ALASKA STATE LEGISLATURE
HOUSE RESOURCES STANDING COMMITTEE
April 5, 2002
1:10 p.m.

MEMBERS PRESENT

Representative Beverly Masek, Co-Chair
Representative Drew Scalzi, Co-Chair
Representative Hugh Fate, Vice Chair
Representative Mike Chenault
Representative Mary Kapsner
Representative Beth Kerttula

MEMBERS ABSENT

Representative Joe Green
Representative Lesil McGuire
Representative Gary Stevens

OTHER LEGISLATORS PRESENT

Representative John Davies
Representative Brian Porter
Representative Bill Hudson
Representative Fred Dyson

COMMITTEE CALENDAR

HOUSE JOINT RESOLUTION NO. 41
Proposing an amendment to the Constitution of the State of Alaska relating to providing for priorities for and among subsistence uses in the allocation of fish, wildlife, and other renewable resources.

- HEARD AND HELD

HOUSE JOINT RESOLUTION NO. 29
Proposing an amendment to the Constitution of the State of Alaska relating to subsistence uses of fish and wildlife.

- SCHEDULED BUT NOT HEARD

HOUSE JOINT RESOLUTION NO. 11
Proposing amendments to the Constitution of the State of Alaska relating to subsistence use of wild food resources and to the harvest of fish and wildlife.

- SCHEDULED BUT NOT HEARD

HOUSE JOINT RESOLUTION NO. 4
Proposing amendments to the Constitution of the State of Alaska authorizing a priority for subsistence users of replenishable natural resources; and providing for an effective date.

- SCHEDULED BUT NOT HEARD

HOUSE BILL NO. 14
"An Act relating to subsistence use of fish and game, to fish and game advisory committees, and to permits for historic or traditional uses of fish and game and harvest practices; amending the definition of 'domicile' for purposes of the Fish and Game Code; and providing for an effective date."

- SCHEDULED BUT NOT HEARD

PREVIOUS ACTION

BILL: HJR 41
SHORT TITLE:CONST. AM: PRIORITY FOR SUBSISTENCE USES
SPONSOR(S): RLS BY REQUEST OF THE GOVERNOR

Jrn-Date	Jrn-Page		Action
02/15/02	2279	(H)	READ THE FIRST TIME - REFERRALS
02/15/02	2279	(H)	RES, JUD, FIN
02/15/02	2279	(H)	FN1: (GOV)
02/15/02	2279	(H)	GOVERNOR'S TRANSMITTAL LETTER
02/15/02	2279	(H)	REFERRED TO RESOURCES
03/27/02		(H)	RES AT 1:00 PM CAPITOL 124
03/27/02		(H)	-- Meeting Postponed to 4/5/02 --
04/05/02		(H)	RES AT 1:00 PM CAPITOL 124

WITNESS REGISTER

BRUCE M. BOTELHO, Attorney General
Department of Law
P.O. Box 110300
Juneau, Alaska 99811-0300
POSITION STATEMENT: Presented HJR 41 and answered questions.

RON SOMERVILLE, Consultant
to the House and Senate Majority

Alaska State Legislature
Capitol Building
Juneau, Alaska 99801-1182
POSITION STATEMENT: Testified on HJR 41.

ROBERT B. STILES, President
DRven Corporation and
Resource Development Council for Alaska, Inc.
121 West Fireweed Lane, Suite 250
Anchorage, Alaska 99503
POSITION STATEMENT: Assisted in presentation of HJR 41; expressed strong support.

CARL ROSIER
Territorial Sportsmen, Inc.
P.O. Box 20761
Juneau, Alaska 99802
POSITION STATEMENT: Testified in strong opposition to HJR 41.

AVRUM GROSS, Partner
Gross & Burke, PC
424 North Franklin Street
Juneau, Alaska 99801
POSITION STATEMENT: Provided reasoning behind the formulation of HJR 41 by the drafting committee; answered questions.

GEORGE YASKA
Tanana Chiefs Conference, Inc. (TCC)
122 First Avenue, Suite 600
Fairbanks, Alaska 99701
POSITION STATEMENT: Testified on HJR 41; conveyed TCC's opposition to subsection (b) with regard to providing a priority only when necessary; offered appreciation that subsection (a) provides a priority; requested clarification about subsection (c).

DICK BISHOP
Alaska Outdoor Council (AOC)
1555 Gus's Grind
Fairbanks, Alaska 99709
POSITION STATEMENT: Testified in opposition to HJR 41 "and similar proposals"; also commented on HJR 11 and HJR 29.

AUSTIN AHMASUK
P.O. Box 1292
Nome, Alaska 99762
POSITION STATEMENT: Testified on HJR 41.

LARRY MERCULIEFF
Rural Alaska Community Action Program (RurAL CAP)
731 East 8th Avenue
Anchorage, Alaska
POSITION STATEMENT: Spoke about issues that have a direct bearing on subsistence legislation, and asked committee to move HJR 41.

ROD ARNO
P.O. Box 871410
Wasilla, Alaska 99687
POSITION STATEMENT: Testified in opposition to HJR 41.

ROSE ATUK-FOSDICK
P.O. Box 1485
Nome, Alaska 99762
POSITION STATEMENT: Testified in support of HJR 41.

TERRY MARQUETTE
3032 Supercub Lane
North Pole, Alaska 99705
POSITION STATEMENT: Testified in opposition to HJR 41.

MARY BISHOP
1555 Gus's Grind
Fairbanks, Alaska 99709
POSITION STATEMENT: Testified in opposition to HJR 41; asked the committee to take the approach of HJR 11 and HJR 29.

ARLISS STURGULEWSKI
3201 C Street, Number 405
Anchorage, Alaska 99503
POSITION STATEMENT: Testified in support of HJR 41.

WAYNE HEIMER
1098 Chena Pump Road
Fairbanks, Alaska 99709
POSITION STATEMENT: Urged committee to take no action on HJR 41.

CHIP WAGONER
Alaska Catholic Conference
3294 Pioneer Avenue
Juneau, Alaska 99801
POSITION STATEMENT: During hearing on HJR 41, presented and read testimony of Bishop Michael W. Warfel that urged members to

work towards a solution that keeps in mind not just the rights of individuals, but also the common good of all Alaskans.

ACTION NARRATIVE

TAPE 02-24, SIDE A
Number 0001

CO-CHAIR BEVERLY MASEK called the House Resources Standing Committee meeting to order at 1:10 p.m. Representatives Masek, Scalzi, Fate, Chenault, and Kapsner were present at the call to order. Representative Kerttula arrived as the meeting was in progress.

HJR 41-CONST. AM: PRIORITY FOR SUBSISTENCE USES

[Contains brief discussion of HJR 11 and HJR 29 during Dick Bishop's and Mary Bishop's testimony, as well as reference to HJR 4 during Mr. Bishop's testimony]

CO-CHAIR MASEK announced that the committee would consider HOUSE JOINT RESOLUTION NO. 41, Proposing an amendment to the Constitution of the State of Alaska relating to providing for priorities for and among subsistence uses in the allocation of fish, wildlife, and other renewable resources. She noted the presence of Representative Davies and welcomed him. [HJR 41 was sponsored by the House Rules Standing Committee by request of the governor.]

Number 0132

CO-CHAIR MASEK expressed appreciation for the hard work that has gone into a [proposed constitutional] amendment. She said this committee is open to new ideas, although she acknowledged the difficulty of coming to agreement. She said [HJR 41] isn't tied to any changes in ANILCA [Alaska National Interest Lands Conservation Act], and doesn't address some "traditional problem areas" such as federal court oversight, commercial sale of subsistence resources, or the issue of times of shortage.

CO-CHAIR MASEK suggested the committee's goal should be looking at reducing the pool of subsistence users, because a lot of competition exists for the state's limited resources; she said support for a subsistence preference must be for those who truly need it. She conveyed her belief that subsistence proposals have been too broad, with too many potential users. She said

although she supports subsistence, she also supports state management.

CO-CHAIR MASEK offered her belief that there had been a chance to resolve this issue in court, an avenue the governor chose not to pursue; she mentioned the Katie John and Babbitt cases, and said the legislative body is therefore taking action. She mentioned the federal takeover of fisheries [management, which occurred after a previous legislature voted down a proposed amendment intended to bring the state constitution into compliance with Title VIII of ANILCA]. She suggested the clash is not so much urban-rural, but is a contest among user groups.

CO-CHAIR MASEK related her understanding that only 4 percent of the fish go to subsistence users, whereas 1 percent or more go to sport catch and the other 95 percent to commercial operations; she anticipated testimony that some groups want to operate commercially under the subsistence title, but that others don't. She expressed hope that this meeting would provide more knowledge for members about management issues and what is already in regulation. Mentioning a recent advisory vote in Anchorage, she remarked, "They're saying that subsistence uses should be allowed to occur before sport uses, and we are already doing that; that's how the system works currently."

Number 0545

BRUCE M. BOTELHO, Attorney General, Department of Law, came forward to present HJR 41, expressing appreciation for Co-Chair Masek's opening remarks with regard to the importance of discussing this issue openly. He also conveyed appreciation on behalf of the governor that this hearing is occurring. Although a solution has eluded [the state] for some time, he suggested the very act of debating and discussing the issue is of great significance.

ATTORNEY GENERAL BOTELHO pointed out that neither lawsuit mentioned by Co-Chair Masek would have resolved the issue of the constitutionality of ANILCA itself. With respect to Babbitt, the dropped portion simply dealt with whether Secretary of the Interior [Babbitt] had authority to adopt regulations to manage subsistence on federal lands; in the final analysis, Attorney General Botelho said, there probably wasn't much room for debate about the Secretary's authority to manage lands, especially having been empowered by Congress to do so.

ATTORNEY GENERAL BOTELHO, with respect to Katie John, said the dispute focused not on whether Congress had the authority to extend ANILCA to navigable waters, but on whether Congress in fact did so. He told members that a clear majority of the 9th Circuit [Court of Appeals] en banc panel concluded that it at least extended to the navigable waters identified originally, and that three justices or judges of the panel would have actually extended it to all waters of Alaska. He said the underlying point, however, is that litigation wasn't going to resolve the dilemma of bringing the state back into management of fish and game resources throughout Alaska.

