

ALASKA STATE LEGISLATURE
SENATE RESOURCES STANDING COMMITTEE

April 7, 2004

4:05 p.m.

TAPE(S) 04-37, 38

MEMBERS PRESENT

Senator Scott Ogan, Chair
Senator Thomas Wagoner, Vice Chair
Senator Fred Dyson
Senator Ralph Seekins
Senator Ben Stevens
Senator Kim Elton
Senator Georgianna Lincoln

MEMBERS ABSENT

All members present

COMMITTEE CALENDAR

SENATE BILL NO. 318

"An Act relating to a preference for Alaska residents in the consumptive uses of fish and game."

MOVED CSSB 318(RES) OUT OF COMMITTEE

SENATE BILL NO. 297

"An Act relating to the taking of black bear, brown bear, and grizzly bear and to registration of big game guides for certain guide use areas."

SCHEDULED BUT NOT HEARD

PREVIOUS COMMITTEE ACTION

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
03/29/04 (S) Heard & Held
03/29/04 (S) MINUTE(RES)
04/02/04 (S) JUD AT 8:00 AM BUTROVICH 205
04/02/04 (S) Scheduled But Not Heard
04/07/04 (S) RES AT 3:30 PM BUTROVICH 205

WITNESS REGISTER

Mr. George Utermohle
Legislative Legal and Research Services Division
Legislative Affairs Agency
Alaska State Capitol
Juneau, AK 99801-1182

POSITION STATEMENT: Commented on SB 318.

Mr. Wayne Regelin, Deputy Commissioner
Department of Fish & Game
PO Box 25526
Juneau, AK 99802-5226

POSITION STATEMENT: Commented on SB 318.

Mr. Don Johnston
No address provided

POSITION STATEMENT: Opposes SB 318.

Mr. David Bachrach
Homer AK

POSITION STATEMENT: Opposes SB 318.

Mr. Paul Joslin
Alaska Wildlife Alliance
Anchorage AK

POSITION STATEMENT: Opposes SB 318.

Mr. Ken Duckett, Executive Director
United Southeast Alaska Gillnetters Association (USAGA)

POSITION STATEMENT: Opposes SB 318.

Mr. Bruce Knowles
Wasilla AK

POSITION STATEMENT: Supports SB 318.

Mr. Curt Herschlib

Cordova District Fishermen United
Cordova AK
POSITION STATEMENT: Opposes SB 318.

Mr. Scott McCallister
Juneau AK
POSITION STATEMENT: Opposes SB 318.

Mr. Bob Thorstenson, President
United Fishermen of Alaska (UFA)
211 4th Street, Suite 110
Juneau, Alaska 99801-1172
POSITION STATEMENT: Vigorously opposes SB 318.

Mr. Andy Craig
No address provided
POSITION STATEMENT: Opposes SB 318.

Mr. Doug Mecum, Director
Division of Commercial Fisheries
Department of Fish & Game
PO Box 25526
Juneau, AK 99802-5226
POSITION STATEMENT: Commented on SB 318.

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

Mr. Alan Austerman
Office of the Governor
Juneau AK
POSITION STATEMENT: No position of SB 318.

Ms. Mary Pete, Director
Division of Subsistence
Department of Fish & Game
PO Box 25526
Juneau, AK 99802-5226
POSITION STATEMENT: Commented on SB 318.

ACTION NARRATIVE

TAPE 04-37, SIDE A

^#SB318

SB 318 - CONSUMPTIVE USE OF FISH AND GAME

CHAIR SCOTT OGAN called the Senate Resources Standing Committee meeting to order at 4:05 p.m. Present were Senators Thomas Wagoner, Fred Dyson, Ralph Seekins, Kim Elton and Chair Scott Ogan. Senator Georgianna Lincoln arrived at 4:05 and Senator Ben Stevens arrived at 6:00. The first order of business to come before the committee was CSSB 318(RES), version Q.

CHAIR OGAN moved Amendment 1.

23-LS1675\Q.1
Utermohle

A M E N D M E N T 1

OFFERED IN THE SENATE

TO: CSSB 318(), Draft Version "Q"

Page 1, line 1:

Delete "**the right of Alaska residents in**"

Insert "**a preference for**"

Page 1, line 7:

Delete "important and fundamental right"

Insert "high preference"

SENATOR KIM ELTON objected.

