted the systems draining into the Tustumena Lake. He said his concern is that what is being talked about is an event that took place by "mother nature" that has decimated part of the salmon run. He said now "we're" having the court system do the same thing by not allowing the CIAA to deposit the [salmon fry] into the lake; "we're" affecting an economy twice - the commercial fishery, sport fishery, personal use fishery, and subsistence [fishery]. Representative Wolf said "we" can't do anything about mother nature, but "we" can do something about the Ninth Circuit Court of Appeals. He stated his support.

Number 1256

REPRESENTATIVE GATTO asked Mr. Johnson about the definition of the words "commercial enterprise".

MR. JOHNSON said he believed that was in the Wilderness Act.

REPRESENTATIVE GATTO asked Mr. Johnson if he knew the definition.

MR. JOHNSON indicated he didn't.

REPRESENTATIVE GATTO said it is an important term as far as the [resolution] is concerned. He said he thought it was of real value to establish ahead of time what those two words actually mean. He said if this language is going to be referred to in some of the supporting documents, he thinks it is pretty valuable to him to know exactly what it means. Representative Gatto suggested that something as simple as taking a relative who is not a resident of the state on a trip in the state is a minor form of some sort of a commercial enterprise. He said if he operates a business, that is a major form of a commercial enterprise. Representative Gatto asked if there is a dividing line, so that he can understand [what actions] violate the Ninth Circuit Court of Appeals ruling or the Wilderness Act or anything else.

MR. JOHNSON said section "4(d)(6)" [of the Wilderness Act] specifically allows commercial services. He remarked, "You can read whatever you want into that."

Number 1368

SENATOR WAGONER said he believes the commercial enterprise referred to in this bill takes place outside of the entire wilderness area, which is one of the problems, and the other commercial enterprise referred to takes place inside the area.

REPRESENTATIVE GUTTENBERG asked Mr. Johnson if there is a problem mixing hatchery fish with wild stock in that area.

MR. JOHNSON said absolutely; a big problem. He said when those hatchery fish are dropped into the Tustumena Lake and mix with the wild fish, it produces a massive effort in Cook Inlet with gillnetters who basically end up intercepting every wild fish that could possibly be trying to get into the system on the Kasilof River, which runs out of Tustumena [Lake]. He said every time "stock fish" are thrown into a system that flows out into saltwater, it causes an extra increased effort [to harvest the fish] by gillnetters, and that extra effort actually comes down to taking a disproportionate amount of fish. He said if more stock fish come back than wild fish, it will [produce] an extra effort to harvest the stock fish, [because] in the process of trying to harvest the stock fish, a higher percentage of the wild fish are going to be taken.

MR. JOHNSON said after years of doing that, it degrades the wild stock down to nothing and results in nothing but stock fish, which have been planted there year after year. He said that's been going on in the Tustumena drainage and is the real problem up there. He said it's been going on for quite a while and "we've" been trying to get the program shut down just for that reason, because it's been hard on the wild stock. He said it is one of the major reasons "we've" not tried to put any "stockings" into the Kenai River because "we" don't want to damage any of the genetics of the stocks that are in the Kenai River. He said the Tustumena Lake [enhancement project] has been going on for such a long time that it's been very hard to do anything about it. He said it is most of the reason for addressing the resolution at this time, and the Ninth Circuit Court of Appeals has come in and put the "shut down" on this [project] for wilderness reasons.

MR. JOHNSON said it is the "wild factor" that's really got this thing going for [KRPGA], because it does not [want] the wild fish wiped out for a bunch of [stocked fish]. He said this is even bigger than what was suggested. He said when a bunch of fish are stocked in the Kasilof River, it causes extra effort at the mouth of the Kasilof River, which impacts the Kenai River, and that's a huge issue.

Number 1550

SENATOR WAGONER said these fish are genetically exactly the same. He explained that the egg take for these fish takes place in Tustumena Lake; the eggs are taken, fertilized, taken to the hatchery, hatched, and fed. He said those fish have a better survival rate by far than those in the wild. Senator Wagoner said there is genetically no difference between a salmon that's reared for the first two years in the hatchery versus the wild. He stated that the genetic strain is exactly the same. He turned attention to the last paragraph of a letter in the bill packet from Attorney General Gregg Renkes, which read [original punctuation provided]:

If allowed to stand, the Ninth Circuit's decision may be used to burden or eliminate legitimate non-commercial activities in wilderness that Congress never meant to bar. We urge you to take action to correct the Ninth Circuit's overreaching. Please let me know if we can be of any other assistance or support.