Number 0753

ATTORNEY GENERAL BOTELHO noted that many Alaskans see this dilemma as a divide between urban and rural Alaska, as Co-Chair Masek had alluded to, whereas others see it as a question of federal encroachment on state authority to manage fish and wildlife throughout Alaska. He suggested both viewpoints have legitimacy, but said he might put it in simpler terms: "How should we fairly allocate fish and game resources to those who most depend upon them for sustenance?" He told members the real consequence of failure to resolve this dilemma has been in the creation, existence, and expansion of a dual management system - one by the federal government, one by the state - in which the two systems unfortunately are growing increasingly apart. He said the state is in this position for one reason: state laws are not consistent with Title VIII of ANILCA, a fairly straightforward law passed by Congress that says rural residents have a subsistence priority for the taking - the use - of fish and wildlife on the public lands of Alaska; he specified that "public lands" means "the federal lands of the state."

ATTORNEY GENERAL BOTELHO, noting that this particular mandate is to be carried out by the Secretary of the Interior, said:

> But Section 805 of the Act says that notwithstanding this directive to the Secretary of Interior, if Alaska passes laws that are consistent with the purpose of ANILCA, provides for the definitions - that priority - and for the participation that is called for in the Act in terms of the development ... of regulations, then the State of Alaska can manage on those same federal lands. And it really is the gravamen of ... what needs to be focused on. If we want to regain management throughout the state of all fish and wildlife resources, we have a very easy way to do that

- ... easy in the sense that it requires us to enact laws of general applicability.

Number 0972

ATTORNEY GENERAL BOTELHO said the foregoing is what is presented today in the form of HJR 41, an effort by a group of private citizens concerned about the twin issues of the fundamental importance of subsistence to a way of life in Alaska and also the concern about management under a unitary system run by the State of Alaska. He told members, "We do not provide you with changes to ANILCA. Our focus here really is what the legislature can do. And what the legislature can do is put a resolution in front of ... the voters."

ATTORNEY GENERAL BOTELHO explained that first, the product is a result of a summit held last August at which 42 Alaskans from all regions of the state and many different walks of life came together in a two-day period to look at this issue and examine the underlying values; he offered his belief that this was the first time "we expressly looked, as a state, at the values underlying the issue." That led to appointment of an 11-member drafting committee that met over the course of eight meetings and several months to come up with [HJR 41]. He said the meetings were long and difficult, but people were able to come up with language they thought would truly meet the twin objectives he'd mentioned.

Number 1129

ATTORNEY GENERAL BOTELHO pointed out that committee packets contained recommendations to look at regulatory changes that, if implemented, would provide for regaining management from the federal government. He emphasized that mere passage of a constitutional amendment wouldn't bring Alaska into compliance [with ANILCA]; the law requires that laws of general applicability be enacted and implemented. The constitutional amendment simply provides the framework from which those laws of general applicability could be enacted.

ATTORNEY GENERAL BOTELHO noted the presence of the following people: Frank Rue, Commissioner, Alaska Department of Fish and Game (ADF&G); Robert Bosworth, Deputy Commissioner, ADF&G; and from his own staff, Stephen White, Assistant Attorney General, Department of Law, who has "worked for years in the fish and game realm, and specifically on subsistence." He then introduced two members of the drafting committee who would offer

comments: Bob Stiles, president of both DRven [Corporation], a coal-development company, and of the Resource Development Council (RDC); and Avrum Gross, "one of Alaska's most prominent attorneys," who was attorney general under [former Governor] Jay Hammond. He requested that Mr. Stiles be allowed to join him at the witness table.

Number 1255

CO-CHAIR MASEK first asked to hear Attorney General Botelho's take on [HJR 41]. She referred to a document in packets titled "Comparison of Subsistence Resolutions" [addressing HJR 41, HJR 11, HJR 29, and HJR 4], put together by Stephen White of the Department of Law. She asked about compliance [with Title VIII of ANILCA].

ATTORNEY GENERAL BOTELHO reiterated that the test for any proposed constitutional amendment ultimately will boil down to this: "If enacted by the people of Alaska, will it provide the framework for laws to be enacted that are consistent ... with ANILCA?" He said the real test is not that it provides, in itself, for definitions, participation, and the priority, but that there has to be a law that will do that; however, until now there hasn't been the ability to pass such a law that is consistent with the Alaska constitution - hence the [proposed constitutional] amendment. As to whether [HJR 41] provides the opportunity to bring the state into compliance, he said:

> I think there is no question about that; my view is that it does. It authorizes, specifically, a priority for rural residents. It has the effect of overturning the ... McDowell [v. State] decision, which in 1989 struck down the rural priority then in existence in Alaska. And it also would authorize a Tier II priority, also based on proximity to the resource, which was separately struck down by the Alaska Supreme Court in State v. Kenaitze. So the effect of this resolution, if ultimately adopted by the people of Alaska, would authorize the legislature to enact laws that would bring us into compliance with ANILCA.

Number 1421

CO-CHAIR MASEK inquired about "the issue in ANILCA 807(c), the judicial oversight." She offered her understanding:

> If the state has management, then the federal government has that judicial oversight. And [if] they find us out of compliance, then they will ultimately step back into the picture. And so ... I'd say, as far as having the state manage the resource, we'd be having more like a dual management. And even if we accepted and passed this amendment to change our constitution, I think we still don't get that true state management back.

ATTORNEY GENERAL BOTELHO agreed that even if a constitutional amendment were enacted, ANILCA would still provide for federal court oversight. He said, however:

> I think it's important to put that in perspective. Number one, it is a federal law; one would expect federal courts to be at least one of the bodies that would be reviewing actions under that federal law. But more importantly, I think, one frequently loses sight over the limited nature of that court oversight. It provides a mechanism for persons who ... believe they are aggrieved by state action to demonstrate to a court that the actions taken by that agency are arbitrary or capricious. It's a standard that we have in our own court system. And, frankly, none of us should shy away from the idea that people should have recourse to the courts when they believe government has acted in excess of their power, or in an arbitrary way. And the question of whether it's the federal courts or the state courts really should be of no moment.

Number 1551

> What's the consequence, though, if a federal court were to find that we have, as a government, been arbitrary? It's actually very limited. The provision doesn't throw out the system. It doesn't revert to federal management. The effect of it is to overturn a specific ruling, regulation by the board, or implementation for a period of a year. So "the focus of federal court oversight is some grand intrusion on state rights or state prerogatives," I think, actually is overblown. My preference would be to see actions, in terms of state government conduct, reviewed by ... state courts. But, again, in a more global sense, the idea of judicial review of the conduct of government

is one that is intrinsic to our system, and one that we shouldn't be troubled by. I do not equate federal courts' intervention in this sense as being in any way equivalent to federal management.

Number 1640

CO-CHAIR MASEK asked Ron Somerville to join Attorney General Botelho at the witness table. Noting that Mr. Somerville has been working on this issue for some time, she asked that he provide his opinion on HJR 41.

Number 1669

RON SOMERVILLE, Consultant to the House and Senate Majority, Alaska State Legislature, pointed out that he isn't an attorney, so any speculation about legal aspects would be better addressed by someone with a legal background. Suggesting that there are major changes in this proposal from what the governor has presented previously, he referred to [page 1, line 8, which read in part, "recognize the subsistence tradition of the indigenous peoples of Alaska"]. He said, "It refers to indigenous inhabitants. There's ... been a couple of instances where that has been reviewed, and one of the questions was whether or not that creates a racially structured proposal, which is new to the process. We have not had that before. I don't think that was even in the intent in ANILCA, although that was originally proposed back when ... the bill first was started."

MR. SOMERVILLE continued, saying the provision for "a second-tier priority" is new as well, and was referenced by Attorney General Botelho; Mr. Somerville offered his understanding, from unspecified attorneys, that there is some question regarding whether that is in compliance with ANILCA. He said there is also a big question with regard to whether this would be a revision, rather than an amendment, to the constitution; he offered his belief that [counsel from Legislative Legal and Research Services] had said this type of [constitutional] amendment would "probably fall under a revision concept, rather than qualifying as an amendment." He added, "I'm just giving you some of the other sides of the issue." He pointed out that he hadn't participated in the summit in Anchorage; he therefore indicated he had little knowledge about it.

CO-CHAIR MASEK recognized the presence of Representative Dyson and welcomed him.

Number 1785

REPRESENTATIVE KAPSNER referred to Mr. Somerville's mention of a second-tier priority and asked Attorney General Botelho, "Don't we already have a Tier II priority?"

ATTORNEY GENERAL BOTELHO answered that Alaska does have a Tier II priority. It largely mirrored the federal requirements: dependence on the resource, proximity to the resource, and availability of alternative resources. However, the Kenaitze case in state court was a challenge to use of the proximity criterion; the Alaska Supreme Court concluded that proximity wasn't a constitutional criterion that could be used in implementing Tier II in Alaska. He pointed out that those three criteria are imbedded in ANILCA itself "in terms of how the federal government would implement." He said:

> Hence one of the steps that this proposed constitutional amendment attempts to do is to make sure the legislature can fully implement, by laws of general applicability, that same Tier II priority - that is, to include proximity to the resources, one of the criteria in determining who should have a priority when resources are so scarce that they're not available to all.

Number 1878

REPRESENTATIVE KAPSNER offered her understanding that "proximity to resource" would also include the concern that perhaps someone from Sitka, for example, could go to Barrow and claim the right to take a whale, although it wasn't a traditional harvest [for that person].

ATTORNEY GENERAL BOTELHO replied:

> That concept is imbedded here as well, although probably less in the context of Tier II than -- as we have formulated it, we ... talk about subsistence in a rural area. And the concept expressed by the drafting committee was to look at a more localized use of subsistence. We certainly intended - and I think were quite clear about it - not to permit someone [from] ... Barrow being able to come to Angoon to hunt deer unless one can demonstrate that there was a customary and traditional pattern and practice to do so. And no one has ever offered that that was the case.

> What happens, though, in the situation where you have defined a smaller area, ... and everyone in that area - local, that rural resident - would qualify for subsistence, but there are not enough resources even then to go through and satisfy all the needs? How do you decide among those residents which ones should have the priority? And this is where the Tier II comes into play, again, looking at the dependence on that resource, looking at the availability of alternative resources, and then the one that is posed here is, "Should ... the law permit the agency to look at proximity to that resource as well, as one of the criteria in deciding who gets first crack at the resource?"

Number 1996

MR. SOMERVILLE offered that the Tier II process, as now structured in both state and federal law, affords the ability to discriminate among subsistence users.

ATTORNEY GENERAL BOTELHO concurred.

