ALASKA STATE LEGISLATURE
SENATE RESOURCES STANDING COMMITTEE
March 29, 2004
3:30 p.m.

TAPE(S) 04-32

MEMBERS PRESENT

Senator Thomas Wagoner, Vice Chair
Senator Fred Dyson
Senator Ralph Seekins
Senator Ben Stevens
Senator Kim Elton

MEMBERS ABSENT

Senator Scott Ogan, Chair
Senator Georgianna Lincoln

COMMITTEE CALENDAR

SENATE JOINT RESOLUTION NO. 31
Relating to urging the United States Congress to compensate the State of Alaska for the effect of federal land ownership on the state's ability to fund public education.

MOVED CSSJR 31(STA) OUT OF COMMITTEE

HOUSE BILL NO. 524 am
"An Act relating to the protection of land and water from waste disposal; providing for the regulation of waste management; making conforming amendments; and providing for an effective date."

HEARD AND HELD

SENATE BILL NO. 318
"An Act relating to the individual right of Alaska residents in the consumptive use of fish and game."

HEARD AND HELD

PREVIOUS COMMITTEE ACTION

BILL: SJR 31
SHORT TITLE: FEDERAL FUNDING FOR EDUCATION

SPONSOR(s): RULES

02/16/04	(S)	READ THE FIRST TIME - REFERRALS
02/16/04	(S)	STA, RES
03/18/04	(S)	STA AT 3:30 PM BELTZ 211
03/18/04	(S)	Moved CSSJR 31(STA) Out of Committee
03/18/04	(S)	MINUTE(STA)
03/19/04	(S)	STA RPT CS 5DP SAME TITLE
03/19/04	(S)	DP: STEVENS G, HOFFMAN, COWDERY,
03/19/04	(S)	STEDMAN, GUESS
03/29/04	(S)	RES AT 3:30 PM BUTROVICH 205

BILL: HB 524
SHORT TITLE: WASTE MANAGEMENT/DISPOSAL
SPONSOR(s): RULES BY REQUEST OF THE GOVERNOR

02/26/04	(H)	READ THE FIRST TIME - REFERRALS
02/26/04	(H)	RES
03/03/04	(H)	RES AT 1:00 PM CAPITOL 124
03/03/04	(H)	Moved Out of Committee
03/03/04	(H)	MINUTE(RES)
03/04/04	(H)	RES RPT 5DP 1NR
03/04/04	(H)	DP: LYNN, STEPOVICH, HEINZE, DAHLSTROM,
03/04/04	(H)	MASEK; NR: GATTO
03/25/04	(H)	TRANSMITTED TO (S)
03/25/04	(H)	VERSION: HB 524 AM
03/26/04	(S)	READ THE FIRST TIME - REFERRALS
03/26/04	(S)	RES
03/29/04	(S)	RES AT 3:30 PM BUTROVICH 205

BILL: SB 318
SHORT TITLE: CONSUMPTIVE USE OF FISH AND GAME
SPONSOR(s): SENATOR(s) SEEKINS

02/11/04	(S)	READ THE FIRST TIME - REFERRALS
02/11/04	(S)	RES, JUD
03/01/04	(S)	RES AT 3:30 PM BUTROVICH 205
03/01/04	(S)	Heard & Held
03/01/04	(S)	MINUTE(RES)
03/24/04	(S)	RES AT 3:30 PM BUTROVICH 205
03/24/04	(S)	Heard & Held
03/24/04	(S)	MINUTE(RES)
03/29/04	(S)	RES AT 3:30 PM BUTROVICH 205

WITNESS REGISTER

Senator Gene Therriault

Alaska State Capitol
Juneau, AK 99801-1182
POSITION STATEMENT: Sponsor of SJR 31.

Mr. Brian Alread
Office of Legislative Research
No address provided
Utah
POSITION STATEMENT: Commented on SJR 31.

Commissioner Ernesta Ballard
Department of Environmental Conservation
410 Willoughby
Juneau, AK 99801-1795
POSITION STATEMENT: Supports HB 524.