CHAIR OGAN explained that he made the amendment consistent with constitutional language in Article 8, Section 4, which says the state shall manage on a sustained yield principle subject to preferences amongst beneficial uses. He used the word "high" preference, not "the highest", because he wanted to imply a preference and because subsistence is already in statute as the highest preference. He asked Mr. Utermohle to comment about keeping existing language that makes sustenance a very important and fundamental right in the statute.

MR. GEORGE UTERMOHLE, Legislative Legal Services, replied that version Q of SB 318 proposes that the state keeps mindful of the important fundamental right accruing to the residents of Alaska in their consumptive use of fish and game for sustenance.

There are significant issues associated with the use of the term 'fundamental right'. In state and federal constitutional law, when we've talked about a fundamental right, we're talking about a very basic principle incorporated into the Constitution

guaranteeing the people of the United States and the state certain liberties. Concomitant with the constitutional protection given to those liberties, those liberties can only be abridged or interfered with by the state [if it can] show a compelling state interest. If the state can manage to overcome that hurdle, then the state has to show that the method it is using to abridge that liberty is the least restrictive of the available options for achieving the state's goal.

The ambiguity that rises in this legislation is the fact that there is no such right currently recognized in the Alaska Constitution or the United States Constitution for the consumptive use of wild fish and game. The text of the Constitution does not provide any discussion of such a right. That doesn't necessarily preclude the existence of such a right being found in the Constitution, because the courts earn their duty by keeping in mind those visions of the Constitution and to find additional fundamental rights where it's an inherent part of the language of the Constitution and is important for maintaining the constitutional system we've established.

Thus far, the state has found a number of implicit fundamental rights - the right to control your personal appearance, the right to reproductive freedom, the right to privacy in the home. Those are the kinds of implicit fundamental rights that have been found to exist in the Constitution. At this point, we have no court cases dealing with a fundamental right such as this. So, we don't know if such a fundamental right would be found to exist in the Alaska Constitution.

We have language in court cases suggesting that there is no fundamental right to engage in commercial fishing in the state. We have cases at the federal level, under the federal constitution, a finding that there is no fundamental right to engage in recreational hunting.

CHAIR OGAN said Article 8, Section 15, says, "No exclusive right or special privilege of fishery shall be created and the exception is for limited entry [indisc]." Statue may imply there is a fundamental right, but the Constitution, which trumps

the statute, doesn't give one as far as fisheries go. Section 4 gives the Legislature authority to create a preference.

I brought up a couple of different things, but there's already a ban on exclusive rights in the constitution to a fishery. There isn't one for game, which implies, if the bill is left as it is, we would have an ambiguity there.

MR. UTERMOHLE replied that the "no exclusive right of fisheries" clause would not necessarily preclude the existence of a preference or a fundamental right to use of fish and game, but it is particularly intended to prevent granting of rights to individuals for exclusive use of a particular resource.

The right discussed in the legislation can be a fundamental right for consumptive use of fish and game to the people of the state, as a whole, as opposed to the kinds of rights that are prohibited under the "no exclusive right of fisheries" clause. It suggests that it is founded upon the preexistence of this fundamental right to the consumptive use of fish and game. If this right does exist, then this legislation may be okay, but until such time as the right is found to exist, it's debatable. This language would give rise to a certain amount of litigation - either to determine whether it should exist or whether the Legislature should determine it is a right and then attempting to have that right enforced by the courts in litigation.

CHAIR OGAN asked who he thought might have a dog in that fight.

MR. UTERMOHLE replied that the legislation has a presumptive preference for consumptive use for sustenance. A question would arise for commercial fisheries that don't use their harvest for sustenance, but rather for commercial purposes. A personal use, subsistence or sports fisherman would have conflicts with commercial fishermen who would attempt to use this language to leverage their position before the Board of Fisheries.

CHAIR OGAN asked if this would preclude the department from declaring a tier 2 situation for moose in a certain area that would close hunting to non-residents, but not to residents.

MR. UTERMOHLE replied that would be the case.

