

MINUTES
SENATE RESOURCES & ENVIRONMENT COMMITTEE

DATE: Wednesday, February 08, 2012

TIME: 1:30 P.M.

PLACE: Room WW55

MEMBERS PRESENT: Chairman Pearce, Vice Chairman Bair, Senators Cameron, Siddoway, Brackett, Heider, Tippetts, Werk, and Stennett

**ABSENT/
EXCUSED:** None

NOTE: The sign-in sheet, testimonies, and other related materials will be retained with the minutes in the committee's office until the end of the session and will then be located on file with the minutes in the Legislative Services Library.

CALL TO ORDER: **Chairman Pearce** called the meeting to order at 1:30 P.M. and asked for motions for the minutes of January 27 and 30.

MOTION: **Senator Heider** made the **motion** for approval of the minutes of January 27. The motion was **seconded** by **Vice Chairman Bair**. The motion **passed** by unanimous voice vote.

MOTION: **Senator Tippetts** made the **motion** for approval of the minutes of January 30. The motion was **seconded** by **Senator Siddoway**. The motion **passed** by unanimous voice vote.

SJR 104: **Senator Heider** presented this Senate Joint Resolution which provides that the rights to hunt, fish and trap are a valued part of the heritage of the State of Idaho and shall forever be preserved for the people through the laws, rules and proclamations of the State and to provide that the rights set forth do not create a right to trespass on private property, shall not affect rights to divert, appropriate and use water, and shall not lead to a diminution of other private rights.

He said that it is a right to hunt, fish, and trap. In Vermont, some documents go back as far as 1777 pertaining to these three things.

Senator Heider said the language is simple and straight forward, so that when the citizens go to their voting booth, they will understand exactly what this amendment to the Constitution does and what they are voting for.

Senator Werk provided a copy of the Attorney General's opinion (which he asked for and it is on file). He asked Senator Heider if the proposed amendment would preclude the state from charging fees for the constitutionally protected right to hunt, fish, and trap. He said that he doesn't have a problem with the concept, but does have a big problem with putting the current system at risk because the language is such that it provides an opening for the potential for a court to rule in that manner.

Senator Heider said that in Minnesota's case, they said that hunting and fishing is a valued part of their heritage and shall forever be preserved and shall be managed by laws and regulations for the public good. In Wisconsin, their Constitution says basically the same thing. He stated that the language in all the states' Constitutions are very similar regarding hunting, fishing, and trapping.

Senator Werk feels that this would cause the Committee to wander in legal proceedings, and in legal proceedings, words have big meanings. The issue here is the word "right". He stated that the AG is basically saying that the language that we have here places us in a position where the court could rule that the system that we have set up would have to be undone or fund Fish and Game in some other manner to make sure the wildlife herds are properly managed.

Senator Heider stated that in the correspondence that he has received from the Attorney General's office, a nine page report, says ".....the fundamental rights found in our State Constitution are those expressed as positive rights. Here, hunting, fishing, and trapping are expressed as a positive right and the proposed amendment would likely be held to establish a fundamental right." Senator Heider feels there would not be a problem.

TESTIMONY:

Ms. Sharon Kiefer, Deputy Director, IDFG, said the Idaho Fish and Game Commission has discussed this bill and currently their position is to monitor the bill while they learn more about status of constitutional amendments in other states. A copy of Ms. Kiefer's testimony (four pages in length, plus five pages of attachments) is on file.

Some of her testimony is inserted into the minutes. She said "there are two parts to SJR 104. Part one is new language for the constitution that intends to establish the right to hunt, fish, trap as a valued part of the heritage of the State of Idaho forever preserved for the people. However, as with any constitutional 'right', the tricky part is the second part of the proposal which attempts to define limits to the right. SJR 104 defines the limits as not 'subject to' but instead 'through' the laws, rules and proclamations of the state. Compared to other existing constitutional amendments of similar subject, this wording is a bit unique and some might argue, less clearly defines the legislative intent."