Ms. Terry Thurbin, Assistant Attorney General
Department of Law
PO Box 110300
Juneau, AK 99811-0300
POSITION STATEMENT: Commented on HB 524 am.

Mr. Lance Nelson, Assistant Attorney General
Department of Law
PO Box 110300
Juneau, AK 99811-0300
POSITION STATEMENT: Commented on SB 318.

Ms. Kathy Hansen, Executive Director
Southeast Alaska Fishermen's Alliance (SEAFA)
9369 North Douglas Hwy.
Juneau AK 99801
POSITION STATEMENT: Opposes SB 318.

ACTION NARRATIVE

TAPE 04-32, SIDE A
^#SJR31

SJR 31-FEDERAL FUNDING FOR EDUCATION

VICE CHAIR THOMAS WAGONER called the Senate Resources Standing Committee meeting to order at 3:30 p.m. Present were Senators Kim Elton, Fred Dyson, Ben Stevens, Ralph Seekins and Vice Chair Thomas Wagoner. The first order of business to come before the committee was SJR 31.

SENATOR GENE THERRIAULT, sponsor, said the statistics used in this resolution were based on the Utah Legislative Council's fiscal office statistics and he would be referencing a number of charts during his comments, which follow.

SJR 31 is related to urging the United States Congress to compensate the State of Alaska for the effect of federal land ownership on the state's ability to fund public education. This legislation stems from a resolution adopted in July of 2002 by the Executive Committee of the Council of State Governments-West (CSG-WEST) urging its membership of 13 states to support and pass joint resolutions expressing how federal land ownership hinders western states' ability to fund education. Chairman Ogan and myself are members of that committee.

The CS before you had one change that was made in State Affairs and that was adding another "whereas" paragraph to page 2, line 27, which ties this resolution to the overall efforts of CSG-WEST and the other 12 member states. Since this effort began, all 13 states have introduced similar resolutions and all but four – California, Washington, Colorado and Alaska – have passed them. This initiative is the result of research and preparation by the legislature [indisc.} of the State of Utah....

The Western Governors' Association (WGA) has also endorsed this resolution, which has been termed APPLE from the Action Plan for Public Land and Education. Western states, as a group, are falling behind in education funding when measured in growth of real per-pupil expenditures during the period of 1979 – 1998. Eleven of 12 of the states with the lowest real growth in pupil expenditure are western states. The growth rate of rural per-pupil expenditures in the 13 western states is less than half – 28 percent versus 57 percent - of that, in the 37 other states. Look at graph 1. On average, enrollment in western states is projected to increase dramatically while the growth rates in other states is projected to actually decrease (graphs 2 and 3)....

In western states the state and local taxes, as a percentage of personal income, are as high or higher than other states (graphs 4 and 5). In 1998-99,

western states had 11.1 percent versus 10.9 percent for the eastern states. In western states, commitment to education as a percentage of the state budget is equal to that of other states. In year 2000, western states' contribution was 32.6 percent versus 32.7 percent for the eastern states. (That is a percentage of total funds (illustrations 6 and 7).

The problem lies with the federal government and the enormous amount of land it owns in western states. If an imaginary line was drawn from Montana to New Mexico, no state east of that line has more than 14 percent of its land owned by the federal government. No state west of that line has less than 27 percent of their land federally owned – with the exception of Hawaii. Four western states have more than 62 percent of their land federally-owned. Alaska is one of those – Idaho, Nevada and Utah (graphs 8 through 11). Number 8 shows that if you draw that imaginary line north to south, those states that are to the west are the ones that have the high percentage of federal ownership....

The primary ways that federal land ownership impacts funding of education in western states is through enabling acts and property taxes. Most enabling acts for western states including Alaska promise to give the state five percent of the proceeds from the sale of federal land for the benefit of public education. In 1977, the federal government abandoned its original policy to dispose of public lands depriving the states of public education funding estimated to be over $14 billion. This resolution does not recommend that federally owned lands be sold, only that the states be compensated as promised. States are not allowed to assess property tax on federal lands impacting western states in the amount of over $4 billion annually. The federal government does provide payment in lieu of taxes - PILT money - as we know, and we receive some PILT money here in the State of Alaska, since states cannot tax federal lands. But the amount of PILT payments to states in 2001 was only 4 percent of the annual property tax revenue lost by western states.