MR. SOMERVILLE contrasted that with what is proposed in HJR 41, "whereby you have a subsistence user with a high priority; then you have another tier above that, between that and whoever is the rest of the residents of the state - it would have some sort of qualification." He added:

> If you look at federal law as it's structured right now in the ... regulation, you find a hodgepodge of the sort of thing that I think Representative Kapsner and the attorney general were referring to, and that is, where you have a subsistence priority. And proximity is used to some extent, although ... if you have a large enough ... population [such as a caribou herd], people from long distances could qualify, is all I'm saying.
>
> Proximity has had kind of a strange application under federal law. And so, to do what the attorney general's saying, you have to probably further narrow that down to make it really a local preference. I mean, right now, the way it's being applied under federal law, it's not really a local preference; it's very broadly applied. [In] some cases, it's limited

to residents of the unit in which a particular subsistence use occurs.

Number 2073

ATTORNEY GENERAL BOTELHO said he needed to correct one thing Mr. Somerville had said. He agreed that a provision in the third subsection [subsection (c) of HJR 41] would authorize, but not require, the legislature to create a subsidiary tier of subsistence use. He pointed out, however, that "this is distinct from our attempt to deal with Tier II, which is really found in subsection (b); so there are two distinct concepts." He concurred with Mr. Somerville's characterization of Tier II as an effort to distinguish among subsistence users.

Number 2111

REPRESENTATIVE DYSON asked, "Why don't we look at the proximity to resource as Tier I, and everything else as personal use?"

ATTORNEY GENERAL BOTELHO replied:

> One of the fundamental questions ... is the extent to which we wish to bring ourselves into conformity with federal law as a means for us at least to achieve unitary management in the state. And to do so, what's really required is to ... make sure that we have laws that would authorize the priority, which is for rural residents on the public lands to have first call for subsistence uses [on public lands]. ... The definitions are a little more complex than that, but that is really what we have to satisfy. ... And it's not in any way to denigrate other approaches that may be ways to deal with subsistence. They won't achieve that objective if they don't provide for the rural-resident priority.

Number 2206

REPRESENTATIVE FATE mentioned the necessity in any constitutional amendment [intended to comply with ANILCA] of having a description or determination of what is "rural." He asked what, if any, procedures or mechanisms exist to take into consideration changes in demographics or cultures, because what is rural now might not be in the future.

ATTORNEY GENERAL BOTELHO said the resolution doesn't address the issue, but suggested that either [the legislature] or the Board of Fisheries and Board of Game - if the matter is delegated to those boards, as has happened in the past - will determine what constitutes rural and nonrural areas in the state. He surmised that everyone appreciates that it will change over time, which he suggested has been a concern in rural Alaska as well, especially where there has been dramatic growth. He added, "I guess the fundamental point is, the determination of what constitutes 'rural' will first lie in your discretion as you develop implementing legislation, but that it is not a static thing; it is something that, as one casts out 20, 30, 40, 50 years and beyond, will be subject to change."

Number 2311

REPRESENTATIVE FATE requested confirmation that although initially it would be the state's responsibility, there would be [federal] judicial oversight, so that if the state decided to change the description of one area from "rural" to "nonrural," that could be overridden.

ATTORNEY GENERAL BOTELHO replied:

> That's correct if, based on the evidence presented to the court, the action by the state agency ... seemed to be arbitrary. Now, having said that, the cure is to make sure that deliberations are fair [and] the information that is collected is fairly weighed. Courts do not go out of their way to overrule agencies, whether it's in the federal system or the state system. There is a great deal of deference that is given to actions of governmental agencies.
>
> The test, really, is ..., in one formulation or another, whether government has been arbitrary. And that suggests some disregard for the facts that are before the agency, or whether there was any consideration of facts before making a decision that affects the public. And so, again, a determination about a particular area being rural or nonrural will be subject to review, but, again, a review that would be looking at the reasonable basis of the agency decision.

Number 2403

MR. SOMERVILLE responded:

> I disagree a little bit with the attorney general because I think the 9th Circuit Court [of Appeals] said, in one of our cases, that they owed no deference to the state. So unless something similar to [U.S.] Senator Stevens's amendments [proposed to ANILCA] were applied - which I think he required [that an] "arbitrary and capricious" standard be applied, and deference be given to the state - that unless that is done, the state's kind of in a bad situation. And I think the attorney general would also agree with me: we haven't won one subsistence case in federal court yet.

Number 2427

REPRESENTATIVE FATE said that was his reading on it. He indicated the 9th Circuit Court of Appeals has had numerous decisions overturned by the U.S. Supreme Court. He continued to express uncertainty with regard to what will, in the future, be rural or nonrural. He agreed with Attorney General Botelho that dynamic change will occur; as an example, he noted that the wilderness at Prudhoe Bay is no longer a wilderness.

ATTORNEY GENERAL BOTELHO suggested the system should provide for that change, but pointed out that it rests in [the legislature's] hands.

CO-CHAIR MASEK announced the presence of Representative Hudson and welcomed him. She called on Representative Davies.

Number 2473

REPRESENTATIVE DAVIES mentioned Tier II and offered his understanding:

> It seems to me that what's required in the constitutional amendment is, minimally, a permissive statement that allows the state legislature to adopt a law of general applicability that would be consistent with ANILCA. And if the constitutional amendment allows for other considerations in addition to that, that are not inconsistent with those laws - the ability to [adopt] those laws - then the constitutional amendment would be, in that sense, consistent with ANILCA.

ATTORNEY GENERAL BOTELHO affirmed the foregoing.

Number 2525

REPRESENTATIVE FATE inquired about the possibility that the changes [proposed in HJR 41] would be considered a revision and therefore require a constitutional convention.

ATTORNEY GENERAL BOTELHO responded:

> The issue of "revision versus amendment" is an important one to raise here. ... I would be glad to furnish you with a copy of an opinion done by my office that concludes that this is in the nature of an amendment, and not in the nature of a revision. And, again, the fundamental test that the Alaska Supreme Court has looked at is both quantitative and qualitative, that is, both looking at the number of places physically - really, you would look at ... changes that would have to be incorporated in the constitution - and also to look at the breadth of the amendment qualitatively, in terms of its impacts. ...
>
> Again, in our view, the ... discrete area that we're talking about, subsistence hunting and fishing, is a relatively limited area. It is certainly confined to Article VIII of the state constitution, the natural resources article. It is not in any way remotely similar to, actually, the case relied upon by the Alaska Supreme Court in looking at a parallel provision in the California constitution; the California case involved something in the neighborhood of 180 different changes.
>
> Having said that, I understand that people could differ on whether it is in the nature of an amendment or a revision. There's one sure way to find out, and that is for this legislature to act, putting a constitutional amendment on the ballot and allowing any citizen to challenge. The supreme court did not hesitate to act, ... and it actually split on that issue with respect to various propositions put before them. But that is the surest way to get this question resolved. ... I have my views; I think they're fairly informed, and my conclusion is that it is in the nature of an amendment. But the final arbiter of that

issue is the Alaska Supreme Court; the way to get the matter to the supreme court is to take action.

Number 2691

MR. SOMERVILLE agreed that the way to get something to the supreme court is to "put something in front of them, which we've done on a number of other cases."

REPRESENTATIVE FATE said he would appreciate a copy of the brief that Attorney General Botelho had written on that subject.

CO-CHAIR MASEK, hearing no further questions, announced that the committee would take public testimony, limited to three minutes per person.

ATTORNEY GENERAL BOTELHO informed Co-Chair Masek that he'd intended to have the governor's presentation spread among three speakers. Although he'd covered some topics, he expressed hope that both Mr. Stiles and Mr. Gross would be given an opportunity to complement his own presentation.

CO-CHAIR MASEK acknowledged that they had signed up. She announced the intention of hearing from people who were present in Juneau as well as those on teleconference. She invited Mr. Stiles to testify.

Number 2776

ROBERT B. STILES, President, DRven Corporation and Resource Development Council for Alaska, Inc. (RDC), came forward, noting that he was a member of the drafting committee for HJR 41. He expressed strong support for HJR 41 and highlighted the importance of the subsistence issue. He explained that he'd gotten involved in the drafting committee for two reasons: first, he was asked; second, it was an issue he'd given a lot of thought to, in part because of his involvement in the settlement of the mental health land trust issues. He told members:

> The majority of all activities related to exploration, development, production, and even transport to market of Alaskans' resources occur in rural areas. So what goes on in rural areas, and the issues ... that are of concern to rural areas, are extremely important to anybody in the resource development business.

> Now, subsistence ... is predominantly a rural issue. And it makes Alaska somewhat unique, ... which is important to preserve. The inability of Alaska to come to grips with how to handle these unique characteristics also makes ... Alaska unique, and that's bad ... in the sense that it creates uncertainty on the part of folks that might be looking at making an investment in some development project in Alaska.

Number 2880

> Now, ... is the uncertainty so great as to make somebody walk away from a really good deal? Probably not, but there aren't very many really good deals out there that stand up and stand a test to where they just blow everybody else ... out of the water. So anytime someone sitting in some office distant from Alaska looks at an array of investment opportunities in front of them, they're going to weigh the risks versus the rewards for that investment. And the ... inability of this state to come to grips with this subsistence issue creates uncertainty; that causes risk. And I can't prove to you that something didn't happen because of it - because it's very difficult to prove something didn't happen - but I can assure you that that is cranked into folks' decision-making process when they're making a decision to make an investment in Alaska versus an investment in Indonesia or South America or someplace else. ...
>
> Does that mean everybody's going to pull their money out of the state? No. Does that mean that there won't be any additional investment ... in Alaska in the resource development area in the absence of [resolving the issue]? Probably no. [Will it] be the maximum amount that we might be able to see? No; that one is clear.

MR. STILES called dual management - no matter what is being managed - a "prescription for disaster," especially when the dual managers' prioritizations of management principles differ.

TAPE 02-24, SIDE B
Number 2959

REPRESENTATIVE FATE mentioned "risk capital" and asked whether Mr. Stiles was speaking of the deleterious effect that dual management has on business.

MR. STILES answered, "Not necessarily. Dual management is a prescription for disaster whether you're talking about managing money or managing caribou."

REPRESENTATIVE FATE offered his understanding that Mr. Stiles was saying it is a disincentive for business. He requested clarification about whether Mr. Stiles' discussion related to risk capital, retail, or the general business climate in Alaska.

MR. STILES replied that he was speaking predominantly of risk capital.

Number 2901

REPRESENTATIVE FATE observed that some [for-profit] Native corporations, in particular, have evolved into large corporations that many Outside venture capitalists are combining with for certain projects. He asked Mr. Stiles how this affects other [venture capitalists] who don't choose to partner with the Native corporations; for example, does this force them to go to Indonesia or somewhere else? He also asked whether Mr. Stiles had any figures or substantiation with regard to whether it is, in fact, a deterrent to risk capital.