"Per more specific legal review, our legal counsel provided the analysis summarized in this testimony. In particular, we bring to your attention the following conclusion: *The meaning of the provision directing hunting, fishing and trapping rights to be 'preserved...through' state laws and regulations is much less clear, particularly since the change was made in response to concern that constitutional rights should not be 'subject to' state regulation. The ambiguous language, in combination with the current legislative history, could lead a court to conclude that the intent of the provision is to restrict traditional state police powers over wildlife. Given the uniqueness and ambiguity of SJR 104, the court may rely on legislative history to determine the meaning of the requirement that hunting, fishing and trapping rights be 'preserved...through' state regulations.*"

"The Commission desires to preserve both the traditions of hunting, fishing, and trapping, and the traditional statutory and Commission regulatory powers so important to providing continued supplies of wildlife. Because of the unique language used in the bill as highlighted above, the Department recommends that the legislature ensure that the legislative history of SJR 104 clarifies that the preservation of hunting and fishing rights requires preservation of traditional regulatory (police) powers to regulate the taking of wildlife, including imposition of license fees." Ms. Kiefer stated that she believes that some of the discussion that has just occurred has begun to establish that legislative record.

Senator Cameron stated that it is certainly subject to legal interpretation as to whether a SJR of one drafting is compelled to another drafting and whether the courts would look at legislative history, or whether they would go to other bills that were similarly drafted. He feels that would be a bit of a stretch and typically, when they look at legislative history, they will look back at the history of SJR 104, and not its predecessor. He asked **Ms. Kiefer** if she could provide a "for instance" of where that might have occurred. She replied "that this is exactly what they are trying to articulate, that the legislative discussion about SJR 104 is establishing that legislative history that they believe is challenged." Ms. Kiefer said she did not mean legislative intent relative to any previous bills that were not heard or acted on, but that history, as we are now discussing SJR 104. **Senator Cameron** said that "what is troubling him in Fish and Game's legal counsel's statement is that they believe constitutional rights should be subject to state regulation. He doesn't understand why the legal counsel would think that, based on the language in the bill on lines 18 through 24, unless they are linking a previously drafted piece of a resolution. It looks as if the Department is pointing the court to look at that other piece." **Ms. Kiefer** replied that as they looked at other constitutional amendments in other states, they saw that language and the legal analysis was that was a more common type of framework that they saw in some constitutional amendments. However, it has been used more often and is a bit clearer in its intent, but relative to bearing a higher success rate than what would be found in SJR 104, is not necessarily so. She stated that with either one, their recommendation would still be the same to create a very clear legislative history of the intent of the legislature, relative to preservation of the rights, as well as any traditional powers of the state that are intended to go along with those rights.

Senator Cameron said he would appreciate it if Ms. Kiefer, or Fish and Game's legal counsel, would provide him with Idaho Constitutional Amendments that show that type of language. He agreed that it needs to be made perfectly clear, that the ending statement of Ms. Kiefer's comments, that we are allowing, or wanting to allow, the Department of Fish and Game to operate as it is currently operating and that we want them to be able to charge a fee and to regulate hunting, fishing, and trapping as deemed appropriate by state statute. Senator Cameron emphasized that that is the desire and asked Ms. Kiefer for suggestions as to how that would be made perfectly clear. He asked if she was suggesting that legislative intent language be adopted by this Committee, or something more specific in the minutes, or what specifically is she suggesting. **Ms. Kiefer** responded by saying that it is being established right now, as this is a recorded public discussion, as well as recorded in the minutes, and those that have spoken are speaking to the content of the Constitutional Amendment. She believes that the record is being established right now.

Ms. Kiefer asked to clarify a point. She said that they are not suggesting that there are Idaho Constitutional Amendments that have the "subject to" rights. Who they are referring to in large part is other states' Constitutional Amendments regarding the right to hunt, fish, and trap, or however they have described it, as either an action or opportunity. She directed the Committee's attention to what Tennessee has done. (This information is provided in the attachments). It is an acknowledgement that this has been used more than once. Ms. Kiefer stated that there is not a "cookbook" out there relative as to how these things are approached. **Senator Cameron** said that "he would like to gently suggest that, in his opinion, it would be a far stretch for some legal counsel to say that it means that they cannot charge, or regulate, because of what Tennessee's or Kentucky's, or some other states' Constitution said different than ours. In his opinion, they will be looking at our Constitution."