SENATOR ELTON said the problem is they don't know what is a fundamental right and he suspected that high preference was not defined in statute.

MR. UTERMOHLE couldn't recall any definition, but subsistence has preference over other uses in state statute.

SENATOR ELTON said that currently two out of three sport caught King salmon in Southeast Alaska are caught by non-residents. If the statute is changed to give Alaskans who define catching a King salmon as a consumptive activity, that means the ratio for sport-caught Kings might go to zero for non-residents and up to three for Alaskans. And for perspective, under the high preference standard, he asked if he could assume that one out of three sport-caught Kings would go to non-residents and two out of three would go to Alaskans.

MR. UTERMOHLE answered:

Assuming that this legislation is correct - that a fundamental right does exist, then it may very well be that the taking of the Chinook salmon in Southeast by non-residents would be entirely precluded until such time as the taking by residents for consumption is completely satisfied. But then, examining your scenario in terms of the language you have before you, the bill, itself, merely establishes a policy that the managers are to take existence of that either fundamental right or in accordance with the amendment, the high preference, into consideration when they allocate and manage those resources. As a matter of policy, then, that would not necessarily preclude an allocation to non-residents.

The legislation just requires that the state take into consideration the use of those resources for consumptive use by residents and not necessarily create a preemptive presumption that the residents must take those fish.

SENATOR ELTON said if the language remains "fundamental right", that's a really, really, really scary proposition for all the sport charter boats and lodges in Southeast Alaska. If "high preference" is inserted, it's only a really, really scary scenario that would have to be litigated to figure out what the manager's responsibility was and the allocation of fish between Alaskans who eat the fish and non-residents who catch the fish and ship it and supposedly eat the fish.

CHAIR OGAN thought that was a fair analysis.

SENATOR THOMAS WAGONER asked if the personal use and subsistence fisheries are basically consumptive uses of our fish.

MR. UTERMOHLE replied that is his understanding.

CHAIR OGAN said it gives him heartburn to see non-residents who come up and fish and ship caseload after caseload of canned fish back. "Once it gets Outside, it's legal to sell - and our game. You can take a moose head down to the Lower 48 and sell it."

SENATOR SEEKINS asked what the difference is between "fundamental" and "inalienable" in terms of describing rights.

MR. UTERMOHLE replied an inalienable right is one that can't be taken away. He assumed that fundamental rights are essentially inalienable.

SENATOR SEEKINS read an excerpt from Justice Matthews' decision on the McDowell 1 case.

The only justification for a law regulating and restricting a common right of individuals to take wild game and fish is the necessity for protecting the same from extinction and thus to preserve and perpetuate to the individual members of the community the inalienable rights which they have had since time immemorial. While the state holding the title to the 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 and the same terms to all people, etc.

SENATOR SEEKINS said he understands that the court can't just go out and define a fundamental right. A case has to be brought to it.

MR. UTERMOHLE replied that is correct. The court is not in a position to legislate an issue. "Until they have an appropriate case, they are not going to be inclined to find existence of a fundamental right."

SENATOR SEEKINS said in this case, the State Supreme Court has found that there is an inalienable right for the individual to take fish and game for their individual use.

MR. UTERMOHLE responded that there seems to be an element of that in what they said.

SENATOR SEEKINS said the needs of Alaskans have to be considered in the planning, management and allocation process. He determined that those needs were for sustenance. He thought the McDowell case strongly implied sustenance. He asked how the state could conform its policy to the findings of the Supreme Court in McDowell - by establishing a preference or recognizing the right.

MR. UTERMOHLE replied that the context of this legislation establishes a policy of the state to recognize the existence of its peoples' right to access fish and game for purposes of consumption.

SENATOR SEEKINS said that is what he was trying to do.

I was trying, quite frankly, to avoid setting up a ladder of preference.... I guess I just wanted to know if my assumption was correct - that inalienable is almost substitutable for fundamental - especially when the court has said you can regulate an inalienable right as long as you're doing it equitably.... Is that how you read it, Mr. Utermohle?

MR. UTERMOHLE replied yes.

The focus of the McDowell case was equal access to resources of the state. Not guaranteeing any individual of the state a particular resource or a particular part of any resource, but just that the citizens of the state have equal opportunity to participate in the groups that take the resources.