MR. STILES first explained that when venture-capital enterprises are joining with the Native corporations in investments, those investments generally aren't in Alaska, although some are; he questioned whether that relates to what is being discussed here. Second, he reiterated that it isn't possible to prove that something didn't happen for a particular reason; however, he offered his experience - with national and international business deals and investments in resource development - that this clearly is a risk factor in the overall evaluation of how a deal in Alaska compares with a deal someplace else. He cited an example and explained the difficulty of doing business when there are unresolved problems; he suggested a potential investor will expect those problems to be resolved before going forward, and that companies from other countries will be waiting in line. He continued:

> You've got the same sort of circumstances - somewhat different, but similar - with regard to subsistence, only it's on the front end of the deal as opposed to

> the back end of the deal. It's not when you're trying to sell the product; it's ... when you're trying to sell the deal, when you're trying to raise money to invest in some sort of a deal here. ...
>
> It doesn't make sense to try to sell a deal into an area where you know that there's going to be this unquantifiable risk factor up there that you're not going to be able to explain to the guy, and he's certainly not going to be able to understand it. And, clearly, if we who live here can't solve the thing, it's not particularly reasonable to expect that somebody else is going to be able to figure the way through, too.

Number 2717

REPRESENTATIVE HUDSON asked Mr. Stiles whether it is discord among Alaskans that creates the problem with regard to decisions about whether to invest in Alaska.

MR. STILES indicated that isn't a significant factor. Rather, it is uncertainty about issues relating to "management of resources that move from federal land to state land," as well as dual management. He said:

> Is it so severe that I would walk away from a really good deal? Well, it might be, because it depends on the deals I'm comparing it against. All of ... the development in Alaska ... is not operated in a vacuum. It has to compete against other investments in other parts of the country, as well as other parts of the world.

Number 2617

CARL ROSIER, Territorial Sportsmen, Inc. (TSI), came forward to testify, noting that TSI has about 1,400 members, primarily in the Juneau area but some in other Southeast Alaska communities; first formed in 1945, TSI has been continuously active in fish and game issues since then. He told the committee:

> As an organization, TSI has in the past and continues to support subsistence use of fish and game resources as a high priority for residents of the state. We do not, however, support the division of our state into rural and urban populations, or predicating the

allocation of these resources based on whether you live in the right zip code.

We strongly oppose HJR 41. This bill does nothing to resolve the issue among Alaskans except commit us to the divisive and unconstitutional provisions of ANILCA in exchange for a change in the state's constitution that classifies 80 percent of Alaskans as second-class citizens in terms of access and common use of fish and game.

Passage of a bill such as HJR 41 does not bring back state management - something we all want and support - but rather ensures the continuing erosion of state management under the federal provisions of Title VIII of ANILCA. Why we would want to vote to assure additional federal control that HJR 41 provides for us is ... beyond all reason.

State management is not state management when you have federal court oversight of what's going on out there; it just simply isn't, and, as I said before, ... we'll continue to see, over time, erosion of the state's role in that management program, to the detriment of the resource.

Number 2518

MR. ROSIER continued:

This bill begins the "slippery slope" process of allocating resources based on race, something that we do not do in any other part of our state constitution. Under this bill, any restriction on the taking of fish and game or other natural resources would trigger the rural subsistence priority. Resource shortage is not the standard, but simply regulation. Virtually every fishery and hunt in Alaska currently has regulations, so all [users] except rural subsistence users start off as at least second-class citizens, and perhaps even lower, ... in that it appears provisions of HJR 41 establish a second tier of urban subsistence users that would have priority, again, over the majority of Alaskans.

While we agree with the state supreme court that there are urban individuals that qualify as subsistence

users, they should be accorded access based on criteria that [are] fair and equitable to all. The blanket standard of "customary and traditional use," so long as it doesn't conflict with rural users, sets up a confusing, expensive, and impossible enforcement scenario that will ... indeed threaten Alaska's resources.

HJR 41 was, in our view, fatally flawed from the beginning. After failure of more special sessions than I care to remember, we end up with the same approach that has failed so many times before, as developed by the administration, starting with the subsistence summit by bringing together a hundred people for a two-day conference to solve the nagging subsistence issue that had previously been worked on by others - other administrations - for months and even years; it was the height of political arrogance in terms of, quote, "developing an Alaskan solution."

Number 2427

MR. ROSIER continued:

There were some well-meaning people that were part of the subsistence summit, but through careful selection, the outcome was preordained to be the vote on the rural priority. The drafting or working group followed the summit, minus any input from ... those that might disagree or help in providing understanding of the concerns for the second-class citizens they were creating; [they] fell right in line. And you have the same - no, a lesser - plan before you than previously considered. This is because there is no mention of the hideous provisions of ANILCA ... that have led us into this dilemma that has divided us so badly since 1978.

No fair and equitable solution is possible without significant changes to ANILCA. If a constitutional vote is determined to be necessary by the legislature, that vote must be ... coupled with the effective dates of ANILCA changes. Prior to putting the issue out for a public vote, voters must be given the real information on what they are voting for. We are not voting to give Katie John fish; we are voting on what our future Alaskans will be able to enjoy, in terms of

> our resources, on an equal footing with their neighbor, and whether the state or the federal government will manage our navigable waters.

Number 2361

REPRESENTATIVE HUDSON referred to equal access, equal rights, and common use, which all are embodied in the state constitution, "making us all equal citizens." He asked Mr. Rosier whether he or his group foresee any associated loss relating to those provisions if the constitution is amended as proposed [in HJR 41]. He recalled hearing concerns that this resolution would open the door and could lead to [inequality] with regard to rights for individuals.

MR. ROSIER replied:

> Anybody can speculate on ... what somebody's going to do in the future on this. But ... the racial connotations alone that are associated with [the language "indigenous people" in] the introductory paragraph of this particular bill, I think, puts us on a slippery slope. I think ... that begins to bring in ... the idea that ... race ... is an element that has to be considered. And under our constitution, I find that to be very obnoxious and quite irresponsible to, in fact, be putting that forth. ...

MR. ROSIER also expressed concern that because it says "may" in that particular paragraph, he foresees "the lawyer profession, again, getting rich ... off of defending those particular issues down the road."

Number 2234

REPRESENTATIVE KERTTULA expressed admiration for Mr. Rosier's work, especially when he was commissioner of ADF&G, and said she has enjoyed working with him. With regard to the issue of court oversight, she recalled cases on other issues, when Mr. Rosier was commissioner, where the court had stepped in. She asked whether it isn't true that in any agency there is always the court, in one way or the other, overseeing [the agency], because someone always has the right to go to court. She added, "We're bringing it as one of our major points here, but, in reality, it could become a point, really, in any situation. Wouldn't you agree that really you run that risk - almost any agency - with resource issues?"

MR. ROSIER replied:

> With resource issues, you certainly do. I think that ... it's the double-jeopardy part of this ... that I object to ... so vehemently on this. And by simply passing the state constitutional amendment on this, we don't get out from under the double jeopardy. We still have the state courts involved, ... and in addition we get the federal courts involved. ... What have we in fact gained by ... giving up, under the constitution, that right ... in order to just comply ... with the provisions of ANILCA? Courts are there ... to be used, but the double-jeopardy thing as far as the state is concerned ... is a bad deal for Alaskans, in my book.

CO-CHAIR MASEK recognized the presence of Representative Porter, Speaker of the House, and welcomed him.

Number 2125

REPRESENTATIVE FATE referred to the suggestion that a constitutional amendment might not remove the federal government from management of fish and game [in Alaska]. He asked, "Is that based on your experience as a commissioner or former commissioner, or is that based on a legal opinion?"

MR. ROSIER answered:

> That's based on my previous experience, because we went through this same chain of events - as the feds came in on the subsistence priority under ANILCA - on game. And ... they were glad to see us around the first year that they had assumed responsibility. There was money that came to the department, but that was quickly phased out. ... As we made the feds smarter on the various issues on this thing, the money began ... to diminish, and ... you have the situation that you have today in which the feds are involved in all of the game decisions. ... They're just getting started on fish at the present time, Representative Fate.

Number 2062

REPRESENTATIVE KAPSNER turned to the issue of racial implications. Referring to page 1, line 8, she noted that it mentions indigenous peoples; she also referred to page 1, line 14, and read from subsection (b), beginning at line 11. She then said:

> The way that it reads, it just seems like the first reference to indigenous people was more of a nod, and it could almost be substituted to read, ... the "Territorial Sportsmen." It's not necessarily allocating a resource to the Territorial Sportsmen or to the indigenous people. It's more of, I think, a recognition of the compromises that have been made, ... and their tradition of hunting and fishing.

MR. ROSIER responded:

> My feeling on that particular paragraph, of course, was: Do we have to put "indigenous" at all? Subsistence is important to all Alaskans. ... That paragraph could just as well have read, ... "We recognize the importance of subsistence to all residents of the state."

Number 1939

CO-CHAIR SCALZI asked Attorney General Botelho whether [HJR 41] is "a de facto local option."

ATTORNEY GENERAL BOTELHO answered:

> To the extent that it talks about rural areas, I think the answer is yes. It's not local in the sense that it is intended ... to cover all of Alaska. We ... would expect to maintain the distinction between rural and nonrural areas of the state, unlike some concepts that would allow for subsistence takings, uses, in urban areas as well, presumably, because there is not a similar limitation.

CO-CHAIR SCALZI asked whether it is essentially a local option in one sense.

ATTORNEY GENERAL BOTELHO replied, "We envision that ... rural Alaska would be, in essence - by, ... presumably, the boards of fish and game, again - divided into subsistence areas that would

be reflective of the customary and traditional uses and patterns, species by species."

Number 1834

REPRESENTATIVE DYSON said to Attorney General Botelho:

> My understanding is, we got into this dilemma because the federal government passed a law that required a kind of discrimination amongst users that was not constitutional under our constitution. ... If that's true, it seems to me that it ought to be very disturbing to anyone who feels like equal rights, equal access, and equal protection are important; it ought to be really disturbing to want to give away a portion of that because we've got this federal-management gun aimed at our heads. And I know enough of you and your record to know that equal treatment [and] equal rights ... have been very important to you. ... How do you rationalize that, or how do you deal with that apparently, to me, ... profound philosophical dilemma that we are faced with?