This resolution proposes to, number one, create legislative awareness; two, educate the public; three, build a western states coalition; and four, petition Congress to compensate western states. In summary, the

> western states are financially harmed in a significant way by the amount of federal land ownership. The conclusion is that federal land ownership hinders western states' ability to fund public education.
>
> That brings us to the question of what is next. CSG-WEST has formed the APPLE initiative steering committee, which is chaired by Speaker Marty Stevens with the Utah House of Representatives and I am also a member, as President of the Alaska State Senate to that steering committee. The steering committee will work like a strategic planning group who will press the case in Congress and the judiciary. The first meeting of the steering committee will be in the CSG-WEST annual meeting that is scheduled to take place in Anchorage this fall.

SENATOR KIM ELTON said the whereas clauses all talk about the issue for western states including Alaska, but the resolve just urges Congress to appropriate just compensation to the State of Alaska only with copies sent to our congressional delegation. He asked why just compensation for the other 12 states couldn't be included.

SENATOR THERRIAULT replied that he wasn't sure, but that would be a good question for Brian Alread, the Utah Legislative research staff person who worked on this resolution.

MR. BRIAN ALREAD, Office of Legislative Research, Utah, responded that there is no official directive limiting this resolution to the various states.

> I think it's simply a matter of each state identifying the issue in their state and becoming part of a larger coalition....I don't think there's any reason to not expand that language if you chose to do so.

SENATOR THERRIAULT pointed out that specific language was added on page 2, lines 27 – 30, about other states' efforts in passing the joint resolution on their individual state, but he felt this resolve could be opened to allow the State of Alaska to advocate on behalf of the entire group.

SENATOR RALPH SEEKINS noted that Alaska is unique in that another 47 million acres have been withdrawn from the tax base by federal fiat, even though they are private lands. He wondered

why they wouldn't ask the federal government to apply the same formula to those lands.

SENATOR THERRIAULT replied that the committee could consider adding another whereas clause pointing out the difference if it desired.

SENATOR SEEKINS reiterated that those lands were removed by federal requirement and the effect is the same as if they were federal lands outside of the state's tax system.

VICE CHAIR WAGONER agreed and added that those lands were supposed to go off of their protected status after 25 years, but Congress authorized it for another 25 years; then asked, "Why aren't we receiving compensation because a lot of that land lies in the unorganized areas, also, of the State of Alaska?"

SENATOR SEEKINS recalled that Texas was the last state to be admitted to the union without being forced to grant lands to the federal government as a condition of statehood.

VICE CHAIR WAGONER asked if the committee was interested in adding another whereas on this issue or put it in separate legislation.

SENATOR SEEKINS replied that he would prefer dealing with it as a separate issue. He moved to pass CSSJR 31(STA) from committee with individual recommendations and attached fiscal note. There were no objections and it was so ordered.
#

3:52 p.m. – 3:53 p.m. – at ease

^#HB524

HB 524am-WASTE MANAGEMENT/DISPOSAL

VICE CHAIR WAGONER announced HB 524 am to be up for consideration.

COMMISSIONER ERNESTA BALLARD, Department of Environmental Conservation (DEC), said she introduced this bill before, but it had been amended.

VICE CHAIR WAGONER asked her to explain the amendments.

COMMISSIONER BALLARD said there were three amendments. The first one had to do with publications guiding the department in

noticing action for public review. The department suggested streamlining the process, but a House amendment restored language to its current status, which provides for two publications on the event of their noticing a permit.

> I have reviewed with the Department of Law right now as to what constitutes a publication of general circulation, but it's my understanding that the amended language which came down from the House will provide the department with the flexibility in a remote community, if there is a publication of circulation in that community of specific interest.... If there is no publication, then we could use a more centralized one such as the Anchorage Daily News. So, I think that we have complete flexibility with this amended language.