CHAIR OGAN said the McDowell case was about users, not uses.

MR. UTERMOHLE agreed that it was about eligibility to participate in the subsistence user group.

CHAIR OGAN asked if users don't have inalienable rights.

MR. UTERMOHLE replied that citizens of the state have rights of many kinds.

SENATOR SEEKINS said he was trying to get at the import of fundamental right versus preference.

CHAIR OGAN asked if every word of every opinion that a justice writes on a case becomes case law.

MR. UTERMOHLE replied that the decision of a case sets out the common law of the state. One would hope that the decision explains how the court got there.

CHAIR OGAN asked if anyone else had any comments about Amendment 1.

SENATOR ELTON said he wanted to hear from the department that administers the law.

SENATOR SEEKINS reminded the committee that the issue is about a function of the Board of Fisheries, not the department's management process.

CHAIR OGAN reflected that the Legislature sets policy, the department manages it and the board allocates it and invited Wayne Regelin to testify.

MR. WAYNE REGELIN, Deputy Commissioner, Alaska Department of Fish and Game (ADF&G), said he would talk about the game side first.

The way this is structured, it would affect both the Board of Fisheries and the Board of Game. We have a statute already, AS 16.05.258, which we always call the subsistence statute and that directs the Board of Game to provide the highest priority for subsistence use. In addition, another statute, AS 16.05.255(d), requires that the taking of moose, deer, elk and caribou by residents for personal or family consumption has preference over non-residents. So, we probably wouldn't change anything the Board of Game does right now, but it's much more complex on the fishery side, because of the large commercial fisheries that we have in the areas of Alaska.

We also have personal use fisheries where we don't have personal use hunts and we have recreational and subsistence fisheries. The same subsistence statute directs the Board of Fisheries to provide a priority for subsistence use of fish, but they don't have any other statutes that establish priorities amongst the other user groups. But, they do have a statute, AS

16.05.251, that gives the Board of Fisheries authority to allocate the fishery resources among the personal use, sport, guided sport and commercial fisheries.

This statute establishes seven criteria that the board may use; it doesn't say in statute that they have to use all seven, but the third one of those criteria speaks directly to this issue. It says that the board should consider the importance of each fishery providing residents the opportunity to obtain fish for personal and family consumption. So, they say they must consider that and then the Board of Fisheries has adopted in regulation these seven criteria. It must consider them under regulation. They must consider all seven of them.

CHAIR OGAN said the amendment states a policy of considering Alaska residents first when it comes to fish and game.

MR. REGELIN replied:

We understand it's totally up to the Legislature to provide direction to the Board of Fish and Board of Game, if it wants to. You can say if you want that higher priority or whatever you want, but I was thinking, if you were going to do this, to put that amendment into AS 16.05.251 where it's already there....

Right now we have a system that has been in place quite a while. Overall, we think it's working quite well and we don't see any need to change it. There may be specific cases of specific fisheries that you would like some changes...there are ways for you and the board to consider those - or the Legislature could take specific action on specific fisheries. But, when you do it as a general thing, it raises concerns for us in the department - how that could change some of the very fundamental things and the way the whole fisheries are managed....

A lot of our concerns from the legal points of view go away if you adopt this amendment. It takes away the words "fundamental right", because we continue to have real concerns over that - not only the Department of Law [indisc.]. Also, an attorney, Paul Linzinie, has given advice that this could cause a lot of mischief,

unintended consequences and jeopardize our ability to regulate.

Paul Linzinie is an eminent attorney who has worked for many years for the International Association of Fish and Wildlife Agencies. He hasn't looked at SB 318 as written, but he did about four or five years ago when this issue came up. He advised all of the states, including Alaska, to be very cautious in using those words and so, to date, no state has done that. We can't give you case law or predictions on the risk.... In reality, we can't do that, because there is no case law. No state has been willing to assume the risk to make this a fundamental right....

CHAIR OGAN asked if he thought Amendment 1 made the bill less troublesome.

MR. REGELIN replied yes, very much so, but it still has major allocation implications that he hadn't time to think through.

SENATOR SEEKINS asked if he was saying that the Board of Fish must consider the seven criteria or that they may.