ATTORNEY GENERAL BOTELHO responded:

> I don't see that kind of dilemma. I start first from the recognition that it may be the infirmity of being a lawyer that puts me here, but recognizing that our constitutional system, in many respects - certainly, at one point - [is] unique: a federalist system that tries to apportion power between the federal government, the central government, and the states, provided that the constitutional laws of the ... central government would reign supreme, and that those would have priority ... in the land.
>
> When we look at ANILCA itself - one example of a federal law - ... I don't think there are many lawyers who would dispute the power of Congress to provide for a rural subsistence priority on federal lands. (Indisc.) start with that proposition. One might challenge it; people have tried, I think, unsuccessfully because Congress also - and if one looks at the findings ... in Title VIII - went through a very rational process in terms of trying to address what they saw as needs of both rural Alaskans and Alaska Natives, and fashioned this particular remedy,

to basically say it is federal policy that, in this rough class we call "rural," those people should have the first call on resources for subsistence uses.

Number 1635

ATTORNEY GENERAL BOTELHO continued with his response to Representative Dyson:

The State of Alaska has its own constitution, as part of this federal system, and it's able to enact laws based on that constitution. It sets up a framework ...; as long as it's consistent with the rights guaranteed in the federal constitution, [it's] free to continue its own experiment.

In this particular case, we have a situation where a federal law provides for this rural preference. It does not require the state to administer it ... anywhere, but if it chooses to do so, it may do so, as long as it has laws that are appropriate. This legislature enacted such a law in 1986; it was struck down in 1989 as being [inconsistent] with our ... Article VIII, as a matter of state constitutional law, not as a matter of federal law - again, because, I think, ... even though the complaint raised federal law issues, the supreme court properly chose to make its decision solely on the basis of state law.

Number 1559

I am not, number one, troubled by the idea that certain Alaskans should get (indisc.) over other Alaskans; it happens in a variety of contexts, whether we're talking about age -- who may, for example, have a driver's license, who may drink; we make those kinds of distinctions all the time. We ... know that there are 18-year-olds who can properly manage alcohol, but we make a policy choice that, given our overall experience, they shouldn't. And we make the same decisions about judgment in terms of who may drive a car; we know that there are a lot of 25-, 35-, and 55-year-olds who probably shouldn't have that instrument, but, as a matter of law, we've decided that we will allow people to have the privilege to drive, starting at 16, until proven otherwise.

> So we make some rational decisions. We make some gross generalizations about who should be in a class and who shouldn't. And we look to see whether there's a rough fit. And there is ..., in a constitutional scheme, a sliding scale in terms of the higher the level of the right, perhaps the more structured and the more close the fit must be.
>
> But in this particular area ... the right to hunt and fish - and when - is not, in the constitutional scheme of things, ... high on ... that ladder of rights that citizens have. And in that respect I think Congress has acted properly. I think it's appropriate for the people of Alaska to look at making a cut that would allow for that kind of rough justice - that is, to provide a priority to rural Alaskans. The amendment that we've proposed would, however, allow the legislature, if it chose to do so, to ... cut it even more broadly.

REPRESENTATIVE DYSON respectfully suggested that equating this with the age limit for a driver's license trivializes the argument. He added, "We just see the U.S. constitutional protection - the equal rights and equal protection - very differently. And your experience and credentials are far better than mine."

Number 1393

REPRESENTATIVE FATE said:

> Aside from the preferences, there's been, certainly, the discussion - I don't think any legal opinions on it - that ANILCA, ... Title VIII, may have some federal constitutional problems. It's never been, I don't think, tried, regardless of this. But we have had a decision by the state supreme court. Why have we not tried to solve this case? Even though the Congress does have plenary powers over the Native people, why have not we tried to get this resolved early on, instead ... of letting it linger, in the highest court of our land [and] get finality to it?

ATTORNEY GENERAL BOTELHO replied:

> Again, because there has been ... no successful challenge to the constitutionality of ANILCA itself.

Even the Alaska Supreme Court's pronouncements on ANILCA have not gone to the constitutionality of the Act itself; it has gone simply to ... what is the physical reach of the Act within the state of Alaska. And on that point it disagreed with the 9th Circuit, but not over whether Congress had the power to enact ANILCA or whether it had applicability to public lands in the state.

No court has concluded that Congress didn't have the authority, nor that it did not exercise the authority to ... provide the priority on public lands in Alaska. The debate has been what constitutes public lands, and did Congress intend, in the case of navigable waters, to include them in that definition or not. And the Alaska Supreme Court said, "In our view, it didn't include the navigable waters of the state," and the 9th Circuit [held] a contrary position. But it would not have resolved the basic question of the dual management in the state; there would have been dual management - it continues to be, regardless of the outcome. And we would not have resolved the question of [the] constitutionality of the Act itself.

Number 1236

It's not been a question of the opportunities. There have been attempts to challenge. Judge Holland, many years ago, [in] 1993-1994, did rule that ANILCA was constitutional. That matter was appealed to the 9th Circuit; the 9th Circuit vacated that decision, concluding that the parties didn't have standing to raise the question. But the state - and not this administration and not the last - [didn't] ever challenge the actual constitutionality of ANILCA itself, and that's because [there was] very little question but that it was constitutional.

Number 1170

REPRESENTATIVE DAVIES offered his belief that putting this, or another amendment with a rural preference, on the ballot wouldn't be tantamount to repealing the equal access clause of the constitution. He requested that Attorney General Botelho comment on that, as well as on "the general proposition that there are many clauses in our constitution that are at tension with one another," and the balancing among those.

ATTORNEY GENERAL BOTELHO responded that he thought Representative Davies' description was apt: there are obvious tensions built in, and it is the role of the executive [branch] and ultimately the courts - with the legislature playing a role as well - to try to reconcile those. He cited limited entry as an example dealing with resource and equal access issues where the state discriminates. He pointed out that the legislature, in dealing with that highly important allocation issue, had put before the voters a constitutional amendment to provide for limited entry as a means to protect the resource. It was adopted, although it was challenged on the grounds that it somehow violated other provisions of the natural resources article. He explained, "The supreme court said they need to be read in harmony - we try to harmonize. There's been a limitation imposed by the people of Alaska on how that will be exercised, but it's entirely proper." Thus not everyone has the right to participate in certain fisheries; it is a constitutional prerogative, authorized by the people of Alaska, "much in the same way that an amendment to our constitution with respect to subsistence might work - it will be harmonized," he concluded.

CO-CHAIR MASEK invited Av Gross to testify. She indicated the committee had information he'd provided.

Number 0949

AVRUM GROSS, Partner, Gross & Burke, PC, came forward to assist in the presentation of HJR 41, noting that it was difficult to take nine days of hard work [in formulating HJR 41] and provide insights in the allotted time. He explained to members:

> I served on the drafting committee that drafted the constitutional amendment you have before you. I want to stress that we drafted this constitutional amendment establishing a rural priority for subsistence rights not because we wanted to create any second-class citizens in Alaska or create any racial distinctions.
>
> We drafted a subsistence preference, first of all, because there is a valid federal law that says, on all federal lands in Alaska, that people who live in rural communities will have the first right to take fish and game for subsistence purposes - before any other uses are allowed - that that is the most important right,

that when fish and game is scarce and ... everybody can't have what they want, the first right will be for rural residents to take fish and game. And if the state doesn't conform with that law, the federal government will manage all the fish and game on federal lands for subsistence purposes.

Now, for years this has been kind of an academic struggle: will they or won't they, will they or won't they; [U.S. Senator] Ted Stevens has held it off for years. And then finally one day the feds arrived; they are here now. ... They are managing subsistence resources on federal lands, which is 40-50 percent of Alaska. They are spilling over into other fisheries and other management systems. It's creating serious, serious problems. And unless and until the state brings its law in conformity with federal law, they will stay. So that was the first reason we drafted this: so that the state would regain control over fish and game management.

Number 0810

MR. GROSS continued:

And the second reason we established a rural priority in constitutional legislation was because it made sense. ... I have lived here for over 40 years. I love to hunt and fish. It has been part of my life as an Alaskan. And the fact of the matter is, most of my friends hunt and fish. It's part of our lifestyles. I don't know anybody who disagrees with the proposition that if fish and game is scarce, the first people who should get a crack at it are people who live in rural, remote areas of the state, who depend on it to live. ... We can argue ... what is rural and what isn't rural, and you can give me a million anecdotes about how rich lawyers in Bethel are hunting and poor Natives in Anchorage are not. But the fact of the matter is that, as a general matter, it makes sense. ... And the 11 people on the drafting committee all believed it made sense.

Number 0747

Now, it's not a racial thing. ... There was an effort when ANILCA was passed to make it a racial thing, to

just give a Native preference in the Bush. And Governor Jay Hammond went down there and testified and pleaded with Congress not to do that. And ... Congress eventually agreed that it would be a rural priority. Sixty percent of the people who live in rural Alaska are white. So this isn't a Native priority. This is a rural priority for people who live in small towns in ... rural Alaska. ...

The amendment we drafted, in its first paragraph, recognizes Native people. The reason we did that was because there was a bitter fight on the drafting committee. ... The AFN [Alaska Federation of Natives] and some of the representatives on the committee wanted to have a tribal recognition for subsistence rights. This was settled when ANILCA was argued in the first instance, that it would not be tribal, would not be Native, would be rural. So the compromise [in drafting HJR 41] was to at least recognize that the subsistence lifestyle in Alaska was fathered by the Native peoples. We all use it now. We all depend on it. But it was at least the history. It's tied up with Native people, so we recognized that.

The second thing is, we drafted a constitutional amendment which allows rural priorities in the areas where they exist. In other words, just because you live in Bethel doesn't mean you can go hunt in Kodiak. You have to take the game in the area where you live, where you have traditionally done it.

And third of all, because we believed subsistence was an Alaskan problem - not a Native problem or a rural problem - we've specifically recognized in the constitutional amendment the right of the legislature to recognize other subsistence rights, so long as they were consistent with federal law, ... which required a rural priority.

Number 0573

MR. GROSS concluded:

I urge this committee and the legislature to grapple with this. What we did is not the "be all and the end all," I'd be the first to recognize; I have criticisms of it myself. It was a consensus position that we

> tried to reach. And we did. The whole group signed off on it.
>
> It is very difficult. Issues of "shall" and "may," oversight, things like that, all have to be thought out. It will be difficult. It was very difficult on the committee. But ... we finally did it because we recognized that the alternative was unthinkable. The alternative was failure, ... which would leave Alaska permanently divided into rural and urban, Native and white, and would leave management of fish and game on federal lands basically in federal hands. And we didn't want to see that happen, so we kept working toward it. And I urge ... the committee to stay with it. It's tough. I'm the first one to know; I didn't think it would be this tough, but it is. But good luck with it.