COMMISSIONER BALLARD explained that the second amendment conformed her bill to the language of another bill that was going through Resources so that references to the financial instruments, which a permit applicant could use to verify that they had the financial wherewithal to carry out, in the case of Department of Natural Resources (DNR), their reclamation responsibilities and, in the case of Department of Environmental Conservation (DEC), their waste management responsibilities. The same description of financial instruments would be in the two bills. "The House, in its zeal to put this amendment in, actually put it in an odd place and we need to move it to where it actually belongs."

The third amendment was a bit of a conforming amendment in another House bill. Language referring to the coalbed methane exemption had already been removed and that removal was repeated in the amendment on the House floor. The Legislature, over the last several years, has put exemptions into AS 46.03.100. The exemptions covered activities such as bilge pumping and water drilling. One of those exemptions was in the event of exploration drilling for coalbed methane. The department has other authorities, particularly in the waste regulations, like planning approval authority, which it has been using to address those waters. The House amended AS 46.03.100 to remove any reference to coalbed methane drilling and this issue has been discussed widely with no objections to its removal.

SENATOR KIM ELTON moved to adopt HB 524 am for consideration. There were no objections and it was so ordered.

SENATOR ELTON offered amendment 1 suggested by the department as follows:

AMENDMENT 1

On page 4, line 31, through page 5, line 1:

Delete "after a financial review under regulations adopted by the department; regulations adopted under this paragraph"

Insert ". Regulations adopted under this subsection"

Page 5, line 10, following "demonstration":

Insert "after a financial review under regulations adopted by the department".

He related that he had discussed the amendment with Representative Heinze's staff who explained that the House floor amendment was made to the wrong part of the bill. So, this amendment that deals with regulations for financial review that will be adopted by the department, is moved from page 4, line 31, to page 5, line 10. "The net effect of this is it doesn't change the intent of the amendment; it just puts the amendment in the appropriate section."

SENATOR BEN STEVENS said it looked like the amendment was redundant.

MS. TERRY THURBAN, Assistant Attorney General, explained that the lawyer who drafted the amendment chose that style specifically to change "paragraph" to "subsection".

The simple answer is that the change would have the effect of leaving this language in place: 'Proof of financial responsibility may be demonstrated by self-insurance, insurance, surety bond, corporate guarantee, letter of credit, certificate of deposit or other proof of financial responsibility approved by the department under regulations adopted by the department.'

SENATOR BEN STEVENS remarked that he didn't see that language anywhere.

MS. THURBAN pointed out that the lead-in sentence started on line 28 and the next sentence would pick up: “Regulations adopted under this subsection”. This is where the first insert is needed. It goes on to conform this bill to the DNR mine reclamation bill so that regulations for corporate guarantees and other forms of financial responsibility would have to prescribe a financial test. The second part of the change on page 5, line 10, is simply to insert a phrase saying the department will have to do a financial review for self-insurance.

SENATOR SEEKINS pointed out that the amendment didn’t make sense without a period in it.

MS. THURBIN pointed out a period in front of “Regulations adopted under this subsection”.

SENATOR SEEKINS conceded.

VICE CHAIR WAGONER noted that there were no further objections to amendment 1 and it was adopted. He stated that he would hold the bill over until next Wednesday’s meeting.

SENATOR ELTON asked Commissioner Ballard if the amendments that were made on the House floor and amendment 1 would have an impact on the fiscal note.

COMMISSIONER BALLARD answered that currently HB 524 am has a zero fiscal note and there would be no changes to it.
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4:10 – 4:11 – at ease

^#SB318

SB 318-CONSUMPTIVE USE OF FISH AND GAME

VICE CHAIR WAGONER announced SB 318 to be up for consideration. He asked if Senator Seekins, sponsor, had any additional comments. He indicated that he didn’t.

MR. LANCE NELSON, Assistant Attorney General, raised three issues for the committee to consider. The first is whether it is the proper role of the Legislature to classify the status of rights as fundamental; second, whether consumptive uses of fish and wildlife for sustenance may properly be considered a fundamental right; and finally, what will be the likely impact from those uses being deemed a fundamental right.