SENATOR WAGONER said to keep in mind that the director of this wilderness area had no problem with this fish stocking effort. He remarked, "We even won, until it was appealed, on a 2 to 1 vote at the Ninth Circuit Court." He said it is a matter of keeping it going to a higher court, which is what's been happening. Senator Wagoner remarked, "Every place else, the decision's been in favor of Cook Inlet Aquaculture [Association]."

Number 1668

CO-CHAIR MASEK moved to report [CSSJR 26(RES)] out of committee with individual recommendations and the accompanying fiscal notes, and asked for unanimous consent. There being no objection, CSSJR 26(RES) was reported from the House Resources Standing Committee.

HB 478-COMMERCIAL FISHING INTERIM USE PERMITS

CO-CHAIR DAHLSTROM announced that the next order of business would be HOUSE BILL NO. 478, "An Act relating to the issuance of commercial fishing interim-use permits; and providing for an effective date."

Number 1715

REPRESENTATIVE PEGGY WILSON, Alaska State Legislature, speaking as sponsor, explained that HB 478 provides for an issuance of a commercial fishing interim-use permit. The Alaska Court of Appeals recently held that the Commercial Fisheries Entry Commission (CFEC) lacked the authority to issue the interim-use permits (IUP) in fisheries that it doesn't have the authority to limit. This bill is a house keeping measure that clarifies that CFEC does indeed have the authority to issue interim-use permits in these fisheries. She said this clarification is consistent with the original intent and purpose of the current statute, which has been in use for 30 years.

Number 1793

FRANK HOMAN, Commissioner, Commercial Fisheries Entry Commission (CFEC), testified. He explained that HB 478 is a measure to clarify that CFEC does have the authority to issue interim-use permits for fisheries that it may never limit, which has been the practice for 30 years, since the beginning of the program. He said Assistant Attorney General John Goltz is handling this appeal in the courts. He explained that three halibut fishermen came in from the Exclusive Economic Zone (EEZ) to sell fish in Alaska and did not have a permit from the State of Alaska to sell those fish. Those fishermen were cited and the case went to court. In the court's reading of the original statute, it took a very narrow reading to say if CFEC could not limit a fishery, it could not issue an interim-use permit. He said CFEC only issues two permits, which are entry permits and interim-use permits. Every fishery that is not limited gets an IUP to authorize it to fish or to have fish in state waters. He remarked:

 Their narrow reading of the original language, it said "pending the establishment" of a maximum number. Pending the establishment means ... we had not limited the fishery, where it says "maximum number," you can just put a parenthesis around that and say "a

limitation" because ... when we establish a maximum number, that means we limited the fishery.

"Pending" means we may never do it, and there's some fisheries, probably, we will ... never do. So, we've always understood that broadly, and the [Alaska] Court of Appeals understood it narrowly. ... The Department of Law (DOL) has appealed this decision to the Alaska Supreme Court to clarify that the original intent was to issue interim-use permits in any fishery that was not limited.

That's in the court now, and this clarification, as Mr. Goltz may testify, will help in his presentation to say that the legislature really did mean that they could issue interim-use permits from the very beginning, so that's in essence ... what the bill says.

Number 1988

CO-CHAIR MASEK said the bill is very straightforward and is a "housekeeping" bill to ensure that the language is consistent with the intent of the original statute. She said as many members know from experience, sometimes the legislature has to go back and do housekeeping. She said she would like to move this bill forward.

Number 2004

REPRESENTATIVE GATTO asked if this bill is retroactive.

MR. HOMAN replied no. The purpose of the initial bill was to change the language of the bill to clarify that the CFEC did have the authority to issue the IUP, which it has done for 30 years. He said the House Special Committee on Fisheries added the retroactivity section to further support DOL in its appeal, by saying the legislature understands and authorizes that CFEC has always had that ability. He said the retroactivity was included to support that position, but he thought the attorney would say that it probably won't have a major impact. He said [the legislature] couldn't go back 30 years and change laws, but it does give the "flavor" of the legislature as far as its opinion of this bill.