MR. REGELIN said he was talking about two different things. The statute, AS 16.05.251, lays out seven criteria the board may use. The board, on its own, has adopted regulations in 5AAC 39.02.05 that say it will consider these seven criteria.

SENATOR SEEKINS asked if there is a tension between consumptive and non-consumptive uses for game versus fish.

MR. REGELIN replied that there are occasional tensions in two or three places around the state, mostly over bear viewing. He said the same statute, AS 16.05.258, says that the highest priority for wildlife resources is consumptive use.

SENATOR ELTON asked if he has a grasp of what high preference is.

MR. REGELIN replied that he thought it means higher than competing preferences if there are four or five different uses. It doesn't mean highest, which leaves a lot of discretion to the Board of Fisheries.

SENATOR ELTON speculated that using "high preference" might be putting the commissioner in the position of issuing emergency

orders. There are times in Southeast Alaska, during which management decisions are made in-season because it looks as if the rate of sport-caught Kings is going to exceed the level that has been set. An emergency order would preclude non-residents at lodges or on a charter boat from taking any more fish until residential preferences have been met. He could see the same kind of thing happening on the Kenai River.

MR. REGELIN answered that he didn't want to speculate about how this would play out over time.

SENATOR ELTON asked him if he thought inserting "high preference" could reduce the catch for non-residents.

MR. REGELIN replied that he thought that was the intent.

SENATOR ELTON said, "That would have fairly devastating impacts on people who make their livelihood with lodges or guiding sport fishermen."

TAPE 04-37, SIDE B

SENATOR LINCOLN asked if he could still ask, "What's broken?" with Amendment 1.

MR. REGELIN replied that he stood by his statement:

The system that we currently have right now doesn't seem to be broken. It may not be perfect and people can disagree over individual decisions, but overall it's very democratic. People have an opportunity to speak and comment and in most places it's working very well. I think if you add the words 'high preference', it will have an effect - exactly how much it's almost impossible to predict, because I still think those words provide an opportunity for the Board of Fisheries to make decisions, given some leeway. But, I think it would overall be litigated in the long term and probably have some direction provided by the courts.

SENATOR LINCOLN said that earlier the difference between the board and his department as management was noted and asked if he had a conversation with the chair of the Board of Fisheries or the Board of Game on this legislation.

MR. REGELIN replied that he hadn't.

The call on allocations is by the board. When we go to Board of Fisheries meetings, we will talk about the biology and the total number of fish that can be harvested and then the board will decide how many go to different user groups - for different kinds of gear groups - for personal use - for subsistence use. Overall, as the fisheries have increased, where there's personal use fisheries, the amount allowed for personal use has increased - often times more so at a higher rate than it has for the commercial users.

CHAIR OGAN said discussion was straying away from the amendment and that a lot of people want to testify.

SENATOR SEEKINS said he couldn't find any preference in section 258 for consumptive use, although he found a preference for subsistence use. He didn't disagree with the amendment, but he thought that consumptive use is an inalienable right and that the Supreme Court supported it.

CHAIR OGAN called for the question on Amendment 1.

SENATOR ELTON objected to briefly discuss how difficult it is to vote on speculative testimony. A lot of questions can't be answered and at a minimum he thought they needed to hear from the chair of the Board of Fisheries or one of its members to get feedback from the people who are doing the allocation. He also pointed out that it's easy to talk about the role of the board in the allocative process, but if statutory language passed at either the fundamental or high preference level, it would effect the behavior of the commissioner who commonly issues emergency orders.

CHAIR OGAN said he appreciated his concerns, but maintained his motion. Senators Fred Dyson, Ralph Seekins, Thomas Wagoner, Chair Scott Ogan voted yea; Senator Georgianna Lincoln voted nay; and Amendment 1 was adopted.

MR. DON JOHNSTON, Alaska resident, said if the subject was subsistence, he wondered why the term "consumptive use" was used and not defined. It seemed like this legislation is assuming the system is currently broken and the Board of Fish isn't doing its job. If Senator Seekins wants a person to be able to catch the fish and take it home and eat it and not do anything else with it, he should spell it out and, "not just write down eight lines and say, 'Okay let the lawsuits begin.'"