First, on the legislative authority question. The intention of the bill is to establish consumptive uses of fish and game by Alaska residents for their sustenance is a very important and fundamental right. Most Alaskans would likely agree with that policy. Hunting and fishing for food in Alaska is like motherhood and apple pie to most of us. However, a possible problem is that terms like 'important right' and 'fundamental right' are legal terms of art that may or may not have legal consequences. It appears that a possible goal of the bill is to have these uses be considered fundamental rights under the state constitution.

If the goal of the bill is to establish constitutional rights, it's not clear that the Legislature has the ability to do that by statute without seeking an amendment to the constitution, itself. The Legislature implements the constitution and acts as authorized by the constitution, but can't change the constitution by statute. I don't know of any precedent for legislative establishment of a right as being deemed constitutionally fundamental. Further, the main impact of effective establishment of a fundamental right occurs in the judicial process. When the government regulates a fundamental right as opposed to a lower status right, it is held by the courts to a much higher standard for justification of any restriction on fundamental rights.

Historically, the courts have been the only branch of government that have found rights to be constitutionally fundamental and have applied appropriate judicial standards. It's unclear what the impact of a legislative declaration of a fundamental right would be. One possible reason for that is that court rulings interpreting the constitution are governed by rules of stare decisis [stare decisis et non quieta movere – To adhere to precedents and not to unsettle things which are established], the rule following precedent. Previous legal rulings are not lightly overturned. The Legislature, on the other hand, may amend or repeal statutes as it sees fit with almost unlimited discretion. It would seem that if a right is truly fundamental, its status should not be easily reclassified. If a right is truly fundamental,

can it be repealed during the next legislative session? There's no legal impediment to that kind of reversal in the legislative rules. So, this raises the question of whether the courts will be required to adopt it and consider it a legislative declaration.

If the goal of the Legislature is not to establish a constitutional right, but only a statutory one, then that raises the issue of what the legal impact of SB 318 would be. The Legislature does have broad authority to establish a clear preference among consumptive uses and non-consumptive uses of fish and wildlife. The Legislature has already gone a long way to protect consumptive uses for food by creating and directing a statutory preference for subsistence uses of fish and wildlife. There are many other existing statutes that would appear to be intentioned with the bill in that they authorize the Boards of Fisheries and Game and the Department of Fish and Game to manage and regulate without necessarily paying special deference to all of the uses identified in SB 318. Without more direction, it would appear that this bill may create controversy and unnecessarily encourage litigation.

The next question is – are consumptive uses of fish and game for sustenance really fundamental rights? Consumptive use of fish and wildlife for food and sustenance has, so far, not been considered fundamental rights by our State Supreme Court. The courts have generally ruled that with very limited exceptions, only the rights enumerated in the Constitution are fundamental rights. The right to hunt and fish for food is not expressed in the Constitution.

Recently, the Alaska Supreme Court catalogued its decision on fundamental rights and explained the standards for identifying such rights. That was in the case of Sampson v. State. The court listed only four fundamental rights not explicit in the Alaska Constitution that had been identified to date, none of which are related to the use of natural resources. Those were:

1. The right to reproductive privacy
2. The right to control personal appearance

3. The right to privacy within the home
4. The right of self-representation in a post conviction hearing.

All of these cases involve personal autonomy to control our appearance or to direct the course of our lives. They don't involve the use of natural resources. The opinion clarifies that other fundamental rights might be recognized stating we are under a duty to develop additional constitutional rights and privileges under the Alaska Constitution if we find such fundamental rights and privileges to be within the intention and spirit of Alaska's constitutional language and to be necessary for the kind of civilized life and ordered liberty which is at the core of our constitutional heritage.

The consumptive use of fish and game, while extremely important to Alaskans, may not meet this test. Hunting and fishing for food is more important culturally and in many other ways, as is the case with commercial fishing, trapping and sportfishing. At its most basic level, though, it is an economic endeavor.