REPRESENTATIVE GATTO commented that this is very hard for him. He remarked, "Somebody wants to say something's retroactive 30-

plus years, and you're saying we're only talking about the flavor, well, I think maybe we can talk about the flavor without putting it into statute"

REPRESENTATIVE GATTO asked if this was a part of the original bill or if it was an amendment.

MR. HOMAN said an amendment was added in the House Special Committee on Fisheries to show legislative support for the state's position.

REPRESENTATIVE GATTO said this is a 31-year retroactivity clause and "anyone would raise their eyebrows as to anything retroactive," but 31 years is a generation backwards. He asked if it is imperative that the [retroactivity clause be included] or whether it is just to add some flavor to the bill. He said he is not in favor of usually adding flavor to a statute. He asked Mr. Goltz to comment about how valuable or important it is to be retroactive.

Number 2126

JON GOLTZ, Assistant Attorney General, Natural Resources Section, Civil Division, Department of Law, testified. Mr. Goltz said he understands there to be two purposes for the retroactivity provision that was added in the House Special Committee on Fisheries. He explained that the first reason is to essentially ratify the interpretation and the application that CFEC had adhered to the statute since it first started issuing interim use and entry permits in 1974. Mr. Goltz said CFEC has always interpreted this statute, as it currently exists, to essentially mean that it has the authority to issue IUPs in every Alaskan fishery that has not been limited. He said a narrower reading was reached by the Alaska Court of Appeals that creates some question about whether the interpretation and application CFEC has been giving the statute has been incorrect in other instances, and it raised the concern about potential suits against the state arguing that CFEC has issued permits and therefore requires permit fees in instances where it lacks the statutory authority. He said that has actually come to pass and there have been two class action suits that have been filed on the basis of the holding of the [Alaska] Court of Appeals decision asking for reimbursement of fees that the fishermen paid for IUPs.

Number 2271

MR. GOLTZ said the feeling of the House Special Committee on Fisheries members who supported the amendment was that the retroactivity provision would help give further assurance of protection and ensure that interpretation of the current statute by the [Alaska] Court of Appeals was not for the use to subject the state for liability in other instances. He explained that the other purpose for the retroactivity provision, as he understands it, is to provide any additional arguments that might be made available to the state in the context of the currently filed court cases. He said there's supposed to be a criminal case that the [Alaska] Court of Appeals has ruled on that has been appealed to the supreme court, but it is still in court and has not been decided yet, in addition to the two class action cases that he'd mentioned.

MR. GOLTZ said the [House Special Committee on Fisheries] seemed to understand that there would be some potential constitutional restrictions on whether or not this change, if adopted by the legislature, could be applied retroactively in those cases that are already in progress. He said he testified before the House Special Committee on Fisheries that there would be some strong arguments he thought he could make on the basis of a retroactive bill to show that the CFEC has had the authority to issue these permits all along. Mr. Goltz said even though there was some question about whether that would ultimately prevail in the courts (indisc.) that could be worthwhile arguments for him.

REPRESENTATIVE GATTO remarked:

With the understanding that the criminal case currently before the supreme court, and the potential for reimbursement of past fees paid, and retroactivity might not be allowed in all cases, I have to tell you that short of some compelling reason and absolute necessity for retroactivity of 31 years, I find that section of this bill very difficult to support.

REPRESENTATIVE GATTO asked Mr. Goltz if he would agree or disagree.

MR. GOLTZ said in his view the retroactivity provision in this bill is not problematic because the bill is essentially conforming the language of the statute to the way the current statute has always been interpreted and applied by state agencies. He said to the best of his reading of the legislative history of the bill, it is also consistent with what the intent of the legislature has been since this language was initially

adopted in 1973. Mr. Goltz said with that understanding, he didn't think that any new requirements or provision is being added retroactively by this bill. He said it is essentially a clarifying amendment in the sense that it ratifies the interpretation that's always been given to the statute in the past. Mr. Goltz said it is also a curative in the sense that it is made in response to and disapproval of the [Ninth Circuit] Court of Appeals decision. He said the arguments that he is making on behalf of the state to the supreme court are that the current statute essentially means what this bill better expresses, so in light of that he doesn't think there is any new requirement being imposed retroactively by this bill.