Number 0490

REPRESENTATIVE DYSON, noting that Bethel, Dillingham, and Barrow are on the verge of becoming urban under the federal definitions, asked whether [the drafting committee] had considered that. He also said [former Governor] Hammond thinks there is "a fair chance that the proximity designator, instead of rural," would allow the Secretary of the Interior to certify that proximity to the resource "meets the requirement ... and spirit of the [ANILCA] Title VIII rural requirement." He requested that Mr. Gross comment on both those issues.

MR. GROSS answered that he honestly doesn't understand the distinction. He explained:

> If you have a rural community ... and you say they can continue their subsistence uses in the area where they have traditionally exercised those subsistence uses, ... which is in the area around the villages, basically, that is proximity. ... It means that if they're going to exercise a subsistence priority, they must do it in Tuluksak instead of going down to Angoon and loading up on deer for the year.

REPRESENTATIVE DYSON suggested that using "proximity" instead of "rural" would protect Dillingham, Barrow, and Bethel from disqualification because of becoming urban through population growth. It also would allow the people of Eklutna, for example,

despite the encroachment of Anchorage, to fish in the camp they have used for a thousand years,

Number 0323

MR. GROSS replied:

> We couldn't solve that. ... We struggled with that. We struggled with the surrounded villages, we struggled with the issues created by them, and we couldn't get there. And finally we came to the conclusion that the best we could do was ... - to meet the basic requirements of federal law, which was a rural priority - to establish a local-proximity concept in relationship to that rural concept, which is, "They have to stay around where they were doing it," and then authorize the legislature to grant other kinds of subsistence rights, through its own wisdom and its own debate in the future, because it would grapple with communities like Eklutna and things like that.
>
> And the more we tried, the more complicated it got. And we were trying to do the right thing. And finally ... we came to the conclusion that all we could really do was to say, "Legislature, you have the power to do this, so deal with this if you wish," without trying to preclude them and write it into a constitutional amendment, because ... who knows how it would come out.

Number 0222

REPRESENTATIVE PORTER asked whether it is a fair statement that the problem facing the three communities - Dillingham, Bethel, and Barrow, which most would consider rural - can only be resolved by federal law.

MR. GROSS answered:

> As I understand it, ... "rural" is presently defined on a federal administrative level, where they make certain presumptions about size, ... and then certain communities are, by definition, rural; certain communities are in the middle; and certain communities are outside of rural. This is one of the reasons, of course, why ... I'm so strongly in favor of the state

doing this, because it seems to me that the state is in a whole lot better position to make decisions on what really is a rural community and what isn't.

Number 0113

REPRESENTATIVE PORTER asked whether passage of this constitutional amendment would allow the state to overcome the size designation that, to his understanding, is in regulation at the federal level.

MR. GROSS replied:

Probably not. We would still have to deal with the issue of defining rural, and the courts have ruled, at least so far, that "rural" constitutes size of community, rather than necessarily location, and that if Bethel reaches a point -- you know, it was interesting you raised this, Mr. Speaker, because I remember some of the Native representatives on the drafting committee were seriously concerned about this.

And I remember at one point, I think it was Byron [Mallott] who sort of leaned back and said, "You know, at some point ... these rural communities become urban. ... There just isn't anything you can do about it." ... They may have large Native populations, they may have one thing or another, but ... when they reach a certain size, you can't call them rural anymore. ... You can create subsistence rights for them, which is the second thing we tried to do, to authorize the legislature to deal with communities that become urban ... [ends midspeech because of tape change].

TAPE 02-25, SIDE A
Number 0001

MR. GROSS continued:

... which is something it seems to me you can do, first of all, through the state defining what is rural - which is not written into federal law; it's an administrative decision - by the state making that decision, and, second of all, by the legislature providing secondary priorities for subsistence which don't conflict because they're in the area of Bethel

and Dillingham and places like that; they don't conflict with other areas, so they don't invade the rural priority, but they make sure that that becomes the first use. That's ... the best we could do with it, I think.

CO-CHAIR MASEK asked how [HJR 41] proposes to determine the history of use of the resource.

MR. GROSS answered:

There's nothing written in the constitutional amendment ... that describes that. It talks about customary and traditional use of a resource. And there is in state law right now a lengthy definition of customary and traditional use, which is in regulation, which has to do with generational use of the resource, the fact that people have depended on it. ... You wouldn't want me to read it, believe me; it's a very long one. ...

One of the debates we had on the commission, for instance, was amending ANILCA; ... that went back and forth on the commission. And there were people who feel that part of this solution to this problem is to amend ANILCA to bring the definitions of ANILCA, of customary and traditional use, for instance, to be consistent with the ones in state law. ... Other people feel that since the Secretary of Interior must certify that the state is in compliance, that if the state adopts these definitions and then the Secretary certifies that we're in compliance, that that's enough - that you don't have to actually go and amend ANILCA, because what the Secretary is doing is saying, "Your definitions conform with ANILCA." But ... that's part of the overall solution, and we were just trying to do the constitutional amendment to help you ... and do some of this work for you.

Number 0242

CO-CHAIR MASEK remarked, "Well, I think on part of the resolution itself ... it's only taking into account for the lower priority."

MR. GROSS responded, "Customary and traditional subsistence use, and then later ..."

CO-CHAIR MASEK interjected, "Rural comes first, then."

MR. GROSS replied, "Yes, it does. Rural must come first."

Number 0318

GEORGE YASKA, Tanana Chiefs Conference, Inc. (TCC), testified via teleconference, specifying that his comments would reflect the position of TCC. He told committee members:

> The Tanana Chiefs Conference is a consortium of 37 tribes in the Interior of Alaska. It covers a very large area, from the Kuskokwim River and the Yukon River. And the primary subsistence issues in this region center around moose and the taking of moose, so it's ... a fairly hot issue. We work towards and strive towards sound management of sustained yield so that we may never have to go towards Tier II or a subsistence shortage. We're always managing and attempting to manage with fish and game for bounty and a bountiful resource.
>
> However, things don't always go our way. And sometimes we do need to go to a Tier II system. And our constituents or tribes developed a position last month, at the annual meeting of Tanana Chiefs, that did not support HJR 41 in its present form; they did pledge, though, to continue working through the process.

Number 0496

MR. YASKA continued:

> We will probably always attempt to seek a tribal preference; it's always been rather our preference to look for that, and we certainly favor a tribal preference or Native preference. Some would call it a racial preference; I guess we see it slightly different, having a longstanding relationship with Congress and the United States government.
>
> But that said, we speak to the specific issues found in HJR 41. And we're dismayed to find that we step away from a full-time priority as we find today in current state law. HJR 41 steps away from that, and

> would only provide it during times of shortages. And so we see ourselves, I suppose, heading in the wrong direction. Our tribal folks are dismayed, disappointed by this. We've been asked to support this by the hardworking people on the committee.

MR. YASKA reiterated concern about going in the wrong direction and concluded, "So we'd like to work with you to improve the language."

Number 0634

MR. YASKA, in response to Co-Chair Masek with regard to what sections TCC doesn't support, cited [subsection] (b), which only provides a priority when necessary. He explained, "We prefer the priority as it is now, I believe, in state law: a full-time priority."

CO-CHAIR MASEK asked Mr. Yaska whether there are other areas TCC isn't happy with.

MR. YASKA replied:

> Well, we certainly appreciate [subsection] (a) that would require the legislature to produce a priority for subsistence. And we just aren't very clear on [subsection] (c) about what that means, when this would authorize the legislature to grant lower preferences for subsistence uses. We aren't sure exactly what that means on the ground in terms of regulation and rules. ... It's a bit ambiguous there, so we're not sure what to make of that.

Number 0861

DICK BISHOP, Alaska Outdoor Council (AOC), testified via teleconference, noting that AOC has always supported personal and family consumptive use, "including that which is perceived commonly as subsistence uses." He told members:

> But we maintain that, for those people who rely on personal and family consumptive use for a large part of their livelihood, those people who live off the land can be properly and adequately accommodated without a constitutional amendment that benefits a particular class or category of Alaskans. Therefore, the council opposes HJR 41 and similar proposals.

> We maintain, in fact, that a constitutional amendment isn't needed at all to provide for people who live off the land. It has been done, and it continues to be done under existing law and constitutional provisions. However, the subsistence issue has been exploited by rural-priority advocates as a means to achieving broader political goals. As part of this strategy, the legislature is routinely criticized for not enabling irrevocable protection of subsistence uses.
>
> The [AOC] understands that the legislature may wish to put that criticism to rest, even though it is not necessary to ensure the continued opportunities for subsistence uses and lifestyles. [If] the legislature chooses, it can take the lead on this issue. We've pointed out in the past that the best alternative is for the legislature to clearly demonstrate that subsistence uses of fish and game for personal and family consumption are provided for under Alaska's constitution without resorting to discriminatory criteria such as rural residency, specific culture, or ethnicity.
>
> Having done so, the criticism referred to earlier - that of not providing that protection - would be rendered baseless, and then the legislature could assist our congressional delegation with ANILCA amendments that remove the taint of discrimination, ensure sound management, and restore Alaska's equal footing with other states in the management of its fish, wildlife, and waters. But conforming to the current Title VIII of ANILCA will not accomplish any of those goals. ...

Number 1045

MR. BISHOP told members that of the proposed constitutional amendments [originally scheduled to be heard that day], only HJR 11 and HJR 29 offer the possibility of providing for subsistence uses without compromising the equal protection and common use provisions of Alaska's constitution.; the rest would enshrine discrimination and divisiveness, rather than eliminate them. He offered his belief that nothing would contribute more to the so-called urban-rural divide than "institutionalizing it in the language of our constitution." He continued:

> There are a number of provisions that, if the legislature chooses to take the lead on this, ... need to be addressed. They include the same standard for any Alaskan who wishes to qualify for a priority use; allocation based on an actual resource shortage, rather than all the time; priority use applies only to fish and game ..., not to all wild renewable resources -- let me point out that the governor's proposed amendment, HJR 41, applies not just to fish and game, but to all wild renewable resources, the same terminology as in ANILCA, and that's a [problem].
>
> So, just to wrap up, let me point out that the legislature is duty-bound to uphold the trust responsibility, as the Alaska Supreme Court has said: the duty to manage the fish, wildlife, and water resources of the state for the benefit of all the people. And we urge the legislature to resist the tempting illusion that if you approve a discriminatory rural-priority amendment, the conflict and divisiveness will end. Please do not patronize special interests that, solely for their own benefit, would willingly have the federal courts dictate the management of fish, wildlife, and other wild renewable resources in the whole state.