The court has recognized that litigants raising subsistence concerns are addressing economic concerns, although not the type of economic concerns, which would preclude a public interest litigant status. Nevertheless, economic endeavors of this type are not accorded fundamental right status by the courts. Alaska's Supreme Court has to this date not recognized any fundamental right to use Alaska's natural resources. Instead, prudent authority is to the contrary. That's in the Apokak case, for example, where the court stated that the right to fish commercially is not a fundamental right. In Hersh Herbert v. State, the court said that the state's power over natural resources is such that it could entirely eliminate the role of hunting guides and no problem of due process would arise. Assuming the power to eliminate other uses as co-equal, this case implies that uses of natural resources do not rise to the level of fundamental rights.

In the McDowell Case, the appellants argued at great length that the right to subsistence hunt and fish was a fundamental right. Nevertheless, in the McDowell

opinion, the court carefully avoided using fundamental rights language or the fundamental right strict scrutiny standard. Instead, the court continued to refer to the natural resource access right in question as a highly important interest running to each person within the state. A highly important interest is not the same as a fundamental right. Moreover, the court developed a new less than strict scrutiny, but nevertheless, heightened standard to be applied in such instances. That was the demanding scrutiny standard. Under McDowell, while subsistence hunting and fishing implicate highly important individual interests, they do not rise to the level of fundamental rights. Moreover, the interest identified was an interest in equal access, not an absolutely and forceful individual right to hunt or fish for food. It can be argued that the court declined to classify subsistence hunting and fishing as a fundamental right.

While access to Alaska's natural resources was undoubtedly of paramount concern to the framers of our constitution and remains so, it is also equally clear that the framers intended such activities as hunting and fishing to be extensively regulated. For example, Article 8, section 17, expressly refers to regulations governing the use or disposal of natural resources. Virtually every other section in Article 8 is expressly or implicitly based on the underlying premise that the Legislature will heavily regulate the use and disposal of natural resources. A fundamental right, such as the right to privacy, may be burdened by the legislative fiat only to serve a compelling state interest. Requiring a compelling state interest for regulating hunting and fishing seasons, bag limits, means and methods, and a myriad of other activities that are routinely regulated by the Board of Game or Board of Fisheries may not be within the intent of Article VIII's provisions.

The next question is, assuming the Legislature may establish constitutionally fundamental rights, what would be the impact of a fundamental right to fish and hunt for food. The current legal standards for hunting and fishing regulations are pretty well settled. In the case of non-uniform classifications, the state must demonstrate an important state interest that

balances against a highly important interest running to each person within the state and it needs to further the state's purpose as it's carefully designed for the least possible infringement on Article VIII's open access values. And for other fish and game regulations, the state need only show any legitimate interest and a close and substantial relationship between its interest and the chosen means of advancing that interest. Rather than these relatively clear-cut standards, fishing and hunting for food are classified as a fundamental right and the standards for a valid restriction will likely get much more difficult to achieve as I've already noted.

The courts would impose strict scrutiny of any regulation of fundamental rights. That's the same standard applied to justify unequal treatment based on race and gender. When the state imposes restrictions on fundamental rights, it would be required to demonstrate number 1, a compelling governmental interest, not just a legitimate or important interest; and two, the absence of a less restricted means to advance that interest. Since we have never had a court require a compelling state interest for fish and game regulations, we're not sure what we would have to show to meet that standard, but it may well be that only serious conservation reasons, like sustained yield concerns, would meet the test. Moreover, many of the current regulations may not pass muster. To cite just a few examples:

1. Fair chase hunting measures of any kind might be vulnerable. These could be insufficient as a compelling state governmental interest.
2. Same-day air-borne hunting bans could be questionable where other less restricted means might address any conservation concerns.
3. Any kind of methods and means restrictions, such as hunting from or with airplanes, helicopters, boats, snow machines or other vehicles may be difficult to justify.
4. Any kind of gear restriction, type of weapon or fishing gear could be suspect.

Any kind of bag or season limits based on needs needs to meet historical allocations. Other non-preferred users could be deficient since those uses would not be

fundamental rights. So, as hunting and fishing for food by residents expanded, commercial fishing, commercial trapping, sport fishing, charter fishing by non-residents would automatically give way regardless of the perceived relative values of the uses. There are probably undoubtedly many other regulatory restrictions that would be vulnerable to a fundamental rights strict scrutiny standard.