Number 2373

REPRESENTATIVE GATTO asked how that would change anything. He remarked, "If we say today, this is what we firmly believe is true and what was intended by the past, that still holds whether or not we make it retroactive to the past, doesn't it?"

MR. GOLTZ said he would agree that there is an issue there and there are some arguments that could be made on both sides about the extent to which this legislature could do anything to change what a previous legislature meant when it adopted a statute. He said he thought the effect that that would have in the application of the law in any particular instance would best be decided by the court. He said he didn't feel like he could express the wishes about what would be resolved in every possible circumstance.

Number 2503

REPRESENTATIVE WOLF asked Mr. Goltz if the retroactive clause would cost the state any money.

MR. GOLTZ said he thought there was a reasonable basis for the decision that was made to apply this retroactively, which is to essentially ratify the interpretation that's been given to (indisc.) historically. Mr. Goltz said he does recognize that there are some instances in which the application of it retroactively could be problematic constitutionally. He said this bill would initially present that it was intended simply to give CFEC the ability to continue to apply the law the way it always has in the past, notwithstanding the [Ninth Circuit] Court of Appeals decision, but to the extent that this legislature can apply the law retroactively to basically remove the lack of authority that might be argued for the issuance of

other permits. Mr. Goltz said he thought it was a reasonable thing to do, although he recognized that there can be some dispute about the applicability of that.

REPRESENTATIVE WOLF suggested there would be a fiscal note.

MR. GOLTZ disagreed. He said he was not aware how this bill, even applied retroactively, would cause any appropriations to be made.

REPRESENTATIVE WOLF asked if the retroactive clause was going to "feed the fire" of the class action lawsuits.

MR. GOLTZ said in his judgment it would not.

Number 2641

REPRESENTATIVE GUTTENBERG asked if it would "damper the fire" of the lawsuits.

MR. GOLTZ said arguably yes, but he was not sure that it was going to have a strong effect one way or the other, but if it had any effect, it would be to discourage anybody seeking to bring a claim making the argument that CFEC lacks the authority to issue permits in the past. He said because the retroactive provision would allow DOL to argue that, if that were true under a previous version of the law, that was effectively cured by the retroactive adoption of that authority in order to bring a wording of the statute into line with the practice and the intent all along.

REPRESENTATIVE GUTTENBERG said the courts are going to rule on the original lawsuit as it is. He asked how much weight the courts are going to place on this bill with the retroactive date on those current standing cases.

MR. GOLTZ said he didn't know for sure. He said because he is the person who is advocating on behalf of the state in these cases he is not in a good position to make that argument in a strong fashion, because it would essentially run counter to the goal he is serving for the state.

Number 2736

REPRESENTATIVE LYNN asked if changing it to be retroactive would make it effective as of 30 years ago and if the court would have to base it upon the bill with it being retroactive.

CO-CHAIR DAHLSTROM asked if the original version of the bill did not include the language adding the uncodified law by amending the new section for retroactivity. She asked Representative Wilson to comment on how and why it was necessary to add that. She said she thought there is a general feeling from committee members that they might be more comfortable in adopting the original version.

REPRESENTATIVE WILSON said the intent of the legislation itself was for clarification, and the [uncodified law] was added because of Mr. Goltz's testimony that there were some class action lawsuits ready to happen because of this. She said the amount of the permit is \$150 and she thought the fishermen were probably not going to gain from that, but the attorneys probably would. She said [the committee] thought that there might be a possibility that it would help the class action lawsuit. She said she was not "locked in" to that part of it, but it could be a possibility that it might help.

Number 2841

REPRESENTATIVE GATTO moved to report HB 478 out of committee with individual recommendations and the accompanying fiscal notes. There being no objection, HB 478 was reported from the House Resources Standing Committee.

HB 444-DIRECT MARKETING FISHERIES BUSINESS

[Contains discussion of SB 286, the companion bill.]