SENATOR SEEKINS responded that he inserted the term "consumptive use" before "sustenance" which is defined.

MR. DAVID BACHRACH, Homer, said he wanted to see things "fleshed out a little more" so he knows what is being talked about. He wanted to know if game was even a concern in this amendment and if management included predator control so there is adequate moose and caribou for consumptive use.

I feel Alaska's wildlife is a public trust that belongs to all Alaskans and that the public interest includes a variety of uses of wildlife including hunting, fishing, trapping, viewing and photography. As Alaskans, we should be looking to where we want to go instead of reacting to where we are and develop methods of dual management to accommodate both consumptive and non-consumptive use of wildlife resources.

MR. PAUL JOSLIN, Alaska Wildlife Alliance, said:

The Alaska Constitution does not grant special individual rights or a high preference or a holier than thou standing to hunters over non-hunters. Therefore, this bill shouldn't, either.

Addressing just the wildlife side of it, because I understand it is fisheries, as well, I see this legislation as a form of prejudicial bigotry aimed against the 75 percent of Alaskans who are non-hunters. Too much power already is concentrated in the hands of hunters. All wildlife regulatory decisions on state land are made by the Board of Game, which is composed solely of people with a hunting background. Non-hunters need not apply. When it comes to the management of our wildlife, hunters and non-hunters should be working together as equals. The Alaska Constitution states that wildlife is intended for the common use of all Alaskans.... I would recommend that the Senate Resources Committee reject SB 318 as discriminatory and prejudicial and consider, instead, SB 343, the bill that would create a Board of Wildlife....

MR. KEN DUCKETT, Executive Director, United Southeast Alaska Gillnetters Association (USAGA), said the concept of how much

potential change is possible with this legislation is a real concern to his organization. Sixty-five percent of his commercial fishermen are Alaskan residents and most of them live in the coastal communities where the economy has been struggling to stay viable. Shifting the priority has boundless implications. He has heard a lot of discussion about allocation between gear groups, but hasn't heard anyone complain extensively about not being able to get enough fish under current personal use regulations. He doubted that the system was broken and felt on the contrary, that it has been successfully developed over a long period of time.

SENATOR LINCOLN said he represented a fairly large group of fishermen and asked what his concern is about the following sentence:

It is the policy of the state that the consumptive uses of wild fish and game resources by Alaska residents for their sustenance is a very high preference when considering the management and allocation of those resources.

MR. DUCKETT replied:

If I understood what that language would change in the current system, I think maybe I could tell you what my concerns were.

MR. BRUCE KNOWLES, Wasilla, said he is on the Mat-Su Advisory Committee that has sent a letter in support of SB 318. He personally supports the bill because the people in the Mat-Su Borough have got the short end of the stick. Their subsistence fishery has been taken away; their personal use fishery has been closed for six years and the Coho run has been cut back to two a day. "Up here there has been a distinct loss of opportunity and I think this bill will give it back to us."

MR. CURT HIERSCHLIB, Cordova District Fishermen United, strongly opposed SB 318.

The goals of the bill are still unclear even after listening to this for over an hour. Many of the definitions within remain unclear. As near as I can tell, it's potentially devastating to the commercial fishing industry, which is in turn devastating to our coastal communities. Our coastal communities are on

the ropes as evidenced by the fact that the state formed the revitalization task force last year.

If the goal of this bill is to insure access to fish and game for all Alaskans, then the best thing that comes to mind is sound management and I think we have the best in the world here. I think the system is working. It's not broken; so don't fix it....

MR. SCOTT MCCALLISTER said he has fished all the seine areas in the state except Cook Inlet and Prince William Sound where he fished other types of gear. He has also fished the Kenai and Chitna Rivers and understands the rural versus urban conflicts with salmon allocations, in particular. He knows what sustenance means to him - putting shoes on his family's feet, food on the table and a roof over their heads.

So far, I'm not seeing what this bill does to enhance or detract from the current system that has provided myself the resource, and my peers, to make a living and sustain our families in the coastal communities of Alaska. The system is working very well....

SENATOR ELTON asked if this statute is changed to provide for a high preference, did he see that rolling down to the commercial fishing industry.