Those are the end of my comments, Mr. Chairman, thank you.

SENATOR SEEKINS asked Mr. Nelson if he thought SB 318 looked like a bill that would amend the constitution.

MR. NELSON replied no and explained that the concern arose because the kind of language that is used in the bill is the kind that is usually ascribed to constitutional rights.

SENATOR SEEKINS read from the McDowell opinion:

> The only justification for a law regulating and restricting the common right of individuals to take wild game and fish is the necessity of protecting the same from extinction and, thus, to preserve and perpetuate to the individual members of the community the inalienable right ...which they have had from time immemorial. [END OF TAPE 04-32, SIDE A]

TAPE 04-32, SIDE B

SENATOR SEEKINS continued:

> While the state holding the title to game and fish, so to speak, in trust for every individual member of the community may pass laws to regulate the rights of each individual in the manner of taking and using the common property, yet, as we have already stated, this must be done under the constitution upon the same terms to all the people – no special privileges or immunities can be conferred. Doesn't inalienable right rise above a fundamental right?

MR. NELSON replied:

> That's an interesting question. The quote from the McDowell case is from a long quote from the Supreme

> Court of Arkansas dealing with an issue that arose in that state. The Supreme Court of Alaska has never interpreted the term 'inalienable right' as to what they mean. It's not a term they used to define constitutional rights....
>
> The other point I would make is that I believe that part of the decision is probably not strictly part of the holding of the court. But I want to emphasize a later part of that quote as to the point I think it was making....

SENATOR SEEKINS interrupted saying that he understood where McDowell was going on the basis of that right. He asked:

> Have you seen anything from the state Supreme Court ever to indicate that the state may not pass laws to regulate the rights of each individual in the manner of taking, etc.? Voting is a fundamental right, is it not? But yet we have rules and regulations under which it must be practiced.

He feared that when somehow the state would not be able to set rules and pass laws to regulate the rights of people, that is overstating the question.

MR. NELSON responded that regulating a fundamental right is much more difficult in that the interest the state would have to demonstrate would have to be compelling, a very high test. For example, if it wanted to discriminate between men and women or people of different races, it would have to demonstrate a compelling state interest to do that.

> So far, we've never been under that test in a court case. We've only been under the lower standards and generally manage to regulate within those standards, but it would be very hard to predict our success or chances for success under a strict scrutiny test.

SENATOR SEEKINS said he understood the bill to mean this is a right when the state considers the management and allocation of those resources and asked, "We don't do that now?"

MR. NELSON replied:

> I think generally it's a practice of both the Legislature and both of the boards – that's usually

> the objective of their regulations – is to provide access to fish and game and they will always consider the ability of individuals to participate. The more difficult question becomes as a legal term of art when that is applied in a judicial proceeding, what are the consequences of that and how does that translate back to standards the boards have to meet to be able to adopt a valid regulation. While I think the needs of people to take fish and game for food are always considered and always, I think, generally considered paramount, I think if the courts accept the declaration of the Legislature and adopt that as a fundamental right, I think it's going to make management decisions much more difficult and the flexibility is going to be gone in a lot of ways.

SENATOR SEEKINS reiterated, "We're treating it as if it were a fundamental right as a matter of policy; we're not establishing another fundamental right."

MS. KATHY HANSEN, Executive Director, Southeast Alaska Fishermen's Alliance (SEAFA), opposed SB 318 and supported Mr. Nelson's comments. She felt this issue needs to be left to the boards, which would deal with it in a public and fair process.

SENATOR SEEKINS moved to pass SB 318 from committee with individual recommendations and attached fiscal notes.

SENATOR ELTON objected. He found the department's testimony compelling, as well as the testimony from the Department of Law. It suggested that the Legislature was trying to establish something in law that should be done constitutionally. Public testimony has opposed adopting the legislation and the motion to move SB 318 out is premature.

SENATOR FRED DYSON said he was sympathetic to the intent of the bill, but was still uneasy and felt the committee should address the issue of whether it would make management of the resources difficult and he wanted Alaska Department of Fish and Game (ADF&G) staff to comment on that.