CO-CHAIR DAHLSTROM announced that the next order of business would be HOUSE BILL NO. 444, "An Act relating to direct marketing fisheries businesses, to the fisheries business tax, and to liability for payment of taxes and assessments on the sale or transfer of fishery resources; and providing for an effective date." [Before the committee was CSHB 444(FSH).]

Number 2890

REPRESENTATIVE PEGGY WILSON, Alaska State Legislature, speaking as sponsor, explained that HB 444 is about a fisheries business tax (FBT) and how that tax relates to a sector of the commercial fishing industry known as direct marketing fisheries businesses. She said in 1913, when the territory of Alaska decided to gain revenue for the fishing industry, this tax was put into place. It is the oldest tax in Alaska and was levied on processing

companies. The percentage was 3 percent on shore-based processors and 5 percent on floating-fisheries processors. She said the floating businesses are primarily large mobile processing facilities, and are assessed at a higher rate to compensate for the fact that they do not operate like a shore-based plant does. This bill focuses on a group of fishing businesses that do not fit the old definition of the FBT. She explained that this bill is a companion bill to SB 286, and is a bill that took years of negotiations between the industry and government. She said the Joint Legislative Salmon Industry Task Force endorses this bill unanimously. She said the bill is about fairness and "leveling the playing field."

CO-CHAIR MASEK asked for a brief overview of the changes made to CSHB 444(FSH).

TAPE 04-13, SIDE B

Number 2990

IAN FISK, Staff to Senator Bert Stedman, Alaska State Legislature, testified. [Senator Stedman was sponsor of the SB 286, the companion bill.] Speaking to changes made in CSHB 444(FSH), he turned attention to page 4, line 5, and he said the word "unprocessed" was added into the language as a clarification to ensure that the [tax] is on the unprocessed value [of the catch]. He explained that one of the things this bill does is it clarifies the value of fish that direct marketing fisheries are supposed to pay tax on. Mr. Fisk said the bill changes the tax rate for direct marketers from 5 percent to 3 percent because in existing law many of the direct market fisheries businesses who do processing on board are basically considered to be the same as floating fisheries business. He clarified that these are small vessels.

Number 2912

MR. FISK explained that this is the oldest tax in the state and as it has evolved over the years, it hasn't really made a distinction between small boat vessels, which do some processing on board, and large floating processors, which are basically floating canning lines. He said this is a fair distinction to make for small boats that are operating out of Alaskan towns. He said the bill changes the point of taxation; the "raw fish tax" - the nickname for fisheries business tax - is applied to the raw fishery resource as it's delivered to a processor, which is the way a vast majority of fish are delivered, and is kind of

the first point of sale. Mr. Fisk said the point that one is taxed on in the direct market business is often a retail point of sale, so [the bill] rectifies that problem, and provides fairness and a level playing field. He said [the bill] rectifies the due dates for all taxes that a direct market business would pay to April 1. There are a few other taxes that the businesses have to pay if handling salmon such as a hatchery and marketing tax. He said instead of paying the taxes monthly, it would be paid once a year, which makes it easier for small businesses to do the bookkeeping.

MR. FISK said [the bill] is a tightly woven compromise [that resulted] from the Joint Legislative Salmon Industry Task Force process. He said the definition of a "direct market vessel" is [a vessel] that is 65 feet or under, which made some of the larger processors more comfortable with the bill, and it applies only to the product that is caught and marketed by the fisherman. He said a direct market vessel can't buy product from other vessels. Mr. Fisk explained that the Department of Revenue (DOR) will be revenue neutral to the state because there are some provisions of the bill that bring in better compliance with the FBT and close a few loopholes on certain types of direct market vessels.

MR. FISK said this bill is helping out small Alaskan businesses and because of current market conditions fishermen are losing their markets and don't have any other options but to try to sell their own product. He suggested the bill would help small Alaskan businesses. Mr. Fisk noted that this is a compromised bill that a lot of work had been put into. He urged the committee to pass the bill.

CO-CHAIR DAHLSTROM asked Mr. Fisk to comment on the \$25,000 that is going to come out of the general fund.

MR. FISK said the requested position for DOR is the only fiscal impact that this bill will have. He said the point is to give DOR the extra ability to check the compliance with the tax.

CO-CHAIR DAHLSTROM asked Mr. Fisk if he anticipated one additional position in 2006 and two positions in 2007. She noted that the [amount of funding requested in the fiscal note] doubles in 2007.