[Co-Chair Masek called upon Jim Adams, but was informed by the Nome Legislative Information Office (LIO) that he'd had to leave.]

Number 1270

AUSTIN AHMASUK testified via teleconference. He informed the committee that he approves of most of the body of HJR 41, recognizing it as an attempt to place subsistence within the constitution, and to address some longstanding and difficult issues [by establishing a subsistence priority] that he believes should be provided to rural people. He said he doesn't believe [HJR 41's] permissive nature addresses his concerns, however. He explained:

> I feel that an exclusive amendment addresses concerns that I have regarding subsistence. Very simply, when we eat our foods such as aged walrus liver, or when we eat moose meat and seal oil, or when we make akutaq from moose fat or caribou fat, those are foods that ... I have lived with all of my life. ... We eat them;

that's exclusive. We were born with them. ... As a previous speaker said regarding the establishment of those utilizations of food, we started them. We're still using them. We want to have them. ...

I want to see exclusive use of those resources, because, frankly, having a permissive constitutional amendment leads to problems that we experienced in this region regarding ... low populations. People speak of sustained yield. Under ... current permissive laws such as Alaska Statute 16.05.258, the subsistence priority, we still have problems in our region regarding moose, regarding fish. We have the only Tier II fishery ... in the whole state of Alaska here, because of permissiveness. It needs to be exclusive.

Number 1448

LARRY MERCULIEFF, Rural Alaska Community Action Program (RurAL CAP), testified via teleconference, noting that he would speak not about specific sections of HJR 41, but in the general sense about "these issues that have a direct bearing on the disposition of HJR 41, ... or any of the subsistence bills, for that matter." He told members:

The best thing that could happen with regard to subsistence would be for Congress to repeal the section of the Alaska Native Claims Settlement Act [ANCSA] that extinguished Alaska Natives' aboriginal hunting and fishing rights. Everything in federal and state law today is based on the false premise that subsistence hunting and fishing activities by rural Alaskan residents were the focus of Congress's concern in enacting Title VIII of ANILCA. In fact, the true focus of congressional concern was to protect the cultural integrity of Alaska Natives.

Madame Chairman, the controversy over subsistence in Alaska is not about an urban-rural divide; it's not about zip codes; it's not about where Alaskans hunt, fish, or gather food; and it is not about race. This issue is about the right of Alaska's indigenous peoples to support themselves, their families, [and] their communities as they have for thousands of years.

Management of subsistence hunting and fishing on the 60 percent of Alaska that is in federal ownership has now been in federal hands for 30 months. Alaska Natives are asking this question: What is so bad about federal subsistence management anyway? The opponents of state subsistence-protection [laws] have sharply criticized the federal bureaus that are responsible for implementing the federal subsistence protections.

The rallying cry is that Alaska's fish and game should not be managed by outsiders or from far away in D.C. And I'd like to remind everyone that the great majority of people who do the day-to-day, hands-on work in the federal subsistence-management arena are Alaskan people. The longer the federal management has continued, the more you hear Alaska Native people asking another question: What is so great about ... state subsistence management anyway?

Number 1579

MR. MERCULIEFF continued:

Finally, ... I want to address the subsistence issue in the same terms as longtime opponents of the state law granting a priority for subsistence uses over all others. Alaska Natives have often been accused of seeking special rights to hunt fish and gather food in our customary and traditional ways. Why is it that these, quote, unquote, special rights are proper for others ... to possess, but not Alaska Natives? And I speak here, for example, of the right of oil companies ... to bid on mineral leasing tracts in certain areas of Alaska; the right of limited entry permit holders, and only such permit holders, to fish in certain waters of Alaska; [and] the right of certain factory processors, and only these processors, to take bottomfish off Alaskan waters. Now, these examples beg the question about ... what is wrong with these kind of rights anyway. There are practical and political reasons for them.

All such things aside, as a final comment, it is the human right of all people to partake in what has always sustained them socially, economically, spiritually, culturally, and nutritionally. It is a

human right not to have a people's dignity and cultural foundation destroyed. Failure to protect the subsistence rights of Alaska Natives will destroy the basis for the diversity and vitality of our culture and our communities, and it's time for the legislature to recognize and protect that right in the constitution and supportable implementing legislation, beginning with moving HJR 41.

Number 1700

ROD ARNO testified via teleconference. He prefaced his testimony by saying he had missed the governor's subsistence summit because of his work as a hunting guide-outfitter during the autumn. He told members:

I oppose the passage of HJR 41 for two reasons. One is, it won't fix the problem. Why should the state amend its constitution to become more restrictive? In line 8, words like "indigenous people" - I mean, that's a nod that would take a fair amount of time for the courts to decipher that one.

Line 14, adding rural residents as the priority, all that does is add another class system. In Alaska today, we discriminate between three groups of hunters: there's the nonresidents - those are the nonsubsistence uses, the first to go; there's Alaskan residents, all; and then, third, there's local Alaska residents. HJR 41 would add a new group, which would be the nonlocal Alaskan residents who can show a "C and T" [customary and traditional] determination for that resource.

Currently, in state law, we already have provisions that would be laws of general applicability and implementation. Under AAC 92.072, we have community subsistence harvest area and permit conditions; these are actions that the board has taken in the past to say people living in a specific area have a priority to a specific species within that area. The board already has this authority, and it has implemented it three times now.

As far as returning the state management back with a constitutional amendment, Bruce Botelho's comment ... that this is an overblown concern has not been the

case for the industry that I've participated in for the last 35 years. In ... Bobby v. [Alaska], the district court said the taking of game is restricted for conservation purposes whenever that occurs; all other uses must be reduced or proscribed before subsistence use is restricted. Therefore, the solicitor saying in '95 on that case, having to do with (indisc.) village management area, that they agreed with the district [court] analysis (indisc.) in statute, ... that excluded all nonresident moose hunters from that area.

Number 1860

MR. ARNO continued:

From that time on, the state has continued, ... through the board process, ... excluding nonresidents in the entire GMU [Game Management Unit] 13, in 16B on the Koyukuk, on the river corridors in GMU 19A - that it's a reality to the resource development of the guide industry that under the current administration of ANILCA that we see through the judicial oversight that our industry cannot continue.

The second point is: Does Alaska need to wait for [an] Alaska Supreme Court decision on the federal takeover [of management]? We've already got one, ... contrary to what Bruce Botelho says, that in the Totemoff v. State case the decision by the Alaska Supreme Court is ... that nothing in Title VIII discloses a clear and manifest purpose ... to prohibit all state regulations of subsistence harvest, that the Alaska Supreme Court doesn't have to listen to anybody else but the U.S. Supreme Court on this issue - and if it's a matter of pushing it, that's the direction I'd like to see the legislature go.

Number 1960

ROSE ATUK-FOSDICK testified via teleconference. Noting that she was raised in Nome and that her parents are from Wales, Alaska, she said she supports HJR 41 for the following reasons:

Rural residents who are primarily indigenous people will have priority, which is only right. I and my family are part of that group in being rural residents

and indigenous to this area and Alaska. You should realize that survival as a distinct people depends on being able to continue to do subsistence activities. Our ... ways of life are very different from other people, and it's mainly because of our knowledge, our experience, and how we are able to survive on natural resources. We have experience in being stewards of the resources in our area.

You should also realize that doing subsistence is important to our economy ... and as a food source. The rural residents in this part of the state have very few opportunities to develop a monetary income. The rate of unemployment is very high. The average annual income of residents in this area is very low. For example, part-time, temporary workers make perhaps $3,000 per year. Seasonal truck drivers may make about $8,000 per year.

People in Alaska are already divided into rural and urban in many aspects, including remoteness from services [and] differences in costs of food. In rural areas around this part of the state, food costs are 100 percent higher than in urban areas; the cost of services such as electricity is as high as 54 cents per kilowatt-hour ... in Teller, as opposed to 11 cents per kilowatt-hour in urban areas. Yet we will probably not all move into urban areas to save money, because our history, our culture, our resources are here in what we call "rural" and what we call home.

Number 2083

TERRY MARQUETTE testified via teleconference. A 32-year resident of Alaska, he told members he firmly stands against any legislation calling for a constitutional amendment "creating subsistence." He explained under the constitution there is equality for all citizens and equal access to the state's resources; any change would create discrimination, hardship for many Alaskans, and resentment, and any subsistence law to grant priorities would, by its nature, be based on "zip code and race." For people living in urban areas, this would cause a cultural hardship. He told members, "This would deny me the opportunity to raise my children with an appreciation of harvesting the resources of the state, and I consider that cultural aspect of my life just as important as the Native people in rural Alaska consider their cultural characteristics."

MR. MARQUETTE referred to Attorney General Botelho's testimony and offered his personal belief that neither the constitutionality of ANILCA nor the concept of subsistence has been challenged; he suggested that before the legislature pursues a change to the state constitution, it ought to pursue "this particular challenge." He also said he'd like to introduce himself to Mr. Gross as one Alaskan who doesn't necessarily believe that the rural people should have first access to the resources in their particular area. He added, "I think we all should work under the law, and we all have equal access to the same resource."

Number 2220

MARY BISHOP testified via teleconference, noting that she is a resident of Fairbanks. She explained her opposition to HJR 41:

> It potentially enlarges the pool of those who get the priority use. And that's the last thing we need to do. If we're going to have a priority, then we need to reduce the number who get the priority, not enlarge it. The larger it gets, the greater impact it has on those people who do not have the priority. ...
>
> Another reason I oppose it is because it ... provides a priority on all renewable resources, not just fish and game, which, again, (indisc.) the federal law. ... I can't quite figure out how Av Gross can come out with this statement that it's only in times of shortage. Unless you believe that ... there's shortage all the time because there's regulations all the time, that just doesn't make any sense. And I think it's very deceptive when people say the priority is triggered by a shortage. It's not. It's there whenever there are regulations, and ... it's quite clear - that's the way the ... federal subsistence board works.

Number 2350

> The Western caribou herd certainly is not in any condition of shortage, and still there's a priority there. The federal subsistence board doesn't look at whether or not there's a shortage; what they look at is whether or not the people can be provided customary and traditional use, and the Bobby case made that very

clear. And anybody that works on this issue should understand what the Bobby case said. It says it's not based on shortage; it's not based on need. It's [that] the priority for customary and traditional use exists all the time.