SENATOR SEEKINS said he believed that individual family use should be a very high standard. It should be difficult for the Board of Fisheries to allocate around that. He reiterated that he wasn't trying to amend the constitution, but establish this fundamental right as a policy of the state with the emphasis on policy. He would have to be convinced that it would prohibit the

department from making wise decisions. When uses compete against each other, it shouldn't be at the expense of those people who depend on the resource for sustenance. He withdrew his motion for further discussion of Mr. Nelson's comments on its amending the constitution.

SENATOR DYSON called a point of order. "I think that's unfair. That's not what he said and it's not what he said when you questioned him on it."

SENATOR SEEKINS conceded his point but reiterated again:

> My intent here is to protect the individual Alaskan family for their food, for their nutrition, and if that's not what we're trying to do, show me how to do that.

VICE CHAIR WAGONER said he was trying to fit consumptive use into subsistence and personal use formulas and he didn't see much difference between consumptive use and personal use; in fact, he felt they are one in the same.

SENATOR SEEKINS furthered his argument saying that personal use has nothing to emphasize it as a priority over all other uses.

SENATOR STEVENS said the only real meaning the paragraph has is the definition of sustenance.

> It says that sustenance is a very important fundamental right when considering the management and allocation. It doesn't say how they'll allocate. It also says nothing in this policy exempts them from compliance with state law.... It's just a litigator's dream, but in every title there is litigator's dreams....

SENATOR DYSON said the fishery he participated in for 25 years [Bristol Bay] was worried that by the time an upriver fisherman got his fish [for sustenance], the run would be done and commercial fishermen wouldn't get their shot. Folks in the Cook Inlet fishery worry about that, too. He wanted the department to comment on those issues.

SENATOR ELTON suggested that this bill created a new playground for attorneys. He strongly urged holding the bill until the committee could get specific answers from the department, the question being:

> If sustenance is a fundamental right and the purpose is to provide protein to Alaskan families that need the protein, how does that affect a sport fish lodge in Elfin Cove or a guided sport fish business on the Kenai River? Will the protein consumer trump the visiting tourist who may want to catch a King salmon out of Elfin Cove or the Kenai River?

Those were issues for the department at one time and they could continue to be issues.

SENATOR SEEKINS reasoned that there is a priority now.

> In areas where ungulate populations have declined, such as unit 13 - there is no non-resident hunting in that district now, because the first priority is to residents in game and if that begins to be threatened, non-resident hunting goes away....
>
> What we're saying is that the Board of Fish needs to have that guidance from the state in that requirement as a policy of the state saying you must plan in your management and allocation for Alaska people to be able to feed themselves and their families as part of that process. Senator Dyson's comment is not what I'm anticipating we'd have to be doing – that we'd have to wait as we do in some subsistence fisheries to make sure that all of the needs have been met before anyone else can harvest, but simply that it be in the planning process and the management process – that we allocate for human consumptive use and that's what my intent is.

SENATOR ELTON responded:

> The instances in which the sponsor is speaking take effect when there is a limited resource and then you establish a priority of take. What this bill purports to do is to extend a preference not based on the amount of animals or fish that may be extant in a certain unit. What this purports to do is prioritize based on the way somebody is going to consume it. I don't have a problem with the department making allocation decisions to different groups based on the number of fish or the number of animals, but this goes beyond that. This gives an allocation priority for

somebody who is going to use the protein to feed their Alaska family and that priority would be there whether or not the population of fish or game is threatened or not threatened.

He suggested that in saying 97 percent of the biomass is taken by commercial fishermen, the committee needs to look at individual species. In his area, a great deal of the King salmon are allocated not to the commercial fish industry, but to the sport fish industry. But further, two out of three King salmon caught in the sport fish industry in Southeast Alaska are caught by out-of-state fishermen.

VICE CHAIR WAGONER said the same thing happens in Cook Inlet. He announced that Senator Seekins withdrew his motion and he was going to turn this issue over to Chair Ogan when he came back. There being no further business to come before the committee, he adjourned the meeting at 4:53 p.m.
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