MR. FISK said he is not certain why there is a difference [in funding] between the two years. He said he thought it was because there won't really be any tax returns for the department

to go over for the first part of the [2006] fiscal year, and it wouldn't be until the middle or the end of the year. He said in the long run, [DOR] will end up with a \$50,000 estimate every year.

Number 2745

REPRESENTATIVE GATTO asked about the definition of unprocessed [fish].

MR. FISK said in some cases a troller can gut and gill a fish, which is kind of the industry standard for trollers, and the fish is not considered processed.

REPRESENTATIVE GATTO said a fish can be finned, gutted, and it remains unprocessed because the flesh is not exposed to air. He said he wanted to ensure that was clear to the committee because it wasn't clear to him. Representative Gatto noted that the head of the fish has to stay on otherwise the flesh would be exposed.

Number 2666

KATHY HANSEN, Executive Director, Southeast Alaska Fishermen's Alliance (SEAFSA), testified. Ms. Hansen said [HB 444] is a compromised bill that's been worked through in a public process for over two years through the Joint Legislative Salmon Industry Task Force; it has agency support, processor support, and industry support. She noted that direct marketers had testified in other committees but it is the time of year when most of them have started to go back out fishing and aren't available. Ms. Hansen urged the committee to pass the bill.

REPRESENTATIVE GATTO asked if a [fisherman] can buy fish from others.

MS. HANSEN said a fisherman cannot buy fish from others and be a direct marketer.

REPRESENTATIVE GATTO asked if a fisherman can carry another fisherman's fish into [town] to save that person a trip.

MS. HANSEN said she would have to take a look at the Alaska Department of Fish & Game's [ADF&G] transporter bills to see if a fisherman can carry in another fisherman's unprocessed fish. She said she did not know the answer.

Number 2597

REPRESENTATIVE GUTTENBERG asked if this bill allows fishermen to get together and form a co-op or a processing conglomeration.

MS. HANSEN said "roundaboutly" that is permissible under current state law. She said those activities can still be done even with this legislation passing. Ms. Hansen remarked:

They'll have to go back to the current laws that are in statute right now and meet those definitions of ... what requirements they'll have to meet for DEC [Department of Environmental Conservation] processing standards [and] what requirements they'll have to meet for Department of Revenue.

MS. HANSEN said it can still be done, but not as a direct marketer dealing with one's own product.

REPRESENTATIVE GATTO asked if fishermen will be paying 5 percent instead of 3 percent.

MS. HANSEN answered in the affirmative.

Number 2546

REPRESENTATIVE WOLF noted that the committee had heard a transporter bill last year. He asked if one boat can haul in several other fishermen's unprocessed fish.

MS. HANSEN said without looking at the transporter bill she didn't remember if there were any restrictions on whether the fish had to be processed or unprocessed and she could not answer the question.

REPRESENTATIVE GATTO said he specifically remembered hearing that bill in committee last year, which [allowed one boat to haul several fishermen's fish into town]. He said Representative Gatto [brought attention to the question] of at what point does it become a co-op, and he said he didn't know that the question was ever addressed.

Number 2463

CHERYL SUTTON, Staff to the Joint Legislative Salmon Industry Task Force, Alaska State Legislature, testified. She said the transporter bill that was passed last year only created the

opportunity for harvesters to offload unprocessed fish onto another vessel that acted as a transporting vessel to a processing plant or a point on land. Ms. Sutton remarked:

This bill has nothing to do with transporting anyone's processed fish It does not increase any of that activity; it's a direct marketer, they're responsible for their own vessel. They fall under a set of rules that are very stringent and very well defined, and if you get into any kind of a processing activity, and we dealt very closely with all the processors in the state on this issue, then you ... come under an entire set of different regulations, and these folks don't want to fall under those regulations, they want to do this activity, try to just expand their own businesses, and perhaps expand their own personal incomes by doing direct marketing, and that's the pure and simple of the bill.

REPRESENTATIVE GATTO said he didn't want to pass legislation and somehow be in conflict [with legislation passed last year]. He said he thought it was great for a person to sell his or her own fish. Representative Gatto asked if [the bill] defeats what was passed last year.