MR. MCCALLISTER replied that he does see that happening.

I don't see that it technically sets a precedent that would accomplish the agenda of someone 100 miles up the Copper River or somebody such as Bruce Knowles who is in the urban area of Anchorage and is the last user in a long line of users. What it will do is tremendously complicate everybody's interpretation of what the charge of the Board of Fish is....

SENATOR LINCOLN asked how he interpreted high preference.

MR. MCCALLISTER replied:

I personally would interpret it that, if I was in a position of sustaining my family under the bill as it's written, I have a high preference. I have a preference of standing equal to anybody else. If I was getting rich in the business...yes, there would be sustenance preferences beyond mine. But right now, I

see myself having absolutely equal standing in a sustenance preference with every other user in the state. I think it's that way now with [how] the Board of Fish currently conducts the business of allocating and managing the fish and game in the state.

MR. BOB THORSTENSON, President, United Fishermen of Alaska (UFA), vigorously opposed SB 318 and noted a UFA letter of opposition that defined sustenance as, "that which is used for personal and family consumption as food or nourishment or to sustain life."

MR. THORSTENSON said:

Most of my constituents, by and large - the ones that are actually making it and haven't gone bankrupt yet - are attempting to sustain life by providing basic food and shelter needs and health care for their families.

I have a quick question, Mr. Chairman, my interpretation of the amendment is it would strike 'very important and fundamental right'. Does it not strike the 'very'? Is this a very high preference or just a high preference?

SENATOR LINCOLN replied that "very" remains in the amendment.

MR. THORSTENSON commented that that would be very, very scary. He thought it could have incredible unintended consequences in the lodge and charter industry in Southeast Alaska. Other consequences that haven't been addressed yet are spring steelhead, which is catch and release or trophy fishing in small areas of the state. Introducing the consumptive use into those systems would cause some serious problems. He noted that steelhead fishing is not impacted by commercial fishing activity.

SENATOR LINCOLN asked if he vigorously opposed SB 318 in any form.

MR. THORSTENSON replied:

Absolutely! Right now, the way the system has been working, there has already been approximately 600 percent increase in the past decade on personal use harvest in the largest and major rivers in Central Alaska and we feel that the current system has worked

very well. There are balances to be made.... In certain parts of the state you have a much larger population. You have a much larger need to establish different types of fishing - sport fishing, guided fishing. Commercial fishing obviously becomes a smaller part of the overall economy in some places....

TAPE 04-38, SIDE A

5:40 p.m.

CHAIR OGAN said he didn't share Mr. Thorstenson's paranoia that there is enough latitude in the language to give the Board of Fish a lot of discretion.

SENATOR ELTON called a point of personal privilege saying, "I think characterizing the previous testimony as paranoid is inappropriate."

CHAIR OGAN said he didn't want to get into a debate about it.

SENATOR ELTON asked if Mr. Mecum, ADF&G, could testify.

CHAIR OGAN said he would do that after getting testimony from Mr. Andy Craig.

SENATOR LINCOLN said she had no objection to that, but she wanted to hear from the Fish Czar, Alan Austerman, and Mary Pete, Division of Subsistence.

MR. ANDY CRAIG opposed SB 318.

It's a question of what particularly is this bill trying to fix. It seems like it's kind of doing an end run around the subsistence preference that has already been established....

MR. DOUG MECUM, Director, Division of Commercial Fisheries, Alaska Department of Fish and Game (ADF&G), testified if the intent of the bill is to provide a higher priority for personal consumption in allocation decisions, he wasn't sure why the term "management" was used, because it implicates the department and the commissioner in the allocation of resources. "I think that is a concern."

CHAIR OGAN said he interpreted that to mean that management is already defined in the constitution in Article 8, Section 4, as managed on a sustained yield basis subject to preferences

amongst beneficial uses. "This language simply clarifies that constitutional mandate you already have.... I think it's a good thing personally.... It's an Alaskans first bill."

SENATOR SEEKINS concurred with his position.

SENATOR ELTON went a step further in characterizing the bill.