Senator Heider said that when they originally talked about this bill, they were "making a right - subject to" and that seemed to be a negative thing. They replaced "subject to" with "through" because they wanted it to be a right that is managed through the rules and proclamations of the State. That was the reasoning for the change.

Vice Chairman Bair asked Senator Heider what his purpose was for declaring fishing, hunting, and trapping as a right? **Senator Heider** responded by saying that history indicates that the people always thought they had the right to hunt, fish, and trap and he wants to make it a guaranteed right for future generations. **Vice Chairman Bair** then asked "if it was his intent that either the Legislature, or the Commission, or the Department's authority, should be prevented, or inhibited, in any shape or fashion, from regulating or charging fees for licenses or permits for that right to hunt in the State of Idaho?" **Senator Heider** said he is not trying to prevent the Department from having that opportunity and that is the reason for the verbiage.

Vice Chairman Bair then referred to the Attorney General's opinion (page three of the letter written to Senator Werk on January 30, 2012). He said the last paragraph will speak both for and against this issue. In the middle of the paragraph it says - "Given the ambiguity of the language, it is equally possible that a court would conclude that the preservation of hunting and fishing rights requires preservation of the subject wildlife, so that the legislature remains free to impose licensing and other restrictions on takings." **Vice Chairman Bair** said that he understands that to say that the Legislature will retain, through judicial review, the right to be able to regulate and charge fees.

Senator Stennett said that she wishes success on this bill and if there is any ambiguity by Fish and Game, or the AG, she wants it to be clear and uncontestable. She suggested to use the words "preserve the privilege" or "opportunity", rather than "right", as that seems to be the word that everyone is hung up on. **Senator Heider** replied that the word "right" is a very powerful word and it is the very word that describes what he wants to do and what he wants the Constitution to preserve.

Senator Tippetts said that a Constitutional amendment should be carefully analyzed and he asked the Committee to look at Tennessee's language (material from Ms. Kiefer). It says, "The citizens of this state shall have the personal right to hunt and fish, subject to reasonable regulations and restrictions prescribed by law." He stated that to him, there is an important difference in that language, because it says "subject to reasonable....." The Senator said that he supports the concept, but wants to make sure the language is right. He feels the Tennessee law avoids the trap that this bill might lead us into. **Senator Heider** stated that he has been "round and round" with the words "subject to" and "through." He said that he doesn't want the right to be subject to, but the right to be preserved and the right will be preserved through the laws, rules, and proclamations of the State. The Senator said that he feels the wording is significant and it is a positive way of saying it.

Senator Werk stated that he would like to support this bill, but wants to know how it will impact the people and what are the consequences? He also wanted more specific language in the bill. **Senator Heider** said that to him, it falls in line with other rights that we are preserving through our Constitution and the bill is written correctly. **Senator Siddoway** asked Senator Heider what the genesis of this proposal is and why is he so concerned about the citizens of the State of Idaho having this right preserved? **Senator Heider** replied that he wants his future generations to have the privilege of experiencing the rights and privileges that he has known. He stated that some sportsmen of Idaho have also come to him and asked that we create this right and it would be a comfort to him to know that it is a part of our Constitution and it will be forever preserved in this great State. **Senator Siddoway** said that when he was on the Fish and Game Commission several years ago, some out-of-state people brought forth an initiative to try to shut down Idaho's

bear hunting. Other groups have sued the Department, or have threatened to sue, over the hunting of some birds. He feels there is a real threat, and his support of this bill is based on those concerns.

Senator Heider replied that if we didn't have our Bill of Rights, we would be in dire trouble, as our rights are challenged at every turn. He feels that this bill, to some degree, will protect the ability to hunt, fish, and trap.