MS. SUTTON said no; the bill passed last year is a totally separate issue. She said she believed there are only 12 vessels in the entire state that applied for a transporter permit of which only 4 vessels were in salmon fisheries, so there wasn't a huge use of that piece of legislation to this point. She said the [two bills] do not cross boundaries in any section of the law. She remarked:

The transporter bill simply would allow me as [a] fisherman - if I were out on the west side of Cook Inlet harvesting fish and I'd had no capacity to offload my fish to a processor, but there was a vessel that was transporting and he had a transporter license and I had the proper licensing - he could take my fish to the east side of the inlet and sell those fish under my authority, so that they're not mixing the issues at all.

REPRESENTATIVE GATTO asked if the fishermen whose fish were being transported would still retain ownership of his or her fish.

MS. SUTTON said correct.

REPRESENTATIVE GATTO indicated that if the fish were kept separately, then there would really be no question that the transporter was simply helping by transporting fish for the other fishermen. He said if the fish were kept together, he would have a different question that has to do with whether "we're overstepping the intent here in saying this is a co-op now, rather than would you mind carrying my fish for me."

MS. SUTTON said she was going to step back from the issue because that's a piece of legislation that was passed last year, is in law, and has absolutely nothing to do with this piece of legislation. She remarked:

I guess that was the only point I really wanted to make clear was that ... you were very clear in the questions that you asked last year about how ... they would be accountable. They spent considerable time with the [Alaska] Department of Fish & Game ... ticketing, ... formatting, and making sure that the individual's fish were clearly accounted for, ... registered, and certified, but this is a totally separate issue. This is a direct marketing bill that deals with commercial fishing vessels that are under 65 feet, and their regulations are totally different from the transporter regulations.

Number 2233

KENNETH DUCKETT, Executive Director, United Southeast Alaska Gillnetters (USAG), testified, and he stated that USAG strongly supports this legislation and has submitted a letter to the committee expressing its support.

CO-CHAIR DAHLSTROM noted that the next committee of referral is the House Finance Committee, which will have the opportunity to view the fiscal note and make determinations [regarding the fiscal impact of the bill].

Number 2189

CO-CHAIR MASEK moved to report CSHB 444(FSH) out of committee with individual recommendations and the accompanying fiscal notes, and asked for unanimous consent.

Number 2173

REPRESENTATIVE GUTTENBERG objected for purposes of discussion. He remarked:

I think Representative Gatto and I have a similar concern that the salmon task force has come to us with a series of recommendations and we've passed most of them. But I think, ... and I don't know how real this is, but ... certainly a concern ... [of] mine is that we're changing situations and there are going to be ... new processes. And people are going to be taking advantage of things that are unseen at this point.

... I support this legislation and I think it does good things, but ... the more we do of these things, the more things that are changing and opportunities are changing and the whole shape of the business, so I am concerned about that in the long run. I am not a commercial fisherman but I think the dynamics of the industry is going to be changing.

REPRESENTATIVE WOLF said he had some reservations about HB 444 as well. He indicated that he thought HB 444 ties directly to the transporter bill passed last year.

Number 2101

REPRESENTATIVE GUTTENBERG removed his objection.

CO-CHAIR DAHLSTROM asked if there was further objection. There being no objection, CSHB 444(FSH) was reported from the House Resources Standing Committee.

HB 319-REMOTE REC.CABIN SITE SALES/LOTTERY SALE

CO-CHAIR DAHLSTROM announced that the final order of business would be HOUSE BILL NO. 319, "An Act relating to the disposal of state land by lottery; and relating to the disposal, including sale or lease, of remote recreational cabin sites." [Before the committee was Version S, adopted as a work draft on 3/01/04.]

Number 2067

JIM POUND, Staff to Representative Hugh Fate, Alaska State Legislature, noted that the bill had been previously heard in committee. He said he was available to answer questions.

CO-CHAIR DAHLSTROM said she had heard some concerns raised about services that people may or may not request or feel entitled to in particular areas, such as schools, roads, emergency services, and so forth.

MR. POUND said there is specific language in existing statute that deals with that issue and basically says [the state] is not responsible for those things in remote cabin locations. He said he didn't have a copy of that section of statute with him.