It sets one class of Alaskans higher than another and we have heard testimony previously about what they think sustenance is - shoes on feet, food on the table - roof over the head. But when you look at the way it is defined, sustenance means that which is used for personal and family consumption. That precludes, it seems to me, the definition of sustenance as roof over head, shoes on feet and so this is not simply putting Alaska residents first. This is putting some Alaska residents ahead of other Alaska residents.

CHAIR OGAN disagreed.

SENATOR ELTON reasoned then that "consumption" should be deleted on line 10.

SENATOR LINCOLN commented that Mr. Mecum was concerned that the term "management" referred to the department.

MR. MECUM pointed out:

The current statutory framework that the legislature has adopted for the Board of Fisheries - speaks to providing a preference for personal family consumption. It may not be strong enough in some people's view.... I've been working with the Board of Fisheries for the past 15 years and in each and every instance that I'm aware of that the board has addressed personal use fisheries, in particular, they have provided for liberal opportunities for those fisheries.

To back up his point, he referred the committee members to department statistics in their packets.

SENATOR LINCOLN asked him to interpret statistics regarding the Chitna dip net and the Copper River sockeye fisheries and how this piece of legislation might impact them.

MR. MECUM replied that it's really difficult to predict what might happen and the courts would end up sorting it out over time. He intended the information to show the committee how the board has taken the need for Alaskans to harvest fish for their personal consumption very seriously and provided liberal opportunities for that to happen.

SENATOR LINCOLN asked the Department of Law if deleting "the right of Alaska residents in" and replacing it with "a preference for" and deleting "important and fundamental right" and replacing it with "high preference" was clear to the Department of Law.

MR. LANCE NELSON, Department of Law (DOL), responded that some of their concerns were addressed with deleting "fundamental right", but current language saying "very high preference" makes the meaning ambiguous. He thought it might encourage the board to prefer those uses as a matter of law over those that are non-preferred. He couldn't speculate on the consequences that would have on management.

SENATOR ELTON asked what Mr. Nelson, as a leading attorney in this area, what he thought "sustenance" meant on lines 9 and 10 and if he believed the accommodations made to the family of a commercial fisherman - whether its buying clothes or shoes or repairing a roof - is covered under its definition in this bill.

MR. NELSON replied that it's probably unlikely that the court would decide that uses of fish by commercial fishermen are covered by this bill.

CHAIR OGAN added, "Unless they are an Alaska resident and feeding their family."

MR. NELSON replied that he is only talking about harvest in the commercial fisheries.

SENATOR SEEKINS wanted to make it clear for the record that he is not trying to take food off of children's tables or clothes off their backs. He just wants to make sure that people who have to feed their families also have high priority.

SENATOR LINCOLN noted the last four words, were "or to sustain life" and asked what that meant.

MR. NELSON replied that he wasn't the one to answer that and couldn't speculate.

SENATOR LINCOLN said she just wanted to know what the department's interpretation was of that language. She requested Alan Austerman to come forward.

MR. AUSTERMAN, Office of the Governor, said he did not have any ready comments.

SENATOR LINCOLN asked if he was intending to look at this bill and come back to the committee with recommendations.

MR. AUSTERMAN replied that he had no intention of coming back to testify. He assumed that ADF&G and DOL would testify after they had digested it.

SENATOR LINCOLN requested Mary Pete to step forward and asked her if she thought this legislation would have any impact on her division.

MS. MARY PETE, Director, Division of Subsistence, replied: "Subsistence has the highest priority and this really says high preference. I don't see any impact on subsistence."

6:07 - 6:08 - at ease

SENATOR FRED DYSON moved to pass CSSB 318(RES) from committee with attached fiscal notes and individual recommendations.

SENATORS ELTON and LINCOLN objected.

SENATOR LINCOLN noted that of the nine people representing a broad base of groups that testified at today's meeting, eight opposed it and one supported it. Department of Law also said it was ambiguous; also neither the DOL nor ADF&G had adequate time to review the CS.

CHAIR OGAN asked for the roll. Senators Ben Stevens, Fred Dyson, Ralph Seekins, Thomas Wagoner and Chair Scott Ogan voted yea; Senators Lincoln and Elton vote nay; and CSSB 318(RES) moved from committee.

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There being no further business to come before the committee, Senator Ogan adjourned the meeting at 6:10 p.m.