MOTION:

Vice Chairman Bair made the motion to send SJR 104 to the floor with a do pass recommendation. **Senator Siddoway seconded** the motion. The motion **passed** by a majority voice vote. **Senator Werk** voted **no** and asked to be recorded as such. **Senator Heider** is the **floor sponsor**.

Chairman Pearce then called on Senator Siddoway to present S 1283.

S 1283:

Senator Siddoway said this bill would provide that any landowner issued a Landowner Appreciation Program Controlled Hunt Tag (LAP tag) may sell the tag to another person, which is currently prohibited. The tag must be used in the hunt area for which it has been issued. Landowners supply a lot of habitat to wildlife and this would help to recoup some of the losses. The **Food Producers** have sent a letter of **support** for this bill.

Senator Tippetts inquired if at any time the landowners were allowed to sell the tags. **Senator Siddoway** said that when the tags were initially sent to the landowners, there were not a lot of restrictions. In the early years, landowners gave the tags away to hunters, but sold the hunters access to their property for hunting.

Senator Siddoway stated that he is a landowner and his operation has enough acreage that between himself, his son, and the company, they are eligible for four landowner tags for elk and deer, and he declared a conflict of interest.

Senator Werk inquired as to how many tags would be available with this proposal that would enter the market as being for sale to the highest bidder. **Senator Siddoway** said that he doesn't think there is a paper trail for that number and not all of the hunting areas in Idaho got these tags. **Senator Werk** then asked why there couldn't be an open market for tags that are transferable? **Senator Siddoway** said that these tags are under the control of the Commission and while one might think that the tags are for the late, late season, they are not. When these tags first came about, some of the hunts were the more "sought after" hunts.

TESTIMONY:

Ms. Sharon Kiefer said that the Fish and Game Commission has not yet discussed this bill, so she could not offer a policy position at this time. They will be meeting February 9 and will review this legislation at that time. A copy of her testimony is on file.

Senator Werk inquired about access to hunting and if a landowner could charge for that access. **Ms. Kiefer** said that any landowner can charge anybody an access fee to their private property.

TESTIMONY: **Mr. James Whittaker**, a rancher from Leodore, said "it is away past time" to market these tags. At any given time during the six-seven month period, he will have 150 game animals (between elk, antelope, deer, and moose) on his ranch. Having a larger spread, lots of hunters come out and the fences are down due to the hunters shooting at the elk. He feels it would be a great benefit to the landowners if they could market the tags, as it is hard to quantify the depredation. This would be one way to reimburse the landowners for the habitat for the game that resides on their ranches. In Lemhi County, 92 percent of the land is either federally or state owned, so that gives the sportsmen a lot of other areas in which to hunt besides on private ground. In Idaho, it is 67 percent. Last year, Mr. Whittaker was allowed only one tag, but by historical measures, he feels they should have had three or four tags.

TESTIMONY: **Mr. Douglas Schleis**, testifying on his own behalf, reviewed the history of the LAP tags, including access, family members only, and the loss of some benefits to the sportsmen. He feels the landowners dictated to the Advisory Board - "do this or else." He also said this bill offers no incentive for the landowners to provide access.

TESTIMONY: **Mr. Kirk Chandler**, Weiser, also testified on his own behalf. The area where he lives is quite different from that of Mr. Whittaker. He and his neighbors have received depredation permits and he lets anyone hunt who asks. About 400 head of elk move down from the high country when it snows to areas that he has saved for his cattle (in the Spring). If he was to receive rent for pasturing the elk, it would amount to \$4,500 a month. If they had to feed hay to the cows because the elk had eaten all the pasture, at today's prices, it would cost \$25,000 to \$30,000 a month. Mr. Chandler is in support of S 1283.

ANNOUNCEMENTS: **Chairman Pearce** announced that due to time constraints, this bill would be carried over to Friday and he will take more testimony if anyone has not had a chance to testify today.

ADJOURN: The **Chairman** adjourned the meeting at 3:10 p.m.

Senator Pearce
Chairman

Juanita Budell
Secretary