Number 1970

NANCY WELCH, Special Assistant, Office of the Commissioner, Department of Natural Resources (DNR), testified. She said the statute being asked about is AS 38.04.010(b).

The committee took an at-ease from 2:21 p.m. to 2:26 p.m.

CO-CHAIR DAHLSTROM asked Mr. Pound for clarification on the issue.

MR. POUND directed attention to AS 38.04.010(b), which read in part:

State land that is located beyond the range of existing schools and other necessary public services, or that is located where development of sources of employment is improbable, may be made available for seasonal recreational purposes or for low density settlement.

The seasonal recreation use or low-density settlement shall have sufficient separation between residences so that public services will not be necessary or expected. The availability of timber, firewood, and water resources shall be considered in determining separation between residences.

CO-CHAIR DAHLSTROM said the bill has a rather large fiscal note. She said the next committee of referral is the House Finance Committee, and she is confident "that they will go through this with a fine-tooth comb."

Number 1839

CO-CHAIR MASEK moved to report CSHB 319, Version 23-LS0477\S, Bullock, 2/25/04, out of committee with individual

recommendations and the accompanying fiscal notes, and asked for unanimous consent.

Number 1818

REPRESENTATIVE GATTO objected for purposes of discussion. He called attention to the following language in AS 38.04.010(b): "The seasonal recreation use or low density settlement shall have sufficient separation between residences so that public services will not be necessary or expected." He said he didn't know how the [legislature] could even determine what would be expected, and that people always expect things once they are there. He asked, "Have you ever found a place where people didn't expect you to stay away or government to come in or somebody take care of me one way or another?" He stated that that hasn't happened in his experience.

MR. POUND said he is inclined to say that Representative Gatto is correct in his assessment, but he believes that this statutory language does protect the state and ultimately if the site is within a municipality or borough, that it would also protect "them" as well.

REPRESENTATIVE GATTO asked if it is known or suspected that that's the situation.

MR. POUND said past experience is that no one in a remote cabin site has expected to have any support from the state as far as utilities and/or schools.

REPRESENTATIVE GATTO asked if it is clear in the bill or in regulation that "you sign away your right to having the borough or the community or somebody establish schools or fire stations" He said he can foresee the state getting "hung up pretty bad" as soon as 10 kids show up and "somebody says I think we have a right to a high school here."

MR. POUND noted that he had not seen all of the language that is involved in the state contract. He said the little bit of contractual language in this bill is correcting some of that contract and he would suspect that the department would have that language within its contract.

Number 1674

MS. WELCH directed attention to AS 38.95.300, a disclaimer applicable to state land disposals, which read:

Except as otherwise specifically provided, nothing in this title

(1) obligates the state to provide services to land that is disposed of by the state, or any grantee of the state, or is the subject of any disposal program;

(2) limits the authority of the state to dispose of land or any interest in land or resources in the area of the current disposal, provides any exclusive right or interest in the area of the disposal, or implies or requires that any disposals made will be limited in type or any other manner.

MS. WELCH said it is a broad exclusion, but it doesn't mean that people won't come in and ask. She said she believes it gives the legislature the authority to "go back and say but here's the law."

REPRESENTATIVE GATTO asked what happens when it conflicts with existing law that says if a community has 10 children, it is entitled to a school. He asked if [AS 38.95.300] would supercede that law or if it would take precedence over previous law because it was signed into law later.

MS. WELCH said she could not provide legal advice on that question; it would be something that the legislature would have to work out. She explained that in past land disposals most subdivisions have been located close to existing communities, so the schools expand or adapt according to the type of use that is occurring there. She said most of the remote parcel program areas would not see many schools go up in those areas, so she would assume that it would still be the same.

REPRESENTATIVE GATTO asked if there were some that did.

MS. WELCH replied that she did not have first-hand knowledge of it, but it is "kind of one of those disclaimers."

Number 1537

REPRESENTATIVE GATTO withdrew his objection.

CO-CHAIR DAHLSTROM asked if there was further objection. There being no further objection, CSHB 319(RES) was reported from the House Resources Standing Committee.

ADJOURNMENT

There being no further business before the committee, the House Resources Standing Committee meeting was adjourned at 2:36 p.m.