Number 2350

MS. BISHOP offered her belief that basing this on need is the only thing that will work without furthering the rural-urban divide, which she said was basically instituted 22 years ago by the federal government. She suggested people would accept that [basis], and that it would probably be constitutional, "if you read the McDowell decision, [which] says ... that what Congress did, and what the state did when they were in compliance, was extremely crude with regard to addressing ... the subsistence needs." She asked that the committee "let HJR 41 peacefully die and continue working on Representative Dyson's HJR 11 and [HJR] 29, the way that that addresses the issue." She also asked members to consider the written testimony she'd submitted.

Number 2440

ARLISS STURGULEWSKI testified via teleconference on her own behalf in support of HJR 41, noting that she was one of 42 people who served on the subsistence summit, debated the issue, and issued a report that spoke to three things: the need in Alaska for unity and diversity, the need to unify the management of Alaska's common fish and wildlife resources, and the vital role that subsistence plays in the lives in Alaskans.

MS. STURGULEWSKI [a former state Senator] said she is appalled that the issue is still unresolved. She emphasized the need for the legislature to bring this issue before the voters, saying there are some real consequences of not taking action. She encouraged looking closely at fish and game, and noted that budgets are shrinking and that the federal government is taking an increasingly larger role. She cautioned, "Frankly, we're losing some of our top management. We also are having a real problem in just the ... [duplication] in the management roles within the state, and having two systems; that doesn't make sense. ... The very basis of our constitution was over the management of our resources for the people." She told members:

I think, more importantly, you're really driving a wedge between the people of the state. Unresolved issues often do that. Native leaders are ignoring the

state capital, and they're going directly to Washington, D.C., to solve issues. I don't think that speaks to building a strong, cohesive state.

Whether you intend it or not, failure to resolve this issue increases ... racial and regional tensions by impacting a whole lot of other issues, not just the issue of subsistence. So I think it's far past the time that we let the people ... of the state have this issue [for a vote]. I was one of the 72 percent of the people that voted in Anchorage recently to say, "Bring it before us. You can't resolve the bloody thing. Let us do it." So it's really time to take action, and I hope you'll do that this session.

Number 2585

CO-CHAIR MASEK noted that members had been provided copies of written testimony from Nelson Angapak, Vice President, Alaska Federation of Natives (AFN).

Number 2609

REPRESENTATIVE FATE referred to Ms. Sturgulewski's statement that Natives are bypassing state government and going directly to Washington, D.C. He offered his understanding that this isn't related just to subsistence, but has been the case since at least five years before ANCSA.

MS. STURGULEWSKI replied:

I spent a lot of years down there, and ... I learned a lot of lessons from some very strong Native legislators. And I honestly believe that our ability to communicate - discuss issues ... that go across a broad range of health and social and education issues - was much stronger and, in a sense, productive in some of the years past. I really think ... it has deteriorated. ... You can tell from the passion in my voice. I've sat through ... many, many hours of testimony on this and other issues, and I can only bring my judgment and what I have seen. I feel that those relationships have deteriorated.

[Co-Chair Masek called upon Paul Barrett, but was informed by the Fairbanks LIO that he'd had to leave.]

Number 2705

WAYNE HEIMER testified via teleconference, saying he was testified on his own behalf "as a reluctant student of ANILCA and subsistence history." He told members:

> I urge the committee to take no action on [HJR] 41 before you. I am pleased that you're finally facing the issue of race, because subsistence has always been, and remains, an issue of race. I'd like to give you just a little history to tell you why we're here and how it got that way. Subsistence arose as a race-preference issue in the House version of ANILCA, where it passed along with federal takeover language to enforce racial discrimination. When this version got to the [U.S.] Senate, Senator Stevens and others amended out race preference and the federal takeover provisions, and tried to make discrimination more palatable by substituting "rural" for a racial preference.
>
> Next, the federal government used rural preference as a crude litmus test of whether they should take over management or not. That has forced us to face the issue of discrimination as it comes to us now. That issue, discrimination, should have been addressed by the courts, who are the check on the power of legislatures and Congress and the executive branches. Attempts to test the basic social issue, equality, that was raised in ANILCA failed because of "lawyering" on the fine points of who should manage and where they should manage.
>
> These approaches might have solved the problems if political and personal expedience on the part of the governor had not resulted in their arbitrary withdrawal from the judicial process. Given that things were well along when the governor dropped the Babbitt and John suits, we might have found those problems decorously decided long ago ... if that hadn't happened. And now we're here today being asked to amend the Alaska constitution to enshrine the shaky interpretation of a single federal judge in laws - the very basis of Alaskan social policy.

Number 2676

MR. HEIMER continued:

> This is a bad idea for many reasons. In addition to the equality question, we have the semantic ... confusion about subsistence itself. If you read ANILCA, you'll find the issue is clearly food. However, subsistence isn't just about food anymore. First, it meant Native tradition. Then it grew to Native culture, then to Native spirituality, and finally to Native religion. ... What it should be is ... not clearly understood by everyone. Yet folks are asking us to discriminate against other Alaskans and our fellows without understanding exactly where we're going.
>
> I could go on for well more than three minutes with illustrations of the inconsistencies or maybe the negative social consequences of institutionalizing preference, which means institutionalizing discrimination. Both are illegal by the constitution and are morally reprehensible in all issues except this one, where the language is so convoluted it's virtually impossible to understand or decipher what any given term means. This means Alaska has a choice: we can either embrace all the confusion and strife associated with an illegal and unjust preference - we can bow to the venial demands of those seeking to control the lives of others as though it were somehow their right because their ancestors were here before others - or we can simply take the high road and go for equality - equal treatment - for all Alaskans, as affirmed by our law.

REPRESENTATIVE KAPSNER said she took offense at a lot of the things she believed Mr. Heimer was implying in his testimony.

REPRESENTATIVE KERTTULA concurred.

[Co-Chair Masek called upon Joseph Strunka and Corina Collins, but was informed by the Fairbanks LIO that they had left.]

Number 2874

CHIP WAGONER, Alaska Catholic Conference, came forward to testify on behalf of Bishop Michael W. Warfel. Mr. Wagoner noted that he would provide written testimony and also had a brochure further explaining what the Alaska Catholic Conference

is; he said there are more than 55,000 Catholics in Alaska. Mr. Wagoner said he himself represents the Alaska Catholic Conference, which is the vehicle that the Roman Catholic bishops of Alaska use to speak on public policy matters that relate to the teachings of the church, and on moral issues. He explained that Bishop Warfel, who couldn't be present at this hearing, is the bishop for the Diocese for Juneau and all of Southeast Alaska, and also currently serves as the administrator for the Diocese of Fairbanks. He read from Bishop Warfel's written testimony:

> For some years now, there has been serious disagreement on how best to allocate fish and wildlife resources in Alaska. The determination of who should have access, particularly when limitations need to be placed on a resource, has been a serious source of division in our state. Obviously, a satisfactory solution has yet to be found. I come before you today to urge you to work for a solution that is both just and truly equitable, one that will serve the common good of Alaskans. In particular, I refer to HJR 41, but also address some general notions surrounding the subsistence debate.
>
> At the heart of the discussion is the notion of "equal access" and the opportunity for all Alaskans to subsist on fish and wildlife. As we know, in 1980 the Alaska National Interest Lands Conservation Act, using race-neutral language, provided that those engaged in a subsistence lifestyle could maintain that lifestyle. As a result, rural Alaskans were to be given a priority. When resources are healthy, no limit would be necessary. As we also know, the Alaska Supreme court ruled that, based on the Alaska constitution and its equal access clause, the state could not provide for a subsistence priority. As a result, the State of Alaska lost oversight of the fish and wildlife resources on federal lands.
>
> In considering a solution, it is important to note that equal access, in the sense of every resident being able to do the same thing, in itself does not offer a just resolution. From an ethical perspective, justice does not require nor demand a [mathematical kind of equality. In fact, insisting on a mathematical kind of equality can sometimes actually be a cause of injustice.] [This last bracketed portion

isn't on tape, but was taken from the written testimony.]

TAPE 02-25, SIDE B
Number 2990

MR. WAGONER continued reading Bishop Warfel's testimony [bracketed portion taken from written testimony]:

> [A true equality, in regards to available resources,] must be understood as a means toward sharing these resources according to need. An overemphasis on the term "equal" would cause us to fall prey to a level of individualism in which there is such a [disproportionate] emphasis on the individual that the overall well-being of a society could be sacrificed.
>
> Also important are the circumstances that surround people, the context in which they live. Circumstances make a difference and vary greatly. Policies are regularly made that recognize circumstances within society such as age - making it illegal to sell minors alcohol or cigarettes; residency - establishing a period of residency to get a PFD [permanent fund dividend]; or sex - stating in law that marriage can only be between a man and a woman. In other words, there is a difference between unjust discrimination and the recognition of necessary distinctions that need to happen for the common good. As such, a policy which allows subsistence opportunities for all Alaskans, but which provides a priority for some residents in time of limited resources, may achieve greater justice than simply maintaining "equal access."
>
> In this debate, there seems to be a particular need to be sensitive to those who would be most deeply affected by it, the Alaska Natives who, as people, have for more than 10,000 years depended upon subsistence. First of all, there is the importance of maintaining indigenous cultures in the state. Subsistence among Native peoples has a spiritual value that far surpasses any economic value that may be placed on the resource. It is critical that society protect and safeguard the right of Alaska Native peoples to preserve their cultures. Protecting

subsistence rights is central to the health of their culture, which in many ways is now vulnerable.

Number 2898

Secondly - again, Bishop Warfel speaking - I note a principle of Catholic social teaching, that of the preferential option for the poor and vulnerable. On the average, Alaska Natives as a group are those most affected by poverty in the state. Statewide, 20 percent of Alaska Natives live below the poverty line. When limitations on fish and wildlife resources are needed, as far as possible, those in greatest need should have access to them. Recognizing that poverty exists in urban areas, too, whenever possible the urban and suburban needy who rely on fish and wildlife should have access to these resources. Efforts to guarantee subsistence opportunities for the poor and vulnerable is a matter not of charity, but of justice.

The issue of subsistence is simply too important an issue for the state not to agree upon a reasonable and equitable solution. I urge you all to continue to work for a solution that will keep in mind not just the rights of individuals, but the common good of all Alaskans. I ask you to remember the unique and particular needs of Alaska Native peoples as well as the common good of all Alaska residents - again, Bishop Warfel's statement.

CO-CHAIR MASEK thanked participants and concluded the hearing. [HJR 41 was held over.]

ADJOURNMENT

There being no further business before the committee, the House Resources Standing Committee meeting was adjourned at 3:40 